

2005

Undercover Marketing: If Omission is the Mission, Where is the Federal Trade Commission?

Brooke E. Crescenti

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Brooke E. Crescenti, *Undercover Marketing: If Omission is the Mission, Where is the Federal Trade Commission?*, 13 J. L. & Pol'y (2005).
Available at: <https://brooklynworks.brooklaw.edu/jlp/vol13/iss2/9>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

UNDERCOVER MARKETING: IF OMISSION IS THE MISSION, WHERE IS THE FEDERAL TRADE COMMISSION?

*Brooke E. Crescenti**

INTRODUCTION

In 1915, the Federal Trade Commission (FTC) was organized as an independent federal administrative agency pursuant to the congressional mandate set forth in the Federal Trade Commission Act of 1914 (FTC Act).¹ The FTC is granted the authority to investigate, prevent, and prosecute unfair or deceptive acts or practices in or affecting commerce, including cases of false advertising and unsubstantiated product claims.² However, in spite

* Brooklyn Law School Class of 2006; B.S. New York University, 2003. The author wishes to thank her parents for their constant love and faith. She would also like to thank the staff of the *Journal of Law and Policy* for their assistance and hard work. Special thanks to her family and J.P., R.Z. and S.M. for their encouragement and to J.G. for his patience and support.

¹ 15 U.S.C. § 41 (2003).

² 15 U.S.C. § 45(b) (1938). With regard to the administration and enforcement of the FTC Act, if the FTC has reason to believe that a violation has occurred of any of the proscriptions in the Act against unfair or deceptive acts or practices in or affecting commerce or unfair methods of competition in and affecting commerce, it may issue a complaint setting forth the Commission's charges. Once the complaint is served on the individual or business entity, the FTC will hold a hearing. *Id.* If, after the hearing, the FTC believes that the individual or business entity indeed engaged in deceptive acts or practices, it may issue a cease and desist order against the practice. *Id.* The federal courts of appeals have exclusive jurisdiction over challenges to FTC cease and desist orders. *Id.* § 45(d). The findings of fact, if supported by evidence, are conclusive on appeal. *Id.* § 45(c). Violations of final orders, whether adjudged by the FTC or the courts of appeals, result in civil penalty

of the FTC's authority to investigate deceptive acts and its requirement that advertisers disclose material connections between product endorsers and the companies selling the endorsed products,³ the FTC thus far has failed to scrutinize undercover marketing, a growing, innovative, and unconventional form of marketing communication.⁴

Undercover marketing is "a type of advertisement using actors in real-life settings to make them appear to be average people."⁵ It utilizes "people hired by a company to surreptitiously promote a product in public establishments."⁶ In a typical undercover marketing campaign, a marketer hires an actor to go into public places and approach consumers with one objective in mind: to pitch a product without revealing to consumers that they are the subjects of a marketing campaign and that the actor is being paid to promote a product.⁷ A successful undercover marketing operative appears to be just another satisfied customer.⁸ The target consumer believes that she is simply engaged in a spontaneous conversation with an average Joe or Jane.⁹ Marketing firms believe that

actions, brought by the Attorney General, and mandatory injunctions. *Id.* § 45(l). In addition, the FTC is granted rulemaking power to supplement the FTC Act in order to curb deceptive practices or unfair competition occurring on an industry-wide basis. 15 U.S.C. § 57a (1914).

³ Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0-255.5 (1980) [hereinafter FTC Guides].

⁴ As of Apr. 19, 2005, all articles and sources cited in and researched in preparation for this note failed to report any FTC proceedings against undercover marketers.

⁵ Undercover Marketing, WEBSTER'S NEW MILLENNIUM DICTIONARY OF ENGLISH (2003), available at <http://dictionary.reference.com/search?q=undercover+marketing>.

⁶ *Id.*

⁷ *Walking, Talking Stealth Ads*, THE JOURNAL RECORD, Sept. 12, 2002, at 2002 WL 4937133; *60 Minutes: Undercover Marketing Uncovered* (CBS television broadcast, July 25, 2004), available at <http://www.cbsnews.com/stories/2003/10/23/60minutes/main579657.shtml>.

⁸ *The Evening Standard: If This Woman Offers You a Drink, Don't Think It's Your Night* (UK television broadcast, July 31, 2001) (noting that undercover marketing operatives are not genuine, disinterested consumers, but rather, the "secret agents of capitalism").

⁹ *Id.*

UNDERCOVER MARKETING AND THE FTC 701

undercover marketing works to capture the coveted 18- to 34-year-old demographic, which historically has been unmoved by traditional print and broadcast advertising.¹⁰ Sam Ewen, CEO of Interference, Inc., a major New York undercover marketing firm, says of undercover marketing, “[W]e can target customers at those times when they’re open to being talked to. It’s not as passive as television or radio. That gives us an advantage.”¹¹

FTC regulations, however, mandate that advertisers disclose any “material connection” between a person endorsing a product and the company selling the product.¹² The FTC Guides Concerning Use of Endorsements and Testimonials in Advertising (FTC Guides) define a “material connection” as a relationship that might affect the weight or credibility of the endorsement.¹³ This note argues that undercover marketing is necessarily deceptive and

¹⁰ Vickie Maye, *You’re Roach Bait to Marketing Spies*, SUN HERALD, Aug. 19, 2001, at 42 (explaining that undercover marketers believe that going undercover is the only way to reach consumers ages 12 to 34 who are “too savvy to fall for traditional advertising methods”).

¹¹ Ryan Naraine, *Questions for Sam Ewen, CEO of Interference, Inc.*, atnewyork.com, July 25, 2001, at http://www.atnewyork.com/news/article.php/8511_808381.

¹² FTC Guides, *supra* note 3, at § 255.5. The regulation states:

When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (*i.e., the connection is not reasonably expected by the audience*) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. *However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.*

Id. (emphasis added).

¹³ *Id.*

therefore violates FTC regulations because the principal goal of any undercover marketing campaign is to assure that target customers are unaware that they are being pitched to by interested product marketers.¹⁴ Jonathan Ressler, the pioneer of undercover marketing in the United States and the founder of Big Fat Promotions, Inc., one of the most prominent undercover marketing firms in New York,¹⁵ boasts, “You can never, ever tell we’re doing it. And we’ll never admit to it. If people ever know they’re being marketed to, we’re not doing our job properly.”¹⁶ Although the FTC prohibits marketers from engaging in this type of conduct without revealing to consumers the endorsers’ financial connections to the company,¹⁷ in practice, the agency has declined to bring enforcement actions against undercover marketers engaged in deceptive practices, despite the statutory mandate directing the FTC to prevent deceptive acts.¹⁸

Part I of this note explores the role of the FTC in regulating, enforcing, and defining the parameters of permissible marketing techniques. Part II argues that undercover marketing is a deceptive practice subject to FTC jurisdiction and that the FTC should investigate the practice in order to comply more fully with its

¹⁴ Brian Steinberg, *Undercover Marketing Is Gaining Ground*, WALL ST. J., Dec. 18, 2000, at B17D (explaining that “the ploy has advertisers plant seemingly average Joes in a demographically desirable crowd—without tipping consumers off that the people touting the goods are hired to do so”).

¹⁵ JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 132 (2004) (explaining that Ressler is credited with the invention of the undercover marketing technique).

¹⁶ *Undercover Agencies*, THE AUSTRALIAN, Sept. 27, 2001, at M03.

¹⁷ FTC Guides, *supra* note 3, at § 255.5. See regulation text cited *supra* note 12.

¹⁸ 15 U.S.C. § 45(a)(2) states that “[t]he Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce” (emphasis added). Undercover marketing falls within this ambit because undercover marketers do not disclose material connections between their companies and their endorsers, as required by the FTC Guides. FTC Guides, *supra* note 3, at § 255.5 (commanding that “when there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement [i.e., the connection is not reasonably expected by the audience] such connection must be fully disclosed”).

UNDERCOVER MARKETING AND THE FTC 703

mandate to enforce the FTC Act. Part III discusses the striking similarities between undercover marketing and infomercials,¹⁹ which have been heavily regulated by the FTC in recent years, and argues that undercover marketing should command similar FTC regulation. Finally, Part IV evaluates the potential consequences of the FTC's inaction with regard to undercover marketing practices, including further tarnished corporate credibility and widespread consumer distrust. This note concludes with a call for action by the FTC.

I. THE FTC'S REGULATION OF DECEPTIVE PRACTICES

The FTC was initially established to enforce antitrust regulations.²⁰ Thus, the FTC's current position as an advertising and marketing enforcer was a "fortuitous by-product" of the terms of the FTC Act.²¹ In 1972, the U.S. Supreme Court, in *Federal Trade Commission v. Sperry & Hutchinson Co.*, construed the Act to give the FTC the power to regulate deceptive advertising and marketing affecting consumers.²² The Court remanded to the Fifth Circuit a judgment setting aside the FTC's cease-and-desist order against Sperry & Hutchinson Co., a trading stamp company, for violating federal antitrust law by suppressing customer trading stamp exchanges.²³ Finding that the FTC had inadequately linked

¹⁹ According to the FTC, infomercials are advertisements "presented in the guise of a talk-show format." *FTC v. California Pacific Research, Inc.*, No. CV-N-88-602BRT, 1991 WL 208470, at *3 (D. Nev. Aug. 27, 1991). Similarly, undercover marketing schemes are face-to-face marketing interactions with customers presented in the guise of everyday conversations with average-looking strangers. *See, e.g., The Evening Standard, supra* note 8.

²⁰ 15 U.S.C. § 41 (effective Sept. 26, 1914).

²¹ W.H. Ramsay Lewis, *Infomercials, Deceptive Advertising and the Federal Trade Commission*, 19 *FORDHAM URB. L.J.* 853, 854 (1992) (citing EARL W. KITNER, *A PRIMER ON THE LAW OF DECEPTIVE PRACTICES* 56 (1978)). While the FTC Act was originally intended to prevent instances of unfair competition between companies, the FTC's current regulatory scheme now focuses on protecting consumers from marketing companies, in addition to protecting companies from one another. *Id.*

²² *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

²³ *Id.* at 250.

Sperry & Hutchinson Co.'s conduct to a violation of antitrust law, the Court considered whether the FTC was limited to regulating only those deceptive acts or practices that violate the spirit of the antitrust laws, that is, only those practices that are unfair to consumers and also affect competition, as the Fifth Circuit held.²⁴ The Court held that the FTC has broad regulatory power to protect both companies and consumers, noting that Congress, when creating the statutory FTC powers, explicitly considered and rejected the inclusion of a rigid list of unfair practices to be regulated.²⁵

The Federal Trade Commission's authority to regulate deceptive advertising and marketing is contained within Section 5 of the FTC Act (Section 5).²⁶ Section 5 provides that unfair or deceptive acts or practices in and affecting commerce are unlawful.²⁷ In *Federal Trade Commission v. Motion Picture Advertising Service Company*, the Supreme Court noted the generality of Section 5, explaining that the statute's proscriptions are flexible to permit their later definition "with particularity by the myriad of cases from the field of business."²⁸ Further, in a conference report, Congress explained that Section 5 is necessarily

²⁴ *Id.* at 239, 248.

²⁵ *Id.* at 239-240. Congress acknowledged that the potential for human inventiveness in the field of consumer manufacturing made it unwise to strip the FTC of regulatory discretion and latitude. *Id.*

²⁶ As amended in 1938. Kathyleen A. O'Brien, *Strategies for Successfully Defending Against Federal Trade Commission Investigations of False and Deceptive Advertising*, 775 PLI/COMM 269 (1997) (explaining that while Section 12 of the Act relates specifically to false advertising concerning food, drugs, devices, and cosmetics, Section 5 of the Act grants the FTC broad jurisdiction over other types of deceptive acts and practices in and affecting commerce that relate to the public interest).

²⁷ 15 U.S.C. § 45(a)(1) (1938) (stating "[u]nfair methods of competition, in and affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful").

²⁸ *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953). The Court, after explaining that Section 5 of the FTC Act gives the FTC broad power to regulate and define unfair or deceptive acts and practices, held that the FTC exercised proper discretion in finding that a film distributor's exclusive screening agreements with theater operators unfairly restrained competition. *Id.* at 394-95.

UNDERCOVER MARKETING AND THE FTC 705

broad because there is “no limit to human inventiveness in this field” and an attempt to pinpoint particular prohibited practices would prove futile.²⁹

The FTC has interpreted its expansive mandate to permit the agency’s investigation into

- (1) any acts, practices, conduct, or circumstances which the Commission has been authorized by law to investigate;
- (2) suspected violations of the laws and regulations enforced by the Commission;
- (3) industry practices to determine whether a trade regulation, rule, legislation, or other means of corrective action would be appropriate; or
- (4) possible violations of a Commission order to cease and desist.³⁰

FTC investigations may take two forms: nonpublic or public.³¹ In a nonpublic investigation, the FTC keeps confidential the details of its investigation of individuals or business entities to protect against premature adverse publicity.³² Conversely, the FTC may conduct public investigations of the practices of an entire industry or group of industries when it feels that the interests of the public will be best served by an open investigation.³³ In either case, with

²⁹ H.R. CONF. REP. NO. 63-1142, at 19 (1914). *See also* *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) (explaining that the generality of Section 5 “necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations”).

³⁰ FTC Operating Manual, ch. 3.1.2.1, *available at* <http://www.ftc.gov/foia/adminstaffmanuals.htm>.

³¹ *Id.* at ch. 3.3.3.1, 3.3.3.2.

³² *Id.* at ch. 3.3.3.1.

³³ *Id.* at ch. 3.3.3.2. The FTC publicly announces open investigations through news releases outlining the FTC’s charges against an individual or company and the allegedly offending act or practice. The news release may also provide a synopsis of prior FTC action against the individual or company. Each release directs readers to the FTC’s webpage or a mailing address to obtain a copy of the formal complaint. *See, e.g.*, News Release, Federal Trade Commission, Ads for Various Diet Supplements and Topical Gels Don’t Cut the Fat, Says the FTC (June 16, 2004) (announcing the FTC’s administrative complaint against Basic Research, L.L.C. and others for making false and unsubstantiated claims about weight-loss and fat-loss gels and supplements), *available at* <http://www.ftc.gov/opa/2004/06/>

the objective of compelling enforcement or corrective action, the agency makes detailed inquiries into possible violations of the laws and regulations it enforces.³⁴

Enforcement mechanisms and other corrective measures employed by the FTC include injunctions, investigational consent agreements, and recommendations for formal FTC complaints, trade regulation rules, industry guides, and policy statements.³⁵ The wide spectrum of enforcement mechanisms available to the FTC allows the agency to choose from among various remedies, including the implementation of prophylactic measures, such as the issuance of a new industry guide or enforcement policy statement.³⁶ These measures may guard against the potential evils

dietsupp.htm; News Release, Federal Trade Commission, Marketer of Electronic Abdominal Exercise Belt Charged With Making False Claims (Oct. 1, 2003) (announcing the FTC's administrative complaint against Telebrands Corp. for using deceptive practices, specifically unsubstantiated product claims, in the marketing and selling of the "Ab Force" exercise device), *available at* <http://www.ftc.gov/opa/2003/10/abforce.htm>.

³⁴ FTC Operating Manual, *supra* note 30, at ch. 3.3.4.1.

³⁵ *Id.* at ch. 3.1.3.4.

³⁶ Issuance of a new industry guide may be appropriate "[w]here there is an indication that a large number of persons are engaged in a similar type of violation" or when widespread violations are threatened by the existence of "competitive considerations" that may "cause many individual persons and firms to adopt and be reluctant to abandon a particular practice until other members of the industry have begun to do so." *Id.* at ch. 8.3.3(1)-(2). The Operating Manual instructs that, "[w]hen promulgation of a guide may provide the impetus for members of an industry to voluntarily correct their business practices and thereby eliminate violations, it can be an effective means of achieving compliance." *Id.* at ch. 8.3.3(2). Industry guides may be more instructive than official FTC regulations because the Operating Manual encourages industry guide drafters to include "meaningful factual criteria" for determining when a violation exists rather than making blanket legal conclusions, such as stating that a practice is illegal when it has the capacity to deceive. *Id.* at ch. 8.3.3(3). For example, in 2001, the FTC promulgated the *Guides for the Jewelry, Precious Metals, and Pewter Industries*, which addressed such industry-wide issues as the proper usage of certain terms and representations regarding gemstones, metals, and product quality. Federal Trade Commission, For Business, Jewelry Guides, *available at* <http://www.ftc.gov/bcp/guides/jewel-gd.htm>.

UNDERCOVER MARKETING AND THE FTC 707

inherent in certain industries before the FTC specifically targets individuals or business entities by issuing complaints and holding formal hearings.³⁷ The FTC thus enjoys great discretion in crafting remedies to combat deceptive practices.³⁸ To assist agency officials in determining whether particular practices are deceptive, the FTC has developed a Policy Statement on Deception.³⁹

A. The FTC's Policy Statement on Deception: Factors for Identifying Deceptive Practices

In recognition of the potential for confusion regarding the reach of the FTC's broad mandate, the agency sought to provide a single definitive statement on what constitutes a deceptive act or practice by issuing a Policy Statement on Deception (Policy Statement) in 1983.⁴⁰ Although FTC policy statements are not binding law,⁴¹ they set forth the circumstances in which the

Issuance of an enforcement policy statement may be based on the "accumulated expertise of the Commission acquired from numerous investigations and proceedings concerning a particular industry or practice," or may be "the outgrowth of an independent Commission determination that pronouncement of an interpretive statement or enforcement policy upon a particular subject will further the public interest." FTC Operating Manual, *supra* note 30, at ch. 8.5.4. For example, in 1994, the FTC issued the *Enforcement Policy Statement on Food Advertising*, explaining its joint enforcement jurisdiction over food advertising with the Food and Drug Administration and the FTC's method of evaluating certain nutritional claims. Federal Trade Commission, For Business, Advertising Guidance, Food Advertising, *available at* <http://www.ftc.gov/bcp/policystmt/ad-food.htm>.

³⁷ See *supra* text accompanying note 2 (describing FTC enforcement procedures).

³⁸ FTC Operating Manual, *supra* note 30, at ch. 3.1.2.2 (explaining that "[t]he Commission possesses broad jurisdiction to deal with unfair or deceptive acts and practices and unfair methods of competition under the FTC [Act] and the various special statutes enforced by the Commission").

³⁹ *FTC Policy Statement on Deception* (Oct. 14, 1983) [hereinafter *FTC Policy Statement*], *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

⁴⁰ *Id.*

⁴¹ FTC Operating Manual, *supra* note 30, at ch. 8.6.1 (stating that while policy statements are intended to clarify the rules that they describe, they do not

Commission intends to take corrective action, or provide interpretive statements on laws or substantive rules.⁴² The FTC's 1983 Policy Statement outlined three criteria that the FTC should consider in determining whether a particular act or practice is deceptive; each of the three factors must be present for the FTC to intervene.⁴³ These factors include the likelihood that the practice will mislead the consumer, the reasonableness of the consumer's reaction to the practice, and the materiality of the practice from the consumer's perspective.

The FTC officially adopted the Policy Statement in *In the Matter of Cliffdale Associates*.⁴⁴ In that case, the administrative law judge concluded that an unfair or deceptive practice was "any advertising representation that ha[d] the tendency and capacity to mislead or deceive a prospective purchaser."⁴⁵ The FTC, however, rejected that approach as "circular and therefore inadequate to provide guidance on how a deception claim should be analyzed."⁴⁶ Rather, the FTC explained that it must evaluate deceptive practices

have binding force).

⁴² *Id.* at ch. 8.5.2. The principle function of an enforcement policy statement is to deter violations of the law by clarifying any ambiguities or uncertainties that may arise concerning FTC enforcement policies. *Id.* at ch. 8.5.3.

⁴³ *Id.*

⁴⁴ 103 F.T.C. 110 (1984) (appending the *Policy Statement* to the decision). The FTC held that Cliffdale engaged in deceptive acts and practices by making unsubstantiated claims about its Ball-Matic Valve (an automobile retrofit device). *Id.* Further, the FTC held that the claims were deceptive because Cliffdale had failed to reveal its relationship with Ball-Matic endorsers, many of whom were Cliffdale business associates being passed off as disinterested customers. *Id.* In support of its decision, the FTC cited the FTC Guides, *supra* note 3, at §§ 255.0-55.5, which require companies to disclose material connections between the company and its product's endorsers. *Id.* See *infra* Part I.B for further discussion of the FTC Guides.

⁴⁵ *Cliffdale*, 103 F.T.C. 110.

⁴⁶ *Id.* The FTC recognized that a clearer, more articulable standard was necessary for evaluating deceptive practices. Simply asking whether the particular alleged deceptive practice had a tendency to deceive an undefined class of consumers provided no framework for future evaluations under the FTC Act. *Id.*

UNDERCOVER MARKETING AND THE FTC 709

based on the factors laid out in its Policy Statement.⁴⁷

1. The “Likely to Mislead” Factor

The Policy Statement provides that a practice will be deemed deceptive only in the case of a “representation, omission or practice that is likely to mislead the consumer.”⁴⁸ Because Section 5 is more prophylactic than punitive in nature, a mere capacity to deceive may garner FTC attention.⁴⁹ Thus, a finding of deception does not require actual deception so long as the practice is likely to mislead.⁵⁰ If an individual or entity induces contact with a consumer through “a representation, practice, or omission that is likely to mislead the consumer,”⁵¹ a violation of the Act will result, even if the consumer is later informed about the marketer’s use of deceptive tactics.⁵² Further, if a message’s overall impression is misleading, it is no defense that some elements of the communication are true because “words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.”⁵³ For example, in *In the Matter of*

⁴⁷ *Id.*

⁴⁸ *FTC Policy Statement, supra* note 39.

⁴⁹ *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963). After noting the broad scope of FTC power to regulate deceptive practices, the court held that the FTC was not erroneously denied a temporary injunction against Sterling Drug. *Id.* The FTC alleged that Sterling Drug deceived consumers by improperly linking its drugs to an American Medical Association endorsement, but the court found that the FTC failed to present sufficient evidence for such a finding at the preliminary injunction stage. *Id.*

⁵⁰ *Id.*; *Resort Rental Car Sys. Inc. v. FTC*, 518 F.2d 962, 964 (1975) (explaining that “advertising capable of being interpreted in a misleading way should be construed against the advertiser” and that “actual deception need not be shown”).

⁵¹ *Cliffdale*, 103 F.T.C. 110.

⁵² *Resort*, 518 F.2d at 964 (explaining that “[t]he Federal Trade Act is violated if [the act or practice in question] induces the first contact through deception, even if the buyer later becomes fully informed”).

⁵³ *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943). In *Bockenstette*, the court upheld an FTC cease-and-desist order based on findings that defendant hatchery owners deceptively advertised that they were linked to the National Poultry Improvement Plan, which represented a choice group of

Encyclopedia Britannica, the FTC found a deceptive omission in violation of the FTC Act when sales representatives misrepresented the purpose of their initial contact with customers.⁵⁴ *Encyclopedia Britannica* salespersons went door-to-door claiming to be conducting brand recognition surveys when, in fact, the main purpose of their contact with the homeowners was to sell encyclopedias.⁵⁵ The FTC held such a failure to disclose impermissible and deceptive because, although surveys were in fact conducted, they were merely the gateway to encyclopedia sales.⁵⁶

2. *The Reasonableness of Interpretation Factor*

The Policy Statement provides that the second factor for determining the existence of a deceptive act or practice is the reasonableness of the consumer's reaction to or interpretation of the act or practice.⁵⁷ The statement provides that "to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances."⁵⁸ Reasonable, however, does not necessarily mean intelligent or discerning.⁵⁹ When reviewing FTC orders, courts recognize that in order to receive protection, consumers should not be expected to be especially bright or discerning.⁶⁰ Indeed, as noted by the Supreme

female hens, when in fact they were not. *Id.* While the hatchery's hens were previously approved by the National Poultry Improvement Plan, once they came under the defendants' ownership they lost that title and could no longer be advertised as such. *Id.*

⁵⁴ 87 F.T.C. 421 (1976).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *FTC Policy Statement, supra* note 39.

⁵⁸ *Id.*

⁵⁹ *Beneficial Corp. v. FTC*, 542 F.2d 611, 618 (3d Cir. 1976). In *Beneficial*, the Court upheld an FTC order, holding that *Beneficial's* advertisements for loans to those entitled to income tax refunds were deceptive because they failed to indicate that potential borrowers had to meet certain credit standards set by *Beneficial*. *Id.*

⁶⁰ *Id.* (quoting Callman, *Unfair Competition and Trademarks* § 19.2(a)(1), which, *inter alia*, described the general consumer public as a vast multitude that

UNDERCOVER MARKETING AND THE FTC 711

Court in *Federal Trade Commission v. Standard Education Society*,

[L]aws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied on to reward fraud and deception.⁶¹

As to the act or practice in question, the Policy Statement cites to *Beneficial Corp. v. Federal Trade Commission*, in which the FTC found that “[i]n determining the meaning of . . . a sales presentation, the important criterion is the net impression that it is likely to make on the general populace.”⁶² Expanding on this notion, in *American Home Products v. Federal Trade Commission*, the Third Circuit held that when considering the reasonableness of the consumer’s reaction, the FTC has the right to examine the total impression made by an advertising tactic.⁶³ Otherwise, “the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.”⁶⁴ Therefore, when considering a consumer’s reaction to an act or practice, the FTC must acknowledge that “[t]he ultimate impression upon the mind of the [consumer] arises from the sum total of not only what is said but

includes “the ignorant, and unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions”); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942) (quoting *Callman* as cited in *Florence Mfg. Co. v. Dowd*, 178 F. 73 2d Cir. 1910). The *Aronberg* court affirmed an FTC cease-and-desist order against the defendant, charging that Aronberg engaged in deceptive practices by advertising his over-the-counter medicinal remedy without revealing its potential dangers to consumers’ health. *Id.*

⁶¹ 302 U.S. 112, 116 (1937).

⁶² *Beneficial*, 542 F.2d at 618 (citing *Grolier*, 91 F.T.C. 315, 430 (1978), remanded on other grounds, 615 F.2d 1215 (9th Cir. 1980), modified on other grounds, 98 F.T.C. 882 (1981), reissued, 99 F.T.C. 379 (1982)).

⁶³ 695 F.2d 681 (3d Cir. 1982). In *American Home Products*, the court held that substantial evidence supported an FTC finding that the defendant deceptively represented that its nonprescription analgesics were proven superior to competitors.

⁶⁴ *Id.* at 688.

also of all that is reasonably implied.”⁶⁵

3. Materiality Factor

The Policy Statement also requires that the representation, omission, or practice be “material” in order to give rise to a finding of deception.⁶⁶ The Policy Statement defines a material representation as an act or practice likely to affect the consumer’s conduct or decision with regard to the challenged product or service.⁶⁷ So long as materiality is found, it is irrelevant whether a consumer was actually deceived by the practice.⁶⁸ In *Federal Trade Commission v. Colgate-Palmolive Co.*, the Supreme Court made clear that material representations or omissions are not limited to those related to the substantive aspects of the product or service being promoted.⁶⁹ Indeed, the Court held that any representations or omissions that materially induce consumer action are subject to the proscriptions of the Act.⁷⁰

⁶⁵ *Aronberg*, 132 F.2d at 167 (noting that the public is often influenced by appearances and general impressions and not simply the specific language used in advertisements).

⁶⁶ *FTC Policy Statement*, *supra* note 39. The Policy Statement cites the definition of materiality in the RESTATEMENT OF TORTS, SECOND § 538(2) (1977), which states that a material misrepresentation or omission is one that “the reasonable person would regard as important in deciding how to act, or one which the maker knows the recipient, because of his or her own peculiarities, is likely to consider important.” The RESTATEMENT § 538(2)(a) cmt. d (1977) states that the material fact does not necessarily have to affect the money paid in a transaction and explains that “there are many more-or-less sentimental considerations that the ordinary man regards as important.” *Id.*

⁶⁷ *FTC Policy Statement*, *supra* note 39.

⁶⁸ *Id.*

⁶⁹ *Colgate-Palmolive Co.*, 380 U.S. at 386-87 (rejecting respondent’s argument that “the only material facts are those which deal with the substantive qualities of a product,” in favor of the FTC’s position that “the misrepresentation of *any* fact so long as it materially induces a purchaser’s decision to buy is a deception prohibited by § 5”). In *Colgate-Palmolive*, the Court reinstated an FTC order that held that the undisclosed use of a prop made of plexiglass and sand in a commercial to simulate a razor shaving a piece of sandpaper clean was a material deceptive practice. *Id.*

⁷⁰ *Id.* Accordingly, deception may stem from marketing or advertising

UNDERCOVER MARKETING AND THE FTC 713

B. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising

In addition to its Policy Statement on Deception, the FTC has provided guidance regarding the use of advertising endorsements in Section 255 of Title 16 of the Code of Federal Regulations.⁷¹ Promulgated by the FTC, this section, known as the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising,⁷² defines endorsement as

[a]ny 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) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party *other than the sponsoring advertiser*. 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.⁷³

Section 255.5 provides that when there is a material connection between an endorser and the seller of an advertised product that might “materially affect the weight or credibility of the endorsement,⁷⁴ *such connection must be fully disclosed.*”⁷⁵ Specifically, the FTC mandates that if actors are employed to pose as actual customers, this fact must be disclosed to the public.⁷⁶ The

methods, not just from unsubstantiated product claims.

⁷¹ FTC Guides, *supra* note 3, at §§ 255.0-255.5.

⁷² 15 U.S.C. § 57a (1914) (giving the FTC authority to prescribe rules with respect to deceptive acts or practices in and affecting commerce).

⁷³ FTC Guides, *supra* note 3, at § 255.0(b) (emphasis added).

⁷⁴ FTC Guides, *supra* note 3, at § 255.5. In other words, the connection is not reasonably expected by the audience.

⁷⁵ *Id.* (emphasis added).

⁷⁶ FTC Guides, *supra* note 3, at § 255.2(b). The regulations state, “[a]dvertisements presenting endorsements by what are represented, directly or by implication, to be ‘actual customers’ should utilize actual customers, both in the audio and video or clearly and conspicuously disclose that the persons in such advertisements are not actual customers of the advertised product.” *Id.*

FTC clarified the appropriate application of the regulation with the following hypothetical example:

An advertisement purports to portray a “hidden camera” situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of actual patrons of the cafeteria for their spontaneous, honest opinions of the advertiser’s recently introduced breakfast cereal. Even though the words “hidden camera” are not displayed on the screen, and even though none of the actual patrons is specifically identified during the advertisement, *the net impression conveyed to consumers may well be that these are actual consumers, and not actors. If the actors have been employed, that fact should be disclosed.*⁷⁷

II. UNDERCOVER MARKETING IS A DECEPTIVE PRACTICE BASED ON FTC STANDARDS

A marketing industry publication aimed at chief marketing officers defines undercover marketing as “the use of actors or shills to pitch a product in a public place without it being revealed that they are salespeople.”⁷⁸ Advertising and marketing industry leaders and numerous consumer advocacy groups are increasingly questioning and criticizing the use of this practice.⁷⁹ The executive director for the Center for Digital Democracy calls the undercover

⁷⁷ FTC Guides, *supra* note 3, at § 255.2, Example 3 (emphasis added). Part III of this note further discusses the FTC’s application of the FTC Guides to infomercials and argues that undercover marketing is as deceptive as certain infomercial practices, which are heavily regulated by the FTC.

⁷⁸ *Lingo Lab: A Marketing Glossary: Undercover Marketing*, CMO Magazine, available at <http://www.cmomagazine.com/glossary/term.html?CID=55>.

⁷⁹ Suzanne Vranica, *That Guy Showing Off His Hot New Phone May Be a Shill*, WALL ST. J., July 31, 2002, at B1 (noting that the executive director of Commercial Alert, a nonprofit consumer activist organization, criticizes undercover marketing as deceptive); *Walking, Talking Stealth Ads*, *supra* note 7 (explaining that many people in the advertising industry agree with consumer protection advocates that undercover marketers go too far and quoting a managing director of Atlanta’s Titan Advertising who argues that undercover marketers are lying to and deceiving the public).

UNDERCOVER MARKETING AND THE FTC 715

marketing phenomenon the “brand-washing of America.”⁸⁰ Nevertheless, the FTC thus far has taken no initiative to challenge the practice, despite its signature element of deceptiveness.⁸¹ Although the FTC has no specific regulations addressing the practice of undercover marketing, its authority to regulate undercover marketing falls within the sweeping coverage of Section 5 of the FTC Act.⁸²

As a threshold matter, the FTC has jurisdiction to regulate undercover marketing as a form of advertising in and affecting commerce.⁸³ Advertising has been defined to include “[a]ny action intended to draw the attention of the public or of a segment thereof to merchandise, a service, a person or organization, or to a line of conduct.”⁸⁴ Undercover marketing easily falls within this categorization. Operatives take action to draw unsuspecting consumers’ attention to a certain product.⁸⁵ Typical undercover marketing techniques include placing attractive young men and

⁸⁰ Daniel Eisenberg & Laura Bradford, *It’s an Ad, Ad, Ad, Ad World: As Conventional Methods Lose Their Punch, More Marketers are Going Undercover to Reach Customers*, TIME (Canadian Edition), Sept. 23, 2002 (explaining that critics believe that undercover marketing “tinker[s]” with consumers’ minds). The Center for Digital Democracy seeks to enhance public understanding of the U.S. digital media system and make the media industry more accountable to the public interest. See CDD Mission Statement, at <http://www.democraticmedia.org/cddmissionstatement.html>.

⁸¹ As of Apr. 19, 2005, all articles and sources cited in and researched in preparation for this note fail to report any FTC proceedings against undercover marketers.

⁸² 15 U.S.C. § 45 (a)(2) (1938) (stating “[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”).

⁸³ *FTC Policy Statement*, *supra* note 39 (explaining that marketing practices, such as bait-and-switch schemes or providing incomplete information to the consumer, are covered by the Act in addition to traditional advertising); see also 15 U.S.C. § 45(2) (empowering and directing the FTC to “prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce”).

⁸⁴ O’Brien, *supra* note 26, at 276 (quoting George E. Rosden & Peter E. Rosden, *The Law of Advertising*, 17.02[2] at 17-36 (1995)).

⁸⁵ *60 Minutes*, *supra* note 7.

women in bars to conspicuously talk about how great their vodka tastes and recommend that other patrons order the same,⁸⁶ paying mothers to extol the benefits of their new laundry detergent at their children's Little League games,⁸⁷ and compensating celebrities to appear on talk shows and praise prescription drugs without indicating that they are spokespersons for the manufacturer.⁸⁸

Although FTC spokespersons have indicated that undercover marketing raises concerns, in their view, undercover marketing may simply be unethical, not illegal.⁸⁹ An assistant director of the FTC's Advertising Practices Division has said of undercover marketing, "It's troubling, but whether it rises to the level of being illegal is not clear. At a minimum it's not clear that there's enough harm done to make it a priority for the FTC."⁹⁰ However, an analysis of a typical undercover marketing encounter reveals that the success of undercover marketing depends on meeting all three of the FTC's criteria for a deceptive practice,⁹¹ none of which references injury or "harm done" to the consumer.⁹² Therefore, the FTC is empowered to regulate undercover marketing and should make regulation of this deceptive practice a priority.

An example of a typical undercover marketing scheme assists in illustrating the deceptive nature of this practice. In 2002, Sony Ericsson hired the marketing firm Interference, Inc. and launched

⁸⁶ Jim Rutenberg, *Phenomenon (Buy Me)*, N.Y. TIMES, July 15, 2001, at 21.

⁸⁷ Catherine Donaldson-Evans, *Advertisers Go Undercover to Push Products*, FOX NEWS, Aug. 17, 2001, available at <http://www.foxnews.com/story/0%2C2933%2C32179%2C00.html>.

⁸⁸ Eisenberg, *supra* note 80.

⁸⁹ Jana Ritter, *Buyer Beware: Uncovering Undercover Advertising*, THE GALT GLOBAL REVIEW, Mar. 18, 2003, at http://www.galtglobalreview.com/business/buyer_beware.html (explaining that the Federal Trade Commission has yet to charge Big Fat Promotions, Inc. with anything other than bad taste); Donaldson-Evans, *supra* note 87 (quoting Mary Engle, assistant director of the FTC's advertising practices division).

⁹⁰ Donaldson-Evans, *supra* note 87.

⁹¹ See Part II.A-C (noting the three factors necessary in order to find the existence of a deceptive practice, including "likely to mislead," "reasonableness of interpretation" and "materiality").

⁹² See Part I.A. 3 (noting that actual consumer deception is not necessary for a practice to be deemed deceptive so long as there is a capacity to deceive).

UNDERCOVER MARKETING AND THE FTC 717

its “fake tourist” campaign.⁹³ Sony sent actors to crowded tourist destinations, such as New York’s Times Square and Seattle’s Space Needle, to pose as tourists.⁹⁴ The operatives went out in pairs, posing as boyfriend and girlfriend, and asked passersby if they would mind taking pictures of the couple.⁹⁵ The operatives handed willing parties a new Sony camera cell phone, acting as if it were their own, and initiated conversations about the phone and its various features.⁹⁶ At no point during the interaction did the operatives reveal that they were employed by Sony to market the new camera phone.⁹⁷

Sony’s campaign is representative of many undercover marketing schemes and, as such, it may serve to highlight the applicability of the FTC’s criteria for identifying deceptive practices to undercover marketing.⁹⁸ Indeed, Sony’s campaign satisfies each of the FTC’s criteria for deception, thus indicating that undercover marketing is ripe for FTC regulation and enforcement action. First, Sony misleads consumers by omitting the fact that the “tourists” are actually paid endorsers.⁹⁹ Second, the beliefs of consumers that they are not part of a paid marketing campaign when they are spontaneously stopped on the street are

⁹³ Vranica, *supra* note 79; *60 Minutes*, *supra* note 7. See also *Case Study: Sony Ericsson*, at <http://www.interferenceinc.com/sony.html>. The case study outlines the marketing elements utilized in the Sony campaign, including fake tourists and “leaners,” the term used for attractive actors placed in bars and clubs to promote the camera.

⁹⁴ Vranica, *supra* note 79; *60 Minutes*, *supra* note 7 (noting that in Times Square, the “ancient home of American marketing, people on the street once “picked pockets, but now, they mess with your mind”).

⁹⁵ Vranica, *supra* note 79 (noting that the operatives have no intention of identifying that they work for Sony); *60 Minutes*, *supra* note 7.

⁹⁶ Vranica, *supra* note 79 (explaining that the idea is to have consumers believe that they’ve “stumbled onto a hot new product”); *60 Minutes*, *supra* note 7.

⁹⁷ Vranica, *supra* note 79; *60 Minutes*, *supra* note 7 (explaining that the Sony operatives were “irresistibly innocent looking” and that the “Good Samaritan” picture-taking consumers had no idea that they were “being had”).

⁹⁸ See *supra* Part I.A (outlining the three FTC criteria for finding a practice deceptive).

⁹⁹ See *infra* Part II.A.

entirely reasonable.¹⁰⁰ Finally, Sony's failure to disclose the true nature of the interaction is a material omission.¹⁰¹

*A. Failure to Disclose That Undercover Operatives Are Paid
Marketers Is An Omission Likely to Mislead the
Consumer*

In order to qualify as a deceptive practice, the Policy Statement first requires that there be an omission likely to mislead the customer.¹⁰² Undercover marketing easily satisfies this criterion because the omission in undercover marketing is the essence of the sales pitch. Instead of deceiving the consumer about a particular attribute of the product or service, a successful undercover marketing operative deceives the consumer into believing that he is not being marketed to at all.¹⁰³ In fact, the thought should never enter the consumer's mind and, if it does, the undercover marketing interaction is viewed as a failure.¹⁰⁴ If an undercover marketing operative fails to disclose that she is paid by a company to promote its product and gives no information to that effect, the customer is almost certain to be deceived by this omission.¹⁰⁵

With undercover marketing, omission is the mission.¹⁰⁶ In fact,

¹⁰⁰ See *infra* Part II.B.

¹⁰¹ See *infra* Part II.C.

¹⁰² *FTC Policy Statement*, *supra* note 39. See Part I.A.1.

¹⁰³ See Part I.A.1 (discussing deceptive representations and omissions).

¹⁰⁴ *Undercover Agencies*, *supra* note 16 (noting undercover marketer Jonathan Ressler's insistence that his operatives' true identities remain secret in order to preserve the success of the campaign).

¹⁰⁵ A useful comparison may be made to infomercials, a marketing practice heavily targeted by the FTC in recent years. See Lewis, *supra* note 21; O'Brien, *supra* note 26. Infomercials are troubling to the FTC because it is rarely clear whether the audience members or endorsers in the infomercials are paid for their participation, thereby creating a tendency to deceive viewers. See Lewis, *supra* note 21. Undercover marketing is much the same. The deception lies not in the claims about the product, but in the representation that the endorser has no financial connection to the product he is extolling. See *infra* Part III for a further discussion of this comparison.

¹⁰⁶ John Heinzl, *Beware Tourists With Talking Cameras*, THE GLOBE AND MAIL, Aug. 1, 2002, at A1 (commenting on the Sony "fake tourist" operatives,

UNDERCOVER MARKETING AND THE FTC 719

“[t]he whole key to undercover marketing is never knowing that it’s going on.”¹⁰⁷ Once a consumer finds out that the person he was chatting with is actually a shill, the cover is blown and the transaction loses its effectiveness.¹⁰⁸ In the Sony cell phone campaign, for example, the passerby is not told that the “tourist” is actually a Sony employee.¹⁰⁹ The seemingly innocent acts of being asked to take a photograph and engaging in friendly banter about the camera are not likely to tip off consumers that they are really the targets of a marketing pitch. A skillful operative cleverly disguises her mission.¹¹⁰ Consequently, there is an omission that is likely to deceive.¹¹¹ Further, in addition to the Policy Statement, the endorsement-specific regulations contained in the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising¹¹² provide that when marketers do not reveal that their endorsers are paid, customers will be deemed to have been unlawfully deceived.¹¹³ The scenario engineered by Sony’s

Jon Maron, director of marketing for Sony Ericsson, explained, “they’re not identified as Sony Ericsson employees because it takes the spontaneity of the conversation away”).

¹⁰⁷ BAKAN, *supra* note 15, at 132-34 (quoting Jonathan Ressler of Big Fat Promotions, Inc.).

¹⁰⁸ *Id.*

¹⁰⁹ Heinzl, *supra* note 106.

¹¹⁰ *Undercover Agencies*, *supra* note 16.

¹¹¹ *Encyclopedia Britannica*, 87 F.T.C. 421.

¹¹² FTC Guides, *supra* note 3, §§ 255.0-55.5. *See* Part I.B (discussing the FTC Guides).

¹¹³ *See, e.g.*, In the Matter of Creative Health, Inc., 2004 FTC LEXIS 51 (2004) (holding that Creative Health Inc. engaged in a deceptive practice in violation of the FTC Act and the FTC Guides by failing to reveal that some endorsers were principals in a public relations company that earned commissions on sales related to its promotions and that other endorsers were product distributors who earned profits based on their sales of the product); In the Matter of TrendMark, Inc., 126 F.T.C. 375 (1998) (holding that TrendMark, Inc.’s failure to reveal that its endorsers were distributors of its diet products who earned profits on their sales was a deceptive practice in violation of the FTC Act and the FTC Guides); In the Matter of Bodywise International, Inc., 120 F.T.C. 704 (1995) (holding that Bodywise International, Inc.’s failure to reveal that its endorsers were healthcare professionals and physicians who derived income from Bodywise product sales was a deceptive practice in

operatives ensures this result.

B. Consumers in Undercover Marketing Campaigns Will Not Reasonably Suspect That They Are the Subjects of a Sales Pitch

The second criterion in evaluating a potentially deceptive practice requires an examination of the act or practice from the perspective of a consumer acting reasonably in the circumstances.¹¹⁴ The relevant question is whether the consumer's reaction to or interpretation of a practice is reasonable; in this case, whether a consumer's impression that he was not part of a paid marketing interaction is reasonable.¹¹⁵

Undercover marketers strive to penetrate consumers' lives and buying processes in a seamless and undetectable manner.¹¹⁶ The goal of undercover marketers is to make sure that the deception is as authentic as possible.¹¹⁷ The target audience is the 18- to 34-year-old market, a market that increasingly rejects the traditional, obvious sales pitch.¹¹⁸ Operatives will congregate in places where consumers usually gather, such as bars and parks.¹¹⁹ They have

violation of the FTC Act and the FTC Guides).

¹¹⁴ *FTC Policy Statement*, *supra* note 39. See also Part I.A. 2.

¹¹⁵ The *FTC Policy Statement* explains that the appropriate inquiry is whether the consumer's interpretation of a practice is reasonable. See *supra* note 39. Therefore, in an undercover marketing situation, the appropriate inquiry would be whether the consumer's belief that he was conversing with an average Joe or Jane is reasonable.

¹¹⁶ *Undercover Agencies*, *supra* note 16 (quoting John Palumbo, Big Fat Promotions, Inc.'s chief strategy officer). Palumbo explained, "[P]eople have to see [the product], they have to understand it in a real way. The only way for them to understand it in a real way is for it to be in their world. And that's what we do. We put it in their life." *Id.*

¹¹⁷ Rutenberg, *supra* note 86.

¹¹⁸ Maye, *supra* note 10 (explaining that Jonathan Ressler believes that undercover marketing is the only way to reach young people who are "too savvy to fall for traditional advertising methods"); *The Evening Standard*, *supra* note 8 (noting that 12- to 34-year-old consumers are especially hard to reach because they have "grown up with the heavy-sell and are now inured to it").

¹¹⁹ Rutenberg, *supra* note 86.

UNDERCOVER MARKETING AND THE FTC 721

similar physical characteristics as the consumers, enabling them to fit in with the target audience, or are especially attractive in order to attract the attention of the target audience.¹²⁰ When the marketing communication is over, the consumers should have no inclination that they were the subjects of a marketing pitch.¹²¹ Undercover marketing actors who do their jobs well create the reasonable impression that they are not being paid to push a product.¹²² Therefore, it is perfectly reasonable for consumers to believe that they are not part of a paid marketing interaction. The “sum total” of what is said and what is reasonably implied would lead a reasonable consumer to believe that he was innocently conversing with a friendly passerby, not that he was the subject of an undercover marketing scheme.¹²³

By way of example, Essential Reality, a gaming company, launched an undercover campaign to promote its new “P-5 Glove,” a gaming accessory that enables users to fly planes and fire weapons on their computers.¹²⁴ Innocent-looking actors were hired to place themselves in Starbucks coffee shops, use the glove, and

¹²⁰ Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603 (1991) (explaining that endorsement marketing is most effective when the consumer can identify with the endorser); *The Evening Standard*, *supra* note 8 (explaining that undercover marketing companies choose their operatives with care to find just the right look for the target consumer).

¹²¹ Rutenberg, *supra* note 86.

¹²² *Id.*

¹²³ *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942) (explaining that “[t]he ultimate impression upon the mind of the [consumer] arises from the sum total of not only what is said but also of all that is reasonably implied”); *see, e.g., 60 Minutes*, *supra* note 7 (quoting Malcolm Gladwell, author of *THE TIPPING POINT*). Gladwell explained of undercover marketing:

[T]here’s a set of rules that govern a lot of advertising and we’re aware of the rules. We’re aware that the woman in the advertising for Ivory Soap is prettier than most women in our lives. A line is crossed, I think, when you go outside of those normal boundaries and start to deceive people in ways that they are . . . totally unwitting to what’s going on.

Id.

¹²⁴ *60 Minutes*, *supra* note 7.

initiate conversation about the device.¹²⁵ John Flaherty, an unsuspecting coffee drinker, conversed with one of the actors about the glove.¹²⁶ When later told by *60 Minutes* broadcast producers that he was a subject in an undercover campaign, he admitted that there was something disturbing about the scheme once he learned the true purpose of the interaction.¹²⁷ The Sony “fake tourist” example is similar.¹²⁸

The FTC might seek to regulate undercover marketing by proscribing practices that deceive only the most savvy of consumers;¹²⁹ however, the FTC’s protection is intended for all consumers, regardless of varied levels of intelligence, naivety, or skepticism.¹³⁰ Judging by the efforts expended by undercover marketers to maintain their cover as average consumers, it is highly unlikely that consumers will take away the reasonable impression that they are conversing with paid actors.¹³¹

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* Flaherty explained, “[i]t just seemed to me like a nice, friendly encounter, and it kind of restores your faith in your fellow New Yorkers. And then, to find out it was all fake, it was just kind of, I don’t know—I don’t like, I don’t like the ring of it.” *Id.*

¹²⁸ Vranica, *supra* note 79 (quoting Gary Ruskin, executive director of consumer activist organization Commercial Alert). When told of the Sony campaign, Ruskin argued, “[i]t’s deceptive. People will be fooled into thinking this is honest buzz.” *Id.*

¹²⁹ Lewis, *supra* note 21, at 860 (explaining that the FTC’s protection is universal and intended for the gamut of American consumers). Lewis explains that the FTC is “the guardian of the ignorant, unthinking and credulous, the defender of ‘Mortimer Snerds’ and the protector of ‘wayfaring men, though fools.’ This victim of deception may not read all that he should, and may merely grab a general impression.” *Id.*

¹³⁰ *Id.*

¹³¹ Vranica, *supra* note 79 (explaining that Sony has “gone to great lengths to train its actors to avoid detection”). Peter Groome, president of Omnicom Group Inc.’s Fathom Communications, explained, “[i]f you put [the actors] in a Sony Ericsson shirt, then people are going to be less likely to listen to them in a bar.” *Id.*

UNDERCOVER MARKETING AND THE FTC 723*C. The Failure to Reveal That Undercover Operatives Are Paid Marketers Is a Material Omission*

The final requirement for finding a deceptive practice is that the omission be material.¹³² A material omission is one that is likely to affect the customer's disposition toward the product being pitched.¹³³ Undercover marketing clearly satisfies this final criterion, given that its ultimate goal is to favorably influence the customer's attitude toward the product.¹³⁴ If Sony did not believe that its stealth tactics would help to sell more camera phones or generate greater buzz about its product, it would have relied exclusively upon traditional advertising mechanisms to increase sales.¹³⁵ However, companies such as Sony and Essential Reality are increasingly cognizant of the potential to increase profits through the use of interpersonal deception.¹³⁶ As a result of the "fake tourist" campaign, Interference, Inc. reports that Sony realized a fifty-percent increase in sales in the markets in which the undercover marketing campaign was conducted.¹³⁷ Marketers recognize the importance of protecting their operatives' identities, and undercover marketing executives rarely divulge their client

¹³² *FTC Policy Statement*, *supra* note 39.

¹³³ *Id.* The *Policy Statement* explains that "[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service . . . materiality will be presumed because the manufacturer intended the . . . omission to have an effect." *Id.*

¹³⁴ Steinberg, *supra* note 14.

¹³⁵ Maye, *supra* note 10 (noting that undercover marketers believe that undercover marketing tactics are necessary to reach savvy, young consumers who are unaffected by traditional advertising methods).

¹³⁶ BAKAN, *supra* note 15 (arguing that corporations have no problem deceiving consumers so long as they can benefit financially from the interaction); Steinberg, *supra* note 14 (quoting marketing executives who say that the trend in advertising must be to interpersonal communication and away from traditional media); Alyson Ward, *Marketers Finding Sneaky New Ways to Pitch*, SEATTLE POST-INTELLIGENCER, Sept. 17, 2002, at E1 (noting that marketers are learning that they have to reach out to consumers where they congregate, not just through a television set).

¹³⁷ *Case study: Sony Ericsson*, Interference Inc. Home, Case Studies, Sony Ericsson, at <http://www.interferenceinc.com/sony.html> (last visited Apr. 19, 2005).

lists for fear of confidentiality breaches that could blow open ongoing campaigns.¹³⁸

Undercover marketing operatives are not merely satisfied customers who wish to spread the joy they have found from using the product they are pitching. They instead are being paid to make the product look and sound as appealing as possible while posing as a typical consumer.¹³⁹ The use of this tactic makes undercover marketing operatives endorers by FTC standards because they are advancing an advertising message that consumers are likely to think is independent of the sponsoring marketer.¹⁴⁰ When the omission is related to an endorsement, the FTC specifically mandates that any material connection between an endorser and the seller of the product be disclosed.¹⁴¹ Given that omissions relating to endorsements are considered material by the FTC, undercover marketing-specific endorsement omissions should receive due attention by the FTC. Marketers are required to disclose to consumers material connections between endorsers and sellers, and naturally, undercover marketing would be of no value if this connection were disclosed.¹⁴² Indeed, companies require that undercover operatives sign confidentiality agreements to ensure that the marketers do not reveal that they are being paid to promote the product.¹⁴³ Customers deserve protection from these tactics because such material omissions offend contemporary notions of fairness,¹⁴⁴ and more importantly, expressly violate FTC

¹³⁸ Steinberg, *supra* note 14 (explaining that marketers are wary of naming names for fear of rendering the campaigns ineffective).

¹³⁹ Jim McBeth, *Buying into the Virus*, THE SCOTSMAN, Aug. 17, 2001, at 4 (explaining that undercover marketing operatives should be approachable and not too good looking or obvious).

¹⁴⁰ FTC Guides, *supra* note 3, at § 255.0 (providing that “[t]he party whose opinions, beliefs, findings, or experience the [advertising] message appears to reflect will be called the endorser and may be an individual, group or institution”).

¹⁴¹ FTC Guides, *supra* note 3, at § 255.5.

¹⁴² *Id.*

¹⁴³ BAKAN, *supra* note 15, at 134 (noting that undercover operatives are contractually bound to conceal their relationships by the companies that employ them).

¹⁴⁴ Arthur Best, *Controlling False Advertising: A Comparative Study of*

UNDERCOVER MARKETING AND THE FTC 725

regulations.¹⁴⁵

In *In the Matter of Cliffdale Associates, Inc.*,¹⁴⁶ the FTC, interpreting the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising,¹⁴⁷ opined that consumers are far more likely to rely on endorsements they believe to be “independent and unbiased” than those they know to be compensated.¹⁴⁸ The FTC held that the company’s failure to disclose the relationship between itself and the endorsers materially affected the weight consumers gave to a particular endorsement.¹⁴⁹ Because making a false claim of impartiality is material to consumers, such an omission is a deceptive practice under the Act and the FTC Guides.¹⁵⁰ For the FTC, therefore, what matters is whether the consumer would have thought differently of the message had he known it was communicated by a paid employee.¹⁵¹ The agency’s holding in

Public Regulation, Industry Self-Policing, and Private Litigation, 20 GA. L. REV. 1 (1985) (arguing that fairness is the goal of advertising regulation).

¹⁴⁵ *FTC Policy Statement*, *supra* note 39; FTC Guides, *supra* note 3, at § 255.

¹⁴⁶ 103 F.T.C. 110 (1984).

¹⁴⁷ FTC Guides, *supra* note 3, at §§ 255.0-55.5.

¹⁴⁸ *Cliffdale*, 103 F.T.C. 110.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ O’Brien, *supra* note 26. See also *FTC Policy Statement*, *supra* note 39 (citing RESTATEMENT (SECOND) OF TORTS § 538 cmt. d (1977)). The Restatement explains that a material fact does not necessarily have to hinge on the finances of the transaction, stating that “there are many more-or-less sentimental considerations that the ordinary man regards as important.” The inclusion of this Comment in the *FTC Policy Statement* indicates that the FTC realizes that consumers are not solely concerned with the money they lose because of deceptive practices. Undercover marketing affects emotions as well in that one should be able to trust those with whom one interacts to be forthcoming about their purposes for the interaction. See also *60 Minutes*, *supra* note 7 (quoting Malcolm Gladwell, author of THE TIPPING POINT). Of undercover marketing, Gladwell noted:

Part of what makes real word-of-mouth so powerful is the understanding that we have . . . that the person telling us about it is telling us about it for . . . disinterested reasons. They’re not being paid by somebody. They have our interests at heart. That is worlds apart from a situation where the person telling us something is telling us that

Cliffdale has been consistently applied to subsequent FTC enforcement actions related to the failure of endorsers to reveal to consumers their material connections with marketers, and applies easily to undercover marketing.¹⁵²

III. UNDERCOVER MARKETING SHOULD BE REGULATED BY THE FTC, GIVEN ITS MARKED SIMILARITY TO INFOMERCIALS, WHICH ARE THE SUBJECTS OF HEAVY FTC SCRUTINY

Since the 1990s, the FTC has strictly regulated deceptive practices in the “infomercial” industry.¹⁵³ Infomercials take the form of full-length talk show programs (often enhanced by studio audiences) devoted exclusively to demonstrating the particular product being marketed.¹⁵⁴ The product demonstrators and audience members endorsing the product in these programs appear to be objective and independent of the company selling the product.¹⁵⁵ In light of the potential of these programs to confuse consumers, the FTC has found that infomercials violate the FTC Act’s proscriptions on deceptive practices when they are designed

because they have some private agenda. They’re getting paid. They’re being planted.

Id.

¹⁵² See, e.g., In the Matter of Melinda R. Sneed, 128 F.T.C. 322 (1999) (holding that the Sneed’s failure to disclose that John Sneed, as an endorser, received a financial benefit from product sales was a deceptive practice in violation of the FTC Act because such a fact would materially affect the weight and credibility given by customers to the endorsement and would be material to customers in their decision to purchase the product); In the Matter of Taleigh Corp., 119 F.T.C. 835 (1995) (holding that Taleigh’s failure to disclose that endorsers of its diet pills were compensated was a deceptive practice in violation of the FTC Act because such a fact would be material to customers in making purchase decisions regarding the products).

¹⁵³ O’Brien, *supra* note 26 (citing several enforcement actions and explaining that “[i]nfomercials,” which are program-length advertisements which frequently masquerade as talk shows, are quickly becoming a favorite target of the FTC”). According to the FTC, infomercials are advertisements “presented in the guise of a talk-show format.” *FTC v. California Pacific Research, Inc.*, No. CV-N-88-602BRT, 1991 WL 208470, at *3 (D. Nev. 1991).

¹⁵⁴ Lewis, *supra* note 21, at 853.

¹⁵⁵ *Id.* at 869.

UNDERCOVER MARKETING AND THE FTC 727

to look like independent television programs rather than paid commercial advertising, and thus, are likely to mislead consumers.¹⁵⁶ Additionally, the FTC has found that the failure of infomercial sponsors to disclose that demonstrators and participants receive compensation from the sponsors constitutes a violation of the FTC Guides on Endorsements and Testimonials in Advertising.¹⁵⁷ The guides mandate disclosure of any material connection between an endorser and the sponsor company.¹⁵⁸

The FTC has instituted enforcement actions against several companies for broadcasting infomercials that are presented as independent television programs rather than paid commercial advertisements.¹⁵⁹ In *In re Twin Star Products*,¹⁶⁰ a highly publicized enforcement action, the FTC enjoined Twin Star from scripting its infomercials in a way that misled consumers into

¹⁵⁶ See, e.g., *In the Matter of Bogdana Corporation*, 126 F.T.C. 37 (1998) (finding that Bogdana employed a deceptive format for its infomercials in violation of the FTC Act by expressly or impliedly representing that the infomercials were independent radio programs, not paid commercial advertising); *In the Matter of Mega Systems International, Inc.*, 1998 FTC LEXIS 207 (finding that Mega Systems engaged in deceptive acts and practices in violation of the FTC Act by formatting its infomercials so as to resemble independent television programming, not paid commercial advertising); *In the Matter of Nutrivida, Inc.*, 126 F.T.C. 339 (1998) (finding that Nutrivida made false and misleading representations in violation of the FTC Act by expressly or impliedly representing that its infomercials were independent television programs, not paid commercial advertising); *In the Matter of Wyatt Marketing Corp. Inc.*, 118 F.T.C. 117 (1993) (finding that Wyatt's infomercial format constituted a deceptive practice in violation of the FTC Act because it expressly or impliedly represented itself as an independent television program, not a paid commercial advertiser).

¹⁵⁷ *In re Twin Star Prods. Inc.*, No. C 3307 (FTC Oct. 2, 1990) (decision and order) (enjoining Twin Star from further broadcasting its infomercials and from making deceptive claims about its paid endorsers); FTC Guides, *supra* note 3, at § 255.5.

¹⁵⁸ *FTC Policy Statement*, *supra* note 39. See *supra* Part I.B (explaining the coverage of the FTC Guides).

¹⁵⁹ See *supra* note 156 for several examples of typical infomercial injunctions.

¹⁶⁰ *In re Twin Star Prods. Inc.*, No. C 3307 (FTC Oct. 2, 1990) (decision and order).

believing that the broadcasted pieces were independent consumer programs.¹⁶¹ In particular, Twin Star deceptively represented that endorsers appearing on the program reflected “[t]ypical members of the public who . . . were independent from all entities marketing the product, when, in fact, the endorsers were its paid employees.”¹⁶² The FTC’s action against Twin Star indicates that the agency recognizes the danger inherent in fooling consumers into believing that they are hearing endorsements from purportedly objective consumers.¹⁶³

Undercover marketing is similarly problematic. Infomercials first attracted the attention of the FTC because of their deceptive format.¹⁶⁴ Product demonstrators and audience members appeared to be extolling the benefits of products of their own accord.¹⁶⁵ Undercover marketing campaigns employ the same tactics, using seemingly objective and disinterested street operatives who are, in actuality, paid actors.¹⁶⁶ Both infomercial sponsors and undercover marketers intend and strive to deceive customers to capture their audiences’ attention and market their products.¹⁶⁷ In light of the parallel nature of these tactics, the FTC should similarly target undercover marketing for enforcement action, given that undercover marketing campaigns, much like infomercials, are deceptively structured so as to resemble otherwise objective interactions.

The infomercial format developed when advertisers realized that while very few people would be inclined to sit and watch a

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ O’Brien, *supra* note 26 (discussing the FTC’s penchant for strictly regulating infomercials). O’Brien explains, “So great are infomercials’ capacity to deceive that they have been described as the ‘seamy underside of the advertising business.’” *Id.* (citing Joanne Lipman, *Infomercial Makers Try to Clean Up Their Act*, WALL ST. J., Mar. 4, 1991, at B3).

¹⁶⁵ *See supra* note 156 (citing examples of typical FTC enforcement actions based on the false independence of the demonstrators and audience members).

¹⁶⁶ *Walking, Talking Stealth Ads*, *supra* note 7.

¹⁶⁷ Lewis, *supra* note 21, at 871 (arguing that infomercial producers never intend clarity in their advertisements because of the need to make customers believe that they are watching an objective television program).

UNDERCOVER MARKETING AND THE FTC 729

thirty-minute commercial, many more people would watch a thirty-minute commercial disguised as an objective talk show.¹⁶⁸ Similarly, undercover marketing developed when marketers realized that their target audience, resistant to traditional advertising, would be much more willing to listen to an average Joe or Jane than a paid spokesperson.¹⁶⁹ Based on the FTC's active regulation of infomercials,¹⁷⁰ logic dictates that the FTC should be just as concerned with undercover marketing because, like infomercials, undercover marketing campaigns are premised on attempts to deceive consumers through the use of orchestrated endorsements.¹⁷¹

IV. A CALL FOR ACTION BY THE FTC

The FTC thus far has failed to seriously scrutinize undercover marketing practices. The public record is devoid of pending

¹⁶⁸ *Id.* at 865.

¹⁶⁹ Maye, *supra* note 10 (explaining that undercover marketers believe that going undercover is the only way to reach consumers ages 12 to 34 who are "too savvy to fall for traditional advertising methods").

¹⁷⁰ See *supra* note 156 for several examples of typical infomercial injunctions.

¹⁷¹ FTC Guides, *supra* note 3, at § 255.5 (stating that any material connection between an endorser and a seller of a product must be disclosed). This blanket rule applies to any marketing practice, regardless of form, so long as an endorsement is involved. On its official website, the FTC addresses infomercials in a section titled *Frequently Asked Advertising Questions*, warning potential infomercial sponsors that they should make sure not to "deceptively mimic the format of news reports, talk shows or other independent programming." Further, recognizing that many infomercials contain endorsements, the FTC refers interested parties to the FTC Guides on Testimonials and Endorsements in Advertising, at <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.htm>. Although the FTC Guides do not specifically mention infomercials, it is clear that the rule is intended to cover all endorsements. Undercover marketing, like infomercials, utilizes endorsements and, as such, is subject to the FTC Guides governing endorsements. FTC Guides, *supra* note 3, at § 255.0-55.5. The FTC should, therefore, give undercover marketing the same attention it has given to infomercials, given the analogous nature of the practices. See Part III (discussing the similarities between infomercials and undercover marketing).

investigations of the practice, filings of individualized FTC complaints, or entries of enforcement orders against specific undercover marketers.¹⁷² However, undercover marketing undeniably is a deceptive practice under FTC standards,¹⁷³ and therefore, the FTC should take affirmative measures to regulate this practice.

Several policy reasons support the FTC's regulation of undercover marketing. First, given the FTC's broad power to regulate deceptive practices, the agency should not shy away from regulating undercover marketing simply because the practice is an innovative one.¹⁷⁴ If the FTC fails to regulate such new technologies, the effectiveness of its regulation of deceptive practices will be severely diminished.¹⁷⁵ Additionally, the FTC should act to regulate undercover marketers based on the increasing threat to consumer protection posed by the now-blossoming use of undercover marketing campaigns by top corporations.¹⁷⁶ Moreover, should undercover marketing tactics come to the attention of the public, consumer backlash might result; the FTC would be wise to anticipate this response and proactively protect the consumer market.¹⁷⁷ Finally, undercover marketing creates a culture of deception that is antithetical to the mandate of the FTC, an agency created for the express purpose of ensuring fair and honest commercial practices.¹⁷⁸

A. The FTC's Authority and Responsibility to Widen Its Scope of Investigation and Enforcement to Cover New Technologies, Including Undercover Marketing

The FTC has a duty to act in the interest of the public and

¹⁷² Based on Westlaw and Lexis Nexis searches of FTC proceedings as of Apr. 19, 2005.

¹⁷³ *FTC Policy Statement*, *supra* note 39; *FTC Guides*, *supra* note 3, at § 255.

¹⁷⁴ *See infra* Part IV.A.

¹⁷⁵ *Id.*

¹⁷⁶ *See infra* Part IV.B.

¹⁷⁷ *See infra* Part IV.C.

¹⁷⁸ *See infra* Part IV.D.

UNDERCOVER MARKETING AND THE FTC 731

investigate deceptive acts and practices.¹⁷⁹ Given the expanding budgets devoted to and the scope of undercover marketing campaigns, the FTC should act expeditiously to regulate this marketing technique.¹⁸⁰ Currently, undercover marketing is primarily of interest only to journalists. Notably, articles on this marketing practice are devoid of any mention of FTC action.¹⁸¹ Perhaps more telling, when interviewed on the subject, Jonathan Ressler, of Big Fat Promotions, Inc., reported that he has yet to hear from the FTC and does not expect to.¹⁸²

Although undercover marketing is significantly different in form from traditional print and broadcast advertising, the FTC should not retreat from regulating this marketing practice, particularly in light of the widespread criticism that undercover marketing has garnered from both consumer groups and advertising executives.¹⁸³ In *American Home Products v. Federal Trade Commission*, the Supreme Court explained that the FTC must be able to expand the parameters of its enforcement to ensure that narrow investigatory or regulatory interpretations do not leave loopholes through which marketers may accomplish the prohibited

¹⁷⁹ 15 U.S.C. § 45(b) (1914).

¹⁸⁰ There are emerging signs of awareness of the practice at the FTC. In a *New York Times Magazine* interview, the assistant director of advertising practices at the FTC said of undercover marketing, "If [sic] testimonial is affiliated with you in some way, you have to disclose that." However, the director would not comment on whether the practice was being investigated. Rutenberg, *supra* note 86. Another associate director for advertising practices at the FTC told the *Wall Street Journal* that undercover marketing "certainly raises ethical questions. At some point it raises legal questions. If a person in a bar makes claims about a product without revealing the fact that he is being paid to promote, you could well have FTC problems." Steinberg, *supra* note 14.

¹⁸¹ As of Apr. 19, 2005, all articles cited in and researched in preparation for this note fail to report any FTC proceedings against undercover marketers.

¹⁸² John Heinzl, *Advertising Slinks Undercover*, THE GLOBE AND MAIL, July 20, 2001.

¹⁸³ Heinzl, *supra*, note 106 (quoting Gary Ruskin, executive director of Commercial Alert, who explained that undercover marketing is the commercialization of human relationships); Rutenberg, *supra* note 86 (quoting Jeff Chester, a board member at the Center for Media Education, who called undercover marketers deceptive "commercial kamikazes").

goal of deception.¹⁸⁴

Following this mandate, the FTC has continually widened its lens of investigation to cover new technologies.¹⁸⁵ In *In the Matter of All-State Industries of North Carolina*, then-FTC Commissioner Philip Elman explained that the FTC retains jurisdiction over practices that may not have been thought of previously and has the duty of developing a body of unfair trade practices law that is “adapted to the diverse and changing needs of a complex and evolving competitive system.”¹⁸⁶ Undercover marketing, if left unchecked, could severely diminish the effectiveness and bite of the FTC’s regulation of deceptive practices.¹⁸⁷ Section 5 of the Act was drafted broadly for the specific purpose of giving the FTC the necessary flexibility to combat “new and improved” deceptive practices.¹⁸⁸ Therefore, because the FTC is empowered to regulate this deceptive practice, the agency should investigate undercover marketing with vigor and resist justifying agency inaction by referencing the innovative nature of the practice.

¹⁸⁴ *American Home Products*, 695 F.2d at 704. The Court explained, “[i]f the Commission is to attain the objectives Congress envisioned . . . it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.” *Id.*

¹⁸⁵ Lewis Rose, *Stealth Marketing (Interactive Marketing Under Government Scrutiny)*, *MARKETING COMPUTERS*, Apr. 1, 1995, at 20 (noting that the FTC has applied its traditional rules to developing technologies over the years, including print ads in 1914, radio ads in the 1920s, television ads in the 1950s, infomercials in the 1980s, and 900 numbers and Internet scams in the 1990s).

¹⁸⁶ *In the Matter of All-State Industries of North Carolina, Inc.*, 75 F.T.C. 465 (1969) (noting that the changing characteristics of the American marketplace forced the FTC to focus its attention upon deceptive practices associated with credit transactions).

¹⁸⁷ *American Home Products*, 695 F.2d at 704. As the Court recognized in *American Home Products*, the potential for innovation and craftiness in the marketing industry makes it essential that the FTC enforce its provisions from all angles. The Court pointed out, “[i]f the Commission is to attain the objectives Congress envisioned . . . it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.” *Id.*

¹⁸⁸ *See supra* Part I (noting the generality of Section 5).

UNDERCOVER MARKETING AND THE FTC 733

B. Undercover Marketing's Rapid Growth and Popularity with Major Corporations Frustrates the Protection of Consumers

Undercover marketing is no longer a grassroots practice.¹⁸⁹ Large, big-budget corporations, such as Microsoft, Kellogg, BMW, Apple, and Cadbury Schweppes PLC, are putting their advertising dollars into undercover marketing campaigns.¹⁹⁰ Further, Big Fat Promotions Inc.'s profits increased fivefold in the first two years of the company's existence.¹⁹¹ Clearly, undercover marketing is no longer a niche endeavor; however, one would be hard pressed to compile reliable estimates of corporate spending on undercover marketing, in part because companies resist admitting that they use stealth methods.¹⁹² Presumably, the more money spent on undercover marketing campaigns, the more consumers will be subjected to polished schemes, inevitably leading to widespread deception.¹⁹³ Consumers are not the only ones falling prey to undercover marketers. Business owners frequently have no idea that their establishments are being used by undercover marketing operatives to push products; further, they are given no compensation in exchange for the use of their venues.¹⁹⁴ As undercover marketers secretly pour greater amounts of money into

¹⁸⁹ John Arlidge, *The Way We Live Now: Too Good to be True*, THE OBSERVER (London Edition), Aug. 12, 2001, at 6; Vranica, *supra* note 79.

¹⁹⁰ Arlidge, *supra* note 189; Vranica, *supra* note 79.

¹⁹¹ Morgan Campbell, *You Won't Feel a Thing*, TORONTO STAR, Aug. 7, 2001, at D01.

¹⁹² Eisenberg, *supra* note 80.

¹⁹³ *Id.* (explaining that "industry experts say that outlays for alternative campaigns are growing rapidly—and that Madison Avenue has little choice but to seek new ways to push products").

¹⁹⁴ Jane Standley, *Undercover Advertising Targets Consumers*, BBC NEWS, August 17, 2001, available at <http://news.bbc.co.uk/1/hi/business/1496213.stm> (explaining that "the conversations struck up or the recommendations you overhear are selling not just talking and sometimes even the business owner doesn't even know what is going on").

more elaborate campaigns, they will soon have both unwitting consumers and business owners literally eating, drinking, and snapping photos out of their proverbial hands.

C. Consumer Backlash: An Inevitable Consequence of Undercover Marketing in a Time of Tarnished Corporate Credibility

Despite some undercover marketers' hopeful outlook for the potential of undercover campaigns, as undercover marketing tactics are revealed to the general public, marketers run the risk of even further tarnishing corporate credibility in this age of corporate scandal.¹⁹⁵ The FTC might determine that it is in the best interest of society and a well-functioning marketplace to preempt the spread of distrust that may balloon as undercover marketing tactics come to light.¹⁹⁶ The fact that successful advertising industry leaders themselves have decried the tactics of undercover marketers should make clear to the FTC that undercover marketing is not only a questionable practice, but also a dangerous one for corporate goodwill.¹⁹⁷ Some in the industry warn that backlash

¹⁹⁵ Ritter, *supra* note 89 (arguing that undercover marketing could be bad for business overall, in that if advertising techniques become so deceptive, corporate credibility could take a hit and result in an overriding state of distrust of companies).

¹⁹⁶ See Harmon Leon, *Secret Agents of Capitalism: Is That Hottie Really Flirting With You, or Is It Undercover Marketing?*, METROACTIVE, May 12, 2004, at <http://www.metroactive.com/papers/metro/05.12.04/marketing-0420.html> (imagining an "Orwellian . . . paranoid environment" resulting from undercover marketing, where interactions with others are made to be questioned).

¹⁹⁷ Vranica, *supra* note 79 (quoting David Lubars, president and creative director at Fallon Worldwide, a prominent advertising agency, who cautioned that marketers should be honest with customers in order to avoid a backlash in the future once undercover marketing strategies come to light). See also Eisenberg, *supra* note 80 (quoting Keith Reinhard, chairman of DDB Worldwide advertising agency, criticizing undercover marketing as "bad business"); *Walking, Talking Stealth Ads*, *supra* note 7 (quoting Scott Marticke, managing director of Atlanta's Titan Advertising, who decried undercover marketing, saying, "[a]s it goes on, it will create a kind of disconnect, and people won't know whom to trust").

UNDERCOVER MARKETING AND THE FTC 735

should be a real concern of undercover marketers.¹⁹⁸ However, judging by the burgeoning number of corporations employing undercover marketers and the money being spent on these campaigns, it does not appear that advertisers are taking such warnings to heart.¹⁹⁹

A 2004 Marketing and Ethics News Poll conducted by *CMO Magazine*, a publication for chief marketing officers, indicates that marketing executives worry about the effects of unethical practices in business, especially in light of the recent scandals involving Enron and Martha Stewart.²⁰⁰ Seventy-three percent of those polled believe that increasing penalties for offenders is the best way to deter future unethical practices.²⁰¹ The marketing executives also stated that deceptive sales and marketing practices were the top ethical issue facing their industry today, followed closely by dishonesty with customers.²⁰² Furthermore, those polled viewed deceptive marketing practices as one of the top three

¹⁹⁸ See, e.g., *60 Minutes*, supra note 7 (quoting Malcolm Gladwell, author of *THE TIPPING POINT*). Of undercover marketing, Gladwell warned:

My problem with undercover marketing is not what happens in the moment. It's what happens in a week, or two weeks, or a month down the road, when we discover we've been duped. And I think that the moment when we discover we've been duped causes a backlash. Companies who engage in this practice are courting that backlash. And that's a very, very dangerous thing to play with.

Id. See, e.g., Rogier van Bakel, *A Letter From the Editor: Big Fat Liars*, *ADVERTISING AGE'S CREATIVITY*, Aug. 1, 2001, at 6. Van Bakel, editor of *Advertising Age's Creativity*, warns that "[u]nlike flavored water poured over vodka, credibility and deceit never mix. You can't build a brand without first building trust, and the fastest way to squander trust is to play people for suckers. . . ." *Id.*

¹⁹⁹ See supra Part IV.B (discussing the rapid growth of corporate budgets for undercover marketing campaigns).

²⁰⁰ *IDG's CMO Magazine Reports the Untold Challenges, Evolving Pressures that Chief Marketing Officers Face*, PRIMEZONE MEDIA NETWORK, Aug. 30, 2004, available at 2004 WL 91766902.

²⁰¹ *CMO Marketing and Ethics News Poll*, available at http://www.cmomagazine.com/ethics_poll/.

²⁰² *Id.* at 5. See, e.g., Vranica, supra note 79 (quoting a marketing executive who characterized undercover marketing as "reprehensible" and "desperate").

ethical issues facing U.S. businesses generally.²⁰³ Perhaps this is because 44.6 percent of those polled admitted that they had witnessed someone in their company engage in or develop deceptive or misleading sales or promotion tactics.²⁰⁴ These numbers are telling. Marketing executives recognize that deceptive marketing practices pose a disturbing ethical dilemma and concede that regulatory enforcement and penalties would effectively deter such conduct.²⁰⁵ The FTC should take advantage of this corporate attitude by enacting regulations to rein in the use of these troubling and deceptive practices.

D. Undercover Marketing Breeds an Atmosphere of Distrust and Skepticism

Undercover marketing adds a new twist to advertising. Although traditional advertising makes use of persuasion or charm, it does not typically involve explicit trickery.²⁰⁶ Undercover marketers flagrantly deceive consumers, and they are not shy about it.²⁰⁷ One undercover marketer told the *New York Times Magazine* that his goal for each mission was simple: to subtly impart the sponsor's message to consumers and "implant things about the product into their head."²⁰⁸ One scholar argues that undercover marketing is distinguishable from most other types of advertising because it is based in artificiality.²⁰⁹ Consumers expect

²⁰³ *CMO Marketing and Ethics News Poll*, *supra* note 201.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Yvonne Cartwright, *Undercover Marketing: Pitching You on the Sly*, BELLINGHAM BUSINESS JOURNAL, Nov. 1, 2003, at B13 (discussing the opinion advanced by Malcolm Gladwell, author of THE TIPPING POINT, that undercover marketing is a bit of a con game). Gladwell's statement highlights the point that traditional advertising tries to coax customers towards a certain product, while undercover marketing tries to hoodwink them. *Id.*

²⁰⁷ *Undercover Agencies*, *supra* note 16 (quoting Jonathan Ressler, founder of Big Fat Promotions, Inc., who boasted that his operatives will never reveal their true agendas).

²⁰⁸ Rutenberg, *supra* note 86.

²⁰⁹ Thomas Nord, *Stealth Marketing – Is it the Next Big Thing or Just a Big Fat Flop?*, THE COURIER-JOURNAL, Aug. 3, 2001, at 1C (quoting a professor of

UNDERCOVER MARKETING AND THE FTC 737

commercials on television, but not in their local bars and hangouts. Companies such as Big Fat Promotions, Inc. and Interference, Inc. intentionally situate endorsers in places where people's guards are down.²¹⁰

Jonathan Ressler of Big Fat Promotions, Inc. attempts to defend his practices by stating that the operatives are telling the truth about the positive attributes of the products they are promoting.²¹¹ However, courts have held that truthfulness within marketing will not save a message that is misleading overall.²¹² Although the FTC mandates that endorsers reveal their connections to sponsor companies, undercover marketers avoid doing so at all costs.²¹³ So long as the FTC continues to turn a blind eye to these deceptive practices, people may eventually become increasingly skeptical of one another's motives. They may begin to ask themselves, "does this girl really want to have a drink with me or is she being paid by the gin company?" or "does my neighbor really prefer that brand of detergent or has she been hired to chat me up about it?" Undercover marketing creates a "sort of *Truman Show* situation where the world is full of 'real people' acting as your best mates when, in fact, they are paid brand spokesmen."²¹⁴ Such a state of distrust cannot be in the public's best interest, which the

marketing at Indiana's Kelley School of Business).

²¹⁰ *Id.*

²¹¹ BAKAN, *supra* note 15, at 134 (explaining that Ressler is proud of his commitment to honesty in telling the truth about the products). *See also* Campbell, *supra* note 191 (quoting John Palumbo, chief strategy officer at Big Fat Promotions, Inc., who said that the practice is honest because the company only sends out operatives who use the products being hocked).

²¹² *Bockenstette*, 134 F.2d at 371 (explaining that "words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive").

²¹³ FTC Guides, *supra* note 3, at § 255.5; Campbell, *supra* note 191 (quoting Jonathan Ressler of Big Fat Promotions, Inc., who explained that the company will not reveal its clients' names). Ressler explained, "by naming them we render the whole promotion useless. The key here is confidentiality." *Id.*

²¹⁴ Arlidge, *supra* note 189 (quoting Sean Pillot de Chenecey, a trends forecasting consultant who works for Saatchi & Saatchi, Weiden & Kennedy, and McCann Erickson).

FTC is empowered to promote.²¹⁵ Kalle Lasn, the editor of *Adbusters* magazine, lamented the potential effect of undercover marketing on communities as a whole. She explained, "It is a form of cultural corruption at a time when advertising already pervades the landscape. It's much more insidious because marketers are creating culture at the grassroots level, on the streets and where we live."²¹⁶

Even children are being exploited by undercover marketers. Hasbro, a leading children's toy company, recently recruited 1,600 boys from Chicago, Illinois, ages eight to ten, and paid them to play a new handheld video game called "Pox" and to tell their friends about it.²¹⁷ Sales of the game skyrocketed and Hasbro spent a fraction of what it would have on a traditional advertising campaign.²¹⁸ Undercover marketing is invading the playground, the local watering hole, Times Square, and the laundromat, and can easily spread anywhere. In its Policy Statement, the FTC warned that the Commission "intends to enforce the FTC Act vigorously . . . [and] will investigate, and prosecute where appropriate, acts or practices that are deceptive."²¹⁹ The FTC must wholeheartedly combat undercover marketing if it truly intends to investigate and prosecute deceptive acts.

CONCLUSION

Although undercover marketing is unconventional and somewhat enigmatic,²²⁰ the FTC retains the power to continually

²¹⁵ 15 U.S.C. § 45(b) (1938) (empowering the FTC to initiate proceedings against individuals and companies using any unfair or deceptive practice in or affecting commerce if such proceeding is in the public interest).

²¹⁶ McBeth, *supra* note 139 (noting the observation of some critics that undercover marketing is sinister in nature).

²¹⁷ *Id.* (outlining the Hasbro campaign).

²¹⁸ *Id.*

²¹⁹ *FTC Policy Statement*, *supra* note 39.

²²⁰ As compared to a television commercial, for example. While undercover marketing can take many forms in many different locales, commercial advertising is considerably standard. Television commercials do not command consumer interaction, while undercover marketers seek to engage consumers both physically and verbally.

UNDERCOVER MARKETING AND THE FTC 739

expand its focus to keep pace with the evolution of the marketplace and to develop new enforcement priorities as times change.²²¹ The FTC should heed the charge of Judge Learned Hand, who observed that the FTC's duty is to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."²²² FTC investigations often serve as a vital means of gathering information for the issuance of new FTC policy statements or industry guides.²²³ Therefore, even if the FTC is unsure at this stage whether undercover marketing practices demand individual prosecutions, the agency still can be proactive by providing undercover marketers with specific guidance as to the permissible bounds of their practices and by alerting them to the imposition of a more regulatory stance in the future.²²⁴ As illustrated by the Sony example, undercover marketing encapsulates all of the FTC criteria for deceptive practices and, as such, should be addressed by the FTC. However the FTC sees fit to best serve the public interest, it must act now before undercover marketing becomes so seamless that it is completely undetectable.

²²¹ *All-State Industries of North Carolina, Inc.*, 75 F.T.C. 465 (noting the expectation that the FTC will continually adapt its regulations to changing competitive systems).

²²² *FTC v. Standard Education Society*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937).

²²³ FTC Operating Manual, *supra* note 30, at ch. 3.1.3.4.

²²⁴ *Id.* at ch. 8.3.3 (explaining that the FTC may issue an industry guide to address a specific practice in lieu of taking individualized enforcement action if such a guide might spur companies to proactively curb the practice in order to avoid FTC prosecution). However, the Operating Manual does caution that an industry guide would be inappropriate if there are indications that the violations are willful or wanton or if compliance with the standard of lawful conduct is unlikely to be attained without an enforcement action or creation of a substantive rule having binding effect. *Id.* at ch. 8.3.4. While an industry guide on undercover marketing may indicate in black and white that undercover marketing contravenes the FTC Act and the FTC Guides, undercover marketers seem intent on doing exactly what the FTC Guides prohibit, namely, refusing to disclose material connections between companies and endorsers. FTC Guides, *supra* note 3, at §255.5. Therefore, an industry guide may do little more than put a name to a practice that the FTC Act already prohibits.