

Advertising in the United States & Europe: The Challenges Ahead

"Trust Me. I'm a Satisfied Customer"

Testimonials & Endorsements in the United States

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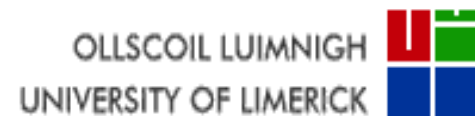
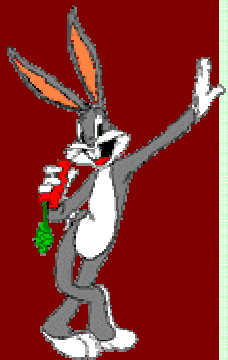
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Limerick, Ireland; July 24-25, 2009



What is a Testimonial or Endorsement?

A verbal or visual communication that consumers, acting reasonably, would be likely to understand to be expressing the opinions, beliefs, findings, or experiences of someone other than the sponsoring advertiser.

A Typical Celebrity Print Endorsement



I'M SENDING CHESTERFIELDS to all my friends.
That's the merriest Christmas any smoker can have —
Chesterfield mildness plus no unpleasant after-taste

Ronald Reagan

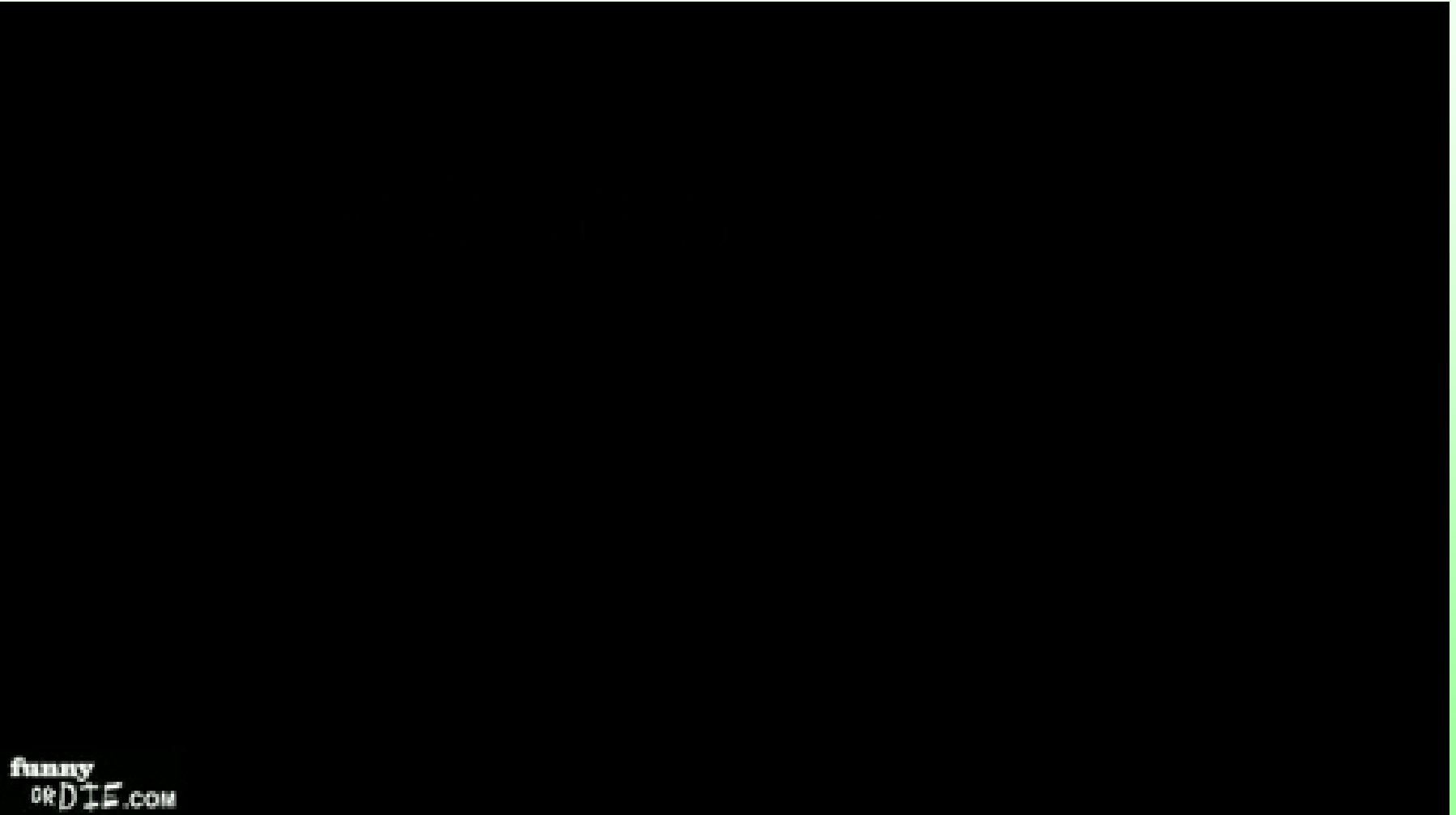
and RONALD REAGAN
starring in "MIDWINTER" a Fine
Thomas Remount Production
Color by Technicolor

CHESTERFIELD Buy the beautiful
Christmas-card carton

A Typical Celebrity Video (TV) Endorsement



A Typical Professional Athlete Endorsement



Enforcement: A Government & Industry Partnership

Federal & State Share Jurisdiction; Industry

- Federal Trade Commission



- State Law



- Self Regulation



Electronic Retailing Self-Regulation Program (ERSP)

The Current State of Regulation

FTC Act, Section 5 [15 U.S.C. §45]:

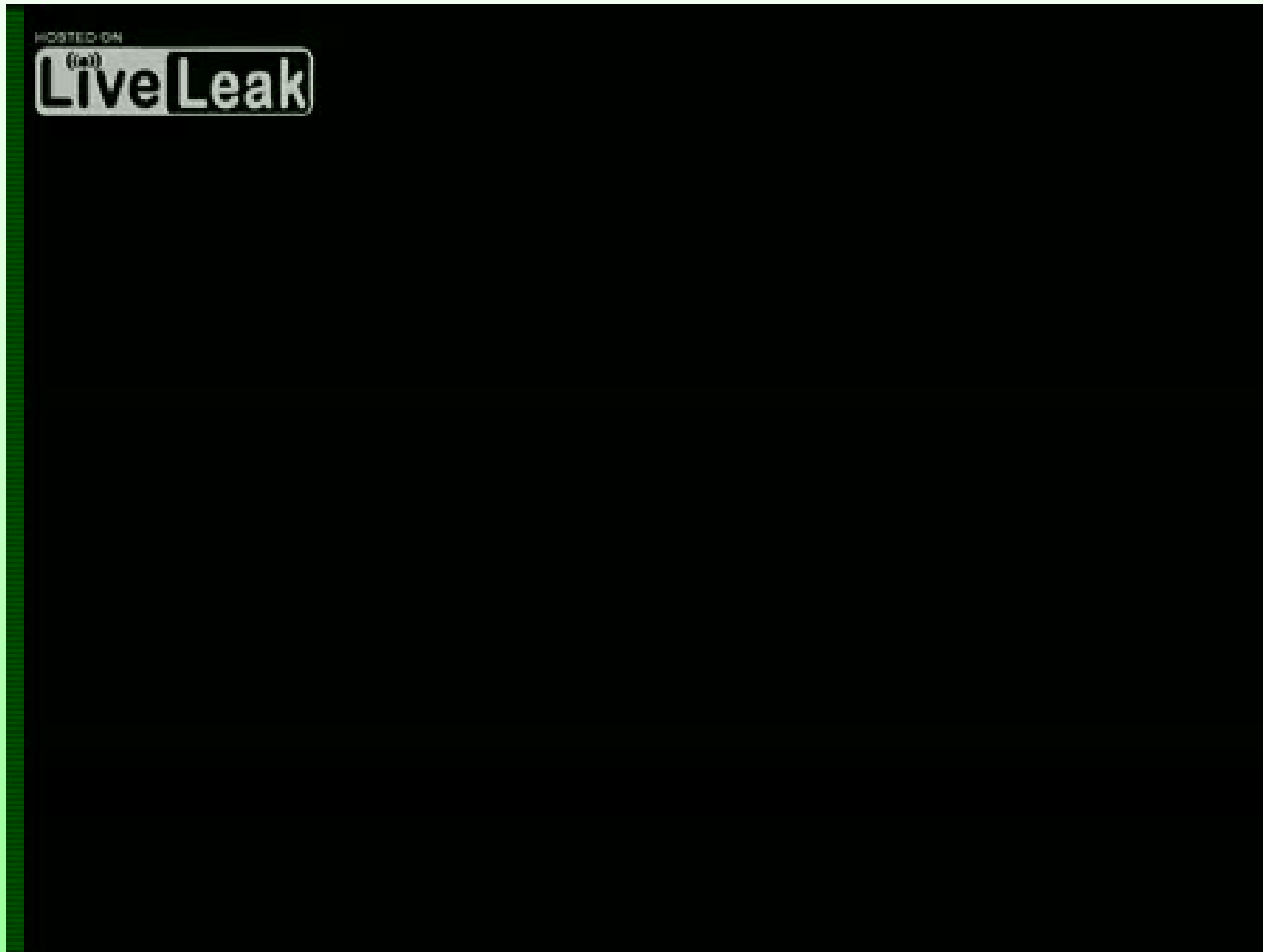
- Advertising must not be deceptive or unfair;

AND

- Guides Concerning the Use of Endorsements and Testimonials in Advertising [16 C.F.R. Part 255]
 - First promulgated in 1975;
 - Last revised in 1980.

Testimonials and Endorsements - The U.S. View

Convergence: Consumers, Comparisons & Green All In One Testimonial Commercial



Current Guidance from the FTC

- Endorsements should not contain representations that would be deceptive or could not be substantiated if made by the advertiser;
- Consumer testimonials interpreted as a representation that the endorser's experience is typical of what consumers generally will achieve. If the advertiser cannot support a claim of 'typicality,' the advertiser must either disclose generally expected performance OR that the results are not typical and may vary.
- Experts must have qualifications represented and endorsement must be supported by appropriate exercise of that expertise; and
- Connections between endorsers and product sellers should be disclosed if they would not reasonably be expected by the audience and might affect the credibility of the endorsement.



The world of advertising has turned
upside down!

The world of advertising has turned
upside down!

The World of Advertising Has Changed

Before Claude Elwood Shannon

After Tim Berners-Lee

Print

Radio

Television

Cookies, Spyware, Invisible GIFs & Web Bugs, Promercials, Microsodes, Mobisodes
Digital Downloads, CGI, Video FX, On-Demand Programming, WiFi, Bookmarks, SMS, WAP, Online Promotions, Interactive Advertising, Domain Names, User Generated Content, Embedded Players, Gadgets, Widgets, Interactive Advertising, online gaming, Podcasts, Advercasts and Webcasts, SPAM, Blogs, Vlogs, SPLOGS, RSS Feeds, Key Words and Metatags, Social Networking, Virtual Worlds, Streaming Media, Online Gaming, Advergaming, Pre-Roll/Post Roll, Interstitial Advertising, search engine optimization, browsers, viral and buzz, RFID, mobile marketing, brew decks, avatars.

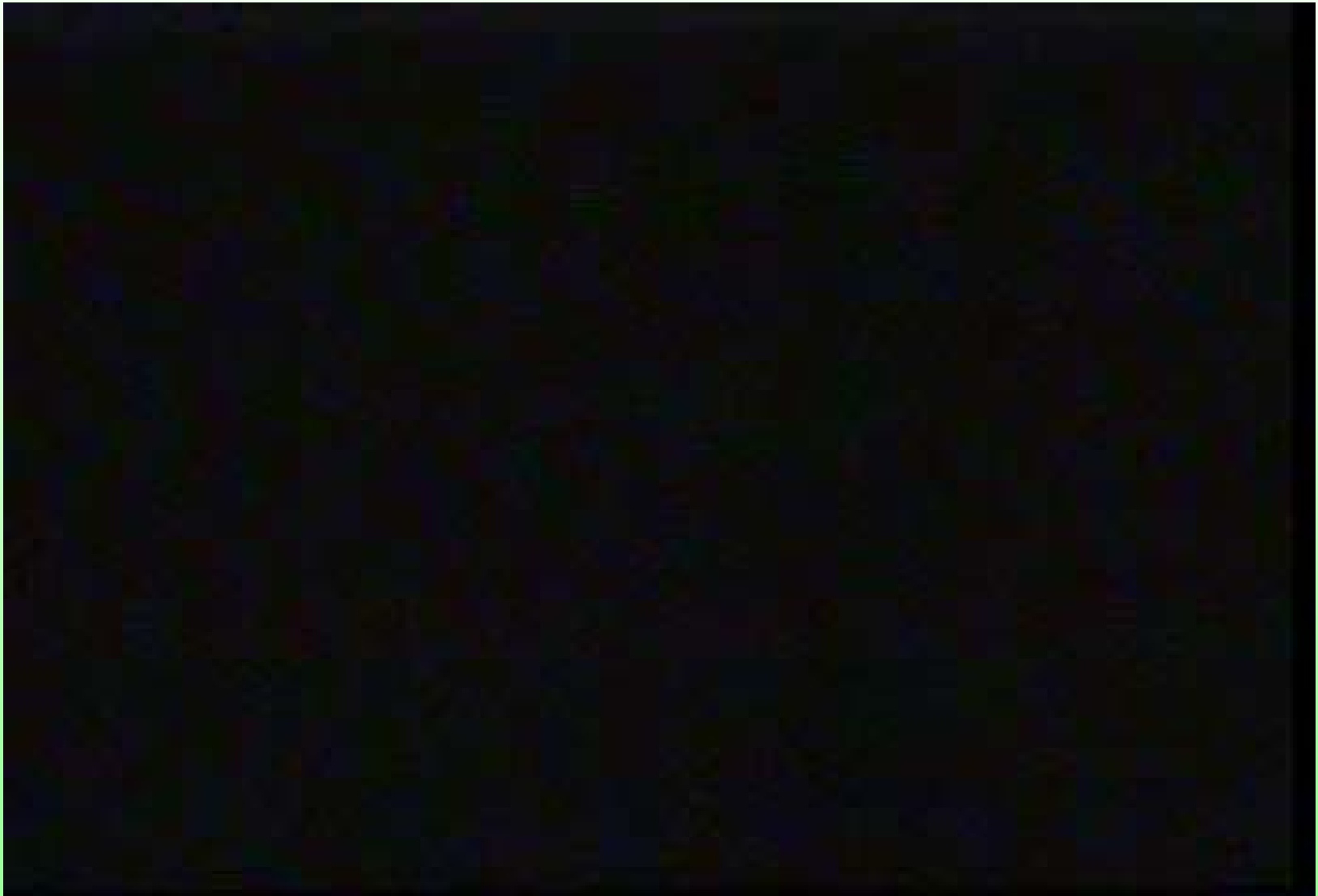
e-[fill in the blank]

Convergence

Distinctions between information, marketing, advertising, entertainment, promotion and, in some cases, networks, ISPs and distribution platforms are blurring.

Advertisers are becoming content creators, media and entertainment companies are becoming ad supported revenue engines, media buying is being performed by advertisers and agents, telecom companies - wired and wireless - are becoming content creators and gaming companies are becoming distribution platforms.

Convergence: Politician? Celebrity? Expert? Consumer?



Why Change Now?

FTC Testimony in the U.S. Senate, Washington, DC, July 22, 2009*

"The Guides were created to cover endorsements and testimonials in print media and 30- or 60-second radio or television commercials. Although the basic principles of the Guides remain valid, the specific applications and examples were not developed, obviously, within a context of program-length infomercials, Internet advertising, word of-mouth or viral marketing, and consumer blogs. In 1980, the advertiser always disseminated the advertisement. With the advent of advertiser-promoted consumer blogging, the advertiser is not always disseminating the endorsement, although it certainly expects to profit from the message.

Moreover, the Commission's enforcement history with false or deceptive advertising using consumer endorsements, as well as its own research, have made it increasingly clear that in one key aspect - disclaimers of typicality - the Guides are not working as intended to prevent consumer deception."

*Prepared Statement of the Federal Trade Commission on Advertising Trends and Consumer Protection before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science and Transportation.

What is the FTC doing?

The FTC recognized the Guides were designed for a different world and there is a "new paradigm" of marketing practices not dealt with or dealt with adequately by the Guides, most notably in social media where marketing practices have shifted from "advertising" to the consumer to "engaging" with the consumer.

2008 FTC proposed revisions to the Guides [73 Fed. Reg. 72,374 (November 28, 2008)]

March 2, 2009 (deadline for comments), FTC had received submissions, from virtually all the major advertising industry associations and participants.

The FTC is currently studying the responsive comments to determine if revisions to its proposed rulemaking are necessary or appropriate.

Note: The FTC will not distinguish between "testimonial" and "endorsement" and will use the terms interchangeably. Who are we to argue?

What Will Change? Liability

Explicitly clarifying that advertisers will be liable for making false or unsubstantiated statements made through endorsements; and

advertisers will be liable for failing to reveal material connections to endorsers; and

endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser who will be liable for false or unsubstantiated statements.

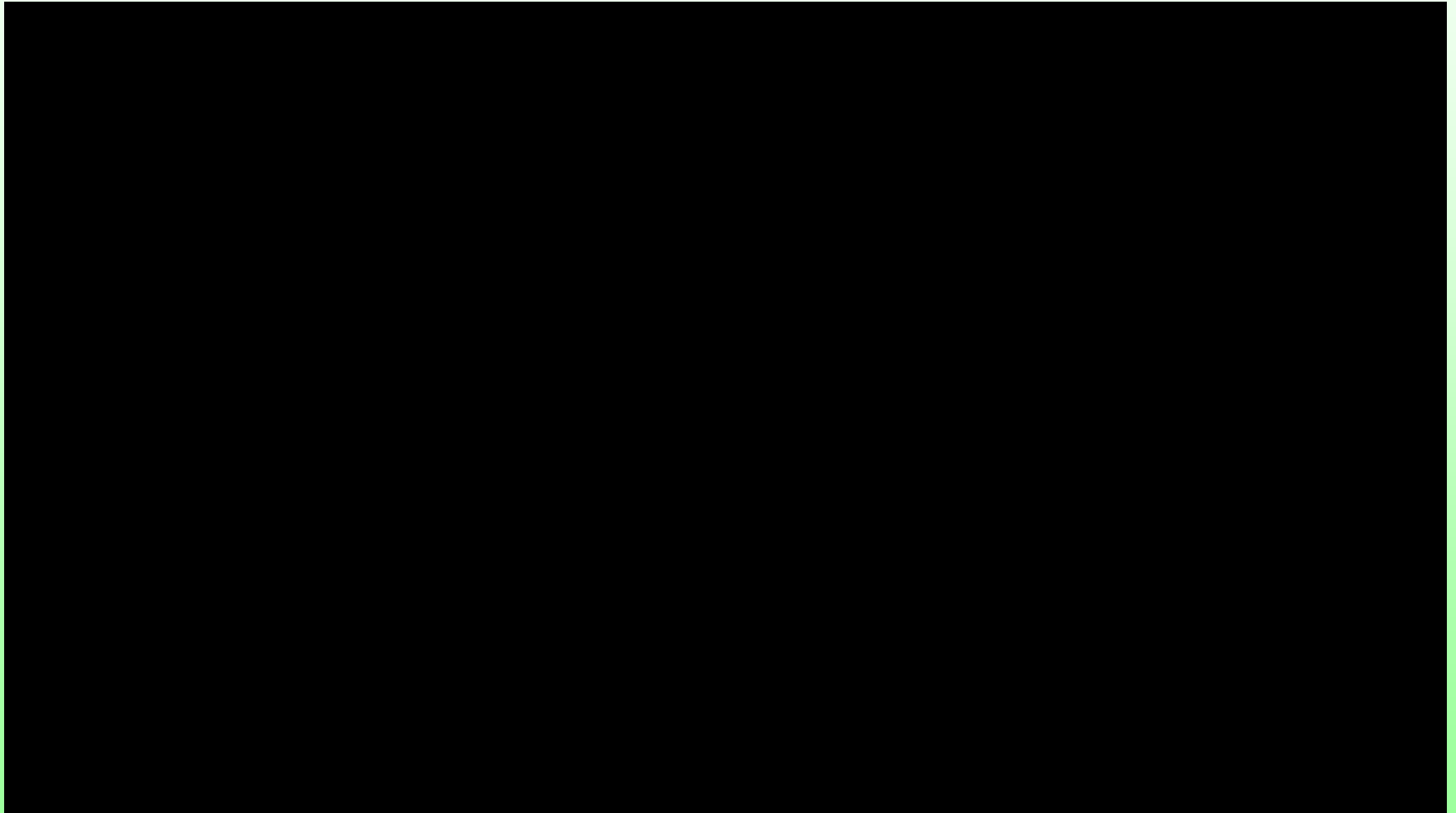
The only relevant criterion in determining whether a statement is an 'endorsement' is whether consumers believe the statement reflects the endorser's views.

What Will Change? Substantiation

Advertisers using consumer endorsements must possess sufficient substantiation to support claims as if the advertiser had made the representation without any endorsements.

In other words, consumer endorsements alone are not to be equated with scientific evidence - consumer endorsements do not serve as reliable or competent scientific evidence because individual consumer experiences in the form of anecdotal evidence do not provide a sufficient basis to substantiate claims.

Endorsing Veggies for PETA - But Substantiating Those Claims?



What Will Change? Typicality

If an advertiser cannot substantiate an endorser's experience as depicting what consumers will generally achieve, then:

the advertisement must disclose, clearly and conspicuously, the generally expected performance of the product or service

and

the advertiser must use adequate substantiation in making that representation.

What Will Change? Safe Harbor Will Disappear

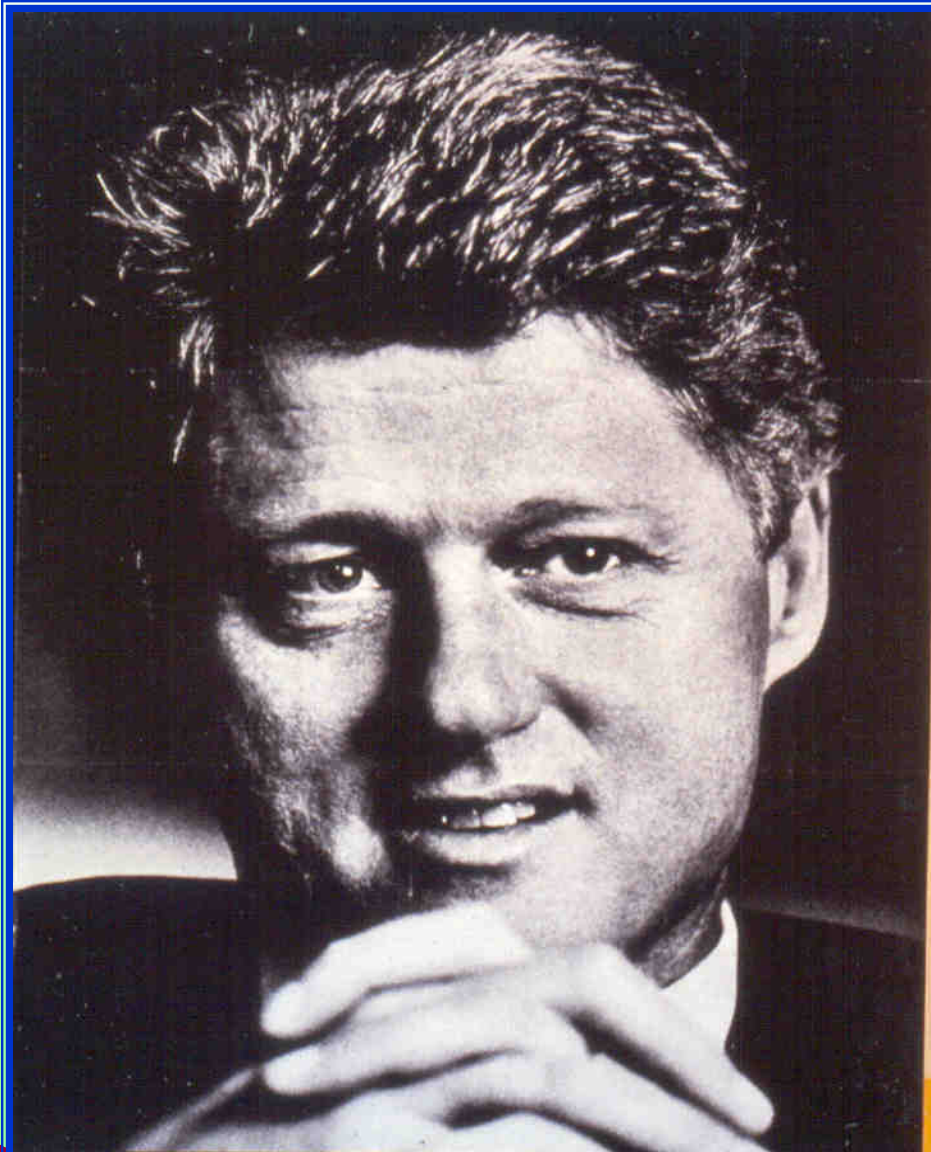
"Results may vary" or "results not typical" will no longer be considered effective in disclaiming the actual or implied representation of typicality, since the FTC staff has determined these types of disclaimers alone are unlikely to be effective in communicating to consumers the limited applicability of the endorser's experience.

Public Figures Are Fair Game, Right?

So as long as I don't actually say a famous person is endorsing my product, I can mention or use them in my advertising.

Oh Really?

As If He Didn't Have Enough Trouble That Year!




"One of the things that I've learned this year is that a strong beer *can* have a really clean taste."

"My wife is more of a beer drinker than I am, and she's the one who first cottoned on to Molson Special Dry. It's strong but it seems to have none of that syrupy aftertaste — it's just smooth and clean and it goes down real easy. Now all the guys at work are into Special Dry too, and some of them like to have a beer or two with their lunch. Me, I try not to do that because I know I'd be useless all afternoon."

Seen Purcell of Beatles Park

◀ A picture of Bill Clinton

Molson Special Dry. The most important new beer for years.



What About a Stealth Endorsement? News Right?



What Will Change? Experts and Celebrities

Previously, experts and celebrities treated the same way. Payments did not generally trigger disclosure requirements.

Under the proposed revisions:

An expert can be paid for an endorsement, but if it's not a flat fee or if the fee is related to success, disclosure of the compensation relationship will be required; and

Where consumers would normally expect a celebrity endorser to be paid no disclosure is required, but (talk shows, public appearances)

Expert? Celebrity? Material Connection? Fees Based on Success?



From Now On Expert Endorsements May Have to Look Like This!



... and our Celebrity Endorsements Like This.



What Will Change? Social Media Subject to Regulation
Endorsements using social media (e.g., blogs, buzz, viral, word of mouth) will be covered by FTC regulation. If there is a relationship between the advertiser and the promoter that would affect the consumer's perception of the promoter's credibility, it must be disclosed.

Example: The Commission is considering to what extent bloggers and advertisers should be held accountable for the contents of blog posts and product reviews:

- Obligation to guide and correct errors;
 - Disclose payments (consideration);
 - Disclose connections (material); and
 - Blogger's opinion must be honest, free of unsubstantiated or false claims.
- Note that "expert" bloggers may have independent obligations.

Commercial blogs are subject to the FTC Act (*FTC v. Enternet Media, Inc., et al.*)

Politicians Too, Right?



**HOW LONG
DO YOU WANT TO
WAIT TO BECOME
THE BOSS?**

www.jobsite.co.uk The fast way to a better job.





Blogs, Vlogs, Splogs, Buzz & WoM

Myths about social media:

- As long as a consumer says it's their opinion, I don't need to prove anything, right?
- Consumer blogs are free speech, they can say what they want?
- If I haven't paid a consumer and I have no connection to the consumer, I can use all the nice things they say about me in advertising, right?
- Are you kidding, I have to make disclosures in word-of-mouth or buzz marketing? That's ridiculous; it's the consumers opinion.

Commercial blogs & vlogs are subject to Section 5 of the FTC Act and actionable if they are false or deceptive (*FTC v. Enternet Media, Inc., et al*). Although great latitude may be accorded for blog & vlog opinions, "sponsored" opinions ("splogs") enjoy less protection.

Repeat after me: I must disclose payments; I must disclose connections; I must correct errors; I cannot disregard inaccuracy; Opinions must be honest, with no false, deceptive or unsubstantiated claims.

OMG! Ads Trgt TiVo Usrs + Txtrs



Marketers Try to Be 'Kewl' With Text-Message Lingo

Unilever's OMG Moment

“Brace yourself, big marketers are getting hip to text-message lingo. In ads that begin in two weeks for a new line of Degree deodorant for teen girls, Unilever is highlighting “OMG! Moments.”

The Wall Street Journal, April 3, 2008

You Can Now Enter Promotions, Follow Celebrities and More on Twitter & Facebook

Leave a comment with your name, valid email address, and tell me what you will wear with your C/E Jeans if you win.

Extra Entries: (Leave 1 comment for each extra entry.)

2. [Follow @thehousewife on Twitter](#) (include your Twitter name in comment!)

3. [Follow @Chickdowntown on Twitter](#) (include your Twitter name in comment!)

4. **Tweet about this contest** 1 entry per tweet, up to 4x daily. Leave 1 comment for each tweet with link to tweet. ([click here](#) to tweet automatically or copy & paste the following:)

Enter to win a pair of JEANS! Chickdowntown.com

Giveaway offered by @thehousewife <http://bit.ly/IYdc8>

Please RT!

5. [Subscribe To Our RSS Feed](#)

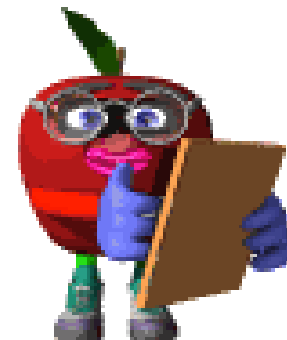


Endorsements from My Avatar?



User Generated Content - The Power of ^{Negative} Endorsements

www.davecarrollmusic.com



Thank You

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