

Article

***1105 DISCLOSURE, ENDORSEMENT, AND IDENTITY IN SOCIAL
MARKETING**

[William McGeveran](#) [\[FNa1\]](#)

Introduction

Imagine that you wander into a bookstore. Out of curiosity, you thumb through the newest novel of an author you loathe, and then you purchase two other books, one as a gift and one for yourself. Now imagine that the moment you turn away from the sales counter, all your friends receive an e-mail message urging them to consider buying all three books because you, their friend, had looked at them. You may raise several objections all at once. First, many shoppers would find automatic disclosure to their friends of personal browsing and buying to be intrusive. Furthermore, the resulting message probably misleads its re-cipients because you do not actually want to read at least one, and perhaps two, of the listed books. Finally, you may consider this commercial exploitation of your personal identity objectionable. If the nascent practice of “social marketing” [\[FN1\]](#) catches on, however, something very similar ***1107** may soon happen routinely on the internet, raising all of these possible concerns.

The popular online social networking platform Facebook launched such an initiative, Facebook Ads, in November 2007. [\[FN2\]](#) Web sites outside of Facebook could determine whether their visitors had Facebook accounts and, if so, disseminate information about those customers' internet browsing, purchases, or other activities throughout their Facebook social networks. Thus, someone who rented a particular movie at Blockbuster Video's web site could find that fact announced to all her friends through their Facebook “News Feeds.” [\[FN3\]](#) Initially, the only notice she received was the brief appearance of a pop-up window that allowed her to cancel the message; if she took no action, the site quickly removed the window and sent the message. [\[FN4\]](#) Although Facebook's initial foray into social marketing was not successful, [\[FN5\]](#) several trends strongly indicate that the practice will return in some form, and Facebook is now experimenting with several different approaches. [\[FN6\]](#) Social network providers face a compelling need to raise revenue, while advertisers crave efficient targeting of referrals from their existing customers. The potential rewards for both parties seem certain to encourage development of new social marketing initiatives.

Interactive tools on the internet--including social networks and other utilities for sharing opinions about products and services--hold great promise for improved communication and enhanced consumer choice. Social marketing can play a positive role in that system. If poorly designed, however, such a program would fail to achieve these benefits or even, in some circumstances, destroy them.

Like celebrity endorsements or cross-branding agreements, social marketing is a form of reputational piggybacking. All three allow a marketer to benefit from an association with someone else's well-known identity. Unlike other arrangements, however, social marketing capitalizes ***1108** on individuals' reputations among their friends, not just in the public at large. In some forms, it does so

without authentic consent. And unlike those other examples of reputational piggybacking, the law has yet to develop rules for social marketing.

Potential problems fall into several distinct types: disclosure, endorsement, and identity. First and most clearly, the individual disclosures made in social marketing messages could impinge on personal privacy. Second, some designs for social marketing could cause information quality problems that degrade not only the effectiveness or accuracy of a particular endorsement, but also the entire ecology of online peer recommendation. Finally, social marketing threatens to rob the individual of control over the commercial exploitation of identity and reputation.

At present, social marketing falls through the cracks between several different sources of possible legal regulation--spanning from privacy to trademark and unfair competition to the appropriation tort and rights of publicity to consumer protection regulation. New combinations of technology and business techniques transcend the old categories. A large class action lawsuit filed against Facebook Ads proves this point, because the complaint struggles, with limited success, to fit its claims into the pigeonholes of current law. [\[FN7\]](#) Constraints within each legal paradigm, though appropriate to the distinct situations from which its rules arise, prevent that law from influencing social marketing design. Modes of enforcement and measurement of damages render some related law largely toothless. And in any case, the existing paradigms were tailored to address only a subset of the concerns-- disclosure or endorsement or identity--and not all three at once.

This Article considers what tools existing law might offer regulators and how these tools fall short, and begins thinking about a future legal approach to social marketing. To be absolutely clear, it examines potential legal responses to problems that may not require legal intervention in the end, depending on how social marketing develops. Though it might be premature to reach final decisions about legal treatment of social marketing, it is time to start evaluating the options. Ultimately, one might reach a normative conclusion that the law should leave social marketing to be regulated by other means--presumably market forces, online social norms, and the technological design of social networking platforms. [\[FN8\]](#) It is just too early to say for certain. This evaluation, however, requires at least a preliminary inquiry into the nature of possible legal regulation. In the course of that inquiry, we will discover some reasons to be cautious about the optimistic view that problems arising from social marketing will self-correct through other means. At a minimum, this Article***1109** argues, the law can play a role, even if only a modest one, in crafting and promoting best practices for social marketing. Those rules should center on ensuring the authentic consent of the people featured in social marketing messages.

* * *

I. Background

* * *

B. Social Networks and Online Advertising

Social networks like MySpace and Facebook describe their services as communities that allow users to communicate more efficiently and share infor-

mation, photos, and interests with their networks of friends, family, and co-workers. [\[FN35\]](#) Users create profiles that typically contain detailed personal information such as birthdates, religious and political affiliations, education and employment history, and lists of hobbies, interests, and tastes in music, books, and movies. [\[FN36\]](#) Users then link, by mutual *1114 consent, to the profiles of people they know, after which each friend can see the other's profile and can keep track of new postings. Privacy settings allow users to control the information that other users can see, although of course the provider of the social networking platform has access to all the information. [\[FN37\]](#)

The sheer size of social networking platforms suggests that they should become an important new venue for advertising. As of April 2009, Facebook claimed over 200 million active users worldwide. [\[FN38\]](#) My-Space still probably has the most users in the United States, with approximately 76 million. [\[FN39\]](#) These and other social networking sites consistently rank among the most popular web sites in the world. [\[FN40\]](#) Such eye-popping statistics have raised expectations about the potentially enormous profitability of social networking sites. Rupert Murdoch's News Corporation purchased MySpace for \$580 million in 2005. [\[FN41\]](#) Facebook is privately held and valuation estimates vary widely, but extrapolations from private investments in the company suggest that it is probably worth several billion dollars. [\[FN42\]](#)

Social networks have tried to capitalize on their access to a large quantity of user data to help advertisers target their messages (and there-by justify a higher rate). [\[FN43\]](#) Both MySpace and Facebook allow advertisers to identify specific demographic groups based on attributes such as location,*1115 gender, age, political views, relationship status, or other keywords, and to aim advertisements at users who fit these profiles. [\[FN44\]](#) In doing so, they followed a familiar and successful blueprint for internet advertising. [\[FN45\]](#) Most advertising-driven sites have developed increasingly sophisticated mechanisms to target messages based on such individual characteristics. Google illustrates this progression. The company famously began selling paid search advertisements, which allowed for the placement of advertisements relevant to precisely the user's objective, based on the search query entered. [\[FN46\]](#) Then, in 2004, Google began targeting advertisements based on the content of messages sent through its Gmail service. [\[FN47\]](#) Most recently, Google has encouraged users of its many services to register for accounts that aggregate information about an individual's activities across all the company's platforms, including maps, searches, blogs, e-mail, word processing, and now even telephone service. [\[FN48\]](#)

So far, however, the extraordinary size of social networks and their access to users' personal information have not translated into revenue that justifies huge market valuations. [\[FN49\]](#) Display ads on MySpace, Facebook, and the social networking site Bebo sell for only thirteen cents for every thousand times the ad is served (CPM, or cost per thousand). [\[FN50\]](#) By *1116 comparison, big traditional media companies such as CBS and NBC charge CPM rates of between fifty and seventy-five dollars on affiliated sites. [\[FN51\]](#) Many observers believe that targeted advertising has worked poorly in social networking contexts because it diverges from a visitor's purpose of interacting with friends; in sharp contrast, Google presents ads precisely when someone is searching for a related item. [\[FN52\]](#)

Given the enormous market pressure to improve these revenue numbers, it seems inevitable that social network sites will turn to social marketing as a means to improve the effectiveness of the advertising they carry. The arrival of an

economic recession might slow down what previously appeared to be an imminent shift, because advertisers may conserve their budgets and take fewer risks. [FN53] Yet the potential of social marketing and the weak performance of other efforts to monetize social networking surely point in the same direction. Put another way: if your revenue-starved business possessed advertisers' "Holy Grail," wouldn't you give them a sip? The next Section discusses social marketing and Facebook's initial foray into the field.

C. Social Marketing and the Example of Facebook Ads

Because the concept is still new, this Article broadly defines the term "social marketing" as any technique that sends information about an ordinary individual's interaction with a product to that person's friends and acquaintances in order to stimulate demand for that product. Social marketing relies on the existing relationship between customers and their friends as a conduit for an advertising message.

To oversimplify somewhat, [FN54] there can be two basic structures for social marketing, depicted by the diagrams below. [FN55] Under the first structure--which was the only kind realistically possible before the rise of new social networking technology--a vendor suggested or encouraged the customer to tell friends about a product. This is what happens, for example,*1117 when marketers offer discounts or other incentives for referring friends to the business.

Figure 1 Social Marketing via Suggestion

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

This structure exists online as well. Most new online interaction tools such as social networks or microblogging rely on purely voluntary communication. Before transmitting personal information such as a status update on Facebook or a tweet on Twitter, a user must compose the text and then push the button to send it. Users choose the content and timing of these communications. Much social marketing falls into the same category, as depicted in Figure 1. If a vendor encourages customers to post positive reviews or to feature new purchases in a social networking profile, then users divulge information intentionally. Figure 1 also represents the flow of information in viral marketing, because the customer, not the marketer, chooses to forward communication to friends.

Some see this structure as a shortcoming. One prominent analyst called it "distorted" because "[e]ndorsements are now passed from trusted customers to prospects, not directly from the brands themselves." [FN56] In a Web 2.0 environment, however, marketers can overcome this "distortion." If they can identify the customer's friends without assistance from the customer, then they can send a message to those friends directly. Marketers can then tell the friends about the customer's inter-actions with the product such as browsing and buying. Figure 2 depicts this information flow.

*1118 Figure 2 Automated Direct Social Marketing

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Social marketing structured as shown in Figure 2 "cuts out the middleman"--although the middleman here happens to be the subject of the personal informa-

tion and the one supposedly providing an endorsement of the product. Marketers using this method can overcome reluctance or inertia on the part of customers to forward word-of-mouth messages. They gain control over the precise content and appearance of the message. Marketers can also provide a link within the message to entice recipients into trying their wares. And they can track the results with precision.

Social marketing appeals to marketers for a range of reasons. Marketers can improve the targeting of a message to consumers likely to buy a product (because friends are more likely to have similar tastes). They can attract the recipient's attention more effectively (because messages from friends may stand out amid marketing clutter). They can overcome the problem that ads are unrelated to a user's purpose in visiting a social networking site (because the messages embed advertising within that social interaction). Perhaps most important, social marketing increases the persuasiveness of the message (because piggybacking on the credibility of the recipient's friend turns the message into a trusted referral or something close to one; it implicitly functions as an endorsement of the product).

The best concrete example of social marketing so far has been the initiative by Facebook, particularly its Beacon feature. [\[FN57\]](#) This Article *1119 uses Facebook Ads as an example, even though techniques will evolve in the future and this specific program does not fully delimit the boundaries of social marketing.

The company unveiled Facebook Ads in November 2007 with two components. [\[FN58\]](#) One of them, Social Ads, allowed businesses to create pages within Facebook, much as an individual would. When a user interacts with an advertiser's page, such as "becoming a fan" of a particular band, publication, politician, or product, a story is transmitted to that user's Facebook friends alerting them and inviting them to "become a fan" as well. [\[FN59\]](#) Because it involved only activities within the Facebook environment, the Social Ads initiative was not very controversial. The only purpose of "becoming a fan" within Facebook is to add that designation to your profile, so it represents an intentional public endorsement. Social Ads thus fall within Figure 1.

Beacon was different. It sent messages within Facebook about a user's actions on sites outside of Facebook. So, to take Facebook's own example of how the program worked: Meaghan, an average Facebook user, might rate a movie at the website of Blockbuster Video. [\[FN60\]](#) The Blockbuster site would then send a query to Facebook's servers and find out whether Meaghan was logged into Facebook. [\[FN61\]](#) If so, a small pop-up window would appear on the bottom right of Meaghan's screen notifying her that Blockbuster would send a message to the News Feeds of her Facebook friends. [\[FN62\]](#) The corner of the pop-up window included a place to click "No Thanks." This notification was unobtrusive and disappeared quickly, however, and many users did not realize the disclosure was made until after the fact. [\[FN63\]](#) Unless the user opted out, Blockbuster sent a promotional message to the News Feeds of all Meaghan's Facebook friends with a statement such as, "Meaghan gave a 4-star rating to the movie Top Gun," alongside the photo from Meaghan's Facebook profile, a Blockbuster advertising message, and a hyperlink that would allow the recipient to rent Top Gun from Blockbuster. [\[FN64\]](#)

*1120 When **Facebook** launched **Beacon**, it claimed partnerships with sixty advertisers including not only Blockbuster but also CBS, Chase, Coca-Cola, Microsoft, Sony Pictures Television, and Verizon Wireless. [\[FN65\]](#) The press

release announcing the program highlighted advertising partners' enthusiasm for Beacon and its ability to add a level of "trust" to advertisements. [FN66] Beacon allows advertisers to harness word of mouth and "turn a user's preferences into an endorsement with commercial value." [FN67] Zuckerberg, the notoriously hyperbolic founder of Facebook, called this system "a completely new way of advertising online" and declared: "For the last hundred years media has been pushed out to people, but now marketers are going to be a part of the conversation." [FN68]

Users felt less enthusiastic about Beacon. They complained that the system often revealed personal information to a user's friends without the user's knowledge or consent. [FN69] The political organization Move-On.org created a Facebook group called "Facebook: Stop Invading My Privacy." [FN70] More than 30,000 members joined in the first week, [FN71] and eventually the group's page reported that it had around 80,000 members. [FN72] As the controversy grew, some of the original Beacon partners put a hold on their participation, though they did not back out completely. [FN73]

A month later, Facebook responded to the backlash by apologizing and reconfiguring Beacon. [FN74] In the new version, rather than sending messages to Facebook automatically, a window appears on the screen asking permission to "tell your friends in Facebook" about an action *1121 taken on a partner site. Without that authorization, the site does not send any social marketing message. In other words, the company changed the program's structure from the one depicted in Figure 2 to that in Figure 1--a more old-fashioned model where a marketer suggests that a customer transmit word of mouth to friends, but the decision to initiate that message remains with the individual and not the marketer. Facebook also overhauled the site's privacy settings so that users could opt out of Social Ads and Beacon altogether.

Despite the failure of Facebook Ads to raise revenue, intensive discussion continues within the industry about the promise of social marketing. [FN75] Facebook itself is preparing to "reboot" the concept of social marketing with a new feature, which it began rolling out in December 2008, called Facebook Connect. [FN76] The feature allows users to log in at other sites using their Facebook identity and to transport their social network with them to the external site. MySpace, Google, and other major players are developing similar identity management initiatives that will compete in this space, giving birth to the next generation of social marketing. [FN77] This evolution underscores the fact that Facebook Ads were only an early and somewhat crude attempt to engage in social marketing. [FN78] The analysis in the remainder of this Article anticipates the eventual emergence of new social marketing endeavors as nearly inevitable and considers the shape of an appropriate legal response.

*1122 II. Potential Concerns About Social Marketing

A. Disclosure Concerns

Probably the most evident concern raised by social marketing is the potential threat of unauthorized and undesired disclosures of particular pieces of personal information. Social marketing depends on a flow of information from the customer featured in an endorsement message to that customer's friends. The ads function only by revealing that the endorser bought a certain shirt, browsed on a certain page, or signed up to receive news about a certain musician. But some people might not want information about their browsing and shopping shared

automatically with a large number of others, and particularly with their friends.

The controversy surrounding the introduction of Facebook Ads focused almost entirely on such disclosure concerns. Both Facebook and opponents of Beacon framed the pertinent issues as “privacy.” [\[FN79\]](#) Media coverage also highlighted unwanted disclosures of personal information. [\[FN80\]](#) Similarly, legal claims against Beacon have all taken this approach thus far. Two class action lawsuits filed in the United States center on the program's allegedly unlawful disclosure of personal information, based on a variety of theories grounded in data privacy law. [\[FN81\]](#) A regulatory complaint against Facebook in Canada likewise focuses on the site's collection and disclosure of personal information, purportedly in violation of that nation's stringent data protection law. [\[FN82\]](#)

Many users found it “creepy” that Facebook transmitted information in the News Feed without asking for specific permission first. [\[FN83\]](#) But just because a disclosure was unintended does not necessarily make it problematic, much less a cognizable legal injury. Unpacking exactly what led to feelings of “creepiness” about Beacon helps define more clearly what serious disclosure concerns might arise from social marketing, as opposed to mere discomfort or uncertainty. I see four distinct (though overlapping) concerns about disclosure.

First, some categories of information enjoy special sensitivity across the board. As we shall see, most privacy law, and especially U.S. law, recognizes far stronger rights against disclosures within defined classes of ***1123** particularly intimate topics. [\[FN84\]](#) These presumptively private topics include medical, sexual, financial, or political matters. In principle, future social marketing initiatives could transmit a user's implied endorsement of anti-diarrhea medicine, condoms, emergency mortgage counseling, or an anarchist group. Though such disclosures might seem the most obviously and seriously troubling, in reality, they are extremely unlikely. No Beacon partner sites focused on such sensitive topics. Moreover, this sales technique appears ill-suited to extremely personal information. Companies that collect extra-sensitive data tread very carefully to avoid alarming customers, regardless of whether they are legally required to do so. [\[FN85\]](#)

A second and related concern is that social marketing might impinge on what Neil Richards has called “intellectual privacy.” [\[FN86\]](#) Automatically publicizing a user's choice of books, music, films, or web sites (and especially those a user has merely browsed) would constrain the capacity to explore ideas freely. [\[FN87\]](#) Introducing its anti-Beacon petition, Move-On.org invoked the specter of disclosures that could invade one's thought processes: “When you buy a book or movie online--or make a political contribution--do you want that information automatically shared with the world on Facebook? Most people would call that a huge invasion of privacy.” [\[FN88\]](#) In contrast to the inherently personal topics noted above, some original Beacon partner sites related to the development of ideas or self-expression, including those affiliated with Blockbuster, CBS, Fandango, and The New York Times. [\[FN89\]](#) This concern regarding intellectual privacy appears more realistic than the concern for extremely intimate information.

Third, in some circumstances users may not want to reveal certain pieces of personal information to particular acquaintances. Messages broadcast to all friends undermine fine-grained individual choices. For ***1124** example, some of the best-publicized negative response to Beacon arose from ruined surprise gifts; because the program was rolled out in November, many users were doing their

Christmas shopping, and Facebook Ads revealed the purchase of presents to their intended recipients. [FN90] More generally, someone who wears sweater sets by day and combat boots by night may prefer these two aspects of her identity to remain separate. What if she only uses a social network professionally but social marketing techniques send messages related to her nightlife? Or college students and other young people may fail to recognize how many people beyond their peers can see their profile on a site like Facebook. [FN91] Even information about seemingly mundane purchases such as clothing can breach these separations. As one commenter objected on the MoveOn protest page, “I don't know about everyone else, but I'm not looking forward to the day where I have to constantly be on alert as to if what I'm doing online is being shared with all my family, friends, and co-workers.” [FN92] This version of the disclosure concern also appears justified. And although overly broad disclosures will cause no more than inconvenience or discomfort in many situations, they could result in significant privacy harms.

Finally, beyond these specific examples of especially sensitive topics, “intellectual” content, and unwanted disclosures to particular individuals, the very possibility of unintentional disclosure can cause more pervasive problems. Jerry Kang compared earlier forms of online tracking to being followed through the mall by a private detective taking notes. [FN93] When Facebook first unveiled Beacon, David Weinberger offered a similar metaphor of a couple talking quietly as they walked down the street, only to discover recordings of their conversation posted on the internet. [FN94] In both instances, semipublic communication is removed from its original context and placed in a much more widely available setting. In other words, regardless of the particular nature of the information transferred, the pre-reform Beacon violated implicit social norms about disclosure and aggregation of personal information. [FN95] By flouting those norms, Beacon contributes to a pervasive sense of surveillance and its attendant discomfort and constraint. [FN96] As sociologists have long understood, we rely on the presumptive privacy of certain activities, both online and off, to give us “down time” from living on display. [FN97] Users who are unsure whether activities will be reported to their friends can be expected to act differently, leading to some of the same pernicious self-censorship effects of monitoring that make intellectual privacy important. [FN98]

One standard response to all of these concerns stresses that only an endorser's chosen friends receive the disclosures from social marketing. [FN99] According to its defenders, social marketing inherently limits the audience to one defined by and known to the endorsers, eliminating or at least reducing drastically the privacy impact of disclosures. This argument is backwards, however. Far from reducing privacy concerns, existing relationships between the endorser and the recipients of social marketing heighten the privacy salience of disclosures in the ads.

We should and do recognize some infringement of privacy interests arising from disclosures made to complete strangers. [FN100] But both law and social conventions recognize a higher--not a lower--degree of privacy in communications with friends and family members. [FN101] As Charles Fried has explained, unwanted disclosures to friends interfere with selective revelation, the process of increasing intimacy gradually by disclosing pieces of personal information over time. [FN102]

Furthermore, as noted above, not all “friends” are created equal, online or in real life. Any individual's social life actually consists of interlocking groups with different norms, roles, and relationships that result*1126 in different levels of

intimacy and disclosure as well as different expectations of discretion or privacy. [FN103] As any user of social networking sites would testify, it can be awkward to reject a request to become friends. Thus, social networks of supposed “friends” are also populated by relatives, professional colleagues, neighbors, former classmates or coworkers, and many casual acquaintances. [FN104] All the people in these undifferentiated groups have not formed identical relationships in real space. Yet most online social networking sites have been built for all-or-nothing sharing. Facebook and MySpace have features that allow users to segment their friends into different lists for different purposes, [FN105] but it is not clear if these subnetworks would interact with social marketing. After all, marketers want to reach every potential customer whom the endorsement can influence, not just a portion of them.

Another reply to disclosure concerns suggests that users of social networks, especially younger users, simply have particularly relaxed preferences about information privacy. [FN106] Those who do not like sharing personal information, the argument runs, should just abstain from online social networking. Even if it were true at one time, the caricature of social network users as a young exhibitionist fringe no longer reflects reality. First, the number of users involved places online social networks firmly in the mainstream: one-third of adult internet users and two-thirds of online teenagers have profiles on social networking sites. [FN107] Because adults account for a much larger proportion of the population, they actually compose the majority of social network users. [FN108] In addition, empirical research demonstrates that the majority of both older and younger users consciously protect their privacy in their use of social networks. [FN109] Finally, as social media functionality spreads rapidly to other*1127 parts of the web, rather than remaining segregated at particular sites dedicated to social networking, the entire internet will soon become more hospitable to social marketing techniques.

Now that online social networking has become ubiquitous, especially among younger cohorts, it simply is not a realistic alternative to opt out altogether. [FN110] Doing so would be like a teenager of a previous generation eschewing the telephone. Moreover, opting out of online social networking can abdicate the ability to shape one’s own reputation--after all, friends and acquaintances will still discuss the abstainer and tag him or her in photos. [FN111] For good or ill, platforms like MySpace and Facebook are a crucial forum for everyone (and especially those under thirty-five) to talk, organize social outings, play games, and hang the virtual posters that define oneself in the world--in short, to live. [FN112] They must have a reasonable degree of confidence in their privacy when they do so.

B. Information Quality Concerns

Social marketing messages are a form of consumer endorsement as the Federal Trade Commission defines the term. [FN113] The virtues of peer recommendations depend very much on their high perceived reliability and independence. [FN114] Social marketing advertisements may not always share in this level of dependability and could convey exaggerated, misleading, or even completely false information or endorsements. Such claims could deceive a recipient into taking actions or making purchases that might not otherwise have occurred, thus distorting choices with bad information. Worse, over time either inaccurate or overly frequent social marketing would seriously undermine the effectiveness of online word of mouth altogether. [FN115] These concerns can be grouped together as worries about the information quality of social marketing.

The baseline of a true endorsement should be defined as an accurate and voluntary declaration of support. Accuracy is crucial, obviously, but *1128 can be difficult to measure. Simplified social marketing messages may convert a mixed and nuanced view of a product into an apparent black-and-white positive opinion. Voluntariness ensures that an endorsement is freely given. One might like a product perfectly well but still not enough to recommend it to others. Even if the supposed endorsements embodied in social marketing messages fall far short of this level of enthusiasm, however, advertisers naturally want to portray them as spontaneous declarations of support.

In principle, and depending on the design of a particular social marketing system, users could trigger positive messages even if their opinions of an underlying product are neutral or negative. If social marketing became widespread, then messages could be sent when a user merely visited a web site, browsed merchandise, tried out a diversion such as a poll or quiz, or entered a contest. Without much trouble one can imagine social marketing developing to the point where eager advertisers parlay routine online actions such as these into automated social marketing messages that imply endorsement. Such endorsements, neither accurate nor voluntary, would pollute the overall information environment.

A misleading implication might not require any direct falsehoods. Rather, the message “Joe answered the quiz at Acme.com, why don't you try?” seeks to drive traffic to Acme's web site by suggesting the thought, “my friend Joe took the time to take this quiz, so maybe I should too.” The message does this even if Joe thought the quiz was rotten after he finished it, or hates the actual products sold at Acme's site, or never paid attention to the fact that Acme sponsored the quiz. Indeed, Facebook's own promotional materials show how the video rental site Blockbuster used Facebook Ads to transmit messages to a user's friends when a user rated movies on the company's web site or Facebook page. [\[FN116\]](#) Blockbuster essentially inserted a user's name and image into an advertisement for the company and sent it to the user's friends, even though that user may never have rented a movie from Blockbuster at all. Before reform of Beacon, this occurred without explicit permission from the user.

Similarly, a user may have been browsing or buying for a particular purpose that does not indicate any genuine personal recommendation. People frequently consider or make purchases that do not match their true preferences. Knowing that your most fashionable friend bought a certain shirt or your most well-read friend bought a certain book could serve as a strong recommendation for those items--unless the shirt actually was for an “ugly nerd” Halloween costume, the book was assigned class reading, or either one was a gift intended to match the recipient's poor taste rather than the purchaser's good taste. The “ruined Christmas *1129 presents” theme to much anti-Beacon commentary [\[FN117\]](#) demonstrates the likelihood of this last example.

Passive or automatic transmission of social marketing messages (that is, shifting from the model portrayed in Figure 1 to that in Figure 2) further intensifies this possible distortion. Even if the endorser likes the advertiser's products just fine, she might not have gone out of her way to say so. An in-person recommendation to a friend, or even a general review written on a blog, requires the endorser's thought and volition. Recipients of these trusted referrals rely on them in part precisely because of their voluntariness. Routinized social marketing messages, however, require no such effort or choice, which diminishes their value

from heartfelt true endorsements to mechanized impersonal advertisement.

It is easy to understand the cumulative damage that would be caused by many inaccurate (or less than fully accurate) social marketing messages. For a comparison, consider how advertisements for movies sometimes include favorable quotes, notoriously excerpting the only faint praise in an otherwise negative review. [\[FN118\]](#) The practice became sufficiently well-known to damage the efficacy of all such critic blurbs, even the entirely accurate ones. [\[FN119\]](#) If social marketing messages become unreliable in this way, then it may prevent the promise of an online culture of recommendation from coming to fruition.

These dangers intensify because removing the speed bump of an individual's decision to tell friends about a product surely would increase the number of such messages. Apart from any inaccuracy, if in-boxes become cluttered with supposed endorsements from people we know, presumably the effectiveness will plummet. The result could be the “spamification” of social marketing. Consumer attention to social marketing is a finite resource shared by all marketers; if they lack incentives or restrictions that prevent them from depleting that shared resource, the resulting overuse by at least some of them could cause a situation resembling a tragedy of the commons. [\[FN120\]](#)

Apparent social marketing endorsements that do not fully reflect a person's views also harm the supposed endorser by diluting his or her reputation and influence, both quantitatively (too many recommendations make each one less valuable) and qualitatively (recommendations the person would not have otherwise made can be unwise and may discourage***1130** the recipient from relying on that person's opinion in the future). Many motivations inspire individuals to engage in word-of-mouth interactions, including desires to feel smart, to be helpful, to express themselves, or to affiliate themselves with groups that share their opinions. [\[FN121\]](#) Some individuals apparently serve as particularly strong “influencers” within their social circle. [\[FN122\]](#) These influencers--from fashion-forward clothes horses to early-adopter computer geeks--gain satisfaction from starting trends or being the first among their acquaintances to try new products. Recipients of all this word of mouth benefit as well, by gaining reliable sources for information and opinions about products: we all have knowledgeable friends whom we ask about purchasing decisions within their field of expertise. No matter how enthusiastically he or she engages in word of mouth, however, each person has a limited fund of social capital to send information or make recommendations to friends. [\[FN123\]](#) Whatever a person's level of influence, a large number of endorsements that are not fully voluntary will squander that influence. [\[FN124\]](#)

The greatest danger of poor information quality arises in the aggregate. An individual social marketing message that misstates or overstates the supposed endorser's level of support may only mislead its recipient into making an ill-advised individual purchasing decision. Cumulatively, however, too many inaccurate endorsements--or even too many social marketing messages overall--will condition recipients to ignore all of them, good and bad. Bad information could generate enough “noise” to drown out any accurate “signal” transmitted by social marketing. [\[FN125\]](#) This spamification of social marketing would undermine the benefits of online ***1131** word of mouth and possibly destroy systems already in existence that help users navigate the ocean of information available online. [\[FN126\]](#)

C. Identity Control Concerns

The final potential concern about social marketing is much more abstract and theoretical than the first two. Those other concerns arise because the content of social marketing messages contributes to some other consequential harm. Concerns about disclosure relate to the personal details that a customer's friends might discover through social marketing and some of the injuries the customer might suffer as a result of that knowledge, such as embarrassment or awkwardness. Information quality concerns derive largely from the possibility that the substance of a message might mislead or confuse consumers, or the danger that social marketing will contribute to information overload.

Identity control concerns, in contrast, do not depend on other second-order harms. Many commentators consider the exploitation of an individual's reputation or persona for commercial purposes to be objectionable in itself. Regardless of whether the information conveyed in the message is sensitive or misleading, nonconsensual reputational piggy-backing may intrude on autonomy. Moreover, observers often object in particularly strong terms when personal identity is unwittingly entangled in commercial marketing. In this view, such uses interfere with a legally protectable interest in "demarcating a space beyond the reach of market forces." [\[FN127\]](#)

The identity control concern dates back at least to the classic article by Samuel Warren and Louis Brandeis that first articulated a common law right to privacy. [\[FN128\]](#) Their argument has often been cited to justify rules against particular embarrassing disclosures (as well as intrusive means of gathering information). At root, however, Warren and Brandeis had a much broader conception of the "right 'to be let alone.'" [\[FN129\]](#) They referred repeatedly to unauthorized publication of a photograph as an affront to the dignity of the individual, even if no other private details *1132 accompany the image. [\[FN130\]](#) Courts and treatise writers may file disclosure and identity control concerns together under the "privacy" label because of their "family resemblance." [\[FN131\]](#) But identity control differs from disclosure because identity could be implicated regardless of any specific information that might accompany a social marketing message.

Different courts and commentators offer different (though overlapping) accounts of the reasons for concern over identity control. [\[FN132\]](#) At times this diversity borders on incoherence: as Stacey Dogan and Mark Lemley suggest, "[A] review of the cases and the literature reveals that no one seems to be able to explain exactly why individuals should have this right." [\[FN133\]](#)

Many have argued from various perspectives that an individual should be entitled to control the use of his or her own "persona" because it is an extension of the self. [\[FN134\]](#) Warren and Brandeis hinted at this idea in general terms. [\[FN135\]](#) Information associated with online personae such as social network profiles now shapes individual identity and reputation profoundly. [\[FN136\]](#) This may lead to dignitary harms from social marketing that interfere with the integrity of those online personae. [\[FN137\]](#) Some, particularly earlier in the tort's development, also viewed an individual's persona as the fruits of individual effort and relied on a form of Lockean labor *1133 theory to justify protection as a natural right. [\[FN138\]](#) Perhaps this impact leads, or should lead, to a right of control over some aspects of public identity. [\[FN139\]](#)

Probably the most dramatic expression of such objections based on natural rights or personal liberty came in the early case of *Pavesich v. New England Life Insurance Company*, [\[FN140\]](#) involving the unauthorized use of the plaintiff's

photograph in an advertisement for insurance alongside an invented quote about his supposed purchase of an insurance policy: [\[FN141\]](#)

The knowledge that one's features and form are being used for such a purpose, and displayed in such places as such advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master . . . [\[FN142\]](#)

Setting aside the overheated rhetoric, bad social marketing practices could raise the very same concerns. A message that appears to convey an individual's commercial endorsement, even if it does not mislead recipients, could interfere with this natural right to autonomy in the exploitation of identity.

In another vein, some commentators adhere to more economically oriented rationales. Some of them argue that, as in copyright, the law should protect individuals' incentives for the creation and maintenance of a coherent identity that embodies their reputation. [\[FN143\]](#) Others straightforwardly suggest that the commercialization of individual identity***1134** proves its value and therefore conclude that the person behind the persona should be compensated for its use. As another early twentieth century court put it, "If there is value in [identity], sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?" [\[FN144\]](#) Either of these rationales might apply to social marketing, which piggybacks on the customer's reputation among his or her friends to sell products. Wresting control of the persona from an individual for commercial purposes might be seen as something akin to unjust enrichment. [\[FN145\]](#)

Broadly speaking, these two types of arguments, rooted in natural rights or in economic efficiency, map on to two distinct, though overlapping, claims for non-trademark persona rights: a tort claim of appropriation that emphasizes protection of dignitary interests and a right of publicity rooted in economic justifications. [\[FN146\]](#)

It is not clear that mere appearance in a social marketing message necessarily unleashes this sort of metaphysical identity crisis. Nor is it clear that recognizing this injury adds much to the law. To the extent that unwanted exposure of the self causes injury, much would seem to be covered by the disclosure concern discussed above. And a message that was unwanted to the point that its implication of endorsement becomes inaccurate falls within the information quality concern, also discussed above. Nevertheless, some individuals prefer to separate themselves from the commercial realm, distinct from their desire to keep information private or to prevent messages that distort their tastes. As a descriptive matter, the law certainly takes seriously the autonomy interests of individuals in controlling the commercial use of identity. As we shall see, claims arising from these inchoate interests are among the strongest responses to all the concerns about social marketing.