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Mad Men and Dead Men: Justification for Regulation of Computer-Generated Images of Deceased Celebrity Endorsers

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MAD MEN AND DEAD MEN: JUSTIFICATION FOR REGULATION OF COMPUTER-GENERATED IMAGES OF DECEASED CELEBRITY ENDORSERS

KERRY BARRETT*

ABSTRACT

Pursuant to the Federal Trade Commission Act, the Federal Trade Commission (“FTC”) is charged with consumer protection through the prohibition of unfair and deceptive trade practices. An unfair and deceptive trade practice is gaining in prominence and has not yet been subjected to FTC regulation. Computer-Generated Images (“CGIs”) of deceased celebrity endorsers are misleading to consumers and constitute a false advertisement. This Note evaluates how digitally resurrected endorsers pervert the consumer decision-making process through analysis of issue-relevant thinking, the match-up hypothesis, event-study analysis, social adaptation theory, and transfer theory. This Note also accounts for the macroeconomic effect of regulation of CGIs of deceased celebrity endorsers. In order to fulfill its constitutionally mandated duty of protecting consumers, the FTC should issue an all-out ban on CGIs of deceased celebrity endorsers.

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I. INTRODUCTION

Forty years after his death, a computer-generated image (“CGI”)¹ of Bruce Lee has digitally resurrected him to endorse Johnnie Walker Blue Label Scotch.² The director of the ad, Joseph Kahn, stated, “We wanted to be as respectful to the man and legend as we could.”³ Kahn must have overlooked that Lee spent his life practicing teetotalism.⁴ Noted Hong Kong filmmaker, Edwin Lee, described the advertisement as

eerily real-life and [looks like] Bruce Lee. But to attribute all that talent so you can sell alcohol? I find it disgraceful. The man even abstained from alcohol . . . The fact that he is “revived” in such vivid manner to promote a product [and] lifestyle he never conformed to nor has a choice in this

¹ Computer generated images of the kind used in advertising allow for user interaction, meaning that the program, whether general or special purpose, allows the creator to be in control of the eventual output, usually through the use of electronic stylus or mouse. See Marilyn Galvin Stewart, *The Computer-Generated Image: An Analysis for Art Education Pedagogy* (1988) (unpublished Ph.D. dissertation, The Ohio State University) (on file with The Ohio State University). The movement of the mouse or stylus is converted into digital values for the computer. *Id.* The values relate to the Cartesian Coordinate System (CSS) that is used to plot a point specified with respect to two intersecting lines, the horizontal x-axis and the vertical y-axis. *Id.* For three-dimensional images, the conceptualization of space takes on a third axis, the z-axis, which accounts for depth. *Id.* Television screens, here the output device, are divided into picture elements (pixels). *Id.* Pixels are the smallest addressable screen element and the larger the number of pixels the higher the resolution of the generated image. *Id.* With high-resolution images, these pixels appear smooth to the naked eye. *Id.* Movement of the image appears when the program orders the computer to display one image and then another in rapid succession. *Id.*

² Dorothy Pomerantz, *Bruce Lee is Back*, FORBES, Oct. 23, 2013; see also Navin Katyal, *The Unauthorized Dissemination of Celebrity Images on the Internet . . . In the Flesh*, 46 CLEV. ST. L. REV. 739, 747-49 (1998) (discussing the ownership rights of celebrity images).

³ Jeremy Blum, *Bruce Lee Whisky Advert Branded a Disgrace*, S. CHINA MORNING POST, July 10, 2013.

⁴ *Id.*

matter is, I feel, immoral and shows you the lowest depravity of mass marketing these days.⁵

Neither the use of celebrity endorsements nor the practice of consumer deception is new to the advertising industry.⁶ The use of celebrities in advertisements reliably results in more favorable ratings amongst consumers as compared to ad campaigns that do not use celebrity endorsers.⁷ Approximately 20% of television commercials feature a celebrity endorsement.⁸ However, the use of celebrity endorsements and the practice of consumer deception are increasingly intertwined as CGI technology is deployed by advertising companies to digitally resurrect celebrities to endorse products, thereby deceiving consumers.

While there is continued use of traditional celebrity endorsements, CGIs are gaining prominence, as there are numerous benefits of using deceased celebrities to endorse products.⁹ One normative issue with celebrity endorsements is the associated cost, and CGI technology ameliorates that issue.¹⁰ For example, rights to the deceased James Dean's image can be purchased for \$15,000, whereas the living David Beckham's endorsement of Gillette razors cost the company over \$35 million.¹¹ Celebrity endorsement advertisements are being used more frequently, and the amount paid to celebrity endorsers is likewise increasing.¹² Ten percent of funds used for television advertisements go to celebrity endorsement contracts.¹³ In fact,

⁵ *Id.*

⁶ For the purposes of this Note, "endorser" will be defined as "any individual who enjoys public recognition and who uses this recognition on behalf of a consumer good by appearing with it in an advertisement." See McCracken, *infra* note 125. In addition, for the purposes of this Note, "celebrity" will be defined as "an individual who is known to the public (actor, sports figure, entertainer, etc.) for his or her achievements in areas other than that of the product class endorsed." See Hershey Friedman & Linda Friedman, *Endorser Effectiveness by Product Type*, 19 J. ADVERT. RES. 63, 63 (1979).

⁷ Charles Adkin & Martin Block, *Effectiveness of Celebrity Endorsers*, 23 J. CONSUMER RES. 57, 57-61 (1983).

⁸ See *infra* notes 76-98 and accompanying text (discussing the prevalence of and the basis for industry utilization of celebrity endorsements).

⁹ For example, deceased celebrities are highly unlikely to cause a new scandal that results in consumer backlash against the company. See generally Laura Stampler, *The 13 Worst Celebrity Endorsement Fails*, BUSINESS INSIDER (Jan. 31, 2012), <http://www.businessinsider.com/the-13-worst-celebrity-endorsement-fails-2012-1?op=1>.

¹⁰ KATHERINE T. FRITH & BARBARA MUELLER, ADVERTISING AND SOCIETIES I: GLOBAL ISSUES (2003).

¹¹ Jacob Davidson, *Digital Necromancy: Advertising with Reanimated Celebrities*, TIME, Aug. 02, 2013. £30,000,000 was converted to \$38,314,176, using the 2013 U.S. Dollars to Euro zone Euros exchange rate, which was 0.783. See *Yearly Average Currency Exchange Rates Translating Foreign Currency into U.S. Dollars*, IRS, <http://www.irs.gov/Individuals/International-Taxpayers/Yearly-Average-Currency-Exchange-Rates>.

¹² Randall Lane, *The Forbes All-Stars*, FORBES, Dec. 19, 1994, at 266-78.

¹³ Stratford P. Sherman, *When You Wish Upon a Star*, FORTUNE MAG., Aug. 19, 1985, at 68 ("Roughly 10% of the ad dollars spent on TV now go for celebrity ads.").

many celebrities will earn more in advertising deals than in the field which gave rise to their fame.¹⁴ The advertising industry uses celebrity endorsements to draw attention to the endorsed product and to add value to the product by transferring the consumer's positive attitude of the celebrity onto the product.¹⁵

The magnitude and impact of advertising has reached historical highs.¹⁶ The United States is the global leader in per capita advertising expenditures spending at \$534.80.¹⁷ Advertisements communicate decisive information to consumers regarding a product's price, quality, and availability.¹⁸ City-dwelling Americans may see as many as 5,000 advertisements per day.¹⁹ Consumers treat advertisements as shortcut decision makers, as few have the time or inclination to fully develop their knowledge as to all product alternatives.²⁰ Therefore, preventing the proliferation of deceptive advertisements is necessary to protecting consumers and guarding against unfair trade practices.

Due to the prominence of celebrity endorsements and CGIs in advertising, the Federal Trade Commission ("FTC" or "Commission") must take action to guard against such consumer deception. Lee's computer-generated endorsement of Johnnie Walker Blue Label Scotch is but one of the deceptive trade practices against which the FTC aims to protect.²¹ Where representations in advertising have the capacity or

¹⁴ *Id.*

¹⁵ Researchers have found several justifications for advertisers' use of celebrity endorsers:

The modern corporation invests significant amounts of money to align itself and its products with big-name celebrities in the belief that they will (a) draw attention to the endorsed products/services and (b) transfer image values to these products/services by virtue of their celebrity profile and engaging attributes . . . Marketing has sought to use the varied meanings personified by celebrities to assist the achievement of specific communication objectives. Underpinning the usage of celebrities in a communications context is the belief that the profile and attributes of the celebrity both draw attention to the messages they deliver and, through a rub-off effect, transfer image values to those messages.

Sheila O'Mahony & Tony Meenaghan *The Impact of Celebrity Endorsements on Consumers*, 10 IRISH MARKETING REV. no. 21997, 1998, at 15.

¹⁶ Walter D. Scott, *The Psychology of Advertising*, THE ATLANTIC (Jan. 1904), <http://www.theatlantic.com/magazine/archive/1904/01/the-psychology-of-advertising/303465>.

¹⁷ FRITH & MUELLER, *supra* note 10.

¹⁸ John Hood, *In Praise of Advertising*, CONSUMER'S RES. MAG., Apr. 1, 1998.

¹⁹ Louise Story, *Anywhere the Eye Can See, It's Likely to See an Ad*, N.Y. TIMES, Jan. 15, 2007.

²⁰ Hood, *supra* note 18.

²¹ In 2012, Marilyn Monroe starred in a Dior Perfume Commercial alongside Charlize Theron, Grace Kelly, and Marlene Dietrich. Monroe was famously a Chanel No. 5 girl, Dior's biggest competitor. See 15 U.S.C. §§ 41-58 (2017); *50 Years After Her Death, Marilyn Monroe is the Face of Chanel's Sexy New Ad Campaign*, DIGITAL SYNOPSIS, <https://digitalsynopsis.com/advertising/50-years-after-her-death-marilyn-monroe-is-the-face-of-channels-sexy-new-ad-campaign/> (last visited Apr. 3, 2017); Nicole Tyrimou, *The Battle of the Fragrance Titans—J'Adore Dior Vs. Chanel No. 5*, EUROMONITOR INT'L (Aug. 3, 2014), <http://blog.euromonitor.com/2014/08/the-battle-of-the-fragrance-titans-j-adore-dior-vs-chanel-no-5.html>; Chris Eggersten, *Charlize Theron Stars Alongside CGI Versions of Marilyn*

tendency to deceive consumers, the FTC has the duty to regulate them.²² While not yet regulated, the use of CGIs of deceased celebrities endorsers in advertising is a deceptive trade practice subject to the Commission's regulation. In order to fulfill its congressionally-mandated duty of protecting consumers,²³ the FTC should issue an all-out ban on computer-generated images of deceased celebrity endorsers.

Section II of this Note explores potential First Amendment protected speech issues with regard to promulgating regulation within this sector. Section III explains the requirements the FTC must meet in regulating deceptive trade practices, including advertising endorsements. Section IV proposes a Statement of Basis and Purpose for the FTC to consider in promulgating a regulation. Section V proposes the Final Regulatory Analysis the FTC would be required to conduct. Finally, Section VI concludes by proffering that because advertisements using CGIs constitute a deceptive trade practice not protected by the First Amendment, the FTC must promulgate regulation.

II. TENSION BETWEEN FTC REGULATION AND FIRST AMENDMENT RIGHTS

A. CGIs of Deceased Celebrity Endorsers Constitute Commercial Speech

The first test the Supreme Court used to define "commercial speech" was the primary purpose test, where speech was deemed "commercial" if sales were the "primary purpose" of the speech.²⁴ The Court has since moved away from the "primary purpose" test.²⁵ In 1973, the Court in *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations* defined "commercial speech" as speech which does "no more than propose a commercial transaction."²⁶ The Court has since sought to define "commercial speech" through the application of a three-factor test.²⁷ The three factors, as stated in *Bolger v. Youngs*, are:

Monroe, Grace Kelly, Marlene Dietrich in New Dior Commercial: The Second Post-Mortem Appearance by Monroe in a Perfume Ad (Sept. 6, 2011), <http://uproxx.com/hitfix/charlizetheron-mingles-with-the-ghosts-of-marilyn-monroe-grace-kelly-marlene-dietrich-in-new-dior-ad/>.

²² Courts have commented on honoring the spirit of FTC Act:

In order best to implement the prophylactic purpose of the statute, it has been consistently held that advertising falls within its proscription not only when there is proof of actual deception but also when representations made have a capacity or tendency to deceive, i.e., when there is a likelihood or fair probability that the reader will be misled.

FTC v. Sterling Drug, Inc. 317 F.2d 669, 674 (2d Cir. 1963); *see also* 15 U.S.C. §§ 41-58.

²³ *See* 15 U.S.C. §§ 41-58.

²⁴ *Valentine v. Chrestensen*, 316 U.S. 52, 52 (1942).

²⁵ *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 385 (1973).

²⁶ *Id.* ("The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine."); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

²⁷ *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) ("The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the

- (1) Whether the speech in question is concededly an advertisement;
- (2) Whether it makes reference to a specific product;
- (3) Whether it is motivated by economic interest.²⁸

The Supreme Court also clarified that a finding of just one of the factors does not make the speech commercial; rather, it is “the combination of *all* these characteristics [that] provides strong support for the conclusion that the speech in question can be properly characterized as commercial speech.”²⁹ Though the Court has endeavored to refine the definition of commercial speech in these ways, it has not abandoned the notion that determining whether speech is commercial is a matter of common sense.³⁰

B. Constitutional Protection Afforded to Commercial Speech under the First Amendment

The First Amendment states, in part, “Congress shall make no law . . . abridging the freedom of speech.”³¹ The Supreme Court originally held that if speech was commercial, it lost all constitutional protection under the First Amendment.³² The Supreme Court later struck down this precedent, making clear that commercial speech is afforded some degree of First Amendment protection.³³ In 1980, hearing

conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.”) (citations omitted).

²⁸ *Id.*

²⁹ *Id.* (emphasis in original).

³⁰ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978) (“We have not discarded the ‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”).

³¹ U.S. CONST. amend. I.

³² The protection of the “marketplace of ideas” was originally thought not to encompass commercial speech, regardless of whether or not the speech was deceptive:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and dissemination opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

³³ *Ohralik*, 436 U.S. at 455 (“Expression concerning purely commercial transactions has come within the ambit of the Amendment’s protection only recently. In rejecting the notion that such speech ‘is wholly outside the protection of the First Amendment,’ we were careful not to hold ‘that it is wholly undifferentiable [sic] from other forms’ of speech.”) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 771 n.24 (1976)).

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, the Court developed a four-part test to determine whether commercial speech is afforded constitutional protection under the First Amendment.³⁴ For commercial speech to fall within the ambit of the First Amendment, the *Central Hudson* Court stated:

- (1) It at least must concern lawful activity and not be misleading. (2) Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.³⁵

Central Hudson goes on to make plain that speech's failure to satisfy the first part of the test, meaning it either concerns unlawful activity or is misleading, is left without First Amendment protection, as

[t]he First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. If the communication is neither misleading nor related to unlawful inactivity, the government's power is more circumscribed.³⁶

C. Despite Being Commercial Speech, CGIs of Deceased Celebrity Endorsers are not Entitled to First Amendment Protection

CGIs of deceased celebrity endorsers satisfy the *Bolger* three-factor test to be considered commercial speech.³⁷ However, they do not satisfy the *Central Hudson* four-part test for commercial speech to be afforded constitutional protection under the First Amendment because they are misleading. For example, the Johnnie Walker

³⁴ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). It is worth noting that this case defined "commercial speech" as an "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561.

³⁵ *Id.*

³⁶ *Id.* at 563-64 (citations omitted).

³⁷ The dichotomy between commercial speech and non-commercial speech has been continuously eroded such that some legal scholars argue that the two forms of speech are indistinguishable:

One obvious logical problem in distinguishing commercial speech from political expression is the simple fact that inherent in every speech labeled as 'commercial' is at least some noncommercial message: the expression of ideas and values such as materialism or capitalism. There is no such thing as 'pure' commercial speech. Certainly, the First Amendment, and the marketplace of ideas, makes no obvious distinction between commercial and non-commercial speech, and the difficulty of the Court over the years in defining commercial speech at least suggests that the distinction does not really exist.

JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1357 (8th ed. 2010) (footnote omitted).

ad is concededly an advertisement that makes reference to a specific product, and it is motivated by economic interest. However, the ad fails the first part of the *Central Hudson* four-part test in that while it concerns lawful activity, it is misleading due to the digital resurrection of the celebrity endorser. Therefore, CGIs of deceased celebrity endorsers are engaging in advertising is outside the ambit of First Amendment protection.

Given the artistic undertaking necessary to produce a lifelike CGI, some may argue that CGIs of deceased celebrities are expressive and not purely commercial speech—and that they are therefore entitled to a greater degree of First Amendment protection.³⁸ However, the Supreme Court has stated that the inclusion of protected speech is not sufficient to immunize commercial speech from government regulation.³⁹ Thus, even if one were to accept the argument that the creation of CGIs is artistic, rendering the speech expressive, that would not prevent their use in endorsements from Commission regulation.⁴⁰ As mentioned previously, the Supreme Court has held that misleading or deceptive commercial speech is left without First Amendment protection.⁴¹

³⁸ Some argue CGIs are arguably artistic and expressive speech:

Like all true artwork, these stunning images are the product of talent, training, vision, hard work, and exceptional technical and artistic skill. In the hands of a trained artist, the computer can become a tool for expressing artistic vision, every bit as much as a paintbrush or chisel. One must recognize that the creation of successful art does not lie solely in the moment of inspiration, but also in the painstaking attention to detail and the millions of crucial decisions along the path to the realization of the finished piece. Just as a master painter conveys his or her unique vision through the application of color, the direction and length of brushstrokes, and the inclusion or omission of detail, the computer artist manipulates the myriad of variables in the software to create compelling images.

PETER WEISHAR, CGI: THE ART OF THE 3D COMPUTER-GENERATED IMAGE 11 (2004). Though it could also be argued that CGIs of deceased celebrities are inherently derivative as the goal to reproduce the original as nearly as possible. Therefore, the CGI should not be entitled to First Amendment protection. *See, e.g.,* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).

³⁹ *See* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (“[T]he affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or moral platitude, to achieve immunity from the law’s command.”).

⁴⁰ The Supreme Court has held that commercial speech embedded in expressive speech is subject to regulation so long as it is not “inextricably intertwined” with expressive speech by a “law of man or of nature.” Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474 (1989) (quotation marks omitted).

⁴¹ *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”).

III. ADVERTISING IN THE REGULATORY ENVIRONMENT: THE ROLE OF THE FTC IN REGULATING DECEPTIVE TRADE PRACTICES

The Federal Trade Commission Act (“FTC Act”), which Congress passed under the authority granted in the Commerce Clause of the U.S. Constitution, gives the FTC the power to prohibit unfair practices and declares that “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices affecting commerce,” are unlawful.⁴² This portion of the Act was amended vis-à-vis the Wheeler-Lea Act of 1938—which amended the original language from “unfair methods of competition in commerce” to “unfair or deceptive acts or practices in commerce” and thereby extended the FTC’s authority to protect consumers as opposed to only business competitors.⁴³ The use of CGIs of deceased celebrity endorsers a product constitutes a false advertisement, and the dissemination of false advertisements is an “unfair or deceptive act or practice.”⁴⁴

A. Defining “Unfair or Deceptive Act or Practice”

“Unfair” and “deceptive” are not defined within the FTC Act; rather, the statutory interpretation of such words has been left to the Commission.⁴⁵ “Unfair” and “deceptive” are legal terms of art that are independent from one another.⁴⁶ Therefore, an advertisement can be unfair, deceptive, neither, or both. An “unfair” act or practice has been defined by the Commission as one that:

- (1) Causes or is likely to cause substantial injury to consumers,
- (2) Cannot be reasonably avoided by consumers,
- (3) Is not outweighed by countervailing benefits to consumers or to competition.⁴⁷

A “deceptive” act or practice is one that is:

- (1) A representation, omission, or practice that misleads or is likely to mislead the consumer,

⁴² 15 U.S.C. § 45(a)(1) (2006) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); *see also* 15 U.S.C. § 45(a)(2) (“The 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.”).

⁴³ Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. §§ 45-57).

⁴⁴ 15 U.S.C. § 52(b) (“The dissemination or the causing to be disseminated of any false advertisement . . . shall be an unfair or deceptive act or practice in or affecting commerce”).

⁴⁵ *See* Civil Justice Reform, 61 Fed. Reg. 4729 (Feb. 5, 1996); *see, e.g.*, United States v. Boisdoré’s Heirs, 49 U.S. 113, 122 (1850); Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435, 437 (1994).

⁴⁶ *See* FTC Policy Statement on Unfairness, FTC (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁴⁷ *See id.*

- (2) A consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances,
- (3) The misleading representation, omission, or practice is material.⁴⁸

As noted above, we need not determine whether false advertising is itself an unfair or deceptive act or practice, as Congress has already determined that it is.⁴⁹

B. Defining "False Advertising"

"False advertising" has been statutorily defined by Congress as "an advertisement, other than labeling, which is misleading in a material respect," meaning that the misrepresentation is "likely to affect a consumer's conduct or decision with regard to a product or service."⁵⁰ Advertisements need not actually mislead or deceive to be subject to FTC regulation, as representations that merely have the capacity to deceive are unlawful.⁵¹ Further, advertisements, which might carry multiple meanings, are false if one of those meanings creates a misleading impression.⁵² Advertisements are "false" not only if they affirmatively make misrepresentations, but also if they fail to make representations with regard to material facts of the advertisement.⁵³ When determining whether false advertising exists, one must evaluate the net impression that the advertisement leaves on the consumer.⁵⁴ However, an advertisement does not become deceptive merely if a minority of consumers unreasonably misunderstands its meaning.⁵⁵

⁴⁸ *FTC Policy Statement on Deception*, FTC (Oct. 14, 1983), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁴⁹ See 15 U.S.C. § 52(b).

⁵⁰ *FTC Policy Statement on Deception*, *supra* note 48; 15 U.S.C. §55(a)(1).

⁵¹ See *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 680 (2nd Cir. 1944) ("That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown . . . Representations merely having a 'capacity to deceive' are unlawful.") (citations omitted).

⁵² See *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953) ("The important question to be resolved is the impression given by an advertisement as a whole. Advertisements which are capable of two meanings, one of which is false, are misleading. . . . Advertisements which create a false impression, although literally true, may be prohibited.") (citations omitted), *rev'd on other grounds*, 384 U.S. 940 (1955).

⁵³ See 15 U.S.C. §55(a)(1).

⁵⁴ Because the purpose of the FTC act is both to ensure fair market competition and protect consumers, the determination of whether deception exists must be made from the point of view of the ordinary consumer,

That law was not 'made for the protection of experts, but for the public – that vast multitude which includes the ignorant, the unthinking and the credulous . . . and the 'fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced . . . The important criterion is the net impression which the advertisement is likely to make upon the general populace.

Charles of the Ritz Distrib. Corp., 143 F.2d at 679 (citation omitted).

⁵⁵ See *FTC Policy Statement on Deception*, *supra* note 48 ("A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an

C. Defining “Endorsement”

CGIs of deceased celebrity endorsers constitute “celebrity endorsements” under the FTC construction of “endorsement” within the Guides Concerning the Use of Endorsements and Testimonials in Advertising, a non-binding guidance document.⁵⁶ This FTC industry guide on endorsements and testimonials in advertising defines an “endorsement” as

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.⁵⁷

An advertisement constitutes an endorsement if “a significant percentage of consumers are likely to believe the celebrity’s statements represent his own views even though he is reading from a script.”⁵⁸ Therefore, under this definition, “endorsements” can include explicit, implicit, imperative, or co-present endorsements.⁵⁹ Explicit endorsements involve the endorser expressly telling the consumer that he or she is endorsing the product, whereas implicit endorsements merely convey that the endorser uses the product.⁶⁰ In imperative endorsements, the endorser is directing them to use the product. In co-present endorsements, the endorser appears alongside or interacts with the product.⁶¹ Further, the FTC has stated that “endorsements must reflect the honest opinions, findings, beliefs, or experiences of the endorser.”⁶² Clearly, Kahn’s Johnnie Walker Blue Label Scotch commercial featuring Bruce Lee falls short of this requirement.

In fact, all CGIs of deceased celebrity endorsers fall short of the FTC standards for endorsements. The Commission has stated,

[W]hen the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it *at the time* the

insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.”) (quoting *In re Heinz W. Kirchner Trading as Universe Co.*, 63 F.T.C. 1282, 1290 (1963)).

⁵⁶ 5 U.S.C. § 553(d) (2017) (explaining that guidance documents are expressly exempted from the requirements of notice-and-comment rulemaking so as to give the guidance documents the force of law); 16 C.F.R. § 225.0(a) (2009).

⁵⁷ 16 C.F.R. § 255.0(b).

⁵⁸ 16 C.F.R. § 255.1(c) (“Example 4: . . . A significant percentage of consumers are likely to believe the celebrity’s statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.”).

⁵⁹ See McCracken, *infra* note 125, at 310.

⁶⁰ See *id.*

⁶¹ 16 C.F.R. § 255.1(a).

⁶² *Id.*

endorsement was given. Additionally, the advertiser may continue to run the advertisement *only so long as* it has a good reason to believe that the endorser *remains a bona fide* user of the product.⁶³

Given that these celebrities are being digitally resurrected, it is a factual impossibility that they are bona fide users of the product at the time the endorsement is given.⁶⁴ Not only was Bruce Lee never a bona fide user of Johnnie Walker Scotch during his life, but he certainly was not a bona fide user forty years after his death.

D. FTC Procedure for Regulating Unfair Trade Practices

The FTC is empowered to regulate unfair or deceptive trade practices through administrative rules.⁶⁵ “For purposes of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and regulations applicable to unlawful trade practices.”⁶⁶ It could be argued that, rather than promulgating a new rule, the FTC might instead clarify in the Guides Concerning the Use of Endorsements and Testimonials in Advertising that CGIs fall within the existing rules.⁶⁷ The purpose of this non-binding industry guide is to clarify Commission rules so as to give the regulated industry the ability to comply.⁶⁷ The industry guides provide definitions and examples of what the FTC would consider

⁶³ 16 C.F.R. § 255.1(c) (emphasis added).

⁶⁴ Bruce Lee does not stand alone as the only CGI celebrity endorser who cannot possibly be a bona fide user of the product at the time the endorsement was given:

While Elton John might have opted to hawk Diet Coke just for the taste of it, the three late film stars who appear with him in a new high-tech TV commercial—Humphrey Bogart, James Cagney and Louis Armstrong—had no choice in the matter . . . In the Diet Coke commercial, John appears to be playing piano in a nightclub while Bogart, Cagney and Armstrong pop in for cameo appearances. Armstrong blows a trumpet riff from a Diet Coke jingle as he stands next to the British pop star’s piano, and Bogart walks into the nightclub as though he is actually Rick Blaine, walking into his own club in downtown Casablanca. Cagney not only places an order for drinks but also appears to smile at his modern lady companion as she rests her elbow on his shoulder.

Dennis McDougal, *Not Quite the Real Thing: Old Movie Clips Used in Commercials Leave a Bad Taste in Filmmaker’s Mouths*, L.A. TIMES, Dec. 16, 1991.

Marketers, eager to latch onto a fresh approach that has proven it can work, have appropriated the dead as pitchmen . . . Recent examples include Fred Astaire dancing with a Dirt Devil vacuum . . . [S]ome complain that exploiting the dead to enrich their heirs also denigrates our culture. Fred Astaire’s widow approved the Dirt Devil spot, but his daughter Ava called them the antithesis of everything her father represented.

Ad Strategies Seeking to Raise the Dead, L.A. TIMES, Jul. 08, 1997.

⁶⁵ See 5 U.S.C. § 601 (2017) (“[T]he term ‘rule’ means any rule for which the agency publishes a general notice of proposed rulemaking”); 16 C.F.R. § 1.14(a) (“The Commission, after review of the rulemaking record, may issue, modify, or decline to issue any rule . . . If it determines not to issue a rule, it may adopt and publish an explanation for not doing so.”).

⁶⁶ 16 C.F.R. § 1.22(a).

⁶⁷ 16 C.F.R. § 255.

endorsements.⁶⁸ The FTC reviews industry guides on an approximate ten-year schedule to ensure that the Commission's rules remain relevant and not unduly burdensome.⁶⁹ The Guides Concerning the Use of Endorsements and Testimonials in Advertising was most recently reviewed in October 2009 and is scheduled for review in 2020.⁷⁰

However, this approach has its drawbacks. Altering the existing guide, while procedurally efficient, opens the door for the advertising industry to claim that the FTC is attempting to promulgate a new, substantive rule through a non-binding

⁶⁸ See *id.* (“Example 4: A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer of advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.”); see also *id.* (“Example 5: A television advertisement for a particular brand of golf balls shows a prominent and well-recognized golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.”).

⁶⁹ *Federal Trade Commission Regulatory Review Plan: Ensuring FTC Rules Are Up-to-Date, Effective, and Not Overly Burdensome*, FTC, <https://www.ftc.gov/sites/default/files/documents/one-stops/regulatory-review/regreviewplan.pdf> (last visited Mar. 27, 2017) (“[I]t is important to systematically review regulations to ensure that they continue to achieve their intended goals without unduly burdening commerce . . . The FTC schedules its regulations and guides for review on a ten-year cycle; i.e., all rules and guides are scheduled to be reviewed ten years after implementation”).

⁷⁰ See 16 C.F.R. § 255; *FTC Publishes Guides Governing Endorsements, Testimonials: Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements*, FTC, <https://www.ftc.gov/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials> (last visited Mar. 27, 2017); *Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program* 15, FTC, <https://www.ftc.gov/sites/default/files/documents/one-stops/regulatory-review/regreviewfrn.pdf> (last visited Mar. 27, 2017) [hereinafter *Ten-Year Regulatory Review*]. The review in 2009 changed the guides to demonstrate that not only is the advertiser liable for false advertising, but so is the celebrity endorser. The estate of the CGI celebrities would therefore be liable for the inherently deceptive commercial use of the CGI representations. In this way, FTC regulation can protect deceased celebrities in ways that other legal recourses have failed, such as the right of publicity. See generally Shannon Flynn Smith, *If It Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications*, 2013 MICH. ST. L. REV. 1719 (2013); Joseph J. Beard, *Clones, Bones, and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead, and the Imaginary*, 16 BERKLEY TECH. L. J. 1165, 1165 (2001).

guidance document.⁷¹ Therefore, the FTC should promulgate a new, substantive rule regarding CGIs of deceased celebrity endorsers and incorporate that rule as an example in the revised industry guide scheduled for 2020.

When the FTC decides to promulgate a rule, it must adopt a Statement of Basis and Purpose and issue a Final Regulatory Analysis.⁷² A Statement of Basis and Purpose includes:

- (1) A statement as to the prevalence of the acts or practices treated by the rule;
- (2) A statement as to the manner and context in which such acts or practices are unfair or deceptive;
- (3) A statement as to the economic effect of the rule, taking into account the effect on small businesses and consumers;
- (4) A statement as to the effect of the rule on state and local laws; and
- (5) A statement of the manner in which the public may obtain copies of the final regulatory analysis.⁷³

The Final Regulatory Analysis includes:

- (1) A concise statement of the need for, and the objective of, the final rule;
- (2) A description of any alternatives to the final rule which were considered by the Commission;
- (3) An analysis of the projected benefits and any adverse economic effects and any other effects of the rule;
- (4) An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen;
- (5) A summary of any significant issues raised by the comments submitted during the public comment in response to the preliminary regulatory analysis; and
- (6) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.⁷⁴

⁷¹ See, e.g., 53 Fed. Reg 19281 (1988), which was struck down as it imposed substantive obligations on regulated industries outside formal adjudication or notice-and-comment rulemaking.

⁷² See 16 C.F.R. §§ 1.14(a)(1)(i-v)-(2)(i-vi).

⁷³ 16 C.F.R. § 1.14(a)(1)(i-v).

While the FTC is required to analyze each factor above when promulgating its final rule, only some of the factors will be dispositive of the Commission's decision to regulate CGIs of deceased celebrity endorsers.

IV. FTC REGULATION: STATEMENT OF BASIS AND PURPOSE

The most salient of the factors for determining regulation are: (1) the statement as to the prevalence of the acts or practices treated by the rule, (2) the statement as to the manner and context in which such acts or practices are unfair or deceptive, and (3) the statement as to the economic effect of the rule taking into account the effect on small businesses and consumers.

A. Statement as to the Prevalence of the Acts or Practices Treated by the Rule

The advertising industry uses celebrity endorsements of products or services because consumers find the endorsements attention-grabbing, likeable, and impactful.⁷⁵ To explain the prevalence of celebrity endorsements, scholars have researched the ways in which celebrity endorsements are an effective advertising strategy.⁷⁶

A 1994 study evaluated the effect of non-substantive product features, such as spokesperson fame, when consumers are engaged in issue-relevant thinking in both competitive and non-competitive settings.⁷⁷ Issue-relevant thinking refers to the focus a consumer allocates to a particular purchase decision.⁷⁸ Issue-relevant thinking generally functions to drive down the import of non-substantive features; however, effects such as competition and neutralization function to increase the influence of non-substantive features.⁷⁹ Neutralization occurs when differences across and among products are counterbalanced and, thus, irrelevant in purchasing decisions.⁸⁰ For example, if a consumer espoused the belief that pair of jeans X was more comfortable but less stylish than pair of jeans Y, and the consumer valued the jeans equally due to that trade-off, neutralization will have occurred as to the jeans' comfort and style.

In this study, researchers found that even when consumers engaged in issue relevant thinking, spokesperson fame had an effect in competitive markets where products were homogenous or featured cross-alternative trade-offs.⁸¹ Neutralization

⁷⁴ 16 C.F.R. § 1.14(a)(2)(i-vi).

⁷⁵ See O'Mahony & Meenaghan, *supra* note 15, at 18 ("Respondents were most in agreement with the statement that celebrity endorsements were attention-grabbing. Celebrity endorsements were also perceived to be entertaining, likeable, and impactful.")

⁷⁶ See generally *id.*; Kahle & Homer, *infra* note 99; Timothy B. Heath et al., *Spokesperson Fame and Vividness Effects in the Context of Issue-Relevant Thinking: The Moderating role of Competitive Setting*, 24 J. CONSUMER RES. 520-34 (1994); McCracken, *infra* note 125.

⁷⁷ See Heath et al., *supra* note 76. Issue relevant thinking is conceptually similar to instances of high involvement conditions as evaluated in Kahle & Homer, *infra* note 99.

⁷⁸ See Heath et al., *supra* note 76, at 520.

⁷⁹ *Id.* at 530.

⁸⁰ *Id.* at 521.

⁸¹ *Id.* at 530.

and competition function to drive down the efficacy of substantive product features, thereby increasing the efficacy of non-substantive features on consumer purchasing attitudes and decisions.⁸² In this way, famous spokespersons, or celebrity endorsers, function as heuristic tiebreakers, or allow consumers to make purchasing decisions based on nonepistemic considerations.⁸³ For example, it is likely that a celebrity endorser would be less efficacious in getting consumers to switch from Band-Aid to another adhesive bandage company as opposed to getting consumers to switch from Pepsi to Coca-Cola, as the latter scenario is typified by a competitive market featuring neutralized, homogenous products. When products are similar, celebrity endorsements have a greater impact.⁸⁴

A 1995 study found that investors place positive economic value on celebrity endorsements in advertising despite the escalating cost of such contracts.⁸⁵ The study shifted the focus away from the effects of celebrity endorsements on consumer attitudes to emphasize the economic impact of a celebrity endorser using an event-study analysis.⁸⁶ Market analysts use announcements of celebrity endorsement contracts to predict a publicly-traded company's potential return on its advertising investment as offset by the considerable cost.⁸⁷ Determining the economic efficacy of the celebrity endorser is complicated by the multitude of factors that comprise a consumer's purchasing decisions.⁸⁸ Therefore, the study posits that one should be able to evaluate the profitability of celebrity endorsements through the abnormal returns a company will experience due to the market analysts' predictions on potential future return.⁸⁹ This event study evaluated the price of a security (which reflects the present value of a company's future assets, presumably taking into account all available information on the company) both prior and subsequent to the announcement of a celebrity endorsement contract.⁹⁰ The difference in the pre-announcement value of the security from the post-announcement value is, therefore, taken to be a dependable gauge of the market's economic value attributed to celebrity endorsements.⁹¹ At the very least, the difference in the security value ought to represent whether the market believes that a company choosing to incur the cost of a celebrity endorsement contract can expect to derive a profit from that investment.⁹² By evaluating 110 celebrity endorsement contract announcements, researchers found that the announcements resulted in positive excess returns on the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 J. MKTG. 56, 60 (1995).

⁸⁶ *Id.* at 56.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 57.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

company's market value.⁹³ The mean abnormal return following the announcement of the celebrity endorsement contract was found to be 0.44%, which was statistically significant at $t=2.39$, $p<.05$.⁹⁴

The study went on to cite several normative issues with the use of celebrity endorsements causing some businesses to shy away from the time-tested advertising practice.⁹⁵ The normative issues included the rising costs in celebrity endorsements, the potential for the celebrity to endorse several competing brands contemporaneously, and the potential for scandal or negative publicity associated with the celebrity endorser.⁹⁶ Businesses, though faced with these issues, continue to use celebrity endorsements. CGI technology can ameliorate many of these drawbacks, as costs of CGIs of deceased celebrity endorsers are far less expensive, and there is virtually no possibility a deceased celebrity will invite new scandal.

The use of celebrity endorsements increases the likelihood that a consumer will purchase the advertised product.⁹⁷ Therefore, it is beyond mere conjecture to suggest that the practice of digitally resurrecting celebrities for commercial practices will only continue to be more prevalent. If live celebrity endorsers are profitable to companies despite the aforementioned risks, then companies will exploit CGIs of deceased celebrity endorsers to exacerbate their profits and minimize potential risks in this lucrative advertising scheme.

B. Statement as to the Manner and Context in which such Acts or Practices are Unfair or Deceptive

In addition to sparking conversation about the prevalence of celebrity endorsements, the use of celebrity endorsements has spurred academics to determine how consumer's dispositions and purchasing choices are influenced by the use of celebrity endorsements.⁹⁸ Overall, the research suggests that consumers' purchasing decisions are impacted by the endorser's physical attractiveness, credibility, or cultural values.⁹⁹

A 1985 study, grounded in social adaptation theory, found that the physical attractiveness of the celebrity endorser affected consumers' attitudes and purchasing

⁹³ *Id.* at 57-58.

⁹⁴ *Id.* at 58.

⁹⁵ *Id.* at 60 ("However, the widespread and persistent use of celebrities in advertising suggests that marketing managers continue to believe that celebrity endorsements are a worthwhile component of that advertising strategy, despite the costs involved. Our results suggest that this belief is generally shared by investors as well.") (discussing despite normative issues, celebrity endorsement advertising schemes continue to be deployed by companies).

⁹⁶ *Id.*

⁹⁷ See generally O'Mahony & Meenaghan, *supra* note 15; Kahle & Homer, *infra* note 99; Heath et. al, *supra* note 76.

⁹⁸ See generally O'Mahony & Meenaghan, *supra* note 15; Kahle & Homer, *infra* note 99; Heath et. al, *supra* note 76.

⁹⁹ Lynn R. Kahle & Pamela Homer, *Physical Attractiveness of the Celebrity Endorser: A Social Adaptation Perspective*, 11 J. CONSUMER RES. 954, 955 (1985).

decisions.¹⁰⁰ Social adaptation theory suggests that the adaptive significance of information will determine its influence.¹⁰¹ Therefore, information will remain valuable only so long as it effectuates adaptation.¹⁰² Advertisements have only fleeting adaptation value, so the information that a consumer absorbs before moving onto the next information source may be the name of the product and the image of the celebrity endorser.¹⁰³ Alternatively, the attractive celebrity endorser may cause the consumer to become more involved with the advertisement as a high involvement condition as to adaptation of sexuality.¹⁰⁴ The study was based on Petty, Cacioppo, and Shuman's 1983 elaboration theory, which found that in conditions of low involvement—where the consumer is not diligently considering information regarding the merits of the service or product—celebrities as opposed to arguments influenced consumer positions.¹⁰⁵ However, Petty, Cacioppo, and Shuman did not give effect to celebrity status or physical attractiveness. The results of the instant study found an effect for celebrity attractiveness when controlling for celebrity recognition and celebrity likeability, as consumers were more likely to purchase a product based on an advertisement featuring an attractive celebrity endorser as opposed to an unattractive one.¹⁰⁶ Beyond purchase intentions, participants in the study evidenced higher levels of brand and argument recall with attractive celebrity endorsers.¹⁰⁷ This study also coalesces with transfer theory and the matchup hypothesis.¹⁰⁸ The matchup hypothesis and social adaptation theory congregate in that information will not be adaptive and, therefore, not valuable if the information is divorced from the advertised product it purports to recommend.¹⁰⁹ Under a matchup hypothesis, there should be a convergence between the image of the celebrity and the message of the product.¹¹⁰ For example, an advertisement featuring iconic singer-

¹⁰⁰ *Id.* at 960 (“This study showed that the involvement effect previously demonstrated for advertisements of disposable razors may be quite sensitive to variation. This phenomenon disappeared in this study and was replaced by an effect for physical attractiveness. These results more closely approximate the hypotheses of social adaptation theory and the matchup hypotheses.”).

¹⁰¹ *Id.* at 954.

¹⁰² *Id.*

¹⁰³ *Id.* at 954.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 959 (“Physical attractiveness may affect attitude change at several different places in the attitude-change process. Sometimes an attractive model may lure readers into an advertisement in effect increasing the ad’s involvement by transforming it into a source of information about that adaptive topic, sexuality.”).

¹⁰⁶ *Id.* at 954.

¹⁰⁷ *Id.* at 957 (“Participants who saw an endorsement by an attractive celebrity liked the Edge product more (M = 14.02) than participants who saw an unattractive source (M = 12.16”); *see also id.* (“Participants were more likely to intend to purchase after exposure to an attractive (M=1.68) than unattractive (M=1.38) celebrity”).

¹⁰⁸ *See infra* text accompanying notes 117-24 (discussing transfer theory).

¹⁰⁹ Kahle & Homer, *supra* note 99, at 959.

¹¹⁰ John R. Rossiter & Larry Percy, *Attitude Change Through Visual Imagery in Advertising*, 9 J. ADVERTISING 10, 10-11 (1980).

songwriter Bob Dylan would demonstrate a greater attitudinal change in consumers if the advertised product was an Apple iPod as opposed to a Victoria's Secret product.¹¹¹ Also, CGIs can create images of a deceased celebrity that are flawless, thereby raising the attractiveness of the celebrity and further altering consumer involvement conditions. To erase such human flaw from a living celebrity endorser is as costly an endeavor as creating a CGI endorser, but with the added drawback of the excessive endorsement contract.¹¹²

Conversely, a 1989 study analyzed the impact of celebrity endorsements on advertising efficacy and credibility as opposed to attractiveness and likeability.¹¹³ The study concluded that consumers find celebrity endorsements function to make advertisements more believable, especially when the advertisement utilizes a two-sided framework—meaning that the celebrity endorser makes both positive and negative statements regarding the advertised product.¹¹⁴

The two-sided framework is predicated on the theory that light criticism of the product by the celebrity endorser functions to increase the celebrity's credibility as to statements made regarding the positive attributes of the product, thereby raising the overall efficacy of the ad.¹¹⁵ Celebrities influence consumers through the process of social influence that can be broken down into three sub-stages, the last two of which can occur concurrently: compliance, identification, and internalization.¹¹⁶ Whereas likability has been linked to identification, credibility is linked to internalization.¹¹⁷ That selfsame study also found that celebrities create a positive attitude within the consumer toward the brand.¹¹⁸ Consumers may find that the celebrity endorsement makes the representations more credible because the message is not coming directly from the company, but from people who choose whether or not to associate their names with the company's product.¹¹⁹ The process by which

¹¹¹ Bob Dylan has been featured in advertisements for both Apple and Victoria's Secret. A possible explanation for the polemic response to the Victoria's Secret campaign is the disjointed nature of the endorser and the product under a matchup hypothesis. See Seth Stevenson, *Tangled Up in Boobs: What's Bob Dylan Doing in a Victoria's Secret Ad*, SLATE MAG., Apr. 12, 2004 ("Even if Victoria's Secret hopes to bring in more [baby] boomer women, do these women want their underwear to exude the essence and spirit of Bob Dylan?").

¹¹² Josh Dickey, *Everyone is Altered: The Secret Hollywood Procedure that has Fooled Us for Years*, MASHABLE (Dec. 1, 2014), <http://mashable.com/2014/12/01/Hollywood-secret-beauty-procedure/#8tMaDIOymkqs>.

¹¹³ See generally Michael A. Kamins et al., *Two-Sided Versus One-Sided Celebrity Endorsements: The Impact on Advertising Effectiveness and Credibility*, 18 J. ADVERT. 4 (1989).

¹¹⁴ *Id.* at 8-9.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.* at 5, 6 (discussing Herbert C. Kelman, *Process of Opinion Change*, 25 PUB. OPINION Q. 57, 57-58 (1961)).

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.*

¹¹⁹ 16 C.F.R. § 255.0(e) (2009) ("Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising

consumers infer the endorser's motive for participating in the advertising campaign is often a subconscious, attribution process.¹²⁰ Companies intend for consumers to believe the celebrity's decision to appear in the advertisement is driven not only by potential profit, but also in a good faith belief in the value of the product.¹²¹ In this way, CGIs of deceased celebrity endorsers made by dead celebrities deceive consumers, especially if the consumer does not know they are being advertised to by an "eerily life-like" CGI.¹²² Digitally resurrected CGI endorsers lack discretion as to whether or not to appear in the advertisement and lend their credibility to the product. Therefore, the extent to which consumers believe such discretion exists constitutes consumer deception.

Another 1989 study rejected the celebrity credibility and celebrity attractiveness models and focused on the cultural value of the celebrity endorser as most indicative of their endorsement efficacy.¹²³ Many celebrities embody cultural ideals such as "strength," "beauty," or "grace."¹²⁴ Celebrities are able to evoke meaning transfer in a way that models or anonymous actors cannot, as celebrities' cultural identities were fashioned in the public crucible.¹²⁵ This cultural self-construction transforms

message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.").

¹²⁰ Valerie S. Folkes, *Recent Attribution Research in Consumer Behavior: A Review and New Directions*, 14 J. CONSUMER RES. 548, 549 (1988).

¹²¹ Michael A. Kamins & Henry Assael, *Two-Sided Versus One-Sided Appeals: A Cognitive Perspective on Argumentation, Source Derogation, and the Effect of Disconfirming Trial on Belief Change*, 24 J. MKTG. RES. 29, 31 (1987).

¹²² Blum, *supra* note 3.

¹²³ Some argue that the source attractiveness and source credibility models are insufficient to gain a full understanding of the efficacy of the celebrity endorsement advertising strategy:

A new perspective on the process of celebrity endorsement has been developed. It has suggested that the source models with which endorsement is now understood by practitioner and scholar are insufficient. The chief deficit of these models is that they ask us to accept that it is the attractiveness and credibility of the celebrity that make the endorsement work. Useful for certain purposes, this approach prevents us from seeing that celebrities are in fact highly individualized and complex bundles of cultural meaning.

Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310, 319-20 (1989).

¹²⁴ See, e.g., Mike McGee, *How We Resurrected Audrey Hepburn™ for the Galaxy Chocolate Ad*, THE GUARDIAN (Oct. 8, 2014), <http://www.theguardian.com/media-network/media-network-blog/2014/oct/08/how-we-made-audrey-hepburn-galaxy-ad> ("We couldn't take the easy option of filming a lookalike and disguising mismatched nuances through shadows and camera angles because, first, Audrey was the absolute star of the show and there was no hiding her in a dark corner; second, as the ultimate symbol of beauty, the likelihood of casting a near-perfect match was nil. So we went the whole hog and digitally recreated every millimeter of her face.").

¹²⁵ McCracken, *supra* note 123, at 315 ("Audrey Hepburn delivers 'elegance' much more vividly than even the most elegant model. She does so because she has enacted and absorbed this elegance by performing it on stage and screen.").

celebrities into archetypes for consumers to emulate in their own self-construction process.¹²⁶ The meaning transfer perspective hypothesizes that the cultural or symbolic meaning of the celebrity endorser is transferred to the product, and from the product to the consumer, so that the endorsements function to create a unique personality for the brand by assuming the personality of the celebrity.¹²⁷ The meaning transfer is complete once the consumer is able identify the cultural value being represented and understand how that value also exists in the product.¹²⁸ Thus, the meaning transfer is best completed under matchup hypothesis conditions.¹²⁹ Through celebrity endorsement advertising, companies appropriate these cultural ideals and transpose them onto their product or service.¹³⁰ The use of CGIs of deceased celebrity endorsers pervert that process, thereby misleading consumers who rely on advertisements when making purchasing decisions.¹³¹

C. Statement as to the Economic Effect of the Rule, Taking into Account the Effect on Small Business and Consumers

The FTC has long been conscious of its effect on small businesses and has emphasized the critical role small businesses have in national strength and the national economy.¹³² It is, therefore, necessary to safeguard the contributions of small businesses vis-à-vis national conglomerates by eliminating the unfair competition that is deceased celebrity endorser advertising. The FTC has addressed the needs of small businesses by undertaking small business compliance assistance pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.¹³³

¹²⁶ *Id.* at 317.

¹²⁷ *Id.* at 310.

¹²⁸ *Id.* at 314.

¹²⁹ *Id.* at 316; *see generally* Rossiter & Percy, *supra* note 112, at 10-16.

¹³⁰ McCracken, *supra* note 125, at 310.

¹³¹ CGIs can pervert this cultural transfer by imputing the celebrity with cultural characteristics, such as dialects and language that they may not have had at their disposal during their lifetime:

My father did not drink, that's true . . . [he] did not have a problem with people who drink occasionally . . . He was never knocking drinks out of people's hands if there were having an enjoyable time . . . [T]his commercial was for China and we thought the point was to get his philosophy out . . . to a large number of people, in a way that would hopefully capture their attention and make them think.' . . . The commercial aired in Honk Kong will be in Cantonese. 'No he did not speak Mandarin [in reality]. But [the ad] was for China.

See, e.g., Vivienne Chow, *It's a Tribute, Not an Ad, Says Bruce Lee's Daughter*, S. CHINA MORNING POST, July 12, 2013.

¹³² *See, e.g.,* Comm'r James M. Mead, Address at the Annual Meeting of the National Electronic Distributors Association (Sept. 10, 1951) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/684191/19510910_mead_the_ftc_and_small_business.pdf) [hereinafter Mead Address].

¹³³ Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601; *Small Business Regulatory Enforcement Fairness Act*, FTC (Jul. 8, 1998),

In 1976, Congress established the Office of Advocacy within the Small Business Administration (“SBA”) to ensure that small businesses had a voice in the rule-making process.¹³⁴ The U.S. SBA concedes that “not all regulations fall more heavily on small firms than on their larger counterparts.”¹³⁵ This is almost certainly the case here, as small businesses would be relatively unaffected by this rule as the FTC focuses its rules on national advertisements and leaves local ads largely to state and local government.¹³⁶ It is the large companies that make most use of celebrity endorsements and are, therefore, impacted by potential CGI regulation.¹³⁷ To allow large businesses to use this deceptive trade practice would result in unfair competition to small businesses.

As the event analysis study found, the traditional use of celebrity endorsements remains profitable.¹³⁸ If CGIs of deceased celebrity endorsers were prohibited, companies would be “constrained” to using a lucrative method of advertising that is not unfair or deceptive to consumers or competitors. Though it is possible that companies will pass the added cost of regulation (i.e., having to pay for living celebrities) onto consumers, advertising, as a practice, generally functions to drive costs down by encouraging fair competition.¹³⁹ Further, any costs will be shared widely across consumers.¹⁴⁰

Unlike healthcare, tax, and environmental compliance, it is unlikely that regulation of CGIs of deceased celebrity endorsers will have a disproportionate impact on small business.¹⁴¹ In fact, this regulation will likely function to bring about equity in business competition.

The federal Regulatory Right-to-Know Act requires the Office of Management and Budget (“OMB”) to submit, to the extent feasible, estimates of the total annual costs and benefits of federal rules.¹⁴² Such publication of cost-benefit analyses allows

<https://www.ftc.gov/news-events/press-releases/1998/07/small-business-regulatory-enforcement-fairness-act-1996-sbrefa>.

¹³⁴ *Office of Advocacy*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/advocacy> (last visited Mar. 12, 2017) (“Advocacy is an independent voice for small business within the federal government, the watchdog for the Regulatory Flexibility Act (RFA) and the source of small business statistics. Advocacy advances the views and concerns of small business before Congress, the White House, the federal agencies, the federal courts and state policy makers.”).

¹³⁵ Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, U.S. SMALL BUS. ADMIN. 58 (2010) (“Moreover, not all regulations fall more heavily on small firms than on their larger counterparts.”).

¹³⁶ *Advertising FAQ’s: A Guide for Small Business*, FTC, <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business> (last visited Feb. 9, 2016).

¹³⁷ See, e.g., McGee, *supra* note 124.

¹³⁸ Agrawal & Kamakura, *supra* note 85.

¹³⁹ See *infra* notes 149-64 and accompanying text (discussing economic effects of proposed regulation).

¹⁴⁰ See *infra* notes 165-69 (regarding consumers being a disparate group).

¹⁴¹ Crain & Crain, *supra* note 135.

¹⁴² Treasury and General Government Appropriations Act of 2001, 31 U.S.C.S. § 1105.

for greater transparency into the regulatory state so as to identify any disparate effect on small business.¹⁴³ OMB's cost-benefit analysis includes only regulations from the previous ten years that are anticipated to have an annual economic impact of at least \$100 million.¹⁴⁴ However, the FTC is outside this reporting process as an independent agency, as Executive Order 12866 applies to executive agencies only.¹⁴⁵ While the FTC is outside this formal process, conducting cost-benefit analyses of potential regulation lends further justification for regulation beyond rhetoric and could be used to evidence that the rule satisfies an arbitrary and capricious standard should it be subjected to judicial review.

V. FTC REGULATION: FINAL REGULATORY ANALYSIS

Similar to the Proposed Statement of Basis and Purpose, the FTC is required to analyze each factor mentioned in Section III when promulgating its final rule.¹⁴⁶ However, only some of the factors will be dispositive of the Commission's decision to regulate CGIs of deceased celebrity endorsers. The most salient of the factors are: (1) the analysis of projected benefits and any adverse economic effects and other effects of the rule, (2) an explanation of the reasons for the determination of the commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen, and (3) the summary of any significant issues raised by the comments submitted during the public comment in response to the preliminary regulatory analysis.

A. Analysis of Projected Benefits and Any Adverse Economic Effects and Any Other Effects of the Rule

The primary projected benefits include the protection of the consumer right to be informed and the protection of fair market competition.¹⁴⁷ As described in Section III of this Note, CGIs of deceased celebrity endorsers pervert the consumer heuristic process.¹⁴⁸

One potential economic effect would be the effect on the national labor market. The dialogue over economic effects of regulation on the national labor market has grown steadily more contentious as the levels of unemployment remain high following the Great Recession.¹⁴⁹

¹⁴³ *Id.*

¹⁴⁴ Exec. Order No. 12,866, 58 Fed. Reg. § 51,735 (1993).

¹⁴⁵ *Id.*

¹⁴⁶ 16 C.F.R. § 1.14 (2017).

¹⁴⁷ Presidential Papers, John F. Kennedy, *Special Message to Congress on Protecting the Consumer Interest*, Mar. 15, 1962 ("These rights include: . . . The right to be informed—to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts he needs to make an informed choice . . . to promote the fuller realization of these consumer rights, it is necessary that existing Government programs be strengthened, that Government organization be improved, and, in certain areas, that new legislation be enacted").

¹⁴⁸ *See supra* Section III.

¹⁴⁹ Josh Bivens, *Macroeconomic Effects of Regulatory Changes in Economies with Large Output Gaps* 1 (Econ. Policy Inst., Working Paper No. 292, 2012); U.S. BUREAU OF LABOR

Without regulation of CGIs of deceased celebrity endorsers, the input costs for advertisers would shrink, thereby enlarging the output gap. The “output gap” is the actual gross domestic product less the potential gross domestic product divided by the potential gross domestic product.¹⁵⁰ Therefore, the output gap reflects the difference between what the economy is producing and what the economy could produce, meaning that a large output gap results in an underperforming labor market and a poor national economy.¹⁵¹ With a negative output gap, the economy features a productive slack, such that the demand for products or services is greater than the supply.¹⁵² The macroeconomic implication of a regulation that creates a negative shock of productivity will lower unemployment, as the existing demand can only be met with increased input.¹⁵³ In this way, a regulation that imposes costs on businesses can function to shrink the output gap and lower the unemployment rate.¹⁵⁴ So, for example, if a company wished to reap the benefits of a celebrity endorser and was unable to deploy deceptive CGI technology (pursuant to this proposed regulation), the company would be required to make an investment in the form of a celebrity endorsement contract, thereby raising its input costs and creating a negative productivity shock, which could only be remedied by increased input of labor shrinking the output gap. And, as demonstrated above, that which increases demand will shrink the output gap, resulting in greater employment so that consumers would be able to meet increased prices through newly acquired disposable income.¹⁵⁵

Another potential economic effect would concern potential rises in the price of goods pursuant to regulation. A rise in prices could result from regulation; however, if significant, the price rise could precipitate a response from the Federal Reserve that would increase interest rates, leading to a reduction in demand of such now unduly costly products.¹⁵⁶ Such a Federal Reserve response is unlikely due to persistent large output gaps following the Great Recession.¹⁵⁷ A study conducted by agents of the Federal Reserve found that regulations that function to reduce supply, because the industry has to bear additional costs, would increase the demand if the regulation leads to an rise in the overall price of the product.¹⁵⁸ The study points to a potential flaw in standard theoretical macroeconomics and posits that consumers consume based on current income as opposed to predictions of expected future income due to liquidity constraints.¹⁵⁹ An increase in price levels decreases the real

STATISTICS, BLS SPOTLIGHT ON STATISTICS: THE RECESSION OF 2007-2009 7 (2012), http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

¹⁵⁰ *Id.* at 2.

¹⁵¹ *Id.* at 4.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Gauti Eggertsson & Paul Krugman, *Debt, Deleveraging, and the Liquidity Trap: A Fisher-Minsky-Koo Approach*, Q.J. ECON. 1469, 1480 (2012).

¹⁵⁷ Bivens, *supra* note 149, at 6.

¹⁵⁸ *Id.* at 6-8.

¹⁵⁹ Eggertsson & Krugman, *supra* note 156, at 1506.

burden of debt, which incentivizes consumers to purchase out of debt rather than out of wealth.¹⁶⁰ Conversely, falling prices lead to an increase in the “Fisher Effect,” meaning that the real value of debt is raised—which leads to deflation and less spending out of debt.¹⁶¹ Therefore, should this regulation lead to rising prices of the advertised goods, the Fisher Effect will actually raise demand for products by effectuating a kind of redistribution of purchasing power.¹⁶²

B. An Explanation of the Reasons for the Determination of the Commission that the Final Rule Will Attain Its Objectives in a Manner Consistent with Applicable Law and the Reasons the Particular Alternative was Chosen

Consumers need Commission intervention because—as a group—they are so disparate and disorganized that their interests are unlikely to be independently protected, whereas organized groups like advertisers will be protected through legislators under public choice theory.¹⁶³ Governmental intervention into the market dates back to 50 B.C. and has continued to modernity.¹⁶⁴ President Kennedy addressed Congress in 1962, outlining the need for government action to meet its duty to protect consumers by stating the four rights of consumers.¹⁶⁵ In the absence of CGI regulation, consumers will be left without the second right: —the right to be informed.¹⁶⁶ The Commission understands that its industry regulation has a real impact on consumers. In fact, “[a]s the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy, the FTC’s work touches the economic life of every American.”¹⁶⁷ Therefore, the Commission must ensure that its rules meet this objective of protecting consumers in a manner

¹⁶⁰ *Id.* at 1482.

¹⁶¹ *Id.* at 1484.

¹⁶² *Id.* at 1484-85.

¹⁶³ Cuevas, *supra* note 45, at 448 (“Public choice theory posits that legislation is not enacted to further the public good, but rather, to further the ends of a particular interest group. Under public choice theory, legislators are primarily concerned with getting reelected. Interest groups that make significant campaign contributions wield a disproportionate amount of power in the legislature, and it is these groups that are able to have legislation passed that furthers their economic interest.”) (footnotes omitted).

¹⁶⁴ DIG. 48.12.2pr. (Ulpianus, De Officio Proconsulis 9) (“Lege iulia de annona poena statuitur adversus eum, qui contra annonam fecerit societatemve coierit, quo annona carior fiat.”); 3 PATRICK MAC CHOMBAICH DE COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW: ILLUSTRATED BY COMMENTARIES ON AND PARALLELS FROM THE MOSAIC, CANON, MOHAMMEDAN, ENGLISH, AND FOREIGN LAW 653 § 2409 (1854) (“The Lex Julia de annona was directed at those who kept up the price of corn by artificial means.”).

¹⁶⁵ Presidential Papers, *supra* note 147, at 236.

¹⁶⁶ *Id.*

¹⁶⁷ *Prepared Statement of the Federal Trade Commission on the FTC’s Regulatory Reform Program: Twenty Years of Systematic Retrospective Rule Reviews & New Prospective Initiatives to Increase Public Participation and Reduce Burdens on Business: Hearing on Agency Views on Regulatory Overhaul Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 112th Cong. 1 (2011) [hereinafter *Hearing*]* (statement of Jon Leibowitz, Chairman, Fed. Trade Comm’n).

consistent with its congressional mandate to protect against unfair or deceptive acts or practices.

In its broadest sense, the Commission's objective is to protect consumers and businesses by ensuring fair market competition.¹⁶⁸ In its actions, the Commission must neither affirm advertising practices that are obnoxious to the rule of law nor promulgate regulation that is inconsistent with its delegated authority or contrary to the public interest.¹⁶⁹ The applicable laws are the statutory authority granted to the FTC in the FTC Act¹⁷⁰ and the Administrative Procedure Act ("APA").¹⁷¹ In order to ensure that the FTC's final rules are consistent with both applicable law and modern technological advances, the FTC engages in periodic reviews of its rules and industry guides. "[W]e [the FTC] systematically and rigorously have reviewed our rules to ensure that they enhance consumer welfare without imposing undue burdens on business."¹⁷² For the reasons outlined in Section III of this note, a rule determining that the use of CGIs of deceased celebrity endorsers for the purposes of celebrity endorsements is deceptive would be consistent with the applicable law and Commission objectives.

C. Summary of Any Significant Issues Predicted to be Raised by the Comments Submitted During the Public Comment Period in Response to the Preliminary Regulatory Analysis

The rules regarding celebrity endorsements were changed with the revision of the industry guides in 2009.¹⁷³ The issues raised by the commentators during that period are anticipated to be substantially similar to that which the Commission can expect in 2020.

The American Association of Advertising Agencies ("AAAA") and the American Advertising Federation ("AAF") found the 1980 industry guides sufficient and therefore opposed the 2009 revisions.¹⁷⁴ The crux of the AAAA's and AAF's

¹⁶⁸ FED. TRADE COMM'N, No. P064502, FTC TESTIFIES ABOUT EFFORTS TO COMBAT FRAUDULENT AND DECEPTIVE ADVERTISING 2 (2009), <https://www.ftc.gov/news-events/press-releases/2009/07/ftc-testifies-about-efforts-combat-fraudulent-deceptive> ("The Federal Trade Commission works for consumers to prevent fraudulent, deceptive, and unfair business practices and to provide information to help spot, stop, and avoid them.").

¹⁶⁹ James Mead, Chairman, Fed. Trade Comm'n, Address at the Annual Meeting of the National Electronic Distributors Association: The Federal Trade Commission and Small Business 5 (Sept. 10, 1951), https://www.ftc.gov/system/files/documents/public_statements/684191/19510910_mead_the_ftc_and_small_business.pdf.

¹⁷⁰ 15 U.S.C. §§ 41-58 (2017).

¹⁷¹ 5 U.S.C. § 553 (2017).

¹⁷² *Hearing, supra* note 167, at 1.

¹⁷³ 16 C.F.R. § 255.0(a) (2009).

¹⁷⁴ American Association of Advertising Agencies and American Advertising Federation, Comment Letter on Proposed Changes to the FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising 2 (June 18, 2007), https://www.ftc.gov/sites/default/files/documents/public_comments/guides-concerning-use-endorsements-and-testimonials-advertising-539124-00008/539124-00008.pdf ("Finding the current Guides effective in ensuring the truth and accuracy of endorsements and testimonials,

joint argument was that there was insufficient evidence to show that testimonials and endorsements were actually deceiving consumers.¹⁷⁵ However, this assertion is a failing argument, as there need not be a showing of actual deception in order for the FTC to promulgate regulation.¹⁷⁶ Rather, the advertisement need only have the capacity to deceive.¹⁷⁷ Further, as the studies above indicate, there is tremendous potential for actual deception with CGIs of deceased celebrity endorsers.¹⁷⁸

One of the main arguments the advertising industry raised in its resistance to regulation was the prominence of industry self-regulation.¹⁷⁹ Self-regulation is voluntary action undertaken by the collective industry to control its collective action as opposed to, or in conjunction with, government regulation.¹⁸⁰ The AAAA and the AAF bill the National Advertising Division (“NAD”) of the Council of Better Business Bureaus (“CBBB”) and the National Advertising Review Board (“NARB”) as sufficient deterrents to advertisers from using deceptive consumer testimonials.¹⁸¹ The Commission does not dismiss the value of self-regulation.¹⁸² The advertising

the AAAA and the AAF strongly urged the Commission to not adopt any changes to the Guides.”) (footnote omitted) [hereinafter Comment Letter].

¹⁷⁵ *Id.* at 3 (“While we appreciate the Commission’s desire to protect consumers from deceptive advertising, there is little evidence that consumers are deceived by testimonials or endorsements, whether in traditional media or new media.”).

¹⁷⁶ *Charles of the Ritz Distrib. Corp. v. FTC*, 143 F.2d 676, 680 (2d Cir. 1944) (“That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown. . . . Representations merely having a ‘capacity to deceive’ are unlawful.”) (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934)) (citations omitted).

¹⁷⁷ *Id.*; *see, e.g.*, *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979) (“Proof of actual deception is unnecessary to establish a violation of Section 5. Misrepresentations are condemned if they possess a tendency to deceive.”); *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978) (“This court has previously stated that advertisements ‘capable of being interpreted in a misleading way should be construed against the advertiser.’”) (quoting *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975)); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) (“Moreover, the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the likelihood or propensity of deception is the criterion by which advertising is measured.”) (footnote omitted).

¹⁷⁸ *See, e.g.*, *Agrawal & Kamakura*, *supra* note 85, at 56; *Heath et al.*, *supra* note 76, at 520; *Kahle & Homer*, *supra* note 99, at 955; *McCracken*, *supra* note 123, at 312; *O’Mahony & Meenaghan*, *supra* note 15, at 15.

¹⁷⁹ Comment Letter, *supra* note 174, at 10 (“[S]elf regulatory framework, which effectively ensures against deception without overly burdening advertisers. . . . Private litigants also continue to challenge unsubstantiated testimonials through Lanham Act litigations. Industry self-regulation via the National Advertising Division (‘NAD’) of the Council of Better Business Bureaus (‘CBBB’), and the National Advertising Review Board (‘NARB’) provides another deterrent. . . .”).

¹⁸⁰ *Andrew A. King & Michael J. Lenox, Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program*, 43 *ACAD. MGMT. J.* 698, 698 (2000).

¹⁸¹ Comment Letter, *supra* note 174, at 10.

¹⁸² *FED. TRADE COMM’N & U.S. DEP’T OF HEALTH & HUMAN SERVS., PERSPECTIVES ON MARKETING, SELF-REGULATION & CHILDHOOD OBESITY: A REPORT ON A JOINT WORKSHOP OF*

organizations posit that unless and until self-regulation becomes ineffective, the FTC should not make any substantive changes to the industry guides.¹⁸³ However, the scholarship is rife with evidence that industries' self-regulation, while helpful, is not the deterrent it touts to be.¹⁸⁴ To date, there has been no industry self-regulation of CGIs of deceased celebrity endorsers.

VI. CONCLUSION AND SUGGESTED EXAMPLE TO BE INCORPORATED IN THE 2020 GUIDE CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING

Celebrity endorsements are a profitable form of advertising and impact consumers' choices.¹⁸⁵ CGIs of deceased celebrity endorsers ameliorate cost issues and concerns, such as potential for scandal of traditional celebrity endorsers. However, the advertising industry has already begun to exploit the advantages of deceased celebrity endorsers through CGI technology. Furthermore, as the U.S. population ages, advertisers may find that these classic, albeit deceased, celebrities are more appealing to aging populations than modern celebrities and socialites.¹⁸⁶ CGIs of deceased celebrity endorsers are misleading and pervert the consumer's purchasing decision. Therefore, in order to fulfill its congressionally mandated duty to protect consumers, the Commission must subject CGIs of deceased celebrity endorsers to regulation.¹⁸⁷ Beyond protecting consumers and businesses by ensuring

THE FEDERAL TRADE COMMISSION & THE DEPARTMENT OF HEALTH AND HUMAN SERVICES 39 (2006), <https://www.ftc.gov/sites/default/files/documents/reports/perspectives-marketing-self-regulation-childhood-obesity-report-joint-workshop-federal-trade/perspectivesonmarketingself-regulationchildhoodobesityftcandhhsreportonjointworkshop.pdf> ("Effective industry self-regulation can have significant benefits, and can, in many instances, address problems more quickly, creatively, and flexibly than government regulation. For self-regulation to be effective, however, it should clearly address the problems it seeks to remedy, adjust to new developments within the industry, be enforced and widely followed by affected industry members, and be visible and accessible to the public.") (footnote omitted).

¹⁸³ Comment Letter, *supra* note 174, at 18 ("Premature changes to the Guides regarding new media are unnecessary at this time as industry self-regulation appears to be effective in prompting appropriate disclosures.").

¹⁸⁴ See, e.g., Mary J. Culnan, *Protecting Privacy Online: Is Self-Regulation Working?*, 19 J. PUB. POL'Y & MARKETING 20, 20-26 (2000); King & Lenox, *supra* note 180, at 698; Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 713-14 (1999); Daniel Castro, *Benefits and Limitations of Industry Self-Regulation for Online Behavior Advertising*, INFO. TECH. & INNOVATION FOUND. 1 (Dec. 13, 2011), <http://itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf>.

¹⁸⁵ See, e.g., Agrawal & Kamakura, *supra* note 85, at 56; Heath et al., *supra* note 76, at 520; Kahle & Homer, *supra* note 99, at 954; McCracken, *supra* note 123, at 318; O'Mahony & Meenaghan, *supra* note 15, at 15.

¹⁸⁶ Mitra Toossi, *Labor Force Projections to 2020: A More Slowly Growing Workforce*, 135 U.S. BUREAU LAB. STAT. MONTHLY LAB. REV. 43, 45 (2012) ("A significant factor shaping the future demographics of the U.S. population is the increase in older population cohort. In 2020, the 55-years-and-older age group will total 97.8 million, composing 28.7 percent of the 2020 resident population, compared with 24.7 percent in 2010.").

¹⁸⁷ Mead Address, *supra* note 132, at 4.

fair market competition, FTC regulation of CGI deceased celebrity endorsers would protect advertising companies from potential penalties incurred from running such a deceptive advertisement.¹⁸⁸ For the above reasons, the FTC, having the ability to regulate this practice, should issue an all-out ban on CGIs of deceased celebrity endorsers.

Example 1: A liquor company contracts out to a graphic design company to create a computer-generated image to digitally reanimate a celebrity. The computer-generated image is used in an advertisement for the liquor company. Many consumers will recognize this celebrity and not simply in their capacity as an endorser. The celebrity endorser lends their likeness and credibility to the product, as consumers will believe that the celebrity would not endorse the product unless he or she actually uses the product. The use of the celebrity will increase the likelihood the consumer will purchase the product. Verbal statements by the celebrity or celebrity interaction with the product would constitute celebrity endorsement. The use of a computer-generated image of a celebrity is a false advertisement as the celebrity is not a bona-fide user of the product at the time of the endorsement. The CGI celebrity endorsement is a false advertisement that constitutes a deceptive trade practice prohibited by law.

¹⁸⁸ *Id.* Such penalties can include: (1) civil penalties which could result in penalties ranging from thousands of dollars to millions of dollars, (2) cease and desist orders, the violation of which can result in a \$16,000 per day fine, or (3) corrective advertising. *Id.*

