

NOTE

REGULATION OF PAID LISTINGS IN INTERNET SEARCH ENGINES: A PROPOSAL FOR FTC ACTION

*Andrew Sinclair**

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I. INTRODUCTION: THE CURRENT STATE OF PAID PLACEMENT AND PAID INCLUSION “ADVERTISING” IN INTERNET SEARCH ENGINES.

A. *The Practice of Paid Placement and Paid Inclusion*

For years, Internet search engines have served as a starting point for users to find information on the World Wide Web.¹ Search engines are often the first place people turn to locate new websites, and most users think of a search engine as an objective compiler of information on the web.² From the beginning of search engine popularity in the mid 1990s, advertisers have sought to attract searchers to their websites.³ In 1998, a company called Idealab introduced the search engine company Goto.com. Goto.com ranked results not by a computer model of relevance but rather by how much an advertiser would pay for placement at or near the top of the results.⁴

The idea was initially met with ridicule, but by 2001, most of the major search engines were using some sort of sponsored listings, often through partnership deals with Goto.com itself, now known as Overture.⁵ The practice of charging websites for inclusion in search results is now common practice.⁶ Other search engines have adopted their own method of charging website owners for better placement in the search results. For example, the AltaVista

* J.D., Boston University School of Law, 2004; B.A., University of California, Santa Barbara, 2000.

¹ See Memorandum from Susannah Fox, Dir. of Research, Pew Internet & American Life Project, *Pew Internet Project Data Memo: Search Engines 1* (July, 2002), available at http://www.pewinternet.org/reports/pdfs/PIP_Search_Engine_Data.pdf (A study of web users found “that search engines are the most popular way to locate a variety of types of information online – including health information, government information, and religious information.”).

² See Consumer WebWatch, *A Matter of Trust: What Users Want From Web Sites*, 17 (Apr. 16, 2002), at <http://consumerwebwatch.com/news/report1.pdf> (A study of web users found that, “Despite so many people using search engines and despite their importance online, most users express ignorance of the practice of many of these engines taking fees to list some sites more prominently than others in their search results. Only four in ten (39%) Internet users have heard of this practice and only 43 percent of those who use the search engines.”).

³ Saul Hansell, *Clicks for Sale: Paid Placement Is Catching On in Web Searches*, N.Y. TIMES, June 4, 2001, at C1.

⁴ *Id.*

⁵ *Id.*; *Overture – Corporate Overview*, at <http://overture.com/d/USm/about/company/vision.jhtml> (last visited Nov. 10, 2002).

⁶ Letter from Gary Ruskin, Executive Director, Commercial Alert, to Donald Clark, Secretary for the Commission, F.T.C., (July 16, 2001), available at <http://www.commercialalert.org/PDFs/SearchEngines.pdf> [hereinafter Letter from Gary Ruskin].

search engine guarantees paying website owners that their websites will be included in the search database and may receive a ranking boost.⁷ Yahoo! charges site owners to include their sites in the Yahoo Directory, results from which are placed at the top of a user's search result page.⁸ However, at least one consumer advocacy organization has alleged that these practices mislead consumers⁹ into believing that the paid listings are objective search results.¹⁰

Though Internet search engines and web sites present countless legal issues across many areas of the law, the issue of paid search engine listings is really a traditional problem in new clothing. Advertisers have often sought to deceive consumers as they make purchasing decisions, and the specific technique of disguising advertising content to appear objective is nothing new. In the print medium, advertisers write special articles that mimic the magazine's or newspapers' original content.¹¹ On television, program length commercials ("infomercials") follow a similar format to those produced solely for information or entertainment.¹²

These deceptive advertising practices have been serious enough to warrant regulation. As a result of congressional and administrative action, there are now specific guidelines in place requiring advertisers to make clear disclosures about the commercial nature of their content.¹³ Internet search engines have created a new medium for advertisers, and with a new advertising medium arises the need for new guidelines to address potentially deceptive uses of that medium.

B. The Commercial Alert Complaint and the FTC's Response

In July of 2001, Commercial Alert, a commercial advocacy organization founded by Ralph Nader and Gary Ruskin,¹⁴ filed a complaint with the FTC

⁷ AltaVista, *Express Inclusion*, at http://www.altavista.com/web/express_incl (last visited Jan. 26, 2003); Greg R. Notess, *AltaVista; Teh [sic] Search Engine Introduces Paid Inclusion* ONLINE 16, Sept. 1, 2001; Pandia, *AltaVista Offers Paid Express Inclusion Plan*, at <http://www.pandia.com/sw-2001/36-altavista.html> (last updated July 11, 2001).

⁸ Yahoo!, *Suggest a Site Using Yahoo! Express*, at <http://docs.yahoo.com/info/suggest/busexpress.html> (last visited Jan. 6, 2003); Michael Doan, *Search Engine Listings Going to Highest Bidders*, KIPLINGER BUSINESS FORECASTS, Jan. 21, 2002; Pandia, *Yahoo! Introduces Annual Fee* at <http://www.pandia.com/sw-2001/68-yahoo.html> (Dec. 30, 2001).

⁹ Letter from Gary Ruskin, *supra* note 6.

¹⁰ *Id.*

¹¹ See *infra* text and accompanying notes 60-62.

¹² See *infra* text and accompanying notes 57-59.

¹³ See *infra* Parts III.B.-C.

¹⁴ Commercial Alert was founded in 1998 by Ralph Nader and Gary Ruskin. The organization's mission is "to keep the commercial culture within its proper sphere, and to prevent it from exploiting children and subverting the higher values of family, community,

against several of the major search engine companies for allegedly engaging in deceptive advertising.¹⁵ The complaint alleged that the placement of advertisements within search engine results is likely to mislead consumers into thinking that the advertisements are search results based solely on relevancy.¹⁶ The FTC declined to take formal action against any of the search engine companies listed in the complaint, but noted that its decision should not be construed as a determination on whether or not the practices violate any statute enforced by the FTC.¹⁷ The FTC also sent letters to the major search engines, including some that were not listed in the Commercial Alert complaint.¹⁸ The letter recommended that search engine companies review their websites and make changes to ensure that: “any paid ranking search results are distinguished from non-paid results with clear and conspicuous disclosures; the use of paid inclusion is clearly and conspicuously explained and disclosed; and no affirmative statement is made that might mislead consumers as to the basis on which a search result is generated.”¹⁹ The FTC thus laid out some guidelines for the search engine companies.²⁰

II. THE NEED TO REGULATE PAID SEARCH ENGINE LISTINGS

The practices of including website advertisements within search engine results and charging websites for inclusion in a search engine’s database create the potential for serious harm in the form of consumer confusion.²¹ General Internet search engines have become a nearly universal starting point for those seeking to find information on the World Wide Web.²² The six most visited websites in April 2002 prominently feature search engines, all of which return some form of paid results.²³ Because of their widespread use, consumers have

environmental integrity and democracy.” Commercial Alert, *Who We Are and What We do*, at <http://www.commercialalert.org/aboutus.pdf> (last visited Nov. 11, 2003).

¹⁵ Letter from Gary Ruskin, *supra* note 6.

¹⁶ *Id.*

¹⁷ Letter from Heather Hipsley, Acting Associate Dir., F.T.C. Division of Advertising Practices, to Gary Ruskin, Executive Director, Commercial Alert, (June 27, 2002), *available at* <http://www.commercialalert.org/PDFs/ftcresponse.pdf> [hereinafter Letter from Heather Hipsley].

¹⁸ *Id.* at 6.

¹⁹ Letter from Heather Hipsley, Acting Associate Dir., F.T.C. Division of Advertising Practices, to [search engine company], (available as an attachment to Letter from Heather Hipsley, *supra* note 17 at 2).

²⁰ *See* Letter from Heather Hipsley, *supra* note 17, at 1.

²¹ Letter from Gary Ruskin, *supra* note 6, at 4.

²² Fox, *supra* note 1, at 1, *available at* http://www.pewinternet.org/reports/pdfs/PIP_Search_Engine_Data.pdf.

²³ Media Metrix, *U.S. Top 50 Web and Digital Media Properties*, at

come to expect relevancy from search engine results.²⁴ Many consumers are unaware that some search engine results are the product of paid placement or paid inclusion, and many believe that it is important to know which listings have been paid for.²⁵

Two policy issues present themselves when search engine results mislead Internet searchers. First, the relevant search engine results are essential to enabling Internet users to find information. Commentators have praised Google's renowned search engine for efficiently bringing users to the information that they seek.²⁶ When Internet users are looking for unbiased information, a search engine system that promotes profitable services will limit the searcher's ability to find the information for which they are looking.²⁷

The second policy issue is the searcher's inability to seek remedies against the misleading search engine. To date, the bulk of the litigation against search engines for their paid listings activity has been from trademark owners seeking to prevent consumer confusion.²⁸ Trademark litigation is fueled by the

<http://www.jmm.com/xp/jmm/press/mediaMetrixTop50.xml> (last visited Jan. 12, 2003) (Jupiter Media Metrix is an internet research company that rates the most visited web properties on a monthly basis.); Danny Sullivan, *Buying Your Way In To Search Engines: Paid Placement, Paid Inclusion, Paid Submissions*, at <http://searchenginewatch.com/webmasters/paid.html> (last updated June 29, 2002).

²⁴ Letter from Heather Hipsley, *supra* note 17, at 3.

²⁵ Consumer WebWatch, *supra* note 2, at 17.

²⁶ *Google Sweeps Search Engine Watch Awards; Leading Search Site Recognized for Outstanding Search Service and Most Webmaster Friendly Search Engine*, BUS. WIRE (Jan. 25, 2001) (announcing Google as the winner of the Search Engine Watch Outstanding Search Service award for its "exceptional performance in helping Internet users locate information from the World Wide Web").

²⁷ For example, a Jan. 20, 2003 search on www.go.com for "Boston University" listed the official Boston University website at number eleven. The first result is a link to Amazon.com, while Rent.com occupies the number two position. *Go.com search: boston university*, at http://srch.overture.com/d/search/p/go/?Partner=go_home&Keywords=boston+university (last visited Jan. 20, 2003).

²⁸ See *Prime Publishers, Inc. v. American-Republican, Inc.*, 160 F. Supp. 2d 266, 284-285 (D. Conn. 2001) (enjoining a cybersquatter from using the plaintiff's trademark in search terms or search engines); *Nissan Motor Co. v. Nissan Computer Corp.*, 204 F.R.D. 460, 466 (C.D. Cal. 2001) (noting that "[t]here appears to be no good cause for not extending [trademark protections and limitations] to cases where one infringes or dilutes another's mark by purchasing a search term . . . for the purpose of manipulating a search engine's results list."); *Playboy Enters., Inc. v. Netscape Corp.*, 55 F. Supp. 2d 1070 (C.D. Cal.), *aff'd*, 202 F.3d 278 (9th Cir. 1999) (finding that the use of trademarks to generate relevant advertising on search engine results pages was not infringing activity because the holder failed to show that its trademarks, which were also ordinary English words, were used in the protected sense).

trademark owner's incentive to protect its mark. If someone other than the trademark owner buys a search engine listing for that trademarked phrase, the user may be misdirected to a competitor's website.²⁹ The trademark owner thus has an incentive to police search engines for potentially infringing activity.

Trademark law, however, does not protect generic phrases.³⁰ There is therefore no incentive for any private entity to police the search engines to prevent consumer confusion with respect to generic phrases. Yet, website operators will still extract a referral fee for searches of the generic phrase, even though they have no legally protected interest in the phrase. No single website operator, however, will have a legally protected interest in search engine referral traffic.³¹ Furthermore, the harm of losing the attention of a consumer to a competitor is reduced because no trademarks have lost value. For example, if a search for "soda pop" leads a consumer to Pepsi's website, Coca-Cola may have lost a customer, but it has not incurred any damage to the "Coca-Cola" mark.

The trademark owner will seek to protect its mark against consumer confusion as to the source of a product or service. While this is beneficial to both mark owners and consumers,³² only owners have legally protected interests in their marks.³³ Therefore, only the mark owners have the ability to

²⁹ See *Nissan Motor Co.*, 204 F.R.D. at 466.

³⁰ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

³¹ See *id.*

³² See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) ("National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.").

³³ See *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (holding that consumers do not have standing to bring false advertising claims under the Lanham Act); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1179 (3d Cir. 1993) (holding that consumers do not have standing to bring false advertising claims in federal courts); *Dovenmuehle v. Gilldorn Mort'g Midwest Corp.*, 871 F.2d 697, 701 (7th Cir. 1989) (dismissing Lanham Act claims by consumers on the basis of standing because they had "no interest in the trade name" and were "not even arguably engaged in commercial activities"); *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004, (1971) (concluding that "Congress' purpose in enacting § 43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally and almost certainly without any consideration of consumer rights of action in particular"); *but see Ortho Pharmaceutical Corp. v. Cosprophar, Inc.* 32 F.3d 690, 694 (2d Cir. 1994) (noting that, "while a plaintiff must show more than a 'subjective belief' that it will be damaged, it need not demonstrate that is in direct competition with the defendant"); Remarks of Rep. Kastenmeier, CONG. REC. H10420-21H (daily ed. Oct. 19, 1988).

bring action to protect the mark.³⁴ In the case of generic search terms in search engines, however, consumer confusion is primarily harmful to the consumers themselves. If consumers cannot find the most relevant information to fit their needs because a financially motivated party has artificially raised less relevant search results to the top of the list, the consumers themselves are worse off, not the marketer of a particular product. In addition, consumers do not have any recourse because they are, by the nature of their confusion, unaware that they are not getting the most relevant search results.³⁵ Therefore, consumers are unable to take legal action to protect themselves because they are unaware that they are being misled. The very nature of the violation prevents consumers from advocating against it.

One policy argument against regulating paid search engine results is the idealistic notion that the spirit of the Internet requires complete freedom of information. Congress, courts, and administrative agencies do not, however, share this view.³⁶ They have continued to create and enforce legislation that views the Internet not as an entity but as a channel of commerce.³⁷ However, regulation of e-commerce, Internet advertising, and internet-related services does not preclude the argument that public domain information should be free from government interference. Arguably, a search engine is merely a compiler of facts (namely, the location of various html documents³⁸) that can be thought of as an editorial work. Indeed, each search engine has its own method of

³⁴ See *supra* note 33 and accompanying text.

³⁵ Consumer WebWatch, *supra* note 2, at 17.

³⁶ American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) (holding that a state statute prohibiting the transmission of material harmful to minors over the internet was unconstitutional because the internet is part of interstate commerce and thus falls within the regulatory power of the federal government); FTC, *Dot Com Disclosures: Information About Online Advertising*, 3, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.pdf> (noting that "[t]he [FTC] Act is not limited to any particular medium. Accordingly, the [FTC]'s role in protecting consumers from unfair or deceptive acts or practices encompasses advertising, marketing, and sales online").

³⁷ FTC *supra* note 36 at 3.

³⁸ Html stands for "hypertext markup language". It is the standard programming language for web pages viewable through browsers such as Netscape's "Navigator" and Microsoft's "Internet Explorer". For more information on html, see World Wide Web Consortium, *Hypertext Markup Language* at <http://www.w3.org/MarkUp/> (last visited March 22, 2003). Some search engines, such as Google, AltaVista, and MSN have started indexing other popular document formats such as PDF, and Microsoft Office files. Chris Sherman, *What's New at AltaVista and MSN Search*, 464 SEARCH DAY (Feb. 13, 2003), at <http://www.searchenginewatch.com/searchday/03/sd0213-avmsn-update.html>; Google, *Google Web Search Features*, at <http://www.google.com/help/features.html#pdf> (last visited Mar. 22, 2003).

determining which results to return for any given search.³⁹ The search engine results page can therefore be considered a subjective expression of what the search engine programmers consider “relevant”.⁴⁰

III. REGULATION OPTIONS FOR PAID SEARCH ENGINE RANKINGS

A. *Congress Could Regulate Paid Search Engine Listings but is Unlikely to Pass Specific Search Engine Legislation.*

The national and international nature of the Internet requires that, if it is to be regulated, it be regulated at the federal level.⁴¹ Because commerce over the Internet is most often interstate commerce, it demands consistent treatment that can only be achieved by federal regulation.⁴² Congress could, for example, regulate the use of paid search engine listings by altering the enabling statute of either the Federal Communications Commission (“FCC”) or the Federal Trade Commission (“FTC”) to force either agency to take action against search engines that use sponsored listings when such sponsorship is undisclosed. Although Congress has traditionally been reluctant to modify the Communications Act or the Federal Trade Commission Act, this type of legislation is not unheard of.⁴³ For example, in 1960, Congress amended the Communications Act by strengthening disclosure requirements for paid programming.⁴⁴ Though the FCC already had the statutory power to regulate “payola” in the broadcasting industry, it was Congressional interest and action that forced the FCC to take a tough position against undisclosed paid programming.⁴⁵

A similar approach could be used to regulate the practice of paid search engine listings. The FTC’s broad statutory power to regulate unfair or deceptive advertising includes the ability to regulate Internet advertising.⁴⁶ However, Congress could push the FTC into taking action against the search engines or more clearly defining the appropriate use of paid listings, by either passing new legislation that would specifically address paid search engine

³⁹ *Brookfield Communications, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1045 (9th Cir. 1999).

⁴⁰ *Id.*

⁴¹ *Pataki*, 969 F. Supp. at 181.

⁴² *Id.*

⁴³ See Lauren J. Katunich, *Notes & Comments: Time To Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 *LOY. L.A. ENT. L. REV.* 643, 646-649 (2001) (explaining that congressional interest in payola regulation led to a modification of the federal Communications Act).

⁴⁴ See *id.* at 647.

⁴⁵ *Id.* at 647.

⁴⁶ FTC, *supra* note 36, at 3.

listings (or undisclosed advertising) or beginning its own analysis of the problem, thus bringing greater interest to the FTC. This situation would run parallel to the FCC payola regulatory action taken in the late 1950s and early 1960s.⁴⁷ In the case of payola, the FCC had already been empowered to regulate radio station airwaves, but it took the House Special Subcommittee on Legislative Oversight to expose the tax evasion, bribes, and other influences that were persuading disc jockeys to play particular records.⁴⁸ This led Congress to amend the Communications Act to give the FCC explicit authority to regulate the practice of payola.⁴⁹

Moreover, Congress has already exercised its power to force agency regulation in this context.⁵⁰ Indeed, the Internet Tax Freedom Act mandates that the FTC promulgate rules that require parental permission before collecting certain types of personal data from minors over the Internet.⁵¹ Conceivably, Congress could create a similar statute to force the FTC to promulgate rules specific to online advertising techniques.⁵² Congress, however, is unlikely to specifically address the problem of undisclosed paid search engine listings. Traditionally, Congress has been reluctant to prescribe specific rules to the FTC. Furthermore, the problem would have to be far-reaching and pose the possibility of serious public harm to receive Congressional consideration.

B. The FTC Has the Ability to Regulate and has Demonstrated its Authority Over Online Advertising.

Section 5 of the Federal Trade Commission Act gives the FTC the authority to regulate “unfair or deceptive acts or practices in or affecting commerce.”⁵³ The Act defines “commerce” as “commerce among the several States or with foreign nations. . .”⁵⁴ Because the Internet crosses state and national boundaries, the FTC has declared that commercial activity on the Internet falls

⁴⁷ For a brief history of the payola statute, see Katunich, *supra* note 43, at 646-49.

⁴⁸ *Id.* at 646-47.

⁴⁹ *Id.*

⁵⁰ Charles R. Topping, Student Article, *The Surf Is Up, But Who Owns The Beach? - Who Should Regulate Commerce on the Internet?* 13 ND J. L. ETHICS & PUB POL'Y 179, 183 (1999).

⁵¹ *Id.*

⁵² *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457, 472 (2001) (explaining that Congress can confer decision-making authority upon an agency as long as it provides an “intelligible principle to which the person or body authorized to act is directed to conform”).

⁵³ 15 U.S.C. § 45(a)(1) (2001).

⁵⁴ See Federal Trade Commission Act of 1914, Pub. L. No. 106-170, 38 Stat. 717 (codified as amended at 15 U.S.C. § 44 (2001)).

within its statutory power.⁵⁵ The FTC has already brought numerous law enforcement actions against purveyors of fraud on the Internet, and it continues to seek out violators.⁵⁶

Though the FTC has not yet brought any actions against search engines for the use of paid listings, it has brought actions in parallel situations involving television and print content. In *National Media Corp.*⁵⁷, the FTC issued a consent order against the manufacturer of various household products for, among other things, “deceptive format.” The FTC claimed that National Media Corp. represented that its commercials were independent television programs and not paid commercial advertising.⁵⁸ Because the commercials were paid advertisements, the FTC argued that the representations that they were independent were false and misleading.⁵⁹

In *Georgetown Publishing House Limited Partnership*⁶⁰, the FTC alleged that an advertisement mailed to consumers constituted an unfair or deceptive act or practice within the scope of Section 5(a) because its representation as an independently-written magazine article was false and misleading. The FTC ordered Georgetown Publishing House to cease misrepresenting, directly or indirectly, that products have been independently reviewed or evaluated.⁶¹ Further, the FTC ordered Georgetown Publishing House to cease representing paid advertisements as independent reviews or articles.⁶²

The FTC has thus demonstrated its statutory authority to regulate advertising practices in many mediums, including the Internet. However, this does not necessarily mean that FTC is the only potential regulator of search engine advertising practices.

C. *The FCC Has the Ability to Regulate but Has Developed a Policy Against Internet Regulation.*

The FCC has the statutory power to regulate search engines, but has so far declined to get involved in such regulation.⁶³ The FCC considers the regulation of Internet content to be beyond the scope of its regulatory power.⁶⁴

⁵⁵ Patricia A. Davidson & Christopher N. Banthin, *Untangling The Web: Legal and Policy Tools to Restrict Online Cigar Advertisement*, 35 U.S.F. L. REV. 1, 14 (2000).

⁵⁶ See FTC, *supra* note 36, at 3; Davidson & Banthin, *supra* note 55, at 14.

⁵⁷ Nat'l Media Corp., 116 F.T.C. 549, 559 (1993) (consent order).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Georgetown Publ'g House Ltd. P'ship, 122 F.T.C. 392, 393-94 (1996) (consent order).

⁶¹ *Id.* at 398.

⁶² *Id.*

⁶³ See *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 207 (D.C. Cir. 1982).

⁶⁴ A. Nati Davidi, *Patrolling The Red Light District Of The Information Superhighway*,

Some have argued, however, that the FCC does indeed have the statutory authority to regulate the Internet.⁶⁵ In *United States v. Southwestern Cable Co.*⁶⁶, the United States Supreme Court broadly construed the Communications Act to give the FCC authority over communication forms beyond those specifically described in the Communications Act. The court noted that the legislative history of the Communications Act “indicates that the Commission was given ‘regulatory power over all forms of electrical communication.’”⁶⁷

The FCC first addressed the regulation of computers used for communication in its “Computer I” proceeding in 1966.⁶⁸ The resulting rules, which became effective in 1971, required the FCC to separate a carrier’s communications activities from its data processing services.⁶⁹ Though the Second Circuit upheld the new rules, the merging of communications and data processing technologies soon rendered them obsolete.⁷⁰ The FCC revisited the problem in the “Computer II” proceedings of 1976.⁷¹ The communication and data processing functions of computers were often merged to create “enhanced services.”⁷² The FCC decided not to regulate these enhanced services because it would be too difficult to separate the communication function from the data processing function.⁷³ However, the FCC did assert its jurisdiction over the matter to preempt potentially inconsistent state laws from interfering with what the FCC determined to be a competitive marketplace.⁷⁴

The FCC therefore has jurisdiction over the communication aspects of the Internet, but has exercised this jurisdiction only to preempt state regulation.⁷⁵ Because of the difficulty in defining which aspects of the Internet fall within the FCC’s regulatory power, however, the FCC is unlikely to regulate any Internet content. Further, a Congressional mandate to require FCC regulation of Internet content is unlikely in light of the problems in defining the FCC’s authority and the availability of FTC regulation. The definitional problems that lead to the FCC’s decision not to regulate Internet content may have a negative effect on consumer information. The FCC requires that sponsored broadcasts are announced as such, but has no parallel rule for sponsored

49 ADMIN. L. REV. 429, 446 (1997).

⁶⁵ Davidson, *supra* note 55, at 14.

⁶⁶ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968).

⁶⁷ *Id.*

⁶⁸ *Computer & Communications Industry Ass’n*, 693 F.2d at 203.

⁶⁹ *Id.*

⁷⁰ *Id.* at 204.

⁷¹ *Id.*

⁷² *Id.* at 207.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Internet content.⁷⁶ The policy behind this requirement should be the same online as on the airwaves to alert consumers as to the content's potential biases.⁷⁷ Thus, if the FCC did regulate Internet content, it would likely require disclosure of paid search engine content.⁷⁸

D. The First Amendment Could be a Barrier to Regulation.

Regardless of whether regulation is rooted in constitutional or statutorily granted power, the constitutionally mandated right to free speech could limit any regulatory body's ability to regulate paid search engine listings.⁷⁹ Though a lesser level of protection is granted to commercial speech, the Constitution still protects commercial speech from unwarranted governmental regulation.⁸⁰ Nevertheless, the government may ban communication that is "more likely to deceive the public than to inform it."⁸¹

In *Central Hudson Gas & Electric*, the Supreme Court applied a four-part analysis to determine whether a regulation on commercial speech violates the First Amendment.⁸² The first part of this analysis requires the court to determine whether the First Amendment protects the expression at all.⁸³ "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."⁸⁴ It would seem that a determination by Congress or an administrative agency that the use of paid search engine listings is misleading would likely overcome the barrier to speech regulation.⁸⁵

A determination that an advertisement violates Section 5 of the FTCA is not necessarily enough to trump First Amendment interests.⁸⁶ Indeed, if a court finds paid search engine listings not to be misleading, the governmental body seeking to regulate the practice must have a substantial alternative government interest in the regulation.⁸⁷ Furthermore, that interest must directly advance

⁷⁶ See 47 C.F.R. § 73.1212 (2003) (requiring that sponsored broadcasts are announced as such and "by whom or on whose behalf such consideration was supplied").

⁷⁷ *In re Applicability Of Sponsorship Identification Rules*, 40 F.C.C. 141, 141 (May 6, 1963).

⁷⁸ See *id.*

⁷⁹ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-63 (1980).

⁸⁰ *Id.*

⁸¹ *Id.* at 563.

⁸² *Id.* at 566.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *id.* at 563.

⁸⁶ *United States v. Reader's Digest Ass'n, Inc.*, 464 F. Supp. 1037, 1051 (D. Del. 1978), *aff'd*, 662 F.2d 955 [****].

⁸⁷ *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-

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the interest asserted and must not be more extensive than necessary.⁸⁸ Finally, the agency must not go further than necessary to eliminate the deception.⁸⁹

Though the First Amendment may offer some hurdles to the regulation of paid search engine listings, the deceptive nature of undisclosed paid listings probably exempts them from First Amendment protection. If a court determines otherwise, a governmental body seeking to regulate the practice must ensure that all of the *Central Hudson Gas & Electric* requirements are satisfied.

IV. PROPOSED ACTION

A. *The FTC Should Bring Action Against Search Engines that Use Paid Listings Without Clear Disclosure.*

Congress, the FCC, and the FTC all have the power to regulate the practice of paid listings in search engines, but the FTC is the regulatory body best poised to regulate the area. Congress is unlikely to find the practice harmful enough to warrant specific regulation, not because the consumer confusion is not harmful, but because the harm caused by deceptive advertising is difficult to measure.⁹⁰ Furthermore, the FCC has little motivation to get involved.⁹¹ Regulating Internet content would be a drastic departure from its dormant position of precluding state regulation without regulating.⁹² The FTC, in contrast, has the power, resources, and position to regulate this area. First, its authority to regulate deceptive trade practices is provided with clarity in its enabling statute.⁹³ Second, unlike the FCC, the FTC has already demonstrated its jurisdiction over Internet commerce.⁹⁴ Finally, and most importantly, the FTC has already involved itself in the particular matter.⁹⁵ By issuing the letter to the search engines, the FTC has demonstrated its involvement and interest in regulating the practice of paid search engine listings and has announced to Congress and other agencies its intention to deal with the problem.⁹⁶

Unfortunately, the FTC's letter was not enough to correct the problem of

566 (1980).

⁸⁸ *Id.*

⁸⁹ *Id.*; *Reader's Digest Ass'n, Inc.*, 464 F. Supp. at 1051.

⁹⁰ Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 681-84 (1985).

⁹¹ *See Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 207 (D.C. Cir. 1982).

⁹² *See id.*

⁹³ 15 U.S.C. § 45 (2001).

⁹⁴ FTC *supra* note 36.

⁹⁵ Letter from Heather Hipsley, *supra* note 17.

⁹⁶ *See id.*

consumer deception.⁹⁷ In previous instances, the FTC has defined specific rules for an emerging but potentially deceptive practice by bringing a claim against one or more of the initial violators.⁹⁸ These actions outlined basic guidelines specific to the practice to which current and future advertisers could adhere to avoid a violation.⁹⁹

Because of the ambiguity in requiring that paid search engine listings be clearly identified as such, the FTC should announce specific rules about what practices are impermissible. Presumably, Google's paid listings are clearly identified by their brightly colored backgrounds, larger font size, indentation offset from the other results, and vertical space between the paid and unpaid listings.¹⁰⁰ On the other hand, AltaVista's paid listings, which appear in the same font, font size, color, and spacing as unpaid listings, are not recognizable as anything beyond the standard objectively ranked search results.¹⁰¹ The FTC's task is to define the point in which the listings are clearly identified by setting out specific requirements.

B. Paid Listing and Paid Inclusion Placement Models Violate Section 5 Unless There is Clear Disclosure.

Section 5 of the FTC Act gives the FTC the authority to regulate unfair or deceptive acts.¹⁰² A practice is deceptive within the meaning of Section 5 if the consumer is "likely to suffer injury from a material misrepresentation."¹⁰³

⁹⁷ See Danny Sullivan, *Paid Content Disclosure Ratings: June 2002*, at <http://searchenginewatch.com/sereport/02/07-disclosure.html> (last updated July 2, 2002).

⁹⁸ See *Nat'l Media Corp.*, 116 F.T.C. 549, 559 (1993) (consent order); *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. 392, 393-94 (1996) (consent order).

⁹⁹ *Nat'l Media Corp.*, 116 F.T.C. at 559; *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. at 393-94.

¹⁰⁰ Danny Sullivan, *FTC Recommends Disclosure To Search Engines*, at <http://searchenginewatch.com/sereport/02/07-ftc.html> (July 2, 2002) ("FTC attorneys Beverly Thomas and Dean Forbes . . . both indicated that personally—not speaking with an official commission viewpoint—they especially like the way Google has handled the situation with paid placement.").

¹⁰¹ *Id.* ("AltaVista provides an example of what I think fails the recommendations. There, paid listings are segregated, as with Yahoo. However, the heading is "Products and Services," which I don't feel meets the "presentation" quality the FTC is looking for, which includes using terms that clearly denote the paid nature of content."); *AltaVista: Boston University*, at <http://altavista.com/web/results?q=boston+university> (last visited Jan. 28, 2003) (AltaVista has since changed its search result format slightly. The words "sponsored matches" now appear above the first results, but the font size, font color, spacing, and background color all appear the same as the actual search results which begin at the fifth listing.).

¹⁰² 15 U.S.C. § 45 (2001).

¹⁰³ *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984).

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Thus, the FTC requires that online advertising must be truthful and not misleading.¹⁰⁴ If a search engine user clicks on a hyperlink advertisement believing it to be independently relevant to the search, that user is being misled by the advertisement.¹⁰⁵ If there is no clear disclosure that the listing or advertisement has been paid for, a consumer acting reasonably is likely to be misled by the listing, and this is material to the consumer's decision to visit the advertiser's website.¹⁰⁶

C. Current Paid Listing and Paid Inclusion Practices Violate Section 5 Because There is No Clear Disclosure that Such Practices are Taking Place.

There are two reasons that the current practices of paid listings and paid inclusion constitute deceptive advertising under Section 5. First, the advertisements are displayed in a deceptive format.¹⁰⁷ Second, the advertisements appear to the user to be endorsed by the search engine.¹⁰⁸

The use of advertising that looks like independent content has been determined to be misleading in previous cases.¹⁰⁹ In the consent order against National Media Corp., the FTC asserted that paid television advertising that is represented "directly or by implication" to be independent television programming violates Section 5.¹¹⁰ The FTC did not report exactly how National Media Corp. misrepresented its advertising as independent programs (other than the fact that the programs were of "program-length").¹¹¹ However, in its compliance order, the FTC required that the paid advertisement display a specific disclosure.¹¹² Though the National Media Corp. Consent Order alleged many other violations in addition to "deceptive format", it clearly states that the FTC believed deceptive format to be a violation of Section 5.¹¹³ The FTC's clarity regarding the substance of the disclosure sets a standard for other infomercial advertisers to comply with Section 5.¹¹⁴ This level of clarity

¹⁰⁴ FTC *supra* note 36, at 4.

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ Nat'l Media Corp., 116 F.T.C. 549, 559 (1993) (consent order).

¹⁰⁸ *See id.* at 559-560.

¹⁰⁹ *Nat'l Media Corp.*, 116 F.T.C. at 574; *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. 392, 397 (1996) (consent order).

¹¹⁰ *Nat'l Media Corp.*, 116 F.T.C. at 559.

¹¹¹ *Id.* at 549.

¹¹² *Id.* at 582. (requiring that paid advertisement longer than 15 minutes display the following disclosure: "The program you are watching is a paid advertisement for [the product or service].").

¹¹³ *Id.* at 559.

¹¹⁴ *See id.*

is lacking in the FTC's letter to the search engines, which leaves the search engines to do their own analysis of what constitutes deceptive format.¹¹⁵

The *Georgetown Publishing* consent order also indicates that the FTC considers deceptive format an actionable violation of Section 5.¹¹⁶ In *Georgetown Publishing*, the FTC's primary complaint was the misleading format of a direct mail advertisement, thus strengthening the notion that deceptive format is enough to warrant regulation under Section 5.¹¹⁷ The order required Georgetown Publishing Limited Partnership to cease and desist from misrepresenting that the product had been independently reviewed or evaluated and that the article was not a paid advertisement.¹¹⁸ The FTC however, did not specifically indicate how an appropriate disclosure would comply with Section 5.¹¹⁹

The second reason that undisclosed paid search engine listings violate Section 5 on the basis of deceptive advertising is that the advertisements appear as endorsements from the search engine company. In the *National Media* consent order, the FTC ordered National Media to cease representing that its advertisements were endorsed unless the endorsement meets the guidelines set forth by the FTC.¹²⁰ The FTC has issued guidelines concerning the use of endorsements in advertising.¹²¹ Though these guidelines do not have the force of the law, they are intended to describe the standards required to avoid deceptive advertising violations of Section 5.¹²² The guidelines define an endorsement as an advertising message which consumers "are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."¹²³ Search engines put forth enormous efforts to be recognized as providing the most relevant search results.¹²⁴ They thus

¹¹⁵ Letter from Heather Hipsley, *supra* note 19, at 2-3.

¹¹⁶ See *Georgetown Publ'g House Ltd. P'ship*, 122 F.T.C. 392, 393-94 (1996) (consent order) (finding that representing a direct mail advertisement as an independently written article, when in fact it was not, constituted a misleading advertisement and therefore violated Section 5).

¹¹⁷ See *id.*

¹¹⁸ *Id.* at 398.

¹¹⁹ See *id.*

¹²⁰ *Nat'l Media Corp.*, 116 F.T.C. 549, 581 (1993) (consent order).

¹²¹ Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (1990).

¹²² Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 608 (1991).

¹²³ 16 C.F.R. § 255.0(b).

¹²⁴ See, e.g., *About AltaVista: Company Background*, at <http://www.altavista.com/about> (last visited Jan. 28, 2003) ("Our Internet Search provides integrated search results, offering users immediate access to the most relevant information. . ."); *Terra Lycos / Web Sites &*

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implicitly endorse their own search results as relevant to the users' searches. When users click on paid listings, they believe the endorsement of the search engine that the listings are relevant to their search.¹²⁵ This is the situation that the FTC's endorsement guidelines, backed by the statutory power of Section 5, seek to protect. Therefore, the use of improperly disclosed paid search engine listings violate Section 5 on the grounds of deceptive format and deceptive endorsements.

D. The FTC's Warnings are Insufficient to Stop the Practice of Improperly Disclosed Search Engine Listings.

Consumer WebWatch and Search Engine Watch both praised the FTC for its letter to the search engine companies.¹²⁶ Despite this praise, however, some of the major search engines are still displaying paid advertisements in a deceptive format and/or with an implicit deceptive endorsement. While AOL Search has grouped its results into "Sponsored links" and "Matching sites", including the phrase "provided by a third party and not endorsed by AOL", MSN Search uses the same spacing, typeface, and text color to make its "sponsored sites" match its "web directory sites."¹²⁷ iWon.com separates its "Sponsored Listings" from its "Web sites," but the user must scroll down in order to see the unpaid listings.¹²⁸ Furthermore, the format of the results page

Services, at http://www.terralycos.com/about/au_1_3.asp (last visited Jan. 28, 2003) ("HotBot.com is an award-winning smart, sophisticated search engine with more than 40 tools to help users better articulate their searches and get relevant search results quickly and easily."); *Teoma Search: About Teoma*, at <http://sp.teoma.com/docs/teoma/about/searchwithauthority.html> (last visited Jan. 28, 2003) ("At Teoma, we've invented a whole new approach to search, and this allows us to achieve our mission of providing the best search results on the Web.").

¹²⁵ See Consumer WebWatch, *supra* note 2, at 17.

¹²⁶ Consumers Union, *Consumer Webwatch Issues Statement In Response To Recent FTC Warning*, at <http://www.consumerwebwatch.org/mediacenter/FTCsearchengineeleaseJuly0302.htm> (July 3, 2002) ("Consumer WebWatch, a non-profit research project whose goal is to improve the credibility of online content, applauds the Federal Trade Commission's recent action requiring major Internet search engines to disclose and make clear instances in which companies have paid to be included in Web search results."); Sullivan, *supra* note 97, ("The US Federal Trade Commission has made a landmark recommendation to the search engine industry that it should improve disclosure of paid content within search results.").

¹²⁷ *AOL Search: Search Results for "Credit Card"*, at <http://search.aol.com/dirsearch.adp?query=credit+card> (last visited Jan. 27, 2003); *MSN Search: Credit Card*, at <http://search.msn.com/results.asp?q=credit+card> (last visited Jan. 27, 2003).

¹²⁸ *IWon*, at <http://search.iwon.com/commerce/multisearch.jsp?searchfor=credit+card> (last visited Jan. 27, 2003).

is very similar to that of the popular search engine Google.¹²⁹ This gives the appearance that the results are provided by Google when, in fact, only the “Web sites” section of the listings comes from Google.¹³⁰

Because paid search engine listings often still appear to be independently relevant website listings resulting from any given search, the FTC should take formal action to clarify exactly how clear the search engine companies need to be regarding the source of their result listings. Given that the FTC has already offered guidance to the search engine companies in their letter responding to the Commercial Alert complaint, and this guidance has proven ineffective, the FTC should pursue adjudication against one or more of the search engine companies to prevent further consumer confusion resulting from deceptive advertising. By issuing a consent order against violating search engine companies, the FTC can define the same type of specific guidelines for Section 5 compliance as it did for the television broadcasting industry in *National Media Corp.*¹³¹

E. Proposed Requirements:

1. Paid Listings Should Contain an Identifying Phrase Such As “Paid Listing.”

The FTC letter to the search engines recommends that search engine website owners ensure that their sites distinguish paid from non-paid listings with “clear and conspicuous disclosures.”¹³² The letter falls short of explaining exactly what type of disclosure is clear and conspicuous in the context of paid search engine listings.¹³³ By requiring specific language such as the words, “paid listing” next to any search engine result that has been artificially boosted in relevance ranking, the FTC will send a clear message to the search engines of exactly how to alert consumers that the link is really an advertisement related to their search and not actually the most relevant result.

Alternatively, the FTC could offer a choice of phrases that serve this purpose. The phrase “sponsored listing” might better serve the search engines, as it more accurately encompasses any advanced placement. Arguably, a search engine could try to avoid the “paid listing” tag by bargaining for something other than cash payment such as an advertising barter (trading high link placement within search engine results for advertising on another website)

¹²⁹ *Id.*; *Google Search: Credit Card*, at <http://www.google.com/search?q=credit+card> (last visited Jan. 27, 2003).

¹³⁰ *See iWon*, at <http://search.iwon.com/commerce/multisearch.jsp?searchfor=credit+card> (last visited Jan. 27, 2003).

¹³¹ *Nat'l Media Corp.*, 116 F.T.C. 549, 581 (1993) (consent order).

¹³² Letter from Heather Hipsley, *supra* note 19, at 2.

¹³³ *Id.* at 2-3.

or a promotional link (for example, a link that promotes another site owned by the search engine company). Any artificial placement within a search engine's otherwise objective algorithm should require disclosure. The phrase "sponsored listing" might better alert the search engines to this disclosure requirement, while the phrase "paid listing" might leave more room for narrow interpretation by the search engines but would better serve to alert consumers as to the nature of the links in question.

In either case, the FTC should pick one phrase and require its consistent use across all websites. Allowing multiple identifying phrases across different websites will further confuse consumers because they will be unable to formulate an impression of exactly what the phrases mean, and consequently will be less likely to truly understand that the artificially-advanced links are advertisements.¹³⁴ Thus, to avoid consumer confusion, the identifying phrase should be consistent across websites. This has the added advantage of defining guidelines for the use of other, non-search result paid links.

2. Paid Listings Should Be Spatially and Colorfully Separated from Unpaid Listings.

As consumers become more familiar with particular websites, they may cease to read and interpret the words of the site and navigate instead by the familiar user interface.¹³⁵ The requirement of an identifying phrase may therefore not be sufficient to notify consumers of the commercial nature of paid search engine listings.¹³⁶ Furthermore, the search engine websites themselves may continue to deceive consumers by using the identifying phrases discreetly to avoid being noticed by consumers.

To avoid these problems, the FTC should require that paid listings appear spatially and conspicuously separate from objective search results.¹³⁷ Some users will distinguish content based on spatial features such as size, indentation, and vertical distance between a website's components. Others will distinguish based on the text and background color. Requiring both space and color differences between the paid listings and objectively relevant search

¹³⁴ The FTC should follow its own example and require a specific wording as it did in *National Media Corp.*, 116 F.T.C. at 582. *See supra* note 112.

¹³⁵ *See Sullivan, supra* note 97 ("[T]he search engines will tell you that despite whatever labels they place in their results, search engine users tend to ignore these. . . . If no one is reading labels or clicking links to learn more about results, isn't that a sign they don't care? The FTC argues perhaps not—instead, it may be a sign that the search engines need to do more investigation of how to reach out to their users.").

¹³⁶ *See id.*

¹³⁷ *See id.* (noting that FTC attorneys, speaking off the record, personally liked Google's method of disclosing paid listings, and stating that "Google's paid results are placed in visually distinct colored boxes, separate from the main editorial results. Moreover, they are listed in close proximity to the labels "Sponsored Link" or "Sponsored Links").

results will ensure that all types of users are able to quickly distinguish advertisement listings from those generated objectively based on relevance.¹³⁸

3. Paid Listings Should Have At Least One Other Identifiable Difference.

The requirements of an identifying phrase and spatial and colorful distinction will probably be enough to ensure that all users can clearly identify paid listings. However, to best ensure that consumers are not confused, the FTC should require a third identifying element for paid listings. Web browsers now provide an array of style features for text such as alternative fonts, underlining, overlining, boldface, and italics.¹³⁹ To provide some room for search engine creativity, the FTC may choose to require a third identifying element of the search engine website's choice. The requirement of a stylistic difference between paid and unpaid search engine listings will enable those users that do not easily distinguish colors and spatial differences to notice the different types of listings. Search engine companies' use of a third distinguishing element will also serve to further obviate the distinction between paid and unpaid links.

4. Paid Inclusion Models Present a Special Regulatory Problem.

Some search engines use a "paid inclusion" model that requires website owners to pay a fee for inclusion in the search results, but do not necessarily promote these sites above others in the database.¹⁴⁰ Other search engines use a hybrid model that requires or allows payment for inclusion, more frequent updates, and better positioning in the search engine results but does not directly place listings at the top of the results page.¹⁴¹ For example, the AltaVista search engine updates its database of websites more often for paying websites than others, thus allowing the website owner to receive traffic resulting from updates in that site's content.¹⁴² AltaVista is also rumored to favor paying

¹³⁸ *See id.*

¹³⁹ Both Internet Explorer and Netscape Navigator browsers support cascading style sheets, which allow for advanced style elements. *See Microsoft Internet Explorer Features*, at <http://www.microsoft.com/windows/ie/evaluation/features/default.asp> (last visited Jan. 27, 2003) ("[Internet Explorer] provides full support for Cascading Style Sheets, Level 1 (CSS1) including borders, padding, and margins which are now supported for inline elements."); *Cascading Style Sheets Developer Central*, at <http://developer.netscape.com/tech/css/css.html> (last visited Jan. 27, 2003) ("Netscape 6 delivers the best support of any browser for HTML 4.0, XML, CSS1").

¹⁴⁰ Letter from Heather Hipsley, *supra* note 17, at 4-5.

¹⁴¹ *Id.*

¹⁴² Danny Sullivan, *AltaVista Sales Pitch Suggested Paid Inclusion Boost*, available at <http://searchenginewatch.com/sereport/02/10-altavista.html> (Oct. 1, 2002) (quoting AltaVista spokesperson Joanne Sperans Hartzell, "Inclusion participants' sites may be spidered more frequently in order to ensure that they are included in the global index, but

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websites in its search algorithm.¹⁴³ A paying website, in theory, will appear to be more relevant than one that hasn't subscribed to the AltaVista paid inclusion service.¹⁴⁴

These revenue models create a special problem for preventing consumer confusion. The results of a user's search are still somewhat relevant, and only indirectly influenced by payment for placement.¹⁴⁵ Consequently, it is hard to identify whether the sites that have paid for inclusion are actually creating advertisements for users to visit their sites, or merely ensuring that they show up in the search results when relevant.¹⁴⁶ Requiring search engines that use paid inclusion to identify the paying sites may confuse consumers into underestimating the relevance of paid inclusion sites, especially in light of the proposed requirement to identify all paid listings with the phrase "paid listing". Consumers may come to associate the phrase, as they should, with results that are really just especially relevant advertisements. Thus, a search engine result that is highly relevant to the user's search but whose operator has paid for better placement may be passed over by users that dismiss it as an advertisement.

To deal with this problem, the FTC should not use the same requirements for paid inclusion search engines as proposed for paid-for-placement listings. Instead, the FTC should require that the search engine clearly disclose the method by which websites are indexed and ranked for relevancy. The details of the search engine's methodology need not be explained alongside the search results, but some other affirmative identification should alert consumers, on the search page, that the results are ranked based in part (or in full in the case of search engines that require all sites to pay to be included) by payment from the website owner.

V. ADVANTAGES AND PROBLEMS WITH FORMAL FTC ACTION

A. *FTC Regulation has the Advantage of Far Reaching Results.*

In addition to providing more substantial guidelines to search engine

this does not ensure higher placements").

¹⁴³ Danny Sullivan, *Paid Inclusion Listings May Get Boosted at AltaVista*, available at <http://searchenginewatch.com/sereport/02/11-altavista.html> (Nov. 4, 2002) (Despite [AltaVista's denial that paid inclusion rankings receive a ranking boost], it turns out that Trusted Feed content may indeed get a bump into the top results, in the right circumstances.").

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g., id.*

¹⁴⁶ *See* Letter from Heather Hipsley, *supra* note 17, at 4 ("To the extent that paid inclusion does not distort the ranking of a Web site or URL, many of these programs provide benefits to consumers. . .").

companies seeking to include paid search result listings in their product, an FTC action against one or more of the search engines will help to define what practices are and are not acceptable in order to comply with Section 5.¹⁴⁷ Furthermore, an FTC consent order can be enforced against other Internet search engines should they fail to comply with Section 5 in the future.¹⁴⁸ This will give the FTC a stronger foothold to take further action, should it become necessary, against future search engine related violations.¹⁴⁹ A consent order will reduce administrative costs in two ways. First, search engine companies will less likely violate Section 5 because they will have a clearer understanding of the requirements for compliance. The need for future administrative action will therefore be reduced. Second, the FTC can more efficiently bring action against future violators because the FTC will have established clear guidelines that can be applied in future cases, and they can avoid the lengthy factual analysis required to determine whether a search engine has engaged in deceptive advertising and has thus violated Section 5.¹⁵⁰ The shortened factual inquiry will save the FTC's time and resources.

Another advantage of FTC legal action is that it will reduce related deceptive advertising practices. Many of the links found on major Internet portals (such as MSN, AOL, and Yahoo) are actually paid advertisements.¹⁵¹ Though many of these links are not actually search engine results, the same concerns over consumer confusion should apply. An Internet portal or other website may easily lead a consumer into thinking that a particular link will take the consumer either to another page within the same website or to an objectively reviewed external site. If a portal or other website sells an advertisement that is not identified as such, the consumer is likely to be

¹⁴⁷ See *Nat'l Media Corp.*, 116 F.T.C. 549, 582(1993) (consent order) (*see supra* note 132).

¹⁴⁸ Lesley Anne Fair, *Advertising Law in the New Media Age 2000: Federal Trade Commission Advertising Enforcement*, PRACTISING LAW INST. CORP. LAW AND PRACTICE COURSE HANDBOOK SERIES, 1207 PLI/CORP 267, 270 (Oct. 2000) ("Courts have upheld FTC orders encompassing all products or all products in a broad category, based on violations involving only a single product or group of products.") (citation omitted).

¹⁴⁹ *See id.*

¹⁵⁰ The FTC can avoid an in-depth analysis of a particular paid listing by clearly outlining the requirements for disclosure in the same way that the FTC has eliminated the need for a lengthy factual determination of whether a particular paid television program constitutes deceptive advertising by outlining the disclosure requirements in *National Media Corp.* *National Media Corp.*, 116 F.T.C. 549.

¹⁵¹ See Danny Sullivan, *The Bumpy Road To Maximum Monetization*, available at <http://searchenginewatch.com/sereport/02/05-money.html> (May 6, 2002) (finding that as many as 39% of the links displayed after a search for "book stores" on some of the major search engines are paid links).

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deceived.¹⁵² Advertisements that are deceptive in format or appear to be endorsed by the search engine or portal in a deceptive manner constitute deceptive acts under Section 5 regardless of whether they are the result of a user's search or they are simply static links on a web page.¹⁵³ The FTC has offered general guidelines to Internet advertisers to aid them in determining whether an advertisement is deceptive, but an action against a major search engine / portal would clarify the specific problems of deceptive format and deceptive endorsement.¹⁵⁴

An FTC action against one or more search engine companies thus has the additional advantage of clarifying what website owners need to do in order to avoid deceptive advertising. The FTC has two options by which to go about setting guidelines for paid links that are not search results. First, the FTC could bring a broad consent order that includes paid, static links as "paid listings," which would allow the FTC to encompass a larger variety of online advertising practices and to require that all paid links meet the proposed criteria to avoid liability. Second, the FTC could bring an action against a search engine company that engages in both paid listing and paid linking practices. The FTC could issue the proposed guidelines for search results as outlined above, but issue different guidelines for static paid links. This would give the FTC more flexibility to define guidelines for the non-deceptive use of paid links.

This second option is the better one because static links appear in many different forms.¹⁵⁵ Search engine results, by their nature, require a list format. The proposed guidelines ensure that listings that are not part of the objectively generated list appear separately from the objective list. Other paid links are not necessarily limited to a list format. They may already contain different colored backgrounds, images, motion, and other distinguishing elements. For these advertisements, the FTC should allow website owners more creativity in identifying the links as advertisements. It may not be appropriate, for example, to require a paid link to have a different background color because there is no standard background color by which to compare. That is because a website may have several different background colors for different elements, but search results are themselves one element of a web page and thus tend to have only one background color.

By bringing a claim against a portal website that has both paid search listings and paid links, the FTC can define separate guidelines for the use of paid linking, thus having greater reach and further reducing confusion over the

¹⁵² See Letter from Heather Hipsley, *supra* note 17, at 4.

¹⁵³ See Nat'l Media Corp., 116 F.T.C. 549, 559 (1993) (consent order); 15 U.S.C. § 45 (2001).

¹⁵⁴ See FTC *supra* note 36.

¹⁵⁵ See Sullivan, *supra* note 151.

practice. The FTC can thus solve the paid listing and paid link problems in a single action. This is advantageous because it reduces administrative costs by preventing future violations while at the same time, making future actions easier to prosecute.

B. FTC Regulation has the Problem of Legal Loopholes.

One problem with FTC adjudication against one or more search engine companies is that the guidelines may prove too narrow to be fully effective. Indeed, one of the criticisms of the FCC payola statute, which addressed a similar problem to that of improperly disclosed paid listings, is that while effective at preventing obvious payola, the practice of payola is still common in less obvious forms.¹⁵⁶

The same situation could result from stricter regulation of online advertising. For example, a search engine could form “partnerships” with other websites and promote the links of partner companies in exchange for similar treatment at the partner website. This would blur the definition of “advertising” with regard to what types of activities are appropriate under Section 5. Websites would have to identify that particular links are from partner companies to officially avoid consumer deception, but consumers, unable to identify the meaning of “partnership” in this context, would again be left on their own to figure out what information is provided objectively. Further rules or adjudicative action would be needed to once again stop the deceptive practices.

This definitional problem can be cured in the context of paid search result listings by defining “paid listing” as any listing that is artificially ranked higher on the result page, regardless of the reason for the artificial boost (payment, partnership, self-promotion, etc.) The problem persists, however, with respect to paid static links:¹⁵⁷ since the very placement of the link on the website is subjective, the “paid listing” definition will not make sense. In these cases, it would be advantageous to limit the specificity of FTC guidelines so that site owners cannot simply avoid the proposed disclosure requirements by structuring deals not to involve monetary consideration. By keeping the broad guidelines already in place, namely, that deceptive advertising is unlawful, the FTC’s spreads its coverage to include the case where a deal has been reached between the portal and the website to which the link points. However, this option is at odds with the proposal that the FTC create specific requirements for advertising links, which better defines what to do at the cost of clearly

¹⁵⁶ See Katunich, *supra* note 46, at 643-44.

¹⁵⁷ On many search engine websites, there are advertisements and links that are constant. These do not change based on the user’s search, but nevertheless appear on the search engine results page. These links need not purport to be search results, but may still deceive consumers.

explaining when to do it. Ultimately, the problem only exists as a limitation to the proposed FTC consent order. The FTC, of course, can still bring action against other deceptive advertising practices.

VI. ANOTHER REGULATORY OPTION IS FOR THE FTC TO USE RULEMAKING

As an alternative course of action for the FTC to better regulate the use of paid listings in search engines is to promulgate a rule that specifically outlines requirements for compliance with Section 5 of the FTCA.¹⁵⁸ While rulemaking has some advantages, adjudication against a search engine company will ultimately achieve the same purpose while saving administrative costs.

There are several advantages to an FTC rule.¹⁵⁹ First, participation will be increased because the FTC will have an opportunity to receive comments from the search engines and consumers.¹⁶⁰ This would arguably provide better rules than the guidelines defined through adjudication and increase compliance.¹⁶¹ With feedback from the search engine companies and the public, the FTC may be able to better understand what requirements would best prevent consumer confusion while preserving the market for paid search engine listings and paid links. Second, promulgating a new rule would be fairer to the search engine industry because there is no legal action taken against any individual search engine company.¹⁶² Finally, a rule will potentially be clearer than guidelines created through adjudication because the specific circumstances to which the rule will apply can be defined.¹⁶³ In adjudication, only the circumstances that apply to the particular case can clearly be defined.¹⁶⁴ Issues outside the particular case will not be resolved.¹⁶⁵

¹⁵⁸ Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (holding that the FTC has rulemaking authority).

¹⁵⁹ David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929 (1965).

¹⁶⁰ *Id.* at 930.

¹⁶¹ *Id.* at 932 (arguing that while the differences between rule-making and adjudication in terms of public participation is less than generally thought, "rulemaking does more characteristically involve the promulgation of concrete proposals and the affording of opportunity for general comment than does adjudication, and such opportunity can be of considerable value to the agency and the public").

¹⁶² *Id.* at 933 ("[W]hen an agency like the FTC has concentrated on adjudication, it has been justifiably criticized for prosecuting violations, large, small, or utterly insignificant, when it finds them rather than attempting a more rational allocation of its limited resources.").

¹⁶³ *See id.* at 940-41.

¹⁶⁴ *See id.* at 937.

¹⁶⁵ *See id.*

Adjudication, however, is a better option for the regulation of paid search engine listings. The FTC can create guidelines through adjudication as long as it applies the guidelines to the specific defendants.¹⁶⁶ There are several advantages to proceeding through adjudication. The guidelines set forth in a legal action can more easily be modified at a later date should they become obsolete.¹⁶⁷ Conversely, if the FTC were to create a rule, it would have to use rulemaking procedures to later amend that rule. Adjudication thus leaves open the ability to make modifications through future adjudicatory action.

Moreover, most of the advantages of rulemaking are either minimal or can be achieved through careful adjudication. Input by the search engines and the public will have a minimal benefit to FTC regulation of paid listings. The search engine companies will lobby for little regulation, while consumers, already largely unaware of the practice of paid listings, are unlikely to comment. Thus, the FTC will have to rely on its own formulation of what practices are appropriate to avoid consumer deception. Adjudication would be no different.

With regard to the rulemaking advantages of better fairness and better regulatory guidance, the FTC could use many consent orders to ensure equal treatment of the search engine companies and provide broad regulatory guidance.¹⁶⁸ There are a limited number of well-used search engines; this low number of defendants would ensure that the FTC would not be precluded from bringing action against all violating search engine companies.¹⁶⁹ By bringing action against more than just one company, the FTC would use consent orders against every violating company to define and reinforce specific guidelines, rather than using one company as a scapegoat and a means for communicating specific guidelines. Furthermore, issuing consent orders against many defendants will allow the FTC to develop guidelines for a variety of circumstances, rendering adjudication nearly as effective in developing specific guidelines as rulemaking.

In sum, although rulemaking is an option for the FTC, adjudication will serve nearly all of the same purposes with the added benefits of low administrative costs, future flexibility, and built-in enforcement of specific guidelines.

VII. CONCLUSION

The use of paid listings and paid inclusion in Internet search engines has the

¹⁶⁶ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (“Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.”).

¹⁶⁷ Shapiro, *supra* note 154, at 947.

¹⁶⁸ *Id.* at 932-33.

¹⁶⁹ *Id.*

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potential to mislead consumers into thinking that targeted advertisements are objectively reviewed, relevant, search results.¹⁷⁰ Despite the FTC's letter to the search engines, paid search engine listings are still likely to confuse consumers in a way that constitutes deceptive advertising in violation of Section 5 of the FTCA.¹⁷¹ To protect consumers, the practice of using paid listings in search engine results should be regulated, and the FTC is in the best position to enact such regulation.¹⁷² Therefore, the agency should act against the major search engines to stop the deceptive practice and further develop guidelines for other search engines and website owners.

Successful consent orders will define explicitly what search engine companies must do to disclose advertisements within their search results, just as previous FTC actions in the print and broadcast industries defined relevant disclosure guidelines for those industries.¹⁷³ The FTC should require that paid search engine listings be disclosed by an identifying phrase such as "paid listing" or "sponsored listing".¹⁷⁴ It should also require that listings be visually distinguishable by their size, color, and spatial attributes, and that search engine companies use one additional distinguishing element to ensure that consumers are notified that the listings are advertisements.¹⁷⁵

Furthermore, the FTC should, through adjudication, define specific guidelines for the use of paid inclusion and other methods of promoting web pages above their natural, objective position in search results.¹⁷⁶ While adjudicatory action will not be a complete solution to the problem of deceptive online advertising, it will give the FTC a strict stance against deceptive advertising online to match that against deceptive advertising on television and in print.

¹⁷⁰ See Letter from Heather Hipsley, *supra* note 17.

¹⁷¹ See *supra* text and accompanying notes 22-33.

¹⁷² See *supra* text and accompanying notes 16-17.

¹⁷³ See *supra* text and accompanying notes 19-22.

¹⁷⁴ See *supra* text and accompanying notes 23-24.

¹⁷⁵ See *supra* text and accompanying notes 25-26.

¹⁷⁶ See *supra* text and accompanying notes 28-36.