



Making a Federal Case out of Blogging

John LaPlante

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Freedom of speech and clear standards for law enforcement are two building blocks of constitutional government.

And yet, right now an overly zealous federal agency is threatening both, a state of affairs that could affect the hundreds of thousands of Minnesotans who use Facebook and other social networking sites.

In early October, the Federal Trade Commission (FTC) laid down the law on people who write blogs, Facebook updates, and Twitter “tweets,” by proposing disclosure statements. The rules state that anyone promoting a product or service must disclose any “material connections” with the seller of that product or service. Violators could face fines of as much as \$11,000, and might even be subject to civil lawsuits.

According to a Harris poll survey conducted earlier this year, half of all Americans have an account on MySpace, Facebook, or Twitter. That likely means that well over a million Minnesotans could be subject to FTC scrutiny if these disclosure statements become law.

Marketers and advertisers are unhappy, of course. The International Advertising Bureau has called for the FTC to withdraw its enforcement guidelines. Randal Rothenberg, president of the advertising association, said: “These revisions are punitive to the online world and unfairly distinguish between the same speech, based on the medium in which it is delivered.”

While the FTC is concerned that a blogger who receives a free package of Pampers from Proctor & Gamble may say something nice about the company, travel and fashion writers at the New York Times or Glamour are free (as far as the FTC is concerned) to accept free trips or clothing. So should bloggers and tweeters.

Another problem with the rules is that they are too subjective and open to manipulation. Several prominent legal bloggers have made this point, including Ann Althouse of the University of Wisconsin (<http://althouse.blogspot.com/>), who worries about selective enforcement.

Walter Olson, who writes at <http://overlawyered.com/>, says, after reviewing the FTC materials, “FTC enforcers will engage in their own fact-specific, and inevitably subjective, balancing before deciding whether to press for fines or other penalties: in other words, instead of knowing whether you’re legally vulnerable or not, you get to guess.”

Ambiguous law strikes at the heart of constitutional government. The more ambiguous a law is, the more government is a government of men, not laws. As the American Civil Liberties Union (ACLU) said a few years ago in the case of a Los Angeles man cited for displaying a “for sale” sign in his vehicle, “Commercial speech is a form of speech individuals, as well as corporations, must be able to exercise without arbitrary restrictions.”

More generally, the FTC rule weakens respect for the First Amendment, which states, in part, “Congress shall make no law ... abridging the freedom of speech.” It’s true that commercial speech has long been regulated, to our loss, and the FTC rules would solidify that precedent.

The FTC says it has no plans (and no resources) to actively police the millions of blogs, Facebook accounts and Twitter feeds. In fact, it tells bloggers, in essence, “Don’t worry, be happy. We’re just going after the advertisers.” But as Jeff Bercovici asks at AOL Daily Finance, “Since when do we give government agencies broad new powers in the expectation that they’ll be used sparingly and judiciously?”

You might think that the guidelines were, as many new laws and regulations are, a panicked response to a recent crisis. You would be partly right. While some companies do engage in blogger payola, there is no sudden need to act.

One FTC staffer has denied the commission saw “a huge problem out there that was imperative to address.” Rather, the FTC is bureaucracy doing what a bureaucracy normally does—expanding its reach and scope until citizens push back.

The commission says that it’s merely updating existing rules to apply to new technologies, but it neglects how those new technologies work. In short, the Internet is a great place for ferreting out unscrupulous actors. As Gordon Crovitz wrote in a Wall Street Journal column, “The Web has its own self-regulatory mechanisms. Failing to disclose interests sullies one’s reputation online, and reputation harm travels faster and lasts longer than it did before the Web.”

On a practical level, the rules have some problems as well. The most common form of advertising, at least in terms of number of sites if not dollars spent, is Google AdSense. Google serves up ads, from third parties, based on words on various web site, including one that I use to write about snowboarding. When readers of that blog click on an ad, Google puts a few pennies in my account and charges the advertiser a few more. Every so often, it sends me a check for \$100.

While I can exclude certain advertisers from the ads, I can’t determine whose ads will appear. Should bloggers like me start monitoring such ads and then disclaiming them? That requirement lessens rather than increases the amount of speech, which is not good for democratic self-government.

Finally, there’s a cultural reason why the FTC action is also bad : It treats adults as children by trying to protect them from somehow being harmed by a “tainted” blog entry. Remember the rule “If it’s too good to be true, it probably is.”

A little discernment would go a long ways.

There used to be an old saying: “Don’t make a federal case out of it.”

With the latest FTC action, however, every casual blathering online might become just that.