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Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians

Leah W. Feinman*

*Fordham University School of Law, leah.feinman@alston.com

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Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*

Leah W. Feinman

Abstract

Advertisers have used the rise of reality television, social media, and the public's fascination with celebrities to connect with consumers in new and non-traditional ways. With these new techniques come new concerns over consumer protection. When an advertisement does not look like an advertisement, consumers can easily be misled. In 2009, the FTC implemented a set of Guides which were intended to clarify and interpret the regulations enforced by the FTC, and advise the public on how to conduct affairs regarding sponsorship disclosure, specifically in new media. As the note describes, the Guides are insufficient as applied to non-traditional advertising techniques, particularly when involving celebrities. The note then proposes a new standard requiring clearer disclosures and a distinction between a celebrity's "personal" and "public" spheres when considering the necessity of a disclosure.

KEYWORDS: advertising, non-traditional advertising, sponsorship, FTC, consumer protection, endorse, celebrity endorsements, right of publicity, disclosure

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“What we search for in celebrities is not so far from what we search for in our friends. The secret is to never trust an animal no matter how many legs it has.”¹

INTRODUCTION

Kim Kardashian is on a date at Serendipity 3, a trendy restaurant on New York’s Upper East Side.² The conversation is mostly about the pair’s love for the restaurant.³ A frozen hot chocolate, the restaurant’s signature dish, is prominently placed on

¹ Dean Crutchfield, *Celebrity Endorsements Still Push Product*, ADVER. AGE (Sept. 22, 2010), <http://adage.com/article/cmo-strategy/marketing-celebrity-endorsements-push-product/146023/>.

² *Kourtney & Kim Take New York: Life in the Big City* (E! Entertainment Television television broadcast Jan. 23, 2010) [hereinafter *Kourtney & Kim Take New York*].

³ *Id.*

the table.⁴ When Kim gets home, she posts a photo of herself leaving Serendipity 3 on her blog, along with the caption “[N]ow that I’m in NYC I get to go to one of my favorite restaurants as often as I like!!! The frozen hot chocolate is to die for!!!!”⁵

Later that night, Kim is distressed when she receives an email alert that her date has been reported by *InTouch Weekly*. “Bible,⁶ I just get [sic] an email. *InTouch Weekly* exclusive ‘Kim Kardashian has a new man.’ I just left this guy, tonight . . . This is why I can’t date, I swear,” Kim sighs as she falls onto the couch.⁷ Kourtney Kardashian, Kim’s sister, explains, “Kim just wanted to go out with a guy, and have some fun and not have it be all about the press and the media and everything that surrounds that.”⁸ Scott Disick, Kourtney’s boyfriend, advises that Kim forget all of the magazines: “You have to live your life for you. Because if you don’t, you’ll never find the love that you want.”⁹

This witty exchange was ironic considering it was filmed and broadcast for the premiere episode of *Kourtney & Kim Take New York*, the third television show to come out of the wildly successful *Keeping Up with the Kardashians* franchise.¹⁰ What started in 2007 as a reality television show about a wacky family with ridiculously beautiful children has turned into an international phenomenon, earning the family a reported \$65 million in 2010.¹¹ Famous only for being famous, the majority of their earnings were amassed from the family’s many endorsement deals.¹²

⁴ *Id.*

⁵ Kim Kardashian, *Stopping by Serendipity 3*, CELEBUZZ! (Oct. 9, 2010), <http://kimkardashian.celebuzz.com/2010/10/09/kim-kardashian-serendipity-3-new-york/>.

⁶ The Kardashians use the word “bible” to convey seriousness, as in, to swear on a bible. See Kourtney Kardashian, TWITTER (May 29, 2009), <http://twitter.com/#!/KourtneyKardash/status/1966364902>.

⁷ See *Kourtney & Kim Take New York*, *supra* note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ See Leslie Bruce, Judith Newman, Bryan Alexander & Marisa Guthrie, *One Mom, Six Kids, A Reality Empire*, HOLLYWOOD REP., Feb. 25, 2011 at 48–69, available at <http://www.hollywoodreporter.com/news/how-kardashians-made-65-million-100349>.

¹¹ *Id.*

¹² See *id.*

The Kardashian family undeniably exploits three emerging commercial components: reality television, social media, and brand endorsement.¹³ Fans do not have to wait to watch *Kourtney & Kim Take New York* on Sunday night to find out what is going on with their favorite Kardashian; all of the Kardashians constantly update their Facebook pages and Twitter accounts.¹⁴ Kim Kardashian has over six million fans on Facebook,¹⁵ and over nine million followers on Twitter.¹⁶ A Facebook post reading “Hi-Lights [sic] and hair cut [sic]! I’m good to go!” garnered 6,534 likes and 991 comments.¹⁷ It comes as no surprise that Kim Kardashian can command up to \$25,000 to mention a product or brand in a tweet. In fact all of the Kardashians have “Twitter clauses” in their contracts, requiring them to discuss the product or brand on their respective Twitter pages.¹⁸

Like the Kardashians, advertisers are also attempting to connect with consumers through social media, reality television, and other non-traditional forms of advertising. Americans receive more than 3,000 commercial images every day.¹⁹ A person’s subconscious can record approximately 150 images, and only about thirty will reach the person’s conscious mind, and advertisers are willing to go to extremes to find ways to cut through the clutter.²⁰

For many years advertisers have relied on celebrity endorsements to reach their audience’s conscious mind. Celebrity endorsements are a type of brand communication in which a celebrity aligns herself with a product or brand and “certifies the brand’s claim and position by extending his/her personality,

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *See* Kim Kardashian, FACEBOOK, <http://www.facebook.com/KimKardashian> (last visited Sept. 8, 2011).

¹⁶ *See* Kim Kardashian, TWITTER, <http://twitter.com/#!/KimKardashian> (last visited Sept. 8, 2011).

¹⁷ Kim Kardashian, FACEBOOK (Feb. 18, 2011, 10:09 PM), <http://www.facebook.com/#!/KimKardashian>.

¹⁸ Bruce, Newman, Alexander & Guthrie, *supra* note 10.

¹⁹ Crutchfield, *supra* note 1.

²⁰ Julie Creswell, *Nothing Sells Like Celebrity*, N.Y. TIMES, June 22, 2008, at BU1, available at <http://www.nytimes.com/2008/06/22/business/media/22celeb.html>.

popularity, stature in the society or expertise in the field to the brand.”²¹ Generally, the success of the endorsement depends on the strength of the match between the celebrity and the brand.²² The strength of the match depends on four factors: (1) trustworthiness or credibility of the celebrity, (2) likeability of the celebrity, (3) similarity between the celebrity and the target audience, and (4) expertise of the celebrity in the subject matter of the product.²³

A successful celebrity endorsement can serve a brand in many ways. Celebrity endorsements can improve brand recognition and recall, forcing the brand to the forefront of the influx of commercial images.²⁴ Consumers will also relate qualities and values they associate with a celebrity with the brands the celebrity endorses.²⁵ In some cases, these associations can refresh or renew the image or reputation of a brand.²⁶

The scope of celebrity endorsements used to be confined to celebrities acting as “brand faces” or spokespeople for products. Celebrities would appear in print or television advertisements, praising the virtues of the brand or product.²⁷ Today, however, traditional celebrity advertisements are increasingly viewed by consumers with skepticism.²⁸ People are busy, focused, and largely immune to traditional advertising and “[p]ersuasion is easiest where the audience is most credulous and least defended

²¹ The Blake Project, *Celebrity Endorsement Guide*, BRANDING STRATEGY INSIDER: THE BRANDING BLOG (Oct. 2, 2010), <http://www.brandingstrategyinsider.com/2010/10/celebrity-endorsement-guide.html>.

²² See Neha Taleja, *Impact of Celebrity Endorsements on Overall Brands*, COOLAVENUES (June 14, 2010), <http://www.coolavenues.com/mba-journal/marketing/impact-celebrity-endorsements-overall-brand-0>.

²³ *Id.*

²⁴ *Id.* See also Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 J. MKTG. 56, 56 (1995).

²⁵ *See id.*

²⁶ See Debiprasad Mukherjee, *Impact of Celebrity Endorsements on Brand Image*, (Soc. Sci. Res. Network Elec. Paper Collection, 2009), available at <http://ssrn.com/abstract=1444814>.

²⁷ Jim Sterne, *Four Metrics for Social Media Marketing Success*, CUSTOMERTHINK (Jan. 11, 2011), http://www.customerthink.com/article/four_metrics_for_social_media_marketing_success.

²⁸ Creswell, *supra* note 20 at BU1.

against promotional messages.”²⁹ Advertisers, therefore, are looking for new non-traditional ways to combine the credibility of word-of-mouth recommendations with the recognizability of a celebrity.³⁰ Celebrity-endorsed messages are “word-of-mouth fire-starters, driven by the extreme levels of consumer interest that celebrities bring to the table.”³¹

With these new non-traditional advertising techniques come new concerns over consumer protection.³² When an advertisement does not look like an advertisement, consumers can easily be misled. Imagine:

- Cameron Diaz carries Smart Water every day to and from her workout at a fancy Los Angeles gym where paparazzi are known to post and shoot;
- An iPhone application that allows you to click on a store and see a list of celebrities who regularly shop there; or,
- Brad Pitt and Angelina Jolie name their next child Sephora.

The Federal Trade Commission (FTC) recognizes that a relationship between an advertiser and a celebrity may affect a consumer’s likelihood to purchase the endorsed product.³³ Therefore, the FTC requires that the relationship be disclosed.³⁴

In 2009, to reflect the changing landscape of advertising, the FTC released updated Guides concerning the use of endorsements and testimonials in advertising.³⁵ The Guides were intended to

²⁹ See Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 111 (2006) [hereinafter Goodman, *Stealth Marketing*].

³⁰ See Crutchfield, *supra* note 1.

³¹ *Celebrity Endorsements More Cost Effective Than Display Ads in Social Media*, TECHJOURNAL SOUTH (Mar. 10, 2011), <http://www.techjournalssouth.com/2011/03/celebrity-endorsements-more-cost-effective-than-display-ads-in-social-media/>.

³² See FTC, *The FTC’s Revised Endorsement Guides: What People are Asking*, FTC: BUREAU OF CONSUMER PROT., BUS. CTR. (June 2010), available at <http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guideswhat-people-are-asking> [hereinafter FTC, *Revised Endorsement Guides*].

³³ Disclosure of Material Connections, 16 C.F.R. § 255.5 (2009).

³⁴ *Id.*

³⁵ See *id.*

clarify and interpret the regulations enforced by the FTC, and advise the public on how to conduct affairs regarding sponsorship disclosure.³⁶ The underlying FTC regulations interpreted by the Guides, which were created primarily for television and radio, were not substantively changed, but the Guides attempted to explain how the regulations are to be used to cover new media.³⁷

Simply extending the existing guides to encompass new media is not sufficient in today's changing world. Part I of this note will describe the history of celebrity endorsements and the development of sponsorship disclosure law. Part II will introduce the FTC Guides, and discuss the current status of sponsorship laws. Part III will identify inadequacies in the law as it stands with regard to new media and non-traditional advertising techniques. In particular, Part III will focus on the inadequacy of the "clear and conspicuous" disclosure standard as applied to non-traditional advertising techniques, and the FTC's failure to appropriately identify when disclosure is necessary within the changing landscape of celebrity advertisements. Part IV will propose a new standard requiring clearer disclosures to accompany each celebrity endorsement in every media format. Part IV will also introduce the distinction between "public" and "personal" spheres, and suggest that the determination of whether disclosure is necessary be based on the sphere in which the endorsement occurs.

I. HISTORY

A. *Celebrity Endorsements Past*

Today celebrities and endorsement deals go hand-in-hand, but well-known personalities were not always so eager to align themselves with products. In the 1800s, Pope Leo XIII was one of the first celebrity endorsers. After awarding a Vatican gold medal to Vin Mariani, a French sparkling red wine, a sketch of the Pope was prominently featured on posters promoting the brand.³⁸

³⁶ *See id.*

³⁷ FTC, *Revised Endorsement Guides*, *supra* note 32.

³⁸ *See The History Behind the Wine*, VIN MARIANI WINERY, <http://www.cocanaturally.com/> (last visited Sept. 19, 2011).

Toward the close of the nineteenth century, “advances in lithographic technology stimulated the use of pictorial advertising.”³⁹ Soon after, merchants began using photos of real people instead of artistic interpretations.⁴⁰

At the beginning of the twentieth century, appearances such as the Pope’s were generally involuntary and cause for humiliation and embarrassment.⁴¹ Today however, celebrities are embracing endorsement deals as an important part of the fame business. The recognition of a right to privacy and the commercial value of one’s likeness caused attitudes toward endorsements to change drastically. Before the right of publicity doctrine was accepted, there was little recourse for those who involuntarily appeared in advertisements. The existence of a right of privacy was suggested in a landmark law review article by Samuel D. Warren and Louis D. Brandeis in 1890.⁴²

According to Warren and Brandeis, the development of “instantaneous photographs and newspaper enterprise” threatened the “sacred precincts of private and domestic life” and, therefore, the law should have recognized a remedy for persons who suffered an invasion of their privacy at the hands of this new technology.⁴³ At the time of the article, the courts had no legal precedent on which to support a finding of recovery based on the breach of a plaintiff’s right of privacy alone.⁴⁴ Therefore, a person who was unwillingly depicted in an advertisement was forced to sue under tort law, generally alleging mental distress, humiliation, or embarrassment.⁴⁵ A young woman who found herself in advertisements for a flour company “took to bed” because she

³⁹ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902). *See also* George M. Armstrong, Jr., *The Reification of Celebrity: Persons As Property*, 51 LA. L. REV. 443, 458 (1991).

⁴⁰ *See Roberson*, 64 N.E. at 443.

⁴¹ Armstrong, *supra* note 39, at 459.

⁴² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206 (1890) (“[T]he existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”).

⁴³ *Id.* at 195.

⁴⁴ *Roberson*, 64 N.E. at 443.

⁴⁵ Armstrong, *supra* note 39, at 454.

“ha[d] been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement, and her good name ha[d] been attacked, causing her great distress and suffering, both in body and mind.”⁴⁶ However, the courts disfavored these claims of emotional distress and plaintiffs were generally unsuccessful.⁴⁷

New York was the first state to codify the right of privacy in 1903 when it enacted a statute prohibiting the use of “the name, portrait or picture of any living person” for trade or advertising purposes.⁴⁸ This statute not only recognized a right of privacy, but acknowledged the commercial opportunities available in one’s likeness.⁴⁹ Courts followed suit and began to grant recovery to involuntary endorsers for the use of their likenesses.⁵⁰

The recognition of a legal right in one’s likeness began to change society’s attitude toward endorsers.⁵¹ Plaintiffs began demanding (and winning) substantial damages for their right to compensation.⁵² Businesspeople capitalized on this trend by organizing the first professional modeling agencies and offering

⁴⁶ *Roberson*, 64 N.E. at 442.

⁴⁷ *See, e.g., id.*; *Murray v. Gast Lithographic & Engraving Co.*, 28 N.Y.S. 271, 271 (N.Y. Sup. Ct. 1894) (“The law does not take cognizance of and will not afford compensation for sentimental injury independent of redress for a wrong involving physical injury to person or property.”).

⁴⁸ N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2011).

⁴⁹ *See Armstrong*, *supra* note 39, at 455.

⁵⁰ *See, e.g., Kunz v. Allen*, 172 P. 532, 533 (Kan. 1918); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909).

⁵¹ The term “right of publicity” was coined in 1953 by Judge Jerome Frank in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). The court in *Haelan* decided that “in addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph.” *Id.* Contemporary legal scholars also supported the right of publicity. Professor Melville B. Nimmer stated that publicity plaintiffs have a valid complaint in uncompensated exploitation of their identities. *See Melville B. Nimmer, The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954). Similarly, Professor William L. Prosser recognized “appropriation, for defendant’s advantage, of the plaintiff’s name or likeness” as one of the factors that constituted invasion of privacy. William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

⁵² *See Armstrong*, *supra* note 39, at 459.

advertisers access to “beautiful and fascinating women, handsome men and pretty, bewitching children.”⁵³

While ordinary people began to enjoy the benefits of appearing in advertisements, celebrities were still reluctant to appear in ads.⁵⁴ President Theodore Roosevelt objected to the City of Spokane’s use of his portrait to promote the Lewis and Clark trail in 1905, and in the 1920s, the composer John Philip Sousa was teased by his friends when a cheap cigar company used his likeness as its trademark.⁵⁵ However, with the amount of money to be made and the shifting attitude of the public, even well-known personalities began to change their tune. Modeling agencies added stage and screen stars to their rosters.⁵⁶ Famous Names, Inc., a modeling agency, enticed advertisers to use their celebrity clients in advertising by promising a “specially posed picture of the celebrity and the exclusive right to that name against all competitors.”⁵⁷ By the late 1930s, celebrity endorsements were widespread among the stars of the screen, radio and stage. General Mills used photos of athletes on Wheaties boxes,⁵⁸ and two-thirds of the top fifty box-office stars in Hollywood were endorsing tobacco products.⁵⁹

With the increasing popularity of radio and motion pictures, advertisers changed the way celebrities endorsed products.⁶⁰ For example, tobacco companies negotiated tie-ins⁶¹ allowing the

⁵³ *Id.* at 458 (quoting E. S. TURNER, *THE SHOCKING HISTORY OF ADVERTISING* 172 (1953)).

⁵⁴ *Id.* at 459.

⁵⁵ *Id.*

⁵⁶ *See id.* at 460.

⁵⁷ *Id.*

⁵⁸ *See History of Innovation: Wheaties—The Breakfast of Champions*, GENERAL MILLS, http://generalmills.com/~media/Files/history/hist_wheaties.ashx (last visited Oct. 16, 2011).

⁵⁹ Jack Doyle, *Al Jolson & Luckies, 1928-1940s*, POP HISTORY DIG (Jan. 29, 2010), <http://www.pophistorydig.com/?tag=american-tobacco-company-advertising> [hereinafter Doyle, *Luckies*].

⁶⁰ *See id.*

⁶¹ “A prominent actor may seek some say as to what are to be allowed, and if allowed, the appropriate level of compensation payable for the use of his or her name and likeness in licensed goods (e.g. clothing, posters, toys and dolls, etc.), not to mention approvals over the likenesses employed if not the quality or other characteristics of the goods themselves.” JAY SHANKER, DAVID E. GUNN & HAROLD ORENSTEIN, ENTERTAINMENT

company to include information about the celebrity's newest studio movie in advertisements for their product.⁶² Similarly, radio stars used product names in their signature sign-off lines.⁶³

Along with the rising popularity of these endorsements, however, came the rise of consumer skepticism.⁶⁴ Newspapers reported that non-smoking celebrities were endorsing cigarettes,⁶⁵ and the FTC launched an investigation into the practices of celebrity endorsements, specifically within the tobacco and athletic markets.⁶⁶ In response to the FTC's investigation, manufacturers adopted a code of conduct and agreed to disclose the compensation for endorsements.⁶⁷

This self-regulation seemed to appease the FTC and consumers, and celebrity endorsements continued to thrive. In the 1950s, Ronald Reagan appeared in print ads for Chesterfield cigarettes and Jeris Antiseptic Hair Tonic, among others.⁶⁸ Then Dinah Shore was the first celebrity to have her name become synonymous with a product.⁶⁹ Her original 1951 endorsement deal with General Motors required her to sing a Chevrolet jingle at the beginning and end of every episode of *The Dinah Shore Show*.⁷⁰ She began filming television commercials and short films for Chevrolet, then in 1956, *The Dinah Shore Show* was expanded into a full one-hour program and renamed the *Dinah Shore Chevy Show*.⁷¹ By 1957, General Motors was paying \$145,000 for each episode of the *Dinah Shore Chevy Show*, and the company's

LAW & BUSINESS PRACTICES OF THE ENTERTAINMENT INDUSTRY 10–59 (2d ed. 2011) (describing “commercial tie-ins”).

⁶² Doyle, *Luckies* (featuring a Lucky Strike advertisement in which an image of Al Jolson is accompanied by text stating “Al Jolson, as he appears in Warner Bros Vitaphone success, *The Singing Fool*.”).

⁶³ See Jack Doyle, *Dinah Shore & Chevrolet, 1956-1963*, POP HISTORY DIG (Mar. 22, 2009), <http://www.pophistorydig.com/?p=1226> [hereinafter Doyle, *Chevrolet*].

⁶⁴ Armstrong, *supra* note 39, at 460.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Billy Ingram, *Ronald Reagan in Advertising - 1950s*, TVPARTY!, <http://www.tvparty.com/movreagan3.html> (last visited Aug. 29, 2011).

⁶⁹ Doyle, *Chevrolet*, *supra* note 63.

⁷⁰ *See id.*

⁷¹ *Id.*

relationship with Dinah Shore was considered “one of the most enduring love affairs in TV.”⁷²

The popularity of celebrity endorsements surged with the introduction of color television in 1965,⁷³ and by 1975, fifteen percent of television commercials featured a celebrity.⁷⁴ Companies recognized the value of associating themselves with a celebrity, and celebrities began to appreciate the benefits endorsement deals could provide beyond the financial gain. Bill Cosby, one of the most popular celebrity spokespeople in the 1980s, said “[a] great bit of our careers depends on keeping ourselves in the public eye. I think performers should take advantage of commercial offers if they’re satisfied with the product.”⁷⁵ It appeared that celebrities’ reluctance toward doing endorsements had disappeared.

In the 1980s and early 1990s, a new type of celebrity endorsement model burst onto the scene: celebrity product integration.⁷⁶ In 1984, Nike hoped to capitalize on the charisma and appeal of rookie National Basketball Association (NBA) player Michael Jordan by designing a new sneaker called the “Air Jordan.”⁷⁷ Jordan was paid \$2.5 million dollars for a five-year contract, which allowed Nike to use the Jordan name and required Jordan to wear the sneakers during games.⁷⁸ Nike’s investment paid off. Jordan’s success on the court made the shoe instantly popular with consumers, but the NBA did not approve of the bold

⁷² *Id.* (quoting *Television: Is There Anyone Finah?*, TIME MAG. (Dec. 16, 1957), <http://www.time.com/time/magazine/article/0,9171,893808-1,00.html>).

⁷³ *Celebrity Endorsement—Through the Ages Timeline*, IBS CASE DEV. CTR., <http://www.ibscdc.org/Free%20Cases/Celebrity%20Endorsement%20Through%20the%20Ages%20p2.htm> (last visited Sept. 13, 2011).

⁷⁴ Michael A. Kamins, Meribeth J. Brand, Syuart A. Hoeke & John C. Moe, *Two-Sided Versus One-Sided Celebrity Endorsements: The Impact on Advertising Effectiveness and Credibility*, 18 J. ADVER. 4, 4 (1989).

⁷⁵ BOB BATCHELOR & SCOTT STODDART, *THE 1980s* 39 (Greenwood Publ’g Grp. 2007).

⁷⁶ Paul Surgi Speck, David W. Schumann & Craig Thompson, *Celebrity Endorsements—Scripts, Schema and Roles: Theoretical Framework and Preliminary Tests*, 15 ADVANCES IN CONSUMER RESEARCH 69, 69–70 (1988).

⁷⁷ *Jordan Brand History*, SNEAKERHEAD.COM, <http://www.sneakerhead.com/jordan-brand-history.html> (last visited Aug. 29, 2011).

⁷⁸ *Id.*

red-and-black coloring of the sneakers.⁷⁹ The league banned the sneakers, requiring players to wear white sneakers instead.⁸⁰ Jordan continued to wear Air Jordans and incurred a \$5,000 fine for each wearing.⁸¹ Nike gladly paid all of the fines.⁸² Jordan's refusal to acknowledge the ban transformed Air Jordans from ordinary sneakers to an illicit status symbol and one of the best-selling pairs of sneakers on the market.⁸³

Endorsements became so popular, in fact, that celebrities began creating their own products. Elizabeth Taylor's "White Diamonds" perfume launched in 1991 and was sold for \$200 per ounce.⁸⁴ The limited edition was released a few years later, and came with the ultimate celebrity incentive: the first 150 people who purchased the perfume were treated to a private tea with Taylor herself.⁸⁵ The success of "White Diamonds" caused an influx of other celebrity perfumes, but still remains the world's best-selling celebrity perfume.⁸⁶

The original policy to support the right of publicity doctrine centered on concern for celebrities and their investments, such as Elizabeth Taylor's investment in the success of the "White Diamonds" perfume.⁸⁷ At the time, the theory was that effort and money were necessary to become famous and create a commercially exploitable persona.⁸⁸ As such celebrities are entitled to the fruits of their labor.⁸⁹ Today, more and more

⁷⁹ Nate Jones, *The Air Jordan Generation: Remembering 25 Years of Sneaker Power*, TIME NEWSFEED (Sept. 9, 2010), <http://newsfeed.time.com/2010/09/15/today-is-the-25th-anniversary-of-the-day-that-changed-sneaker-culture-forever/>.

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *See id.*

⁸³ *Id.*

⁸⁴ Katharine Mackenzie Paterson, *Elizabeth Taylor's White Diamonds*, DAILY FACE (Mar. 28, 2011), <http://www.katharinepaterson.com/blog/beauty/elizabeth-taylors-white-diamonds>.

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ Russell J. Frackman & Tammy C. Bloomfield, *The Right of Publicity: Going to the Dogs?*, UCLA ONLINE INST. FOR CYBERSPACE L. & POL'Y (Sept. 1996), <http://legacy.gseis.ucla.edu/iclp/rftb.html>.

⁸⁸ *Id.*

⁸⁹ *Id.*

celebrities are simply “known for their well-knownness.”⁹⁰ This phenomenon, however, does not make protection of these famous-for-being-famous celebrities any less important. As evidenced by the Kardashian example, endorsements are not only financially profitable for celebrities, but they can also enhance the status and recognizability of a celebrity, thus leading to even more demand for their likeness in endorsement deals. The danger of oversaturation in the marketplace and the importance of autonomy over one’s likeness remain compelling reasons to support the right of publicity doctrine.⁹¹

B. *Celebrity Endorsements Today*

Today, approximately \$50 billion is spent globally on corporate sponsorships and endorsements.⁹² Due to the changing landscape of media, technology, and consumers’ attention spans, advertisers are looking to incorporate celebrities into their advertising campaigns in new and innovative ways. Traditional formal endorsements are changing and being mixed into the many channels of media available to consumers in today’s marketplace. Advertisers use non-traditional techniques, such as social media endorsements, informal celebrity endorsements, and reverse celebrity endorsements, to maximize the effect of their celebrity ad campaigns in today’s changing world.

1. Formal Endorsements

Traditional or formal endorsements have long been the standard for celebrity endorsements. In a formal endorsement deal, advertisers use a celebrity’s name or likeness to represent a brand or product in television or print ads.⁹³ As part of the deal, advertisers may hold press conferences or write press releases

⁹⁰ DANIEL J. BOORSTIN, *THE IMAGE OR WHAT HAPPENED TO THE AMERICAN DREAM* 57 (1961).

⁹¹ Frackman & Bloomfield, *supra* note 87.

⁹² Crutchfield, *supra* note 1.

⁹³ See Pollyanna Kwok, Note, *The Use of a Celebrity’s Name and Likeness in News Stories in Conjunction with Advertisements – Celebrities Seeking Broader Protections*, 32 SW. U. L. REV. 761, 762 (2003).

promoting the celebrity's involvement with the brand.⁹⁴ Academy Award winner Nicole Kidman's endorsement of Chanel No. 5 perfume provides an example of a formal celebrity endorsement. Kidman was named the spokesmodel for the perfume in 2003, and appeared in a commercial.⁹⁵ Since the airing of the commercial, global sales of Chanel No. 5 have jumped thirty percent.⁹⁶ While formal endorsements do garner positive results for the brand, the changing face of technology and media is forcing advertisers to develop new ways to associate celebrities with their brands.

2. Non-traditional Endorsements

a) Social Media Endorsements

As most people now know, social media has taken our world by storm. Facebook has more than 750 million active users, fifty percent of whom log in on any given day.⁹⁷ On average 460,000 people create Twitter accounts every day, and the site averages 140 million tweets daily.⁹⁸ Advertisers are not blind to this trend. Like the entrepreneurs who added celebrities to their client rosters in the 1920s, businesses today are constantly developing methods to facilitate the blending of advertisements and social media. Ad.ly is a company that works with brands to create successful celebrity endorsements on social media platforms.⁹⁹ Ad.ly promises to help brands and advertisers "connect with consumers via the most influential celebrities, artists and athletes on the most popular [social media] platforms."¹⁰⁰ Services include assisting brands in choosing the right celebrity to endorse their product, creating

⁹⁴ See, e.g., Press Release, T-Mobile, Actress Catherine Zeta-Jones Signs with T-Mobile International as Global Spokeswomen (June 11, 2002), available at <http://newsroom.t-mobile.com/articles/t-mobile-spokeswoman-catherine-zeta-jones>.

⁹⁵ Creswell, *supra* note 20.

⁹⁶ *Id.*

⁹⁷ *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Aug. 31, 2011).

⁹⁸ *Twitterblog #numbers*, TWITTER, <http://blog.twitter.com/2011/03/numbers.html> (last visited Aug. 31, 2011).

⁹⁹ *About Adly*, ADLY, <http://ad.ly/about/> (last visited Aug. 31, 2011).

¹⁰⁰ *Id.*

endorsement messages, and tracking the success of the endorsed message.¹⁰¹

“Ad.ly influencers,” the company’s name for celebrities affiliated with Ad.ly, include 50cent, Paris Hilton, and Charlie Sheen.¹⁰² Ad.ly employees create endorsed messages that influencers approve and then post on their Twitter pages. Fans see the endorsed message on the influencers’ Twitter feed, for example: “Want to know how Old Navy makes your butt look scary good? Ask a Kardashian ;)http://bit.ly/cU2GLX (Ad).”¹⁰³

The method has proven to be hugely successful. Ad.ly influencer Charlie Sheen, famous for his substantial Hollywood career and his role on the television show *Two and a Half Men*, became an Internet phenomenon when he broke the Guinness World Record for “Fastest Time to Reach 1 Million Followers.”¹⁰⁴ Ad.ly quickly coordinated a relationship between Sheen and Internships.com, a start-up internet company.¹⁰⁵ One hour after Sheen tweeted “I’m looking to hire a #winning INTERN with #TigerBlood. Apply here – http://bit.ly/hykQQF #TigerBlood Intern #internship #ad,”¹⁰⁶ linking to an internship opportunity posted on Internships.com, the site had received 95,333 hits.¹⁰⁷ In the first three days alone, the website received 74,040 applications for the position, and 1,035,021 unique visitors.¹⁰⁸

¹⁰¹ *More About Advertising with Ad.ly*, ADLY, <http://adly.com/advertisers/more-about-advertising-with-ad-ly/> (last visited Sept. 12, 2011).

¹⁰² *Celebrities on Adly*, ADLY, <http://ad.ly/celebrities/celebrities-on-ad-ly/> (last visited Aug. 31, 2011).

¹⁰³ *Khloe Kardashian*, TWITTER (Oct. 27, 2010), <https://twitter.com#!/KhloeKardashian/status/28907554676>; see Krista Thomas, *Doing Social at Scale: Ad.ly in 2011*, ADLY (Jan. 5, 2011), <http://adly.com/2011/01/doing-social-at-scale-ad-ly-in-2011/>.

¹⁰⁴ *Charlie Sheen’s Twitter Sets Guinness World Record*, HUFFINGTON POST (Mar. 3, 2011, 11:45 AM), http://www.huffingtonpost.com/2011/03/03/charlie-sheens-twitter-se_n_830903.html. Interestingly enough, Sheen admits to joining Twitter because it is a “cash cow.” *Id.* As it turns out, Sheen had help from Ad.ly in setting up his account. See Andrea Spiegel, *The Real Story Behind Charlie Sheen Joining Twitter*, FORBES (Mar. 2, 2011, 4:05 PM), <http://blogs.forbes.com/andreaspiegel/2011/03/02/the-real-story-behind-charlie-sheen-joining-twitter-adl/>.

¹⁰⁵ See Arnie Gullov-Singh, *Charlie Sheen: Data Beats Emotion*, ADLY (Mar. 9, 2011), <http://adly.com/2011/03/charlie-sheen-data-beats-emotion/>.

¹⁰⁶ *Charlie Sheen*, TWITTER (Mar. 7, 2011), <http://twitter.com#!/charliesheen>.

¹⁰⁷ Gullov-Singh, *supra* note 105.

¹⁰⁸ *Id.*

In addition to simply connecting celebrities to products through Twitter tweets, Ad.ly has begun to successfully exploit the “intersection” of celebrities, social media, and television shows.¹⁰⁹ During the 2011 Super Bowl, Ad.ly influencers posted tweets about why they enjoyed eating a particular brand’s snack food during the game.¹¹⁰ The brand found that the method created a meaningful association between their food product, the celebrity, and the Super Bowl.¹¹¹ Using similar campaigns, Ad.ly offers its clients the ability to “[e]fficient[ly] reach . . . millions of consumers in [their] target audience.”¹¹²

b) Informal Celebrity Endorsements

The evolution of reality television, social media, and the internet has given consumers greater access to celebrities than ever before. Viewers are increasingly interested in the personal lives of celebrities, and are no longer satisfied to read about upcoming film projects or sporting events. Magazines such as *OK!* and *US Weekly* show pictures of celebrities as they walk red carpets and their neighborhood streets.¹¹³ Reality shows like *Keeping Up With the Kardashians*, give a glimpse into celebrities’ homes while gossip blogs, send minute-by-minute reports on the goings-on of these celebrities and their everyday lives.¹¹⁴

These mediums do more than increase viewers’ access to celebrities; they give advertisers increased opportunities to use celebrities to endorse their brands and products. Advertisers no longer need to wait for specific events or films to capitalize upon a certain celebrity’s exposure for product endorsement. Advertisers can pay celebrities to carry or wear products as they go about their

¹⁰⁹ See Krista Thomas, *TV & Social: A Match Made in Heaven*, ADLY (Mar. 20, 2011), <http://adly.com/2011/03/tv-social-a-match-made-in-heaven-2/>.

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *More about advertising with Ad.ly*, *supra* note 101.

¹¹³ See, e.g., *Editorial Overview*, US MAG., <http://srd.com/mediakits/USWeekly-online/EditorialOverview.html> (last visited Sept. 9, 2011); *About OK!*, OK! MAG., <http://www.okmagazine.com/about/> (last visited Sept. 9, 2011).

¹¹⁴ See, e.g., Duncan Riley, *A Look Inside PerezHilton.com Staggering Traffic Numbers for June 2008*, INQUISITR (July 1, 2009), <http://www.inquisitr.com/27929/a-look-inside-perezhiltoncom-staggering-traffic-numbers-for-june-2008/>.

day-to-day lives and still have the products appear in magazines and on the internet. Magazines and blogs frequently publish paparazzi photos of celebrities—photos that include whatever product they happen to be carrying.

Lindsay Lohan is the classic child star who fell from grace. Once a media darling because of her red hair and wide smile, lately Lohan appears in the press mainly because of her legal troubles and addiction to alcohol.¹¹⁵ Lohan showed up to an arraignment in her felony theft case wearing a white dress and was photographed and filmed by paparazzi from all of the major news outlets and websites.¹¹⁶ Some suspect that Lohan was paid to wear the dress, called “The Glavis Dress” by designer Kimberly Ovitz.¹¹⁷ The photographs (and dress) were posted in newspapers, magazines, and on blogs.¹¹⁸ Within one day, the \$575 dress was sold out at all of the designer’s online retailers.¹¹⁹

Even celebrities not involved in high-profile court cases are being photographed with various products. Lady Gaga has been photographed carrying a Nikon camera,¹²⁰ and Leonardo DiCaprio was photographed riding an Ultra Motor A2B Electric Bicycle.¹²¹ Some websites, such as Coolspotters.com, keep track of the products and brands celebrities use through photos submitted not

¹¹⁵ See *Lindsay Lohan Reaches Plea Deal, Gets One Day in Jail*, MSNBC.COM (Aug. 23, 2007, 6:44 PM), <http://today.msnbc.msn.com/id/20412029/>.

¹¹⁶ See Amber Sutherland & David K. Li, *Gal’s Fashion Passion for Lindsay’s Killer Dress*, N.Y. POST (Feb. 11, 2011, 8:41 AM), http://www.nypost.com/p/news/national/women_out_to_kill_for_lindsay_killer_yRtPCZvqbYyruX26xDwT3I [hereinafter Sutherland & Li, *Killer Dress*]; see also Liz Kelly, *Lindsay Lohan’s White Dress Sells Out Online*, WASH. POST: CELEBRITOLOGY 2.0 (Feb. 11, 2011, 8:36 AM), http://voices.washingtonpost.com/celebritology/2011/02/lindsay_lohans_white_dress_sel.html [hereinafter Kelly, *Lohan’s White Dress*].

¹¹⁷ Kelly, *Lohan’s White Dress*, *supra* note 116.

¹¹⁸ See *id.*; see also Sutherland & Li, *Killer Dress*, *supra* note 116; Brittany Talarico, *Lindsay Lohan Wears Short, Tight White Dress to Arraignment*, OK! MAG (Feb. 9, 2011, 5:01 PM), <http://www.okmagazine.com/2011/02/lindsay-lohan-wears-short-tight-white-dress-to-arraignment/>.

¹¹⁹ See Sutherland & Li, *Killer Dress*, *supra* note 116.

¹²⁰ *Lady GaGa and Nikon*, COOLSPOTTERS.COM, <http://coolspotters.com/musicians/lady-gaga/and/brands/nikon#medium-688138> (last visited Sept. 13, 2011).

¹²¹ *Leonardo DiCaprio and A2B Electric Bike*, COOLSPOTTERS.COM, <http://coolspotters.com/actors/leonardo-dicaprio/and/bicycles/a2b-electric-bike#medium-1059952> (last visited Sept. 12, 2011).

only by paparazzi, but by fans on the street as well.¹²² Coolspotters.com allows the viewer to search by product or by celebrity, and some pages feature options to buy the featured products.¹²³

c) Reverse Branding Endorsements

Most endorsements require celebrities to tout the virtues of a particular brand or product. Some suspect that companies are also using celebrities to negatively affect a competitor's product.¹²⁴

One such situation started on New Year's Day 2011, during the broadcast of the Rose Bowl between Texas Christian University and the University of Wisconsin.¹²⁵ Erin Andrews is a sports reporter for ESPN.¹²⁶ She was voted "America's Sexiest Sportscaster" by Playboy magazine in 2008 and gained widespread popularity when she was a finalist on the popular television program *Dancing With the Stars*.¹²⁷ During the Rose Bowl, Andrews commented that the Texas Christian University players seemed to be slipping on the field because of their new Nike cleats.¹²⁸ At the time, the comment seemed to simply be a tidbit provided by Andrews to add some color to the commentary. Two weeks later, however, it was publicly announced that Andrews may have had another motivation for her comment: she was the

¹²² See *About Us*, COOLSPOTTERS.COM, <http://coolspotters.com/about> (last visited Sept. 12, 2011) [hereinafter COOLSPOTTERS, *About Us*].

¹²³ *Id.*

¹²⁴ Please note, this is not to suggest that any of these companies have in fact engaged in this behavior, but simply brings to light suspicious examples of behavior that could become problematic if engaged in for marketing practices.

¹²⁵ Allan Brettman, *ESPN's Erin Andrews Endorses Reebok Shoe, Two Weeks After Her Damaging Report on Nike Football Shoe*, OREGONIAN (Jan. 25, 2011, 7:50 PM), http://blog.oregonlive.com/playbooksandprofits/2011/01/espn_reporter_erin_andrews_end.html.

¹²⁶ *Erin Andrews Bio*, ESPN MEDIAZONE (Oct. 27, 2009), http://www.espnmediazone.com/us/2009/10/27/andrews_erin/.

¹²⁷ Katie Thomas, *Andrews Faces Questions About a Deal With Reebok*, N.Y. TIMES, Jan. 30, 2011, at SP 5, available at <http://www.nytimes.com/2011/01/30/sports/30espn.html>.

¹²⁸ *Id.*

new spokesperson for Reebok ZigTech, one of Nike's largest competitors.¹²⁹

Suspicious of this type of marketing again emerged surrounding Nicole "Snooki" Polizzi, a cast member of MTV's hit reality show "Jersey Shore". Snooki quickly became the subject of ridicule due to her drunken hijinks and outlandish behavior on the show.¹³⁰ During the show's first two seasons, Snooki was often seen carrying a Coach purse.¹³¹ Coach attempts to market itself as an exclusive, luxury brand and aligns itself with spokespeople such as actress Kate Bosworth, known for her beauty, talent and class.¹³² A personality such as Snooki, known for heavy partying and a tacky fashion sense, represents something very different about the bags that she carries, and is not in line with Coach's desired image.¹³³

Shortly after MTV announced that Snooki and her fellow castmates would be returning for a third season, Snooki no longer carried her Coach bag, and was constantly seen with a Gucci bag instead.¹³⁴ The internet was abuzz, many speculating that the purse had been provided to her not by Gucci, but by Coach to try to rid the high-end brand of the negative association with Snooki.¹³⁵

Coach is not the only company to recognize the impact a negative celebrity association can have on a brand. Executives at Abercrombie & Fitch, a clothing retailer known for all-American young adult apparel, offered Snooki, and the other members of the "Jersey Shore" cast "substantial payment" to stop wearing the

¹²⁹ *Id.*; Brettman, *supra* note 125. Andrews was not officially announced as the spokesperson until January 13, 2011. However, we can safely assume that negotiations regarding the deal and contract were taking place or complete on New Years Day when the statements were made. *Id.*

¹³⁰ See Cathy Horyn, *Snooki's Time*, N.Y. TIMES, July 25, 2010, at ST 1, available at <http://www.nytimes.com/2010/07/25/fashion/25Snooki.html>.

¹³¹ Simon Doonan, *How Snooki Got Her Gucci: The Dirt on Purses*, N.Y. OBSERVER (Aug. 17, 2010, 9:55 PM), <http://www.observer.com/2010/culture/pricey-landscaping>.

¹³² *Kate Bosworth for Coach*, CELEBRITY BRANDS (Jan. 29, 2008), <http://www.celebritybrands.net/accessories/kate-bosworth-for-coach>.

¹³³ *Cf.* Doonan, *supra* note 131 (stating "Nobody in fashion wants to co-brand with Snooki.").

¹³⁴ *See id.*

¹³⁵ *See id.*

brand.¹³⁶ Abercrombie & Fitch expressed concern that the cast's "association with [the] brand could cause significant damage to [the brand's] image."¹³⁷

II. THE LAW OF SPONSORSHIP DISCLOSURE

A. *Background*

In the early days of sponsorship, advertisers craved recognition for their contributions, and very publicly and announced their involvement by having their name appear as part of the program's title, introduction, or sign off. Deceptive marketing and consumer protection were not yet concerns. Congress *was*, however, concerned about unfair benefits conferred on publishers and broadcasters.¹³⁸ In the early twentieth century, Congress enacted the Newspaper Publicity Act of 1912, which offered subsidized postage to publishers as long as they distinguished content, for which money or other valuable consideration was paid, as "advertisements."¹³⁹

Similarly, with the rise of radio advertising, lawmakers were concerned about windfalls for broadcasters.¹⁴⁰ Congress enacted § 19 of the Radio Act of 1927 to regulate broadcasters the way publishers were regulated.¹⁴¹ Section 19 required that broadcasters disclose the role of sponsors in their programming.¹⁴² Later, the Federal Communications Commission (FCC), established by Congress through the Communications Act of 1934 to regulate interstate and international communications,¹⁴³ adopted Section 19

¹³⁶ Laurie Segall, *Abercrombie to 'Jersey Shore': Ditch our Brand*, CNNMONEY.COM (Aug. 17, 2011, 6:41 AM), http://money.cnn.com/2011/08/16/news/companies/Abercrombie_jersey_shore/.

¹³⁷ *Id.*

¹³⁸ See Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 327, 332 (2004).

¹³⁹ See *id.* at 332-33.

¹⁴⁰ See *id.* at 332.

¹⁴¹ See *id.*

¹⁴² Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934).

¹⁴³ 47 U.S.C.A. § 151 (1996).

of the Radio Act without debate in Congress or material changes to the language.¹⁴⁴

The Federal Trade Commission Act (“FTCA”), signed into effect in 1914 by President Woodrow Wilson, created a federal agency, the Federal Trade Commission (FTC), to regulate competition and consumer protection.¹⁴⁵ The FTC was “empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition”¹⁴⁶ The FTC almost immediately interpreted the FTCA to allow itself to outlaw misleading advertising as well.¹⁴⁷ In 1938, Congress codified this interpretation by amending the FTCA to specify a prohibition against unfair and deceptive acts and practices in advertising.¹⁴⁸ Since 1938, the FTC has administered a wide variety of laws to protect consumers from deceptive advertising practices.¹⁴⁹

B. Current Legal Regime

Today, the same two relevant pieces of legislation dictate regulations for the disclosure of sponsorship: the FTCA and the Communications Act of 1934 (the “1934 Act”).¹⁵⁰ The 1934 Act focuses on sponsorship disclosure regulation in broadcasting.¹⁵¹ The FTCA, by contrast, governs all types of trade and commerce.¹⁵² Accordingly, most non-traditional advertising falls outside the realm of the 1934 Act, and instead is governed predominantly by the FTC under the FTCA.

¹⁴⁴ See Kielbowicz & Lawson, *supra* note 138, at 332–34 (citing 47 U.S.C. § 317 (2010)).

¹⁴⁵ *Federal Trade Commission: A History*, FTC, <http://www.ftc.gov/ftc/history/ftchistory.shtm> (last visited Sept. 10, 2011).

¹⁴⁶ Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2006).

¹⁴⁷ JEF I. RICHARDS, *DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT* 10 (1990).

¹⁴⁸ *Id.* at 11.

¹⁴⁹ *About the Federal Trade Commission*, FTC, <http://www.ftc.gov/ftc/about.shtm> (last visited Sept. 10, 2011).

¹⁵⁰ 47 U.S.C. § 151 (2006).

¹⁵¹ *Id.*

¹⁵² 15 U.S.C. § 45(b) (2006).

1. The 1934 Act

The 1934 Act, as it stands today, requires that a station shall announce any broadcast as paid for or furnished for which any “money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting.”¹⁵³ The 1934 Act also sets forth some exceptions where disclosure is not necessary. Under one exception, disclosure is not required if the “service or other valuable consideration” is given for free, as long as the consideration given is “reasonably related” to the product in the broadcast.¹⁵⁴ Revisiting the Kardashian example, viewers of *Kourtney & Kim Take New York* often see the girls in their suites in the Smyth Tribeca, a New York City hotel. Likely the Smyth Tribeca is giving the Kardashians their suites for free as the “valuable consideration” in exchange for the publicity the hotel receives from being on the show. In this case, the exchange of the suites for the publicity is likely to be considered reasonably related because the Kardashians are receiving free lodging in the hotel, and nothing more, and therefore disclosure is not required. However, if Smyth Tribeca not only provides rooms during the shooting of the show, but also gives the Kardashians gold member passes that entitle them to free rooms for life, that would not be considered “reasonably related,” and the relationship would have to be disclosed.

This exception only applies to situations in which the service or consideration is not conditioned upon an identification of the product, or any of its qualities. Taking the Kardashian hypothetical again, if the Kardashians receive the rooms on the condition that on every episode Kim Kardashian describes the spacious rooms and friendly staff, this would not fall into the exception, and disclosure would be required.

The statute also provides an exception for sponsorship announcements that make it “clear that the mention of the name of the product constitutes a sponsorship identification.”¹⁵⁵ In those

¹⁵³ 47 U.S.C. § 317(a)(1) (2006).

¹⁵⁴ *See id.*

¹⁵⁵ 47 C.F.R. § 73.1212(f) (2010).

cases, because the sponsor is identified no disclosure is needed.¹⁵⁶ Returning to the Kardashian example, if the show announced that “Tonight’s episode of *Kourtney & Kim Take New York* has been brought to you by the Smyth Tribeca” no additional disclosure would be required.

The 1934 Act highlights the progression of sponsorship disclosure regulation in traditional advertising. However, because the 1934 Act only covers broadcasting, deceptive advertisements in new media and other types of non-traditional advertising fall outside the protection of the act.

2. The FTC’s Authority

The FTC’s principle mission is to protect the consumer from practices the regulators feel are unfair or deceptive.¹⁵⁷ The FTC makes determinations on a case-by-case basis.¹⁵⁸ Generally, for a finding of deceptiveness the representation must be material and likely to mislead as determined from the perspective of a consumer acting reasonably under the circumstances.¹⁵⁹ First, the FTC will determine if a representation, omission or practice is likely to mislead the consumer.¹⁶⁰ Second, the FTC will examine the suspect practice “from the perspective of a consumer acting reasonably in the circumstances.”¹⁶¹ If the practice is directed primarily to a particular group, for example children or teenagers, the FTC will consider “reasonableness from the perspective of that group.”¹⁶² Third, the FTC will examine whether the representation, omission or practice is material.¹⁶³ A material practice is one that is “likely to affect the consumer’s conduct or

¹⁵⁶ *See id.*

¹⁵⁷ *See* 15 U.S.C. § 45(a)(2) (2006).

¹⁵⁸ *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising 16 C.F.R. § 255.0 (2009).

¹⁵⁹ *See* Letter from James C. Miller III, Chairman of Federal Trade Commission, to Hon. John D. Dingell, Chairman of Committee on Energy and Commerce, FTC (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

decision with regard to a product or service.”¹⁶⁴ If the FTC determines that the practice is material, then “consumer injury is likely.”¹⁶⁵ According to the FTC, “[i]njury exists if consumers would have chosen differently but for the deception.”¹⁶⁶

3. The FTC’s Guides

In hopes of clarifying the laws regarding deceptive practices and encouraging voluntary compliance, the FTC composed a set of guides (the “Guides”) which set forth the Commission’s interpretation of the Act.¹⁶⁷ Though not legally enforceable, the Guides provide guidance on compliance with the disclosure laws by elaborating on the FTC’s interpretation of the Act.¹⁶⁸ The Guides are designed to encourage voluntary compliance by informing businesses of how to conform their practices to the requirements of the Act.¹⁶⁹

First introduced in the early 1970s, the Guides specifically address the requirements of Section 5 of the Act, which regulates endorsements in advertising practices.¹⁷⁰ The first three sections of the Guides were enacted in 1975, and three more followed in 1980.¹⁷¹

In 2007, due to changes in technology and advertising since 1980, the FTC prepared to adapt the Guides and sought comments regarding endorsement-related issues.¹⁷² The FTC received twenty-two comments.¹⁷³ Most of the comments focused on two areas: the use of user-generated, or consumer endorsements; and the disclosure of material connections between advertisers and endorsers in the new technologies.¹⁷⁴ Many of the comments

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Any violation must be brought under the appropriate statute. *See* 16 C.F.R. § 255.0(a) (2009).

¹⁶⁸ *See id.*

¹⁶⁹ 16 C.F.R. § 255 (2009).

¹⁷⁰ *Id.* at 72375–76.

¹⁷¹ *Id.* at 72376.

¹⁷² *See id.*

¹⁷³ *Id.*

¹⁷⁴ *See id.*

suggested that it would be useful to illustrate the application of the Guides' principles to new media.¹⁷⁵ In 2008, after conducting its own consumer research and reviewing the comments, the FTC published for comment proposed amendments to the Guides which included several new examples that addressed consumer-based endorsements and disclosure of material connections in new contexts.¹⁷⁶

In December of 2009, the Commission promulgated the proposed changes, the purpose and focus of which was to clarify the application of the Guides to consumer-generated content.¹⁷⁷ The revised Guides addressed celebrity endorsements by adding language stating that endorsers and advertisers may be liable for false claims made in an endorsement or for failing to disclose a material relationship.¹⁷⁸ The proposed amendment further illustrated the applicability of the Guides to new technology by incorporating examples addressing when a celebrity's relationship with an advertiser must be disclosed in the new media formats.

a) What is an Endorsement?

Section 255.0 defines "endorsement" and "endorser."¹⁷⁹ An "endorsement" is

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring

¹⁷⁵ See generally *Review of the Guides Concerning the Use of Endorsements and Testimonials in Advertising: Public Comments*, FTC (Jan. 9–March 2, 2009), <http://www.ftc.gov/os/comments/endorsementguides2/index.shtm> (last visited Oct. 19, 2011).

¹⁷⁶ 16 C.F.R. § 255 (2009).

¹⁷⁷ For the purposes of this note, we will discuss only the relevant sections: 16 C.F.R. §§ 255.0, 255.1, 255.5 (2009).

¹⁷⁸ 16 C.F.R. § 255 (2009).

¹⁷⁹ *Id.*

advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.¹⁸⁰

An endorser is “[t]he party whose opinions, beliefs, findings, or experience the message appears to reflect.”¹⁸¹ Endorsements must always express the “honest opinions, findings, beliefs, or experience of the endorser,”¹⁸² and they may not “convey any express or implied representation that would be deceptive if made directly by the advertiser.”¹⁸³

Generally, an advertisement that reflects a person’s true personal feelings will be considered an endorsement.¹⁸⁴ However, if the person making the statement is unknown to the reasonable viewer, the statement or review will only be considered an endorsement if the person was compensated.¹⁸⁵ Similarly, obviously fictional dramatizations or “scripted banter” are not endorsements.¹⁸⁶

When dealing with a celebrity, most appearances in an advertisement will be considered an endorsement. Personal statements about a product will be considered endorsements for purposes of these rules, even if the statements are scripted (unless the script was obviously fictional, as discussed above).¹⁸⁷ Even if the celebrity is seen using the product in an advertisement but makes no statement regarding the product, it is considered an endorsement.¹⁸⁸ The Guides give an example of a television advertisement for a brand of golf balls that features a well-recognized professional golfer practicing with the brand of balls.¹⁸⁹ In this case, the consumer might reasonably believe that the celebrity would not appear in such an advertisement unless he

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (“The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.”).

¹⁸² 16 C.F.R. § 255.1 (2009).

¹⁸³ *Id.*

¹⁸⁴ *See* 16 C.F.R. § 255.0 (2009).

¹⁸⁵ *Id.* at ex. 3.

¹⁸⁶ *See id.* at exs. 2, 7.

¹⁸⁷ *Id.* at ex. 6.

¹⁸⁸ *Id.* at ex. 5.

¹⁸⁹ *Id.*

actually approved of the brand or product, and could believe that this was an expression of the golfer's personal views.¹⁹⁰

b) When is Disclosure Required?

When an advertisement is deemed to include an endorsement, the FTC requires that any material connection between an endorser and an advertiser must be disclosed.¹⁹¹ A material connection exists when the relationship between the endorser and the advertiser could affect the choice of the consumer, as in the case of a paid endorser.¹⁹² When an advertiser compensates a celebrity to act or speak on behalf of the product, the FTC has deemed that to be a material connection in that it could affect the trust a consumer would place in that product.¹⁹³

However, when a reasonable consumer would presume that the endorser was being compensated for their statement, disclosure is not required.¹⁹⁴ The Guides illustrate when compensation is likely to be expected by a consumer, and therefore when disclosure is not required, through a series of examples.¹⁹⁵ In one example, when a company utilizes a well-known personality in a formal endorsement, the Guides do not require a disclosure. A film star who endorses a food product by expressing her individual preference does not require a disclosure, because it is presumed that the consumer understands she is being paid for the endorsement.¹⁹⁶ Reasonable consumers are familiar with formal endorsements deals, and therefore in the case of the film star endorsing a food product, compensation is expected.

In another example, the Guides provide the illustration of a famous tennis player who credits her improved game to laser vision correction surgery on her social networking site.¹⁹⁷ In that case, disclosure must be made because the nature of the medium

¹⁹⁰ See 16 C.F.R. § 255 (2009).

¹⁹¹ 16 C.F.R. § 255.5 (2009).

¹⁹² See *id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ *Id.* at ex. 2.

¹⁹⁷ *Id.* at ex. 3.

might deceive consumers into believing she is not being paid for the statements.¹⁹⁸ If, on the other hand, the tennis player happened to be wearing a certain trademark in a television interview, but does not mention the brand, no disclosure is required because, according to the FTC, no representation is being made about the product.¹⁹⁹ The Guides make no mention, however, of what should occur if celebrities were to post pictures of themselves on their social networking sites wearing a particular trademark, with no mention of the brand.

Another example discusses a young man who signs up to be part of a “street team,” a program in which endorsers are sent out into public to speak to passersby about the positive qualities of a brand or product.²⁰⁰ Endorsers incentivize street team members to talk about a particular product to friends and acquaintances.²⁰¹ Because the incentives “materially affect” the street team member’s endorsement, his connection with the advertiser must be disclosed as well.²⁰²

c) How Must Material Connections be Disclosed?

Section 255.5 defines the requirements for disclosing a material connection between advertisers and endorsers quite broadly, saying simply that the payment or compensation must be “clearly and conspicuously” disclosed.²⁰³ The advertiser must disclose either the payment or promise of compensation, or the fact that the endorser knew or had reason to know that she would be entitled to some benefit if the endorsement favored the advertised product.²⁰⁴ Disclosures are measured by how reasonable consumers actually perceive and understand the disclosure within the context of the entire advertisement.²⁰⁵ The appropriate way to disclose a relationship depends on the nature of the advertisement

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at ex. 9.

²⁰¹ *See id.*

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ *See generally id.*

in which the endorsement is communicated.²⁰⁶ A disclosure is necessary if a “significant minority” of reasonable consumers would be misled.²⁰⁷ The FTC has opted to allow advertisers to use their discretion as long as disclosures are “large and clear as deemed appropriate” with respect to the size, context and content of the advertisement.²⁰⁸ The FTC grants advertisers some discretion in formulating their disclosures,²⁰⁹ and has held that disclosure messages at the beginning or end of shows are sufficient.²¹⁰

Most recently, the FTC set forth some factors it considers when evaluating whether a particular disclosure is “clear and conspicuous” for online advertising.²¹¹ The factors include (1) the placement of the disclosure, (2) the proximity to the claim it is qualifying, (3) the prominence of the disclosure, (4) whether other parts of the advertisement distract from the disclosure, (5) the length of the advertisement, and (6) the volume, cadence, duration and language of the disclosure.²¹² When confusion about the meaning of the Guides arose, the FTC attempted to clarify the requirements by suggesting wording for online endorsements, such as “Company X sent me [name of product] to try, and I think it’s great.”²¹³ Furthermore, the FTC suggested that a link to a disclosure or a blanket statement on a webpage may not be a sufficient disclosure, but a broad statement accompanying an ad

²⁰⁶ FTC, *Dot Com Disclosures: Information about Online Advertising*, FTC at 1, 5 (2000), <http://ftc.gov/os/2000/05/0005dotcomstaffreport.pdf> [hereinafter FTC, *Dot Com Disclosures*].

²⁰⁷ FTC, *Revised Endorsement Guides*, *supra* note 32, at 2.

²⁰⁸ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,130 n.55 (Oct. 15, 2009).

²⁰⁹ *See generally id.*

²¹⁰ Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, FTC, to Gary Ruskin, Exec. Dir., Commercial Alert, FTC (Feb. 10, 2005), *available at* <http://www.commercialalert.org/FTCletter2.10.05.pdf>. However, in 2005, the FTC rejected a proposal for in-show pop-up disclaimers that appear whenever a paid-for product placement occurs in a show. *Id.*

²¹¹ FTC, *Dot Com Disclosures*, *supra* note 206, at 1–2.

²¹² *Id.*

²¹³ FTC, *Revised Endorsement Guides*, *supra* note 32, at 4.

that “[s]ome of the products I’m going to use in this video were sent to me by their manufacturers” would satisfy the standard.²¹⁴

The Guides are helpful because they acknowledge the application of the rules to online advertising, but they provide little guidance as to how the “clear and conspicuous” standard should be applied to non-traditional types of advertising. The guidance they do provide is unrealistic, and not likely to be accepted by advertisers as plausible solutions. Clearer guidelines are required as consumers and advertisers continue to navigate the developing world of new media and non-traditional advertising.

III. ANALYSIS

The FTC regulations regarding endorsements were originally constructed for traditional means of advertising.²¹⁵ Simply applying the old guides to new media fails to address the ever-changing reality of today’s consumer and her relationship with celebrities. With the implementation of the 2009 Guides, the FTC attempted to broaden the scope of its established rules to apply to online and new media. However, the “clear and conspicuous” standard is vague and difficult to apply across the myriad of channels through which advertisers transmit endorsed messages.

A. “Clear and conspicuous” Standard

The new FTC Guides provide an insufficient standard for disclosure that is not appropriate for today’s advertising industry. When a material connection exists, the FTC mandates that the disclosure be “clear and conspicuous.”²¹⁶ However, the FTC’s vague standard and longstanding deference to self-regulation by the advertising industry poses new problems in an era of non-traditional media. First, the disclosures suggested by the Guides do not maintain the integrity of the advertisements as they exist in non-traditional forms. Advertisers often resort to measures that are arguably in violation of the Guides because they are unwilling to forego successful nontraditional marketing techniques. Second,

²¹⁴ *Id.* at 4–5.

²¹⁵ *See id.* at 2.

²¹⁶ *See* 16 C.F.R. § 255.5 (2009).

the solutions applied by some advertisers are not sufficiently clear to inform consumers about the relationship between the advertiser and endorser. Third, many advertisers have found ways to embed the disclosure messages so that they are not conspicuous enough. And last, advertisers have not applied this standard to other types of advertising, so endorsements in some of the more recent and subtle advertising techniques remain undisclosed.

1. Failure to Maintain Integrity of the Advertisement and Questionable Advertiser Tactics

The FTC has always relied heavily on self-regulation of the advertising industry, but the “clear and conspicuous” disclosure standard does not give the advertising industry enough guidance with which to self-govern in the world of non-traditional advertising.²¹⁷ In October 2010, social media marketing firm Ad.ly extended its business model to Facebook.²¹⁸ A few short months later, Facebook banned Ad.ly from using its business model on Facebook, saying “[w]e feel that it is important to take action when we see repeated violations of our Terms and activity that is misleading to our users and partners.”²¹⁹ Specifically, Facebook opposed the use of personal profiles for profit.²²⁰ The CEO of Ad.ly argued against this decision, saying “[a]ll that’s going to happen is this [is] going to go underground, and people will be getting paid, and it won’t be disclosed.”²²¹ Ad.ly’s situation illustrates how companies and advertisers are struggling to find ways to maintain the integrity of their advertising agreements while complying with the FTC’s “clear and conspicuous” standard in social media.

²¹⁷ See WOMMA, *Social Media Marketing Disclosure Guide*, WOMMA.ORG, 1 (2010), <http://womma.org/ethics/disclosure/Social-Media-Marketing-Disclosure.pdf> [hereinafter WOMMA, *Disclosure Guide*].

²¹⁸ Peter Kafka, *Ad.ly Promises to Get More Celebrities, Pitching More Stuff, In Your Facebook Feed*, ALL THINGS D, WALL ST. J.: DIGITAL NETWORK (Oct. 12, 2010), <http://allthingsd.com/20101012/ad-ly-promises-to-get-more-celebrities-pitching-more-stuff-in-your-facebook-feed>.

²¹⁹ Peter Kafka, *Facebook Gives Ad.ly’s Celebrity Endorsement Business the Boot*, ALL THINGS D, WALL ST. J.: DIGITAL NETWORK (Apr. 9, 2011), <http://allthingsd.com/20110409/facebook-gives-ad-lys-celebrity-endorsement-business-the-boot/>.

²²⁰ *See id.*

²²¹ *Id.*

The Word of Mouth Marketing Association (“WOMMA”), a non-profit organization dedicated to advancing credible word-of-mouth advertising, developed recommended ethical guidelines for advertisers who wanted to comply with the FTC regulations in their social media advertising.²²² WOMMA recommends that disclosure messages appear in a “reasonable font size and color that is both readable and noticeable to consumers,” and that they “be easily viewed and not hidden deep in the text or deep on the page.”²²³ Additionally, WOMMA provides examples as to how the disclosures should read.²²⁴ “I was paid by _____ . . .” is one such example WOMMA recommends advertisers use preceding every endorsed message.²²⁵ For social media platforms with character restrictions,²²⁶ like Twitter, “hashtags”²²⁷ such as “#spon” or “#ad” are likely sufficient.²²⁸ In every case, WOMMA recommends that the page feature a link to a full “Disclosure and Relationships” statement which states any contracts, relationships or conflicts of interest that may affect the credibility of any sponsored statements or reviews on the page.²²⁹

The WOMMA guidelines are helpful in assisting advertisers to avoid the wrath of the FTC, but advertisers are likely to decline to use these practices because they are inconsistent with the purpose of celebrity endorsements in these contexts. As discussed above, consumer skepticism has led to attempts by advertisers to turn to different forms of endorsements.²³⁰ Consumers today are more likely to favor a recommendation from someone in their social network over an up-front advertisement. Celebrity endorsements

²²² WOMMA, *Disclosure Guide*, *supra* note 217, at 1.

²²³ *Id.*

²²⁴ *See id.* at 2.

²²⁵ *Id.*

²²⁶ Some popular networking sites have character restrictions. *Id.* For example, Twitter has a maximum of 140 characters for each posting. *About*, TWITTER, <http://twitter.com/about> (last visited Sept. 8, 2011).

²²⁷ A hashtag is the hash symbol (“#”) followed by a word to highlight relevant key words for categorization in a search. *Twitter Help Center |What Are Hashtags (“#” Symbols)?*, TWITTER, <http://support.twitter.com/entries/49309-what-are-hashtags-symbols> (last visited Sept. 12, 2011).

²²⁸ WOMMA, *Disclosure Guide*, *supra* note 217, at 2.

²²⁹ *See id.*

²³⁰ Armstrong, *supra* note 39, at 460.

in social media are successful because the consumer feels an emotional connection with the celebrity.²³¹ The social media connection allows the consumer to believe that she has a meaningful look into the personal life and feelings of the celebrity.²³² Though the consumer likely understands that a “#spon” hashtag means that the celebrity is being paid to write the status or tweet, the consumer can still believe that the content of the message is written by the celebrity and expresses her true feelings. An obviously endorsed message on the celebrity’s page will destroy the illusion of this connection.

2. Unclear or Inconspicuous Disclosures

The disclosure solutions that advertisers come up with are often not clear or conspicuous enough to comply with the Guides. Take, for example, the Facebook page of Bethenny Frankel, one of the reality stars on *The Real Housewives of New York*. Frankel posted on her Facebook wall, “Watching my baby Bryn crawl on the floor in her adorable Pampers diapers!”²³³ This message may make readers feel that Frankel is sharing a personal moment with them, which is precisely the type of connection an advertiser would want the consumer to establish with its product. On the other hand, if the message read “Pampers paid me to tell you how much I love their diapers,” such a disclosure would interfere with the consumer’s experience in the social media setting and likely cause them to reject the endorser and the message. By embedding endorsement messages in social media and other non-traditional advertising, advertisers seek to avoid this rejection.

Frankel’s post as it exists is problematic in that there is no sign of disclosure on the page. Instead, the consumer must click on the word “Pampers” to be taken to Pampers’ Facebook page.²³⁴ If

²³¹ Creswell, *supra* note 20.

²³² *See id.*

²³³ *Bethenny Frankel*, FACEBOOK (Mar. 3, 2011, 4:33 PM), <http://www.facebook.com/bethennyfrankel/posts/10150102268793591>.

²³⁴ *Pampers*, FACEBOOK, <http://www.facebook.com/pampers> (last visited Oct. 20, 2011). While the Pampers page does not identify Frankel as a spokesperson, the endorsement relationship between Pampers and Frankel is well noted. Leslie Bruce, *The Business of Being Bethenny*, HOLLYWOOD REP., Apr. 29, 2011, at 56–95, available at <http://www.hollywoodreporter.com/news/bethenny-frankel-skinnygirl-sale-181124>.

meant as a disclosure, the link is not conspicuous enough to inform a consumer about the relationship between Frankel and Pampers. The link does not take the viewer to a location on the Pampers Facebook page where Frankel is clearly identified as an endorser. Moreover, a “significant minority” of Frankel’s fanbase may not even have a reason to go to the Pampers webpage, making it likely that relatively few people would see the disclosure, even if one existed.

Even when disclosures are clear they are often hidden from view of the consumer, rendering them worthless. NFL quarterback Drew Brees posted a blanket statement on his Twitter homepage to appease the FTC.²³⁵ The statement reads, “Please note that Drew Brees is an endorser for several companies and promotes them through his social media.”²³⁶ The tweets on his page that reference Pepsi, Advocare Muscle Fuel, Madden NFL, TRX Training, and Flip Video almost never contain individual disclosures.²³⁷

Brees’ disclosure statement lacks clarity because it does not give consumers specific information about the material connections that exist between Brees and the particular brands on his page. The statement does not specify which brands Brees has a contractual agreement with. The disclosure requirement exists to ensure that consumers have information about relationships that might affect the choices they make when buying products.²³⁸ Brees’ blanket statement forces the consumer to guess which brands are compensating Brees. Consumers may assume that a football player is paid to write about a soft drink, but may believe that the player was not being paid to write about more professionally-related products, like weight supplements. However, it could be the case that Brees is a paid endorser of Advocare, a weight supplement company, and simply a lifelong fan of Pepsi. Brees’ statement gives the consumer no way of

²³⁵ See *Drew Brees*, TWITTER, <http://twitter.com#!/drewbrees> (last visited Sept. 8, 2011).

²³⁶ Jeff Bercovici, *Drew Brees Toes FTC’s Line on Twitter Endorsements*, FORBES (Dec. 23, 2010), <http://blogs.forbes.com/jeffbervovici/2010/12/23/drew-brees-toes-ftcs-line-on-twitter-endorsements/>.

²³⁷ See generally *Drew Brees*, *supra* note 235.

²³⁸ See *supra* note 179 and accompanying text.

knowing which brands are paying Brees to endorse them, and it is therefore not clear enough to comply with the FTC standard.

Brees' statement is also not conspicuous enough to satisfy the Guides. Only people who go to Drew Brees' Twitter homepage will see his disclosure statement; those who simply follow him on their own Twitter feeds will only see his updated tweets. The feed does not alert the consumer to the fact that there is a material relationship between Brees and any advertiser in a conspicuous way. A consumer will have to actively seek out the disclosure statement by going onto Brees' homepage. Many consumers do not often look at the homepages of celebrities they follow on Twitter, and are simply satisfied to read the celebrity's updates through an aggregated feed. Those who do go to Brees' homepage may still forget about the disclosure statement months later when they see a sponsored tweet show up on their own page.

One might argue endorsed messages on Facebook or Twitter are analogous to product placement in television shows and therefore, because the FTC does not require disclosures to run simultaneously with the product placement, the FTC would not require disclosures to appear on the same webpage as the endorsed message. The analogy is weak. Brees' disclosure statement differs from television shows that have the ability to run disclosures in the opening and closing credits. To see the disclosure in the credits, a viewer has to do nothing more than remain where she is, and continue watching the same channel. In the Brees example, the consumer will have to actively go to another page within the Twitter website to see the disclosure. It would be more analogous to requiring the television viewer to change the channel in order to see the disclosure. Accordingly, Brees' statement is not a conspicuous disclosure.

3. Little Guidance for Non-traditional Advertising Methods

The FTC standard is difficult for advertisers to follow in social media, and the difficulties become even more pronounced in other types of non-traditional advertising. Even formal endorsement deals, once easily adapted to comply with the "clear and conspicuous" standard, have become complicated in the changing landscape of advertising. The FTC correctly assumes that a

reasonable consumer realizes that a celebrity appearing in a print or television advertisement is compensated to do so.²³⁹ However, it is unclear as to whether a reasonable consumer would assume that a celebrity who appears in a well-publicized advertising campaign for a product or brand is also compensated for writing about the product on her social networking site.

Examples of this confusion are prevalent all over print magazines and the Internet. Kim Kardashian includes hashtags on her tweets of some products,²⁴⁰ but not necessarily when she posts pictures of herself wearing her Skechers Shape-ups.²⁴¹ While Kim Kardashian is a spokeswoman of Sketchers²⁴² consumers may not be aware that the relationship between Kardashian and the advertiser extends to all aspects of her life.

Accordingly, a celebrity's involvement in even a well-publicized advertising campaign may not, by itself, be conspicuous enough to satisfy the "clear and conspicuous" standard. Someone who does not watch much television may not see Kim Kardashian wearing her Sketchers on her reality show, but may see the image on Perez Hilton.com.²⁴³ Or, a consumer who is not internet savvy might get all of her celebrity news from *OK! Magazine*. Therefore, unless an advertising campaign is run in every form of media, the campaign might not reach all consumers who have seen the endorsed message. Further, even if the consumer does eventually see a disclosure statement, she will have to connect that disclosure back to each endorsed message she has seen.

Imagine also the difficulty for advertisers in attempting to apply the "clear and conspicuous" standard to a typical informal

²³⁹ See 16 C.F.R. § 255.5 (2009).

²⁴⁰ See *Kim Kardashian*, TWITTER (Mar. 25, 2010), <http://twitter.com/#!/KimKardashian/statuses/11037479921>; *Kim Kardashian*, TWITTER (Jan. 15, 2011), <http://twitter.com/#!/Kimkardashiane/status/26032946938904577> (posting "spon" instead of "#spon").

²⁴¹ *Photos of SELF Magazine: Kim Kardashian*, FACEBOOK (Mar. 28, 2011), <http://www.facebook.com/photo.php?fbid=10150450307940613&set=o.8908243810&type=1>.

²⁴² See Ken Baker, *Kim Kardashian Walks Off with New Endorsement*, E! ONLINE (Nov. 21, 2010), http://www.eonline.com/news/kim_kardashian_walks_off_with_new/212462; see generally *National Ad Campaign*, BONGO, <http://www.bongo.com/campaign.asp> (last visited Oct. 20, 2011 7:42 PM).

²⁴³ *Perez Hilton*, PEREZHILTON.COM, <http://perez Hilton.com/> (last visited Oct. 20, 2011 7:44 PM) (a popular celebrity gossip site).

endorsement. Recall the example of Lindsay Lohan wearing the Ovitz dress to court. Would Lohan simply stating “I am being paid by Kimberly Ovitz to wear this dress” be sufficient? Should she be required to say it repeatedly? Not only are these solutions impractical and unlikely, but they are also insufficient. Unlike the street team member who has the ability to tell his subjects that he is representing a brand, when Lohan wore the now infamous white dress to court, many more people saw her than those she was in direct contact with at the time. Lohan may have been required to communicate that she is a paid endorser to the people she saw at the courthouse, but neither she nor the advertiser can control what the media prints. The advertiser can hardly be expected to track down every photo taken of Lohan that day to make sure that each publication of the photo is accompanied by a disclosure statement. This would be prohibitively expensive, and probably impossible. Therefore, it is possible (and likely) that even if Lohan did repeatedly state that she was a paid endorser while wearing the dress, her message wouldn’t reach every consumer that saw her picture online or in magazines. The many channels of media available to both consumers and advertisers make the “clear and conspicuous” standard difficult to apply to endorsement campaigns.

B. The Reality of Celebrities Today

Generally, the FTC only requires disclosure when there is a representation made about the brand or the objective qualities of the product.²⁴⁴ When no mention of the brand or qualities is made, the FTC does not consider there to be an endorsement, and no disclosure is necessary.²⁴⁵ For example, taking the illustration of the tennis player mentioned above, even though the player is

²⁴⁴ See 16 C.F.R. § 255.5, ex. 3 (2009). The FTC addresses the issue of the increasing interest in celebrities’ personal lives in the example that refer to a tennis player who shares positive statements about a product on her social networking site. *Id.* The example states that disclosure may be required because consumers may not realize that she is a paid endorser because the site allows her fans to read in real time what is happening in her real life but does not specify what happens if the tennis player mentions or shows a product or brand on the same social networking site without specifically mentioning the positive qualities of the product. *See id.*

²⁴⁵ *See id.*

contractually obligated to wear a particular brand during a television interview, no disclosure is required because she is not making an affirmative statement about the product's quality.²⁴⁶ By neglecting this type of endorsement, the FTC is ignoring the fact that new media gives celebrities more power and ability to endorse a product in new ways, above and beyond simply touting its virtues.

In today's world we increasingly see celebrities in their natural habitats. When a celebrity is seen in her professional capacity, for example at a press junket, in a film or television show, or on the red carpet, it can safely be assumed that a consumer will realize that the celebrity is being compensated to wear or use a particular brand. If the celebrity is being paid, she is representing only that the brand is good enough that she can accept its money and endorse it without guilt or harm to her reputation. However, reality shows, social media, paparazzi, and celebrity blogs allow consumers to see the unscripted, unstyled versions of celebrities. When consumers think that they are experiencing a celebrity behind the scenes, or in the celebrity's "private sphere," the assumptions change. The use of a product in the private sphere may convey to the consumer that the celebrity uses the product not only in the public sphere, but also in the private sphere. By using the product in the private sphere, the celebrity is making a representation—ordaining the product with all of the qualities that the consumer admires in the celebrity.

It could be argued that these representations are examples of "image advertising," a form of advertising that the FTC has been reluctant to regulate.²⁴⁷ Image advertising attempts to create a favorable mental picture or association with the product in the mind of the consumer,²⁴⁸ appealing "not to the rational, but to the emotional, the libidinal, or the subconscious."²⁴⁹ It is advertising

²⁴⁶ *See id.*

²⁴⁷ *See* Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 *BUFF. L. REV.* 721, 774 (2010).

²⁴⁸ *Image Advertising Definition*, *BUS. DICTIONARY*, <http://www.businessdictionary.com/definition/image-advertising.html> (last visited Sept. 10, 2011).

²⁴⁹ Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 *S.C. L. REV.* 683, 691 (2007) [hereinafter Goodman, *Peer Promotions*].

that creates a “warm fuzzy glow” but makes no factual representations about the brand or product.²⁵⁰ Many advertisers could argue that their celebrity associations are types of image advertising, and therefore not currently regulated by the FTC.²⁵¹

Celebrity endorsements today, however, accomplish more than the mere desire to fill the consumer with warm fuzzies; they are specific and pointed. Take, for example, Lohan’s white dress. That celebrity endorsement not only resulted in creating an emotional connection between the consumer and the Kimberly Ovitz brand, but resulted in the demand for the particular dress that Lohan was wearing.²⁵² People look to celebrities to find out precisely what they are wearing in order to emulate their idols.²⁵³ When Paris Hilton, known as much for her fashion sense as for her hotelier family, wears a Hale Bob dress to go shopping, she is making a representation that the dress is not only fashionable, but, more importantly, it is something that she wears.²⁵⁴ These are objective representations that the advertisers are making by hiring the celebrity endorser.

These objective representations can be seen on websites such as coolspotters.com, discussed above. Coolspotters.com advertises itself as a resource that allows consumers to “discover and buy the products, brands, and fashions being used by your favorite celebrities—in their real lives.”²⁵⁵ Coolspotters.com is based on the idea that trends for all kinds of products, from fashion to electronics to accessories, start with celebrities.²⁵⁶ The website has found a way to streamline and capitalize on the representations of quality, value, and coolness celebrities make solely by carrying,

²⁵⁰ Tushnet, *supra* note 247, at 774.

²⁵¹ See Goodman, *Peer Promotions*, *supra* note 249, at 691.

²⁵² Kelly, *Lohan’s White Dress*, *supra* note 116.

²⁵³ Creswell, *supra* note 20.

²⁵⁴ HALE BOB, <http://www.halebob.com> (last visited Sept. 9, 2011). Hale Bob is brand of women’s clothing and accessories that “capture[s] the attitude of style, glamour and fashion of the celebrity elite,” and is worn by such celebrities as Halle Berry, Cameron Diaz, and Cindy Crawford. *About Hale Bob*, HALE BOB, <http://www.halebob.com/about.php> (last visited Sept. 12, 2011).

²⁵⁵ COOLSPOTTERS, *About Us*, *supra* note 122.

²⁵⁶ See *id.*

wearing, or using a product in their daily lives.²⁵⁷ The revenue for the website comes from brand advertising and commission on e-commerce transactions.²⁵⁸ Every time a consumer uses the click-through option on the website to buy a product seen on a celebrity, the brand pays Coolspotters.com a commission.²⁵⁹ The success of this business model shows that celebrity association with a product or brand affects the consumer's view of the product.

Of course, not every product the celebrity is seen wearing, carrying or using is part of an endorsement deal. This is precisely why disclosure is so important. In the days when every celebrity association is not a representation, disclosure is necessary to inform consumers as to which are for pleasure, and which are for profit.

IV. PROPOSAL

A. *The FTC Should Require that "clear and conspicuous" Sponsorship Disclosure Accompany Every Sponsored Message*

The minimal "clear and conspicuous" standard is adequate to protect consumers against misleading statements in traditional forms of advertising, but it does not sufficiently address the issues being presented in non-traditional advertising. Advertisers are using endorsement techniques that go beyond the two- and three-dimensional planes of print and television advertising, and are sending their endorsers into the multi-planed existence of the internet and social media. The FTC needs a standard that follows endorsers everywhere they go.

The FTC more adequately addresses disclosure requirements in other areas, specifically in the Guides for Dietary Supplement

²⁵⁷ *See id.*

²⁵⁸ Peter Cohan, *Growth Matters: Coolspotters Lets You Buy What Celebs Wear*, BLOGGING STOCKS (Mar. 2, 2009, 12:20 PM), <http://www.bloggingstocks.com/2009/03/02/growth-matters-coolspotters-lets-you-buy-what-celebs-wear/>.

²⁵⁹ *Id.* The phrase "click through" is defined as the process by which a visitor clicks on a web advertisement and goes to the advertiser's web site. *Click-Through*, WEBOPEDIA, http://www.webopedia.com/TERM/C/click_through.html (last visited Sept. 12, 2011).

Advertising,²⁶⁰ and the Guides for the Jewelry, Precious Metals and Pewter Industries.²⁶¹ For dietary supplement advertising, the FTC suggests that disclosure of necessary qualifying information be clear, prominent, and “close to the claim being qualified.”²⁶² Similarly, disclosures clarifying precise diamond weights should be made “in close proximity to” and “on every page where a fractional representation is made.”²⁶³

Both of these standards include an important element that is missing in the Guides for endorsements: the requirement that the disclosure be close to the message. This element is crucial to the FTC’s goal of protecting the consumer from misleading advertising, and should be included into the Guides for endorsements.

The FTC should adopt a standard which reads: “disclosure that is clear, conspicuous, and contemporaneously accompanies each sponsored message and is translated through all types of media in which the message is likely to appear.” The benefits of this standard are twofold: it allows the FTC to continue with its deference to the self-regulation of advertisers, while it provides more protection for consumers by suggesting that the disclosure must be visible to the consumer at the time they are receiving the endorsed message.

The subtle nature of new forms of advertising makes it important to allow advertisers to disclose the endorsement while maintaining the integrity of the advertisement. Otherwise, as discussed above, advertisers will be able to circumvent the regulations, or ignore them altogether. Since advertisers are constantly developing new advertising techniques, it is fitting to allow them discretion to devise ways to best comply with the FTC standards in non-traditional advertising campaigns. The FTC should not attempt to dictate how this standard should be applied

²⁶⁰ FTC, *Dietary Supplements: An Advertising Guide for Industry*, FTC: BUREAU OF CONSUMER PROT., BUS. CTR. (Apr. 2001), available at <http://business.ftc.gov/documents/bus09-dietary-supplements-advertising-guide-industry#Application> [hereinafter FTC, *Dietary Supplements*].

²⁶¹ 16 C.F.R. § 23.0 (2011).

²⁶² FTC, *Dietary Supplements*, *supra* note 260, at 6–7.

²⁶³ 16 C.F.R. § 23.17(d) (2011).

through the inclusion of more examples, because new media is constantly changing and will consistently outpace any published examples. Accordingly, a more general, yet protective standard, to encourage to self-regulation of the advertising industry is preferred.

The advertising industry has already exhibited its ability to create FTC-approved methods of disclosure. For example, the proposed standard will serve to clarify that the commonly accepted #ad and #spon hashtags must accompany *each* endorsed message and be visible to the consumer as they are viewing the endorsement. Hashtags will satisfy the standard provided that they are positioned at the end of the endorsed message or in the caption of a photo. Therefore, Khloe Kardashian's page that reads "Want to know how Old Navy makes your butt look scary good? Ask a Kardashian ;)http://bit.ly/cU2GLX (Ad)" will be sufficient disclosure; whereas endorsements that require the viewer to click through to another page, such as Brees' blanket statement or Frankel's hyperlink, will not.

The proposed standard similarly provides guidance for types of advertising that do not yet have a standardized form of endorsement. Requiring that the disclosure accompany each endorsed message eliminates confusion that could arise in the contexts of reverse branding, informal endorsements or formal endorsements. The proposed standard makes it clear that the existence of a well-publicized formal endorsement deal is not sufficient to inform consumers of a material relationship across all channels of media. Therefore, despite her formal endorsement deal with Sketchers Shape-Ups, Kim Kardashian will still need to include a hashtag in every Facebook or Twitter posting regarding the sneakers.

Similarly, this standard gives more protection to consumers in the context of informal celebrity endorsements. Advertisers will be required to create new methods for disclosing relationships with celebrities at the time of the informal endorsement, and through each form of media used. For example, it would not be sufficient disclosure for Lohan to simply state that she was being paid to wear the Ovitz dress to court, and hope that the newspapers report that statement. Rather, advertisers would be required to come up

with the equivalent of a real-life hashtag—something that would translate to the news outlets on which Lohan’s picture would likely appear. Perhaps, for example, the advertising industry could come up with some standard form of label or tag that could be worn or carried that would let consumers know that the celebrity is a paid endorser.²⁶⁴ This system would also benefit consumers in situations of reverse branding, by requiring disclosure even when the message does not refer directly to the product, as in the case of Coach only providing products to certain celebrities, like Kate Bosworth, to whom consumers associate a particular level of sophistication.

B. The Distinction Should be Based on Whether the Celebrity is in her Personal or Public Sphere

“Whether or not an audience member is deceived by a communication will depend on what she expects from the speaker.”²⁶⁵ Focusing on a consumer’s reasonable understanding is key, but the FTC should articulate a clear standard for determining when a reasonable consumer would misunderstand the relationship between the advertiser and the celebrity. The determination should be based on whether the celebrity is being viewed in her public or personal sphere, and not as to whether an objective representation about the product is being made.

Public spheres would be defined as the work a celebrity performs in her purely professional capacity. For example, a celebrity’s appearance in a film, album, or sporting event would be considered an appearance in the public sphere. On the contrary, a celebrity’s private sphere would be defined as any activity taking place outside of the professional environment. Private spheres would include celebrities updating their personal Facebook page, walking down the street, or shopping at a grocery store. When a celebrity is in her private sphere, any material connection must be disclosed.

²⁶⁴ The label example is not likely to be very popular with advertisers or celebrities. It is just an example, and its inadequacies highlight why advertisers are in a better position to devise proper disclosures than lawyers or legislators.

²⁶⁵ Goodman, *Stealth Marketing*, *supra* note 29, at 111.

Sometimes the lines between public and personal lives of celebrities blur, but any blurry areas will be resolved using the FTC's "reasonable consumer" standard. The FTC's main objective is consumer protection. In keeping with the standard set forth by the FTC when determining if disclosure is necessary, the determination would be made based on the experience of a reasonable consumer. The standard should be narrowly construed and applied, to best protect the consumer and prevent confusion and problems that will likely accompany the development of new forms of media. If a reasonable consumer would feel that she was viewing the celebrity in a private sphere, disclosure would be necessary. If a reasonable consumer would understand that the celebrity was working in her public sphere, then no disclosure would be necessary.

Take for example, Justin Timberlake. Justin Timberlake is a platinum recording artist and actor known for his boyish good looks and impressive dance moves. Many of his fans know that Timberlake is also an avid golfer. In 2008, Timberlake signed an endorsement deal with Callaway golf that required him to play with Callaway equipment and carry a Callaway bag.²⁶⁶ When Timberlake is photographed going into the golf club with his Callaway bag, he is not making any verbal statements about the brand or its qualities. He is, however, making a representation about the product. He is representing that he, Justin Timberlake, a popular young man who enjoys golf, chooses to use Callaway products. He is representing that Callaway products are cool, like he is.

If Timberlake were photographed wearing a Callaway hat in one of his music videos, or while performing at a concert, it is likely that a consumer would understand that he was acting as Justin Timberlake, the performer. Therefore, a reasonable viewer would consider Timberlake to be in his public sphere, and disclosure would not be necessary. However, if paparazzi photographed Timberlake wearing the Callaway hat on the golf

²⁶⁶ *Justin Timberlake will Endorse Callaway Golf*, GRABER PARTNERS: MEDIA & ADVER., <http://www.graberpartners.com/newsandnotes/?p=188> (last visited Sept. 10, 2011).

course, a reasonable viewer would likely believe that Timberlake was out for a relaxing day of golf. The viewer, therefore, would likely consider this to be Timberlake's private sphere, and disclosure of the endorsement deal would be necessary.

Admittedly, this standard becomes more difficult to apply in the context of famous-for-being-famous celebrities. Kim Kardashian, for example, does not have a clearly defined career, and therefore it is hard to determine when she is in her public sphere. Kardashian is best known for her involvement in reality television, and therefore her appearances in *Keeping Up with the Kardashians* and *Kourtney & Kim Take New York* could arguably be considered appearances in her public sphere. This exhibits the importance of making the determination from the viewpoint of a reasonable consumer. Reality shows claim to chronicle the real, unscripted lives of these stars. Certainly reality shows and the stars depicted credit their success to the assumption that a reasonable consumer believes that she is watching the celebrities in their private spheres. Therefore, to consider this a public sphere and not require disclosure would be giving advertisers the same type of windfall that caused regulators to initially require sponsorship disclosure. A reasonable viewer could believe that she is seeing celebrities on reality shows in their private spheres, and therefore disclosure should be made contemporaneously with the endorsement.

CONCLUSION

Celebrity endorsements have "the power to instigate and inspire, enlighten and enrage, entertain and edify the consumer."²⁶⁷ Today's skeptical consumer, however, forces advertisers to continuously adapt the use of celebrity endorsements in order to provide consumers with the sense of peer-recommendation they seek when choosing a product.²⁶⁸ The amended FTC Guides provide little guidance to advertisers as to how to comply with

²⁶⁷ Crutchfield, *supra* note 1.

²⁶⁸ See Tushnet, *supra* note 247, at 721.

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endorsement regulations in new social media contexts and leaves no room for innovation.

The proposed standard “disclosure that is clear, conspicuous, and contemporaneously accompanies each sponsored message and is translated through all types of media in which the message is likely to appear” and distinction between private and public spheres take a step towards addressing the need for more specific and timely guidelines. However issues still remain. Self-regulation, though generally successful in the advertising industry may allow some advertisers to continue to fly under the radar and use deceptive techniques. Further, strict self-regulation, such as Facebook’s refusal to allow celebrities to use personal pages for financial gain, will cause advertisers to resort to even more deceptive means of advertising and disclosure. Lastly, as the line between the public and private spheres continue to blur, so will the definition of image advertising and the FTC’s ability to regulate the endorsements. Updated standards and clearer guidelines are necessary to allow the FTC first to catch up to the advertising industry, and then to track it into the future.