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YouTube Marketing: Legality of Sponsorship and Endorsement in Advertising

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YOUTUBE MARKETING: LEGALITY OF SPONSORSHIP AND ENDORSEMENTS IN ADVERTISING

Katrina Wu^{al}

Abstract

YouTube endorsement marketing, sometimes referred to as native advertising, is a form of marketing where advertisements are seamlessly incorporated into the video content unlike traditional commercials. This paper categorizes YouTube endorsement marketing into three forms: (1) direct sponsorship where the content creator partners with the sponsor to create videos, (2) affiliated links where the content creator gets a commission resulting from purchases attributable to the content creator, and (3) free product sampling where products are sent to content creators for free to be featured in a video. Examples in each of the three forms of YouTube marketing can be observed across virtually all genres of video, such as beauty/fashion, gaming, culinary, and comedy. There are four major stakeholder interests at play—the YouTube content creators, viewers, YouTube, and the companies—and a close examination upon the interplay of these interests supports this paper’s argument that YouTube marketing is trending and effective but urgently needs transparency. The effectiveness of YouTube marketing is demonstrated through a hypothetical example in the paper involving a cosmetics company providing free product sampling for a YouTube content creator. Calculations in the hypothetical example show impressive return on investment for such marketing maneuver.

Companies and YouTube content creators are subject to disclosure requirements under Federal law if the content is an endorsement as defined by the Federal Trade Commission (“FTC”). This paper applies the FTC Guide to the YouTube context and identifies disclosure practices that may be problematic under the FTC guidelines. Pervasive issues with disclosure on YouTube include inconsistency as to how content creators disclose as well as the lack of conspicuousness for disclosures buried in description boxes. This paper proposes that there is an urgent need to increase transparency for YouTube endorsement marketing and that YouTube should promote a uniform standard of disclosure. Contrary to the argument that disclosures would undermine the effectiveness of marketing, this paper argues that proper disclosure will not only foster viewers’ trust in content creators but will also promote consumer goodwill.

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I. INTRODUCTION

With the rise of YouTube since 2005, the online video hosting service was a platform and personal stage for any ordinary individual to voice oneself. YouTube users are free to upload any user-generated content onto the platform, including homemade comical shorts, memorable moments in life, and rants or personal thoughts on anything imaginable. YouTube videos are a true

embodiment of our pride in our values involving the freedom of speech. A lot of YouTube content creators (“YouTubers”) rose to fame with an expanding subscriber/follower base. Businesses saw an opportunity with growing viewership and explored marketing potential with YouTubers (sometimes known as native advertisement or stealth marketing¹). YouTube sponsored activities can largely be found under three forms: (1) explicit sponsorship where the sponsoring company pays the YouTuber a flat fee, or a specified amount per number of views on a video specifically created to market a brand or product, (2) affiliated links where purchases made through the link, or coupon code provided by the YouTuber will help the YouTuber earn a commission on the sale, and (3) free product sampling where companies send products to YouTubers with the hope that they will create product reviews, advertorials,² and just general exposure of the product. The marketing agenda is integrated into the content itself and because consumers/viewers generally do not regard YouTube videos as a source of advertisement, marketing in YouTube content can be far more effective than traditional marketing. This is because consumers generally view those content without guarding suspicions. It should be noted that this paper does not address YouTube’s own advertisements (called “In-Stream Ads”)³ where ad clips can run before (pre-roll), some point during the video (mid-roll), and after the video (post-roll). The form of marketing addressed in the paper is one where companies bypass YouTube and contact video creators directly to feature

¹ “Native advertising” is defined as a form of paid media where the ad experience follows the natural form and function of the user experience in which it is placed. *What is native advertising?* SHARETHROUGH, <http://www.sharethrough.com/nativeadvertising/#definition> (last visited Mar. 16, 2013). “Stealth advertising” is defined as a way of advertising a product so that people do not realize that you are trying to make them buy something. *Stealth Marketing Definition*, CAMBRIDGE DICTIONARIES ONLINE, <http://dictionary.cambridge.org/us/dictionary/business-english/stealth-marketing> (last visited Feb. 18, 2015).

² “Advertorial” is an advertisement that imitates editorial format. *Advertorial Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/advertorial> (last visited Feb. 10, 2015).

³ *In Stream How Video Ads Work*, GOOGLE, https://support.google.com/displayspecs/answer/1870961870961870966244557?hl=en&ref_topic=6244532 (last visited Dec. 19, 2014) (“YouTube In-Stream Ads can run in video players appearing on YouTube watch pages and channel pages with featured videos.... Non-skippable ads can be a maximum of 15 seconds.”).

products in their videos. The commercial relationship exists solely between the YouTuber and the sponsoring company.

This paper explores the dynamics between marketing and law for YouTube sponsorship and endorsement. Part II catalogs some examples of the marketing practice. Part III examines the interplay of the four stakeholder interests including YouTube content creators, viewers, YouTube, and sponsoring companies. Part IV of the paper assumes a marketing angle, analyzing the effectiveness of YouTube marketing using a hypothetical scenario, while Part V highlights legal implications with this practice, namely the need to disclose endorsement and sponsorship relationships. This paper concludes by arguing that while enormous marketing opportunities exist on YouTube, there is an urgent need to increase transparency in this form of marketing. It is recommended that content creators and companies self-implement better disclosures while YouTube considers standardizing disclosure formats across all videos. Contrary to the argument that disclosure will undermine the effectiveness of marketing, this paper argues that upfront disclosures will not only foster consumer goodwill, but will ensure the sustainability of endorsement marketing on YouTube.

II. CATALOG OF YOUTUBE CHANNELS: A FEW EXAMPLES IN ENDORSEMENT MARKETING

YouTube sponsorship and endorsement can be seen across a wide variety of channels, including, but not limited to, beauty, fashion, comedy, food, and gaming channels. This Section documents a few examples of endorsement and sponsorship across these categories. Examples of sponsorship activities can be largely categorized into the three forms mentioned in the introduction: (1) explicit sponsorship; (2) affiliated links; and (3) free product sampling. This section first

provides an overview of how videos under the categories of beauty, comedy, food, and gaming appear on YouTube, then proceeds to provide some examples under explicit sponsorship, affiliated links, and free product sampling.

Beauty and Fashion

Viewership of beauty and fashion related YouTube videos have gained traction over the past few years⁴ with these YouTubers now being colloquially referred to as “beauty and fashion gurus.”⁵ One can find various types of beauty and fashion videos in the form of a tutorial for a certain makeup look or an “outfit of the day” video. For example, YouTubers showcase the outfit they have put together, a review of a certain product, or a “favorites” video. The YouTuber shares his or her favorite products, or a “haul” video, showing recent purchases such as cosmetics products, clothing and accessory items.

Comedy/Short Film

Some of the most subscribed to channels on YouTube are in the comedy genre, with more than a dozen of channels boasting over 10 million subscriptions.⁶ Comedy content on YouTube

⁴ E.g., *Michelle Phan*, YOUTUBE, <https://www.youtube.com/user/MichellePhan> (last visited Feb. 3, 2015) (beauty channel with 8 million subscribers); *Ingrid Nilsen*, YOUTUBE, <https://www.youtube.com/user/missglamorazzi> (last visited Feb. 3, 2015) (beauty and fashion channel with 3 million subscribers); *Stilababe09*, YOUTUBE, <https://www.youtube.com/user/StilaBabe09> (last visited Feb. 3, 2015) (fashion and beauty channel with 3 million subscribers); *Zoella*, YOUTUBE, <https://www.youtube.com/user/zoella280390> (last visited Feb. 3, 2015) (beauty channel with 9 million subscribers); *Bethany Mota*, YOUTUBE, <https://www.youtube.com/user/Macbarbie07> (last visited Feb. 3, 2015) (fashion channel with 9 million subscribers); *AndreasChoice*, YOUTUBE, <https://www.youtube.com/user/AndreasChoice> (last visited Feb. 4, 2015) (beauty and fashion channel with 3 million subscribers); *CutiePieMarzia*, YOUTUBE, <https://www.youtube.com/user/CutiePieMarzia> (last visited Feb. 4, 2015) (fashion channel with 5 million subscribers); *ThatsHeart*, YOUTUBE, <https://www.youtube.com/user/ThatsHeart> (last visited Feb. 4, 2015) (beauty and fashion channel with 1 million subscribers); *Kandee Johnson*, YOUTUBE, <https://www.youtube.com/user/kandeejohnson> (last visited Feb. 8, 2015) (beauty channel with 3 million subscribers). See generally *YouTube Browse Channels: Beauty and Fashion*, YOUTUBE (last visited Feb. 1, 2015), https://www.youtube.com/channels/beauty_fashion (YouTube directory listing 995 popular beauty and fashion channels).

⁵ See generally Wendy Rodewald, *The 25 Best YouTube Beauty Vloggers*, DAILY MAKEOVER (June 27, 2014), <http://www.dailymakeover.com/trends/makeup/beauty-vloggers-youtube> (last visited Nov. 3, 2014).

⁶ E.g., *Smosh*, YOUTUBE, <https://www.youtube.com/user/Smosh> (last visited Feb. 8, 2015) (comedy channel boasting 21 million subscribers); *RayWilliamJohnson*, YOUTUBE, <https://www.youtube.com/user/RayWilliamJohnson> (last visited Feb. 8, 2015) (comedy channel boasting 10 million

can include: various social commentary in the form of parody and satire, observational comedy poking fun at everyday life, musical comedy where the YouTuber incorporates humor into a song.

Food

YouTube has a corner for makeup tutorials as well as cooking tutorials.⁷ Viewers can look to the many YouTube cooking clips when aspiring for new recipes and the how-to for cooking.

Gaming

Provided that the most subscribed to channel on YouTube is a gaming channel by the name of PewDiePie, whose channel boasts over forty-million subscribers, gaming channels on YouTube can be prime candidates for game advertisers.⁸ YouTube gaming videos are usually in the form of a recorded screen of the YouTuber playing the game, with the YouTuber narrating and commenting as he or she engages the game.⁹ Popular YouTube game videos can appear in a “walkthrough” format where the YouTuber shows viewers how to play a certain segment of the

subscribers); *JennaMarbles*, YOUTUBE, <https://www.youtube.com/user/JennaMarbles> (last visited Feb. 8, 2015) (comedy channel boasting 15 million subscribers); *HolaSoyGerman*, YOUTUBE, <https://www.youtube.com/user/HolaSoyGerman> (last visited Feb. 8, 2015) (Chilean comedy channel boasting 24 million subscribers); *NigaHiga*, YOUTUBE, <https://www.youtube.com/user/nigahiga> (last visited Feb. 8, 2015) (comedy channel boasting 15 million subscribers).

⁷ *E.g.*, *LauraInTheKitchen*, YOUTUBE, <https://www.youtube.com/user/LauraVitalesKitchen> (last visited Feb. 7, 2015) (cooking channel with 2 million subscribers); *MyCupcakeAddiction*, YOUTUBE, <https://www.youtube.com/user/MyCupcakeAddiction> (last visited Feb. 7, 2015) (cooking channel with 2 million subscribers); *ByronTalbot*, YOUTUBE, <https://www.youtube.com/user/ByronTalbot> (last visited Feb. 7, 2015) (cooking channel with 900,000 subscribers).

⁸ *E.g.*, *PewDiePie*, YOUTUBE, <https://www.youtube.com/user/PewDiePie> (last visited Nov. 21, 2015). *E.g.*, *VanossGaming*, YOUTUBE, <https://www.youtube.com/user/VanossGaming> (last visited Feb. 8, 2015) (gaming channel with 14 million subscribers); *SkyDoesMinecraft*, YOUTUBE, <https://www.youtube.com/user/SkyDoesMinecraft> (last visited Feb. 8, 2015) (gaming channel with 11 million subscribers); *Vegetta777*, YOUTUBE, <https://www.youtube.com/user/Vegetta777> (last visited Feb. 8, 2015) (gaming channel with 11 million subscribers); *SmoshGames*, YOUTUBE, <https://www.youtube.com/user/smoshgames> (last visited Feb. 8, 2015) (gaming channel with 6 million subscribers).

⁹ *E.g.*, *PewDiePie*, *Flappy Bird—Don't Play This Game!*, YOUTUBE (Jan. 27, 2014), <https://www.youtube.com/watch?v=lQz6xhlOt18>; *GameRiot*, *The Walking Dead Season 2 Episode 5 All Endings – Alone, Jane, Kenny, Wellington*, YOUTUBE (Aug. 27, 2014), <https://www.youtube.com/watch?v=4vgvFILmhMU>

game,¹⁰ or in “multiplayer live” format where the YouTuber captures a game played with another player in live time.¹¹

A. Examples of Explicitly Sponsored YouTube Videos

Under this category of marketing, the YouTuber partners with the sponsor to create videos with the exclusive purpose to market a brand or product, and the sponsoring company pays the YouTuber a flat fee, a percentage of sales resulting from the video, or a specified amount per number of views on the video (e.g., \$1.50 for every 1000 views).¹²

An example involves one of the earliest and most popular YouTube makeup artist Michelle Phan, who partnered with global cosmetics giant L’Oreal S.A. to promote Lancôme products. Phan created a series of videos featuring Lancôme products, usually in the form of a makeup tutorial, or some advertorial content. In one advertorial video, *Clubbing Makeup Tutorial*, Phan instructs viewers how to recreate the makeup look using a range of Lancôme products from face foundation to eyebrow pencil. This particular video has garnered over six million views since being posted in 2010.¹³ In another monthly sponsored video, Phan demonstrates how to find the perfect shade of red lipstick for different skin tones. All of the lipsticks featured in the video were part of the

¹⁰ E.g., PewDiePie, *The Last of Us Gameplay Walkthrough Playthrough Let's Play (Full Game) - Part 1*, YOUTUBE (June 13, 2014), <https://www.youtube.com/watch?v=0wLjngvrpw>.

¹¹ E.g., Ali-A, *Let's Go Team! Ghosts Live w/ Ali-A #1 - (Call of Duty Ghost Multiplayer Gameplay)*, YOUTUBE (Nov. 6, 2013), <https://www.youtube.com/watch?v=NvfXg4dPuq4>; TotalBiscuit, *TotalBiscuit and The Yogscast "play" Magicka - Part 1 - You're a Wizard Simon*, YOUTUBE (Feb. 18, 2011), <https://www.youtube.com/watch?v=wZHhwUK8aj8>.

¹² See generally Alex Halperin, *The Big Haul: Teenage YouTube Superstar Bethany Mota Has More Fans than Vogue and a Fashion Line of Her Own*, BUSINESSINSIDER (Jan. 18, 2014, 8:49 AM), <http://www.businessinsider.com/haul-teenage-youtube-shopping-star-bethany-mota-2014-1#ixzz3SX9s32oO> (“While licensing arrangements vary in structure, Aviva Rosenthal, a partner at Los Angeles-based Act III Licensing said one common approach would include an advance and a guaranteed payout, with the licensee collecting 10% on the goods’ wholesale value or about 6% of retail.”).

¹³ Michellephan, *Clubbing Makeup Tutorial*, YOUTUBE (Mar. 25, 2010), <https://www.youtube.com/watch?v=Bu836l-AIAo>.

Lancôme collection, with a direct link to Lancôme’s website provided in the description box to the video (see Appendix One for the Lancôme—Phan series).¹⁴

In the genre of comedy, popular comedy channel TheFineBros has partnered with cat food brand Friskies in creating a series of comical videos featuring kittens and Friskies products. In a video that has garnered over nine million views and counting, TheFineBros captured cats’ reactions to a laptop screen playing footages of online viral cat videos (see Appendix Two).¹⁵ Towards the end of the video, the cat dashes off towards a plate of Friskies brand cat food and devours the food. The description box to the video contains a link to Friskies’ YouTube channel and other cat videos created for the series.

YouTube chef Byron Talbott, recently partnered up with natural sweetener brand Truvia¹⁶ to market the stevia-based sugar substitute (see Appendix Three). In a video featuring his recipe of brown butter cookies, Talbott endorses Truvia by using Truvia’s brown sugar blend as the main ingredient in making the cookies.¹⁷

Game producers Electronic Arts (EA) and Ubisoft have invited YouTubers to create videos on a commission basis, whereby a YouTuber is paid a sum for every thousand views on the video.¹⁸ It is often the case sponsored YouTube gaming videos lack a disclaimer that the video is sponsored, calling into question the legality of such practices (discussed in Legal Implications Part V *infra*).¹⁹

¹⁴ Michellephan, *Perfect Red Lips*, YOUTUBE (Feb. 24, 2011), https://www.youtube.com/watch?v=jd_Qgcue3IU

¹⁵ TheFineBros, *Cats React to Viral Videos*, YOUTUBE (Apr. 1, 2014), <https://www.youtube.com/watch?v=VSpFRcTeUQ4>.

¹⁶ Owned by Cargill, Inc.

¹⁷ ByronTalbot, *Brown Butter Cookies*, YOUTUBE (Sept. 16, 2014), <https://www.youtube.com/watch?v=qpDNgqOhvMM>.

¹⁸ Greg Finn, *Are Sponsored YouTubers with Undisclosed Deals Breaking the Law?*, EUROGAMER (July 17, 2014), <http://marketingland.com/sponsored-youtubers-undisclosed-deals-breaking-law-91581>.

¹⁹ Simon Parkin, *Blurred lines: Are YouTubers breaking the law?*, EUROGAMER (July 16, 2014), at <http://www.eurogamer.net/articles/2014-07-16-blurred-lines-are-youtubers-breaking-the-law> (“Bain—better known to his 1.7 million YouTube channel subscribers as TotalBiscuit—has been offered, from posting a product link in a video’s description through to elaborate campaigns. Bain was asked not to disclose the nature of the proposed sponsored content to his viewers. He refused the deal. . . . Bain believes that the majority of YouTubers and

B. Examples of YouTube Videos with Affiliated Links

YouTube videos with affiliated links differ from the explicitly sponsored videos in that the YouTuber need not have partnered with the sponsor for the purpose of creating a specific video.²⁰ Instead, the YouTuber is part of a company's affiliate program,²¹ where purchases made through a specific URL or coupon code is attributed to the YouTuber, and the YouTuber is compensated with a commission on the sale. In a *Holiday Gift Guide* video, YouTuber Jen Chae recommends a makeup set by Too Faced Cosmetics as a Christmas gift. In the description box to the video, Chae lists the products mentioned in the video and provides links to those products (see Appendix Four). The link redirects through Reward Style (a marketing company providing monetization tools for publishers) then to Affiliate Traction (the marketing agency that handles Too Faced Cosmetics' affiliate program), and finally arriving at Too Faced Cosmetics' webpage where the viewer can purchase the recommended makeup set.²² Another way a sale can be linked to the YouTuber under an affiliate program would be the use of a coupon code. For instance, in the same *Holiday Gift*

channels current fail to disclose to their viewers when the game's publisher directly pays for content.") (last visited Nov. 11, 2015).

²⁰ There are also frequently "hybrid" videos where the video is both sponsored and contains affiliated links in the description box. *E.g.*, Evelina Barry, *How To Find A Fashion Sense*, YOUTUBE (Apr. 27, 2014), <https://www.youtube.com/watch?v=RQ-r60b2xy0> (last visited Nov. 11, 2015) (featuring Warby Parker sunglasses in video and provides an affiliated link in the description box to the merchant's website); BubzBeauty, *Cosy Winter Makeup*, YOUTUBE (Dec. 5, 2014), <https://www.youtube.com/watch?v=Dhxd75CbsTg> (creating a sponsored video featuring products from BH Cosmetics and provides an affiliated link in description box as well) (last visited Nov. 11, 2015).

²¹ *E.g.*, *Too Faced Affiliate Program*, TOO FACED COSMETICS LLC, <https://toofaced.affiliatetechnology.com>, <https://toofaced.affiliatetechnology.com> (last visited Feb. 8, 2015) (The cosmetics company affiliate program's webpage); *BH Cosmetics Affiliate Program*, BH COSMETICS INC., <http://www.bhcosmetics.com/affiliate/sign-up> (last visited Feb. 6, 2015).

²² FrmHeadtoToe, *Holiday GIFT GUIDE, for girls & guys!*, YOUTUBE (Dec. 11, 2014), <https://www.youtube.com/watch?v=nFB6hV9FKLU> (providing a link in the description box to the "Too Faced La Belle Carousel," at <http://bit.ly/1zyj62n> which takes the user to a restyle link, at <http://rstyle.me/n/qiiunf6ye>, then, redirects the user through an affiliate technology link at, https://toofaced.affiliatetechnology.com/redirect.php?nt_id=2&url=https%3A%2F%2Fwww.toofaced.com%2Fp%2Fsets%2Fla-belle-carousel%2F%3FsiteID%3DQFGLnEoLOWg-Dj0q8kwNNetOE6nio679dg%26ls_affid%3DQFGLnEoLOWg&Medium=Affiliate; arriving at the final webpage on Too Faced Cosmetics, at <https://www.toofaced.com/c/sets/>).

Guide video earlier, YouTuber Jen Chae provides a coupon code to receive a 10% discount on a cosmetics website that is traceable to the buyer.²³

C. Examples of Free Product Sampling

Companies often send free products to YouTubers to increase brand exposure. Established YouTube beauty channels can expect to receive free products from companies from time to time in hopes of encouraging the YouTuber to feature such products in a video. Recently acquired by the global cosmetics giant L’Oreal,²⁴ Urban Decay is a cosmetics brand that is very active in YouTube marketing and often provide YouTubers free products to try out and review. YouTube beauty gurus Sona Gasparian and Wayne Goss, just to name a few, are on the receiving end of Urban Decay’s latest products (see Appendix Five). In a review video created by Gasparian, the beauty guru shares with her viewers that she has received a set of Urban Decay Revolution Lipstick from the company and proceeds to do a review of these lipsticks, providing an up close view of swatches on all shades.²⁵ YouTube makeup artist Goss similarly shared in a video *Gift Ideas—Urban Decay the Vault!* that he has received the product set from Urban Decay, then, proceeded to show the items in the set and recommend the set as a great gift idea.²⁶ Product sampling is also prevalent outside of the beauty and fashion industry. YouTube comedian Anna Akana received a

²³ *Id.* (“COUPON CODES: Pretty and Cute, at <http://www.prettyandcute.com>, provides users the code FRMHEADTOTOE, receive 5% off entire purchase.”) (last visited at Nov. 11, 2015).

²⁴ Scheherazade Daneshkhu, *L’Oréal buys Urban Decay cosmetics brand*, THE FINANCIAL TIMES (Nov. 26, 2012, 10:43 AM), at <http://www.ft.com/intl/cms/s/0/5427f052-37b2-11e2-8edf-00144feabdc0.html#axzz3rFv52YOr> (last visited at Nov. 11, 2015).

²⁵ Sona Gasparian, *Review/Haul: Urban Decay 2013 Holiday Collection*, YOUTUBE (Sept. 9, 2013), https://www.youtube.com/watch?v=tR1Wqh4nl_s (last visited Nov. 11, 2015).

²⁶ Gossmakeupchat, *Gift Ideas—Urban Decay the Vault*, YOUTUBE (Oct. 25, 2014), <https://www.youtube.com/watch?v=UqJXsmhUdEk> (last visited Nov. 11, 2015).

free trip sponsored by Contiki, a travel and trip planning company, with the YouTuber promoting exposure to the company by mentioning Contiki in the video and in the description box.²⁷

III. STAKEHOLDER ANALYSIS: BALANCING FOUR INTERESTS AT PLAY— CONTENT CREATOR, VIEWERS, YOUTUBE, AND COMPANIES

In the context of YouTube marketing, there are four prominent stakeholders at play: the YouTube content creator (“YouTuber”), the consumer/viewer, YouTube, and companies seeking to promote their products. This part of the paper analyzes how the practice of YouTube sponsorship marketing impacts each of these stakeholders.

A. YouTube Content Creator: Juggling Financial Interests and Viewers’ Trust

At the onset of YouTube, most videos were created without a financial motive and a desire to share moments in life with friends and family. Though different from traditional career paths, the surge of YouTube’s revenue-sharing Partner Program²⁸ paved way for a new form of career. YouTube content creators could now make videos for a living on a full-time basis. According to the YouTube press site, there are over a million content creators in over a dozen countries earning money from videos under the YouTube Partner Program.²⁹ Of these million YouTube Partners,

²⁷ Anna Akana, *How to Have a Healthy Relationship*, YOUTUBE (Dec. 22, 2014), <https://www.youtube.com/watch?v=VUIbRehCVks>. See also AndreasChoice, *What's In My Big Bag??!*, YOUTUBE (Apr. 6, 2012), <https://www.youtube.com/watch?v=r4HWobdyexw> (traveling to Italy through travel planning company Contiki while providing a link to Contiki’s website in the description box) (last visited Nov. 11, 2015).

²⁸ The YouTube Partner Program allows creators to monetize content on YouTube through a variety of ways including advertisements, paid subscriptions, and merchandise. YouTube content creators are referred to as “YouTube Partners” by YouTube. *What is the YouTube Partner Program?*, GOOGLE, <https://support.google.com/youtube/answer/72851?hl=en> (last visited Feb. 18, 2015).

²⁹ *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> (last visited Feb. 17, 2015).

thousands are making six-figures per year.³⁰ Top grossing YouTube Partners report income in the low millions annually.³¹

As some YouTube channels gained popularity, advertisers found ways into the videos through endorsements and sponsorships. Companies began to build relationships with YouTubers to promote and market their brands. Specific terms to these agreements are often cloaked in secrecy. There is very little open discussion of sponsorship details, possibly due to confidentiality constraints in the agreement.³²

As mentioned, YouTubers could receive free products from companies (in hopes of a positive review for said product) or be contacted for sponsorship opportunities (being paid for featuring the product in a video). In certain cases, it is possible that YouTubers do not get paid unless the viewer uses the coupon code linked by the YouTuber (affiliated marketing). This creates the possibility that companies posit an “exploitive” relationship with YouTubers, where YouTubers get paid close to nothing for their work, excluding free products sent to them. Companies reaping the benefits from inexpensive and effective marketing and YouTubers not

³⁰ *Id.*

³¹ Devan Joseph, *Here's How 2 Dudes Make More Than \$4 Million A Year On YouTube*, BUSINESS INSIDER (Dec. 29, 2014, 12:03 PM), <http://www.businessinsider.com/youtube-smosh-video-millions-2014-12> (reporting the famous YouTube comedy channel Smosh earns \$4 million yearly from creating YouTube videos); Erik Sherman, *How Web Stars Make Money—Lots of It*, CBS NEWS (June 10, 2014, 12:43 PM), <http://www.cbsnews.com/news/how-web-stars-make-money-lots-of-it/> (providing ranges of income YouTube stars make from \$825,000 to \$8.5 million yearly from YouTube) (last visited Nov. 11, 2015).

³² Halperin, *supra* note 12 (“[YouTube personality Bethany Mota] and Aéropostale declined to comment on the terms of their deal. While licensing arrangements vary in structure, Aviva Rosenthal, a partner at Los Angeles-based Act III Licensing said one common approach would include an advance and a guaranteed payout, with the licensee collecting 10% on the goods’ wholesale value or about 6% of retail.”); Teresa Novellino, *YouTube makeup star pencils in investment from L’Oreal*, UPSTART BUSINESS JOURNAL (Aug. 16, 2013, 12: 29PM), <http://upstart.bizjournals.com/entrepreneurs/hot-shots/2013/08/16/youtube-makeup-star-launches-own-line.html?page=all> (“Terms of the arrangement were not clear, but it’s a clear coup for Phan and a bold and experimental move for L’Oreal . . .”).

being compensated accordingly create an issue of fairness and balance of power.³³ The companies triumph over the scheme as the ultimate winner.³⁴

There is arguably more value created for consumers from this form of marketing than traditional commercials, e.g. better entertainment value from watching one's favorite YouTube personality or "educational" value from a tutorial or review of products. But, the value-added to consumers becomes less apparent if YouTubers compromise their honest opinion in hopes of maintaining financial relationships with advertisers and sponsors. For YouTube videos to maintain the integrity as the go-to source for honest opinions, YouTubers need to constantly balance their financial interests with sponsors as well as uphold their obligation to viewers in being truthful and not feel obliged to provide positive reviews for sponsored products.³⁵

B. Consumer/Viewers: the Appeal of YouTube

There are various motives and reasons compelling a viewer to watch a video on YouTube. Some viewers visit YouTube for entertainment purposes while others resort to tutorials on YouTube to learn how to do something. It is also very frequently the case a viewer searches for a product review on YouTube before purchasing a product.³⁶ While the average consumer could prefer YouTube marketing over traditional advertisements (whether in terms of having more

³³ Ari Laurel, *Subversive Marketing at the YouTube Beauty Counter*, BE YOUNG & SHUT UP (Mar. 6, 2014), <http://beyoungandshutup.wordpress.com/2014/03/06/subversive-marketing-at-the-youtube-beauty-counter/> ("YouTube creators are often paid in free stuff, which seems awesome if making videos is your hobby, but it's a cheap way for a company to make more money off you.").

³⁴ See *infra* Part IV.

³⁵ See *infra* Section VI.A (proposing clear and conspicuous disclosure on a voluntary basis by the YouTuber can help strengthen trust from subscribers).

³⁶ Lexigence, *YouTubers: the New Form of Advertisement*, LOYOLA DIGITAL ADVERTISING (Sept. 25, 2014), <http://loyoladigitaladvertising.wordpress.com/2014/09/25/youtubers-the-new-form-of-advertisement/> ("I personally always go to YouTube first when I am looking to buy a new product whether it be makeup, skincare, etc."); Zach James, *Forget Amazon. YouTube Is Where Shoppers Do Research More and more consumers using video to research products*, ADWEEK (Aug. 28, 2013), <http://www.adweek.com/videowatch/forget-amazon-youtube-where-shoppers-do-research-152068> ("More and more, users are flocking to YouTube over Amazon for all of their pre- and post-purchase discussions.").

entertainment value or educational value), viewers have an indisputable right to know if they are being marketed to. Over the past few years, YouTube viewers are becoming more aware of the presence of sponsorship looming in YouTube videos, and some point out their suspicion of a video being sponsored in the comments section. Viewers engage in discussions with other fellow viewers regarding whether a video is sponsored: some express displeasure with the seemingly “commercialization” of what used to be homemade content while others express complacency acknowledging this phenomenon as the way it is.³⁷

YouTube sponsored videos differ from traditional above-the-line commercials where the spokesperson in the advertisements appears more distant than the YouTuber who is just an “average Joe” or “plain Jane” next door. The average consumer may find YouTube celebrities more relatable and genuine, giving YouTube videos a modest and down-to-earth sentiment, which is a very valuable marketing asset. Viewers of a YouTube channel have a relationship with their favorite YouTube personality, possibly interacting with the YouTuber via the comment section and more. Here, the elements of trust and friendliness at play arguably puts consumer/viewers in a more vulnerable position. If a YouTuber gives his or her stamp of approval on a certain product, viewers can be very trusting of that opinion, much like the effect from social media marketing (word-of-mouth recommendations from friends and family). The element of trust is evidenced in

³⁷ Moe Moe, Comment to *November Favs 2014*, BubzBeauty, YOUTUBE (Dec. 8, 2014), <https://www.youtube.com/watch?v=Ypg1Fn3L4Q0> (“Is this video sponsored? It seems like it is.”); Yuki Vin, Comment to *November Favs 2014*, BubzBeauty, YOUTUBE (Dec. 8, 2014) (“[F]or your information, Bubz is very popular & a lot of companies send her their products to try. But Bubz only show here that she really likes.”); Katchya8, Comment to *November Favs 2014*, BubzBeauty, YOUTUBE (Dec. 8, 2014) (“Why are subscribers acting so butt-hurt over the sponsoring of videos lately. She blatantly tells you which things she didn’t purchase herself.”); Doingitforjohnny, *Who are some YouTube beauty gurus who you loved but now think aren't so great?*, REDDIT (May 26, 2014), http://www.reddit.com/r/MakeupAddiction/comments/26jdix/who_are_some_youtube_beauty_gurus_who_you_loved/ (“I’m pretty sure [Michelle Phan would] be number one on this list. I used to really like her, and then it got to commercial and gimmick-y.”).

the comment sections of videos where consumers frequently state they have purchased a product based on the YouTuber's recommendation.³⁸ The comments section also provides a convenient forum where users can interact with each other or with the YouTuber regarding specific products, such as getting answers on product-related questions.³⁹

C. YouTube: Juggling Financial Interest in Advertising Revenue and Relationship with Content Creators

Advertising revenue is the bread and butter for YouTube, and the key to attracting advertisers is having good content that appeals to viewers. Content creators are therefore the singular most important contributor to YouTube's business model, supported by the fact that out of YouTube's \$3.5 billion in revenue in 2013, YouTube paid out \$2 billion to YouTube Partners, leaving the content host YouTube with a net profit of \$1.5 billion.⁴⁰ While it is difficult to conceive that YouTube would be jubilant about sponsorship marketing that occurs between the companies and YouTubers (recall that companies are bypassing YouTube to work directly with YouTubers),

³⁸ E.g., Jesse Blair-French, Comment to *November Favs 2014*, BubzBeauty, YOUTUBE (Dec. 8, 2014), <https://www.youtube.com/watch?v=Ypg1Fn3L4Q0> ("Waiting for the [recommended] cleansing oil to come in travel size so I can try it. As always, great favorites, bubz! We can always trust your recommendations!"); Mari Karot, Comment to *November Favs 2014*, BubzBeauty, YOUTUBE (Dec. 8, 2014), <https://www.youtube.com/watch?v=Ypg1Fn3L4Q0> ("Hi Bubz! I just ordered the Too-Faced Everything Nice Palette. It's the first time I'm buying one."); Mandy Mackintosh, Comment to *The TRUTH about Sponsored Videos, Affiliate Links and Being a Beauty Guru*, JenLuv's, YOUTUBE (June 21, 2014), <https://www.youtube.com/watch?v=xvVRHVg0HDw> ("I'll be honest, since I started watching YouTube beauty videos, I've bought quite a few products based on what people say and think."); Alice Bolin, *My Imaginary Friends: The Beauty YouTuber Economy*, THE HAIRPIN (June 25, 2015), <http://thehairpin.com/2014/06/my-imaginary-friends-the-beauty-youtuber-economy> ("This is why I am endlessly and insidiously more motivated to buy BB creams and gel eyeliners that vloggers recommend than ones magazines do. Despite how calculated beauty YouTubers likeability is, I can't help it—I like them.") (last visited Nov. 10, 2015).

³⁹ E.g., XxcrazyuppyxX, Comment to *MAY BEAUTY FAVES Part 1 (Korean Makeup: BB Cushions, Powders, Skincare)*, MeejMuse, YOUTUBE (May 30, 2014), <https://www.youtube.com/watch?v=ia3wd6E2cYc> (Can I still use a BB Cushion if I have enlarged pores? The pores on my nose and parts of my cheeks are really enlarged so whenever I try using BB Cream it shows straight away...I have dry sensitive skin as well so which BB Cushion would be more suitable for me?"); Lisa Cole, Comment to *November Favourites | Zoella*, Zoella, YOUTUBE (Dec. 10, 2013), <https://www.youtube.com/watch?v=Ekw8L7rRNQ8> ("What's the shade of [the] Rimmel concealer?").

⁴⁰ Jay Yarow, *YouTube's Revenue Revealed, And It's Much Worse Than Expected*, BUSINESS INSIDER (July 7, 2014), <http://www.businessinsider.com/youtubes-2013-revenue-2014-7> (Google does not release revenue information for YouTube, numbers are based on estimates) (last visited Nov. 10, 2015).

YouTube does not prohibit this type of marketing relationship.⁴¹ It is not entirely clear what YouTube's position is in terms of sponsorship activities, but YouTube seems to cherish its relationship with its partner content creators, as they are the livelihood that brings in advertisement revenue for YouTube.

Though somewhat in a conflicting position, as YouTube loses out on potential advertisement revenue as companies bypass YouTube for ads, YouTube allows for this sidestepping as long as it does not compete with YouTube's own advertisements (in the form of inStream advertisements that play pre-roll, mid-roll, or end-roll). This is evidenced under YouTube's product placement policy that forbids YouTube content creators from including sponsored messages where YouTube offers a comparable ad format.⁴² YouTube seems to have reconciled the legitimacy of paid product placement because those do not compete directly with YouTube's own advertisements in format (sponsored YouTubers often present paid product placement as some form of advertorial, whereas YouTube's pre-roll burns resemble traditional commercials).

D. Companies: Still a Far Way from Fully Capitalizing YouTube Marketing

It is projected that advertising will continue to move toward mobile advertising and digital media as print media declines.⁴³ Social networking company LinkedIn predicts that native advertisement will continue to trend and that 2015 will be "all about native advertising".⁴⁴ With the advent of digital media and diversification of cable channels, advertisers face increasing

⁴¹ See *infra* Section V.B.

⁴² *Paid Product Placement*, YOUTUBE, <https://support.google.com/youtube/answer/154235?hl=en> (last visited Dec. 19, 2014).

⁴³ Sarah Turk, IBISWORLD INDUSTRY REPORT: ADVERTISING AGENCIES IN THE US, at 9 (IBISWorld 2014) (on file with author).

⁴⁴ Sallie Krawcheck, *The Big Idea 2015: Inclusive Capitalism = A More Prosperous Capitalism*, LINKEDIN (Dec. 16, 2014), <https://www.linkedin.com/pulse/big-idea-2015-inclusive-more-sallie>. See *supra* note 1 for definition of native advertisement.

difficulty to market towards desired demographics as target audiences become more fragmented (evidenced by the growth of number of cable channels as well as the availability of various digital content).⁴⁵ With the hurdle of increasing target customer fragmentation, companies find themselves needing to infiltrate a multitude of media channels.

According to Silicon Valley venture capitalist Mary Meeker, YouTube is “one of the most used media assets in the world” and yet it remains “one of the most undermonetized media assets in the world.”⁴⁶ A prominent marketing research firm estimates that YouTube has brought in \$1.13 billion in advertising revenue in 2014, only a small fraction of the global TV advertising market of \$200 billion.⁴⁷ The *New York Times* observes this phenomenon, reporting that while viewers may be migrating online from traditional television, the advertising dollars have yet to follow.⁴⁸

YouTube channels have captured Millennials (people born from the early 1980s through the early 2000s) and the teen demographic, evidenced by a research showing that these groups prefer YouTube personalities over Hollywood celebrities⁴⁹ as well as YouTube’s viewer demographics (56% of viewers are between ages 18-44).⁵⁰ Some point out that big companies and advertisers may be neglecting “millions of millennial wallets”.⁵¹

⁴⁵ *Id.*

⁴⁶ Jonathan Mahler, *YouTube’s Chief, Hitting a New ‘Play’ Button*, N.Y. TIMES (Dec. 20, 2014), http://www.nytimes.com/2014/12/21/business/youtubes-chief-hitting-a-new-play-button.html?_r=0.

⁴⁷ *Id.* (“The marketing research company eMarketer estimates that YouTube will log about \$1.13 billion in ad revenue in 2014, a small fraction of the \$200 billion global TV advertising market. CBS, for instance, brought in nearly \$9 billion last year.”).

⁴⁸ *Id.*

⁴⁹ Susan Ault, *Survey: YouTube Stars More Popular Than Mainstream Celebs Among U.S. Teens*, VARIETY (Aug. 5, 2014), <http://variety.com/2014/digital/news/survey-youtube-stars-more-popular-than-mainstream-celebs-among-u-s-teens-1201275245/>.

⁵⁰ MICHAEL MILLER, *YOUTUBE FOR BUSINESS: ONLINE VIDEO MARKETING FOR ANY BUSINESS* 8 (2d ed. 2011). The distribution of YouTube viewers’ age groups: ages 2-18 (23%), ages 18-34 (37%), ages 35-44 (19%), ages 45-54 (13%), and ages 55+ (8%).

⁵¹ Stephanie Chan, *Teens Love YouTube Superstars, But Advertisers Aren’t Biting—Yet*, READWRITE (Aug. 7, 2014), <http://readwrite.com/2014/08/07/youtube-advertisers-marketing-campaign>.

Marketing expenditures in large companies support the notion that companies may not be fully optimizing their advertising budgets. Cosmetics giant L’Oreal S.A. reportedly spent \$1.57 billion in advertising expenditure in 2013 in the U.S., with major categories of spending being magazines (54.8%), cable TV (13.4%), network TV (12.9%) with only about 1.4% in internet display and 0.8% in internet search advertisements.⁵² Advertisement schemes like product samples, social media, and special marketing events are not even measured in the company’s advertising expenditure. These advertisement figures demonstrate ample room for growth and development in digital advertising including YouTube sponsorships.

Companies began to realize the potential in this avenue of marketing as some of these YouTube channels garnered subscriptions in the millions and counting. Engaging in marketing through YouTube channels allows companies to select the desired target segments based on the YouTuber’s particular audience. For example, if a cosmetics company wishes to target a segment consisting of image-conscious females between the ages of eighteen and thirty in North America, the company could collaborate with a YouTuber whose viewership consists of such demographic. Because of this possibility to target desired segments with heightened precision, YouTube marketing can be much more effective than traditional above-the-line marketing (see Part IV *infra* in calculating the return on investment for YouTube marketing).

IV. EFFECTIVENESS OF YOUTUBE MARKETING

To briefly reiterate the three forms of YouTube marketing addressed in this paper: (1) a video can be explicitly sponsored where the YouTuber is compensated for making the video, (2) a video can contain affiliated links where purchases made through the link will help the YouTuber earn a commission on sale, or (3) the YouTuber can receive free products from companies with or

⁵² REDBOOKS, L’OREAL S.A. ANNUAL MEASURED U.S. MEDIA SPEND (2014) (on file with author).

without guidelines from the company for potential review. This Part of the paper analyzes the effectiveness of YouTube marketing practices, focusing on the last maneuver of free product sampling.

Costs for digital advertisement are usually expressed as cost per impression (“CPM”) or cost per click, where the first denotes the advertising costs for each time the ad is shown and the latter denotes the cost for every time an actual “click” on the ad occurs.⁵³ Common Key Performance Indicators (“KPIs”), for measuring effectiveness of digital marketing, are click-through rate (defined as the ratio of times advertisement shown to times people actually clicking the ad)⁵⁴ and conversion rate (defined as the percentage who perform the desired action of making a purchase after clicking on the ad link).⁵⁵ For video advertising, instead of using click-through rate as a measure of effectiveness, a “view-through” rate is used, counting the number of times a video was viewed completely.⁵⁶

Sales resulting from advertisement are easier to track for digital and social media marketing than traditional marketing such as TV or radio commercials. In the case of affiliated marketing for instance, sales attributable to the marketing investment can be tracked via the link provided in the YouTube video’s description box or the use of a coupon code.

As is the case for every marketing campaign, it is important for companies to track the efficiency and return from those campaigns. Similarly, companies engaging in YouTube marketing

⁵³ *Cost Per Impression*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/cpm.asp> (last visited Dec. 18, 2014). *Cost Per Click*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/cpc.asp> (last visited Dec. 18, 2014).

⁵⁴ *Click Through Rate (CTR)*, GOOGLE, ADWORDS, <https://support.google.com/adwords/answer/2615875?hl=en> (“A ratio showing how often people who see your ad end up clicking it.”) (last visited Dec. 18, 2014).

⁵⁵ *Conversion Rate Definition*, MARKETINGTERMS.COM, http://www.marketingterms.com/dictionary/conversion_rate/ (last visited Feb. 18, 2015).

⁵⁶ *Video ad metrics*, GOOGLE, DOUBLE CLICK, GOOGLE, https://support.google.com/dfp_premium/answer/1217514?hl=en (last visited Dec. 19, 2014). *It is also possible to track the number of views at “quartiles”, e.g., number of times video played to 25%, 50%, 75%, and 100% of its length.*

can easily incorporate metrics such as marketing return on investment (“ROI”) to measure the effectiveness of YouTube marketing. A marketing ROI can be encapsulated in an equation as such:

$$\text{Marketing ROI} = \frac{(\text{Gross Profit} - \text{Marketing Investment})}{\text{Marketing Investment}}$$

To rearrange the equation another way, the effectiveness of a marketing campaign can be measured by the incremental revenue from the marketing campaign divided by the cost.⁵⁷

$$\text{Marketing Revenue to Cost Ratio} = \frac{\text{Incremental Revenue}}{\text{Cost}}$$

In order to arrive at the incremental revenue resulting from a digital marketing campaign, the company would need to know the conversion rate, defined as the percentage of site visitors becoming a paying customer.⁵⁸ Conversion rates can be measured without much difficulty in the context of YouTube videos: the sponsoring company can track the number of visitors coming from the link provided in the YouTube description box, and the number of subsequent converts (viewers who click on the link and subsequently purchase the merchandise).

A. A Hypothetical Scenario Analysis in Calculating Marketing Effectiveness—Free Product Sampling

The following scenario analysis takes on a hypothetical situation to demonstrate the computation of marketing ROI: a YouTuber specializing in the beauty category is sent a set of lipsticks from the cosmetics brand Urban Decay, containing the brand’s latest collection of lipsticks including 22 shades. Each lipstick retails for \$22 on the Urban Decay website, the set of lipsticks retails for \$484 (\$22 x 22 lipsticks). The scenario assumes that the YouTube beauty guru

⁵⁷ Victor Ho, *One Simple Metric You Need to Determine Marketing ROI*, INC.COM (Apr. 25, 2013), <http://www.inc.com/victor-ho/one-simple-metric-you-need-to-determine-marketing-roi.html>.

⁵⁸ See *Supra* note 55.

is requested by Urban Decay to film a review of the lipsticks, without specific guidelines as to the content of the review. The YouTuber is asked to provide a link to Urban Decay's website selling the lipstick, with redirect technology that can track clicks and resulting purchases.⁵⁹

For the purposes of this calculation, five inputs are needed: (1) number of total viewers on a video, (2) percentage of total viewers who clicked on the link to Urban Decay's website in the description box, (3) the percentage of viewers who ultimately made a purchase out of those who clicked the link (conversion rate), (4) the profit margin of products sold, and (5) the cost of marketing, which in this case would be the cost of the lipstick set sent out to the beauty guru for free.

For input (1), the calculations include three scenarios with 6 million, 1 million, and 300,000 views on a particular video. These numbers are entirely within reasonable assumption because, as documented in Part II *supra*, Michelle Phan's Lancôme-sponsored video that boasts over six million views is just one of many videos with such a viewership figure.⁶⁰ Input (2) is not a publicly known figure as YouTubers tend to shy away from disclosing such figures openly (YouTube content creators have access to analytics data as to how many clicks on a link in the description box occurred⁶¹). The calculations here therefore assume five different scenarios using 1%, 2%, 3%, 4%, and 5% of viewers clicking on the sponsored link provided in the description box. For input

⁵⁹ *Supra* notes 21–23.

⁶⁰ *E.g.*, BethanyMota, *Morning Routine: Fall Edition*, YOUTUBE (Sept. 8, 2013), <https://www.youtube.com/watch?v=koMbIaJ8Tmo> (18 million views as of Feb. 2015); CutiePieMarzia, *My Shoe Collection!*, YOUTUBE (July 7, 2012), <https://www.youtube.com/watch?v=J1hv-D64NxU> (1.7 million views as of Feb. 2015); ItsJudyTime, *Selena Gomez Love You Like A Love Song Official Music Video inspired Hair & Makeup Tutorial*, YOUTUBE (July 4, 2011), <https://www.youtube.com/watch?v=Y3z2sCWvx0c> (18 million views as of Feb. 2015); KandeeJohnson, *Glitterati Lip Tattoo & Lip Word Tattoo | Kandee Johnson*, YOUTUBE (Dec. 3, 2011), <https://www.youtube.com/watch?v=S4cBipeLMiw> (18 million views as of Feb. 2015); AndreasChoice, *Easy DIY Halloween Costumes Ideas! | AndreasChoice*, YOUTUBE (Oct. 14, 2013), <https://www.youtube.com/watch?v=gl6jrDtnU6M> (3.4 million views as of Feb. 2015).

⁶¹ *YouTube Analytics*, YOUTUBE, <https://www.youtube.com/yt/playbook/yt-analytics.html> (last visited Jan. 5, 2015).

(3), known as the conversion rate, the calculations herein borrows the figure from a research study on conversion rates for Google AdWords across different industries.⁶² According to the research, the average conversion rate on Google AdWords for the beauty and fitness industry is 4.56%, meaning out of every hundred clicks on an ad, approximately 4.56 clicks resulted in purchases.⁶³ For input (4), the calculations assume a 50% markup for cosmetics retailer (which is on the conservative side according to various sources), so that each converted customer purchases one Urban Decay lipstick at a profit of \$11 (\$22 x 50% profit margin).⁶⁴ Input (5) is the cost of advertisement, which is the cost of lipstick, equaling the assumed 50% markup in input (4) multiplied by the retail price of each lipstick (\$22 x 50%=\$11, \$11 x 22 lipstick in a set=\$242). See spreadsheet below with the corresponding numbered inputs described in this paragraph.

To calculate the marketing ROI, the incremental revenue from the video is divided by the cost of the campaign. Applying the five inputs, the marketing ROI in the example is the product of inputs (1), (2), (3), and (4) divided by input (5).

$$\begin{aligned} \text{Marketing Revenue to Cost Ratio} &= \frac{\text{Incremental Revenue (Input1*Input2*Input3*Input4)}}{\text{Cost (Input5)}} \\ &= \frac{\text{Input1 (number of views) x Input2 (\% clicked on link) x Input3 (conversion rate) x Input4 (profit margin)}}{\text{Input5 (cost of product)}} \end{aligned}$$

⁶² *Google AdWords*, GOOGLE, www.adwords.google.com (last visited Jan. 5, 2015). Google AdWords is an online ad placement service offered by Google to place ads above, below, or on the side of Google search results.

⁶³ Larry Kim, *What's a Good Conversion Rate on Google AdWords? Average Conversion Rates by Industry*, BUSINESS 2 COMMUNITY (Nov. 4, 2012), <http://www.business2community.com/online-marketing/whats-a-good-conversion-rate-on-google-adwords-average-conversion-rates-by-industry-0318438>.

⁶⁴ See Kentin Waits, *Cheat Sheet: Retail Markup on Common Items*, WISEBREAD (Dec. 9, 2011), <http://www.wisebread.com/cheat-sheet-retail-markup-on-common-items> (Citing to Euromonitor that the average markup for cosmetics is 78%); Tamara Monosoff, *Demystifying Profit Margins and Markups*, ENTREPRENEUR (Nov. 27, 2006), <http://www.entrepreneur.com/article/170964> (“It’s not uncommon for a retailer to expect a minimum gross margin of 50 percent. This is often referred to as a ‘keystone’ markup.”).

Exhibit A. Scenario analysis yielding high marketing ROIs

(1) Video Views	(2) % Click on Link	(3) % Make Purchase (conversion rate)	# of Transaction (1)*(2)*(3)	(4) Profit Margin (\$22*50%)	Total Incremental Profit (1)*(2)*(3)*(4)	(5) Cost of Advertising (cost of product at \$11*22)	Marketing ROI $[(1)*(2)*(3)*(4)]/(5)$
6,000,000	5%	4.56%	13,680	11.00	150,480	242	622
6,000,000	4%	4.56%	10,944	11.00	120,384	242	497
6,000,000	3%	4.56%	8,208	11.00	90,288	242	373
6,000,000	2%	4.56%	5,472	11.00	60,192	242	249
6,000,000	1%	4.56%	2,736	11.00	30,096	242	124
(1) Video Views	(2) % Click on Link	(3) % Make Purchase (conversion rate)	# of Transaction (1)*(2)*(3)	(4) Profit Margin (\$22*50%)	Total Incremental Profit (1)*(2)*(3)*(4)	(5) Cost of Advertising (cost of product at \$11)	Marketing ROI $[(1)*(2)*(3)*(4)]/(5)$
1,000,000	5%	4.56%	2,280	11.00	25,080	242	104
1,000,000	4%	4.56%	1,824	11.00	20,064	242	83
1,000,000	3%	4.56%	1,368	11.00	15,048	242	62
1,000,000	2%	4.56%	912	11.00	10,032	242	41
1,000,000	1%	4.56%	456	11.00	5,016	242	21
(1) Video Views	(2) % Click on Link	(3) % Make Purchase (conversion rate)	# of Transaction (1)*(2)*(3)	(4) Profit Margin (\$22*50%)	Total Incremental Profit (1)*(2)*(3)*(4)	(5) Cost of Advertising (cost of product at \$11)	Marketing ROI $[(1)*(2)*(3)*(4)]/(5)$
300,000	5%	4.56%	684	11.00	7,524	242	31
300,000	4%	4.56%	547	11.00	6,019	242	25
300,000	3%	4.56%	410	11.00	4,514	242	19
300,000	2%	4.56%	274	11.00	3,010	242	12
300,000	1%	4.56%	137	11.00	1,505	242	6

As shown in the calculations,⁶⁵ even with the most conservative assumption of 1% for input (2) (that a mere 1% of viewers proceed to click on the link provided by the YouTuber), sponsoring companies still enjoy marketing ROIs as high as 124, 21, and 6 for each of the assumed 6 million, 1 million, and 300,000 viewers on a video. These marketing ROI figures are unprecedented and represent a supremely lucrative choice for marketers. These figures are comparable to effective email marketing, reportedly having a marketing ROI of about 4300% (or 43 times) because email marketing is virtually costless to execute.⁶⁶ However, YouTube and email marketing are not substitutes, and businesses should consider implementing both campaigns where applicable.

⁶⁵ Note that the calculation herein will be on the conservative side because the equation merely captures the sales directly resulting from the advertisement; the equation does not account for subsequent repeat business by the same customer (e.g., a customer purchased product X from brand Y by clicking on the YouTube sponsored link, but returns to purchase product Z from the same brand after a positive experience from product X). The conversion rate in the calculations only pick up on those who purchase through the link provided in the YouTube description box. It is possible for some viewers to visit the website directly without going through the link provided, and thus not captured by the statistics.

⁶⁶ Brian Clark, *Email Marketing: How to Push Send and Grow Your Business*, COPYBLOGGER, <http://www.copyblogger.com/email-marketing/> (citing Direct Marketing Association that the marketing ROI for email campaigns) (last visited Feb. 18, 2015).

YouTube marketing has qualities absent in email marketing, such as the ability to engage the audience and not having a spam-like stigma, as in the case of email marketing.⁶⁷

V. LEGAL IMPLICATIONS IN YOUTUBE ENDORSEMENT MARKETING

A. *Federal Trade Commission Guides (2009)*

Given that YouTube itself is just about a decade old, native advertising on YouTube is also relatively new and under development. The Federal Trade Commission (“FTC”) published *Guides Concerning the Use of Endorsement and Testimonials in Advertising* (“Guide”) in 2009 in response to the proliferation of marketing in new media, addressing the application of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to the use of endorsements and testimonials in advertising.⁶⁸ Specifically, the Guide defines “endorsements” and imposes disclosure requirements and legal responsibility on companies and content creators under the usual advertising laws.⁶⁹ The Guide defines “endorsement” as “any advertising message... that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”⁷⁰ While the FTC does not believe all consumer-generated media that “discuss product attributes or consumer experiences should be deemed as ‘endorsements’,” the Guide provides for an objective facts and circumstances test to determine whether a statement is an endorsement. The test calls for a consideration of whether the speaker is compensated by the advertisers, whether the product or service was provided for free by the advertisers, terms of any agreement, the length of the relationship between the advertiser and

⁶⁷ See generally Julia Forneris, *The Disadvantages of Email Marketing*, HOUSTON CHRONICAL, <http://smallbusiness.chron.com/disadvantages-email-marketing-3472.html> (last visited Feb. 18, 2015).

⁶⁸ 16 C.F.R. § 255 (2009).

⁶⁹ F.T.C., .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013).

⁷⁰ 16 C.F.R. § 255.0 (b) (“including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization.”).

speaker, the previous receipt of products or services from the same or similar advertisers, the likelihood of future receipt of any such products or services, the value of the items received, and the degree of advertiser’s control over the statement.⁷¹ The Guide also cautions that an advertiser’s lack of control over specific statements *would not* automatically disqualify the statement from being deemed an “endorsement” within the meaning of the Guide.⁷² It should be duly noted that the FTC Guides are merely an “administrative interpretation of laws administered by the Commission,”⁷³ and therefore do not have the force of law.⁷⁴ The FTC may bring enforcement actions, however, upon practices allegedly in violation of the FTC Act.⁷⁵

1. Application of the Guide’s Facts and Circumstances Test to YouTube: YouTube Marketing Falls inside the Guide’s Parameter

According to the Guide, the threshold issue is whether the content creator’s statement would qualify as an “endorsement” as defined by the Guide. If the statement falls under the scope of the Guide, a disclosure will be required whereas if the statement falls outside of the Guide, no disclosure need be made.⁷⁶ The first two categories of YouTube marketing addressed in this paper—explicit sponsorship and affiliated links—are clearly under the scope of the Guide because

⁷¹ F.T.C., *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53124, 53126 (Oct. 15, 2009) (amending 16 C.F.R. § 255), available at https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf.

⁷² *Id.*

⁷³ F.T.C. Federal Register Rules and Regulations, 16 C.F.R. § 1.5 (2008).

⁷⁴ F.T.C., *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.0 (“The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers”); F.T.C., .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (March 2013).

⁷⁵ See *Division of Advertising Practices*, F.T.C., <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices> (last visited Nov. 21, 2015).

⁷⁶ F.T.C., *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53124, 53126 (Oct. 15, 2009); *Comment* (“Does Receipt of a Product, Without Monetary Compensation, Constitute a Material Connection That Must Be Disclosed? . . . The threshold question is whether the speaker’s statement qualifies as an ‘endorsement’ under the Guides. If not, no disclosure need be made.”).

the relationship would likely “materially affect the weight or credibility of the endorsements”,⁷⁷ but the last category where YouTubers receive free products, with or without guidelines for review, may be less clear and would need to be determined on a case by case basis.

In the series of examples provided in the Guide, a specific example involving a blogger receiving free merchandise speaks directly to the paper’s third category of free product sampling. According to the FTC, if a blogger receives merchandise from a marketer with a request to review it, with no compensation paid other than the value of the product itself, whether the situation would be deemed an endorsement depends on the value of the product, whether the blogger *routinely* receives such requests, and if the blogger received products from the company under the premise that the blogger is known to have wide readership within a *particular demographic group that is the company’s target market*, the blogger’s statements would *likely* be deemed “endorsements”.⁷⁸ Applying this example to YouTube, whether a YouTube video would be deemed an endorsement, thus falling under the mandate of disclosure, would depend on whether the YouTuber maintains a consistent relationship with such companies and what the motives are for the company in selecting a particular YouTuber. Almost indisputably, companies reach out to specific YouTubers because of the YouTuber’s specific target audience. For instance, cosmetics companies reach out to beauty gurus on YouTube for the very purpose of reaching a desired target demographic and game producers do the same with YouTube gaming channels. With this pretext, most of the YouTube

⁷⁷ F.T.C., *Disclosure of Material Connections*, 16 C.F.R. § 255.5 (Jan. 1, 2012). Example 4 involves an ad featuring a physician who speaks for an anti-snoring product and since consumers are unlikely to expect the physician to be receiving a percentage of gross product sales and that these facts would likely materially affect the credibility that consumers attach to the endorsement, the advertisement should clearly and conspicuously disclose the connection between the company and the physician. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. at 53142 n.85 (“If the blogger is actually paid by the advertiser or a third party acting on its behalf, disclosure certainly will be warranted.”).

⁷⁸ F.T.C., *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53124, 53126 (Oct. 15, 2009).

videos in the third category would then fall under the deemed endorsement definition of the Guide, thus requiring clear and unambiguous disclosure of such relationships to viewers.

2. Clear and Conspicuous Disclosure Mandated by the Guide

If a statement falls within the parameter of the Guide in the preceding paragraphs, a disclosure is mandated. Applying the clear and conspicuous disclosure requirement mandated by the Guide, YouTubers must disclose if there is a relationship with the seller of the advertised product that may not be readily apparent or reasonably expected by the viewers.⁷⁹ In making a clear and conspicuous disclosure, advertisers and YouTubers need to assume the perspective of a reasonable consumer, bearing in mind that consumers usually do not read the entire website or screen.⁸⁰ The disclosure should be communicated effectively with an effort in drawing attention to the disclosure.⁸¹

The FTC staff guidance, intended to aid compliance with the Guide's disclosure requirements, enumerates factors in considering whether a disclosure is clear and conspicuous: the proximity of the disclosure to the advertising statement, the prominence of the disclosure, whether the disclosure is unavoidable, whether other parts of the ad distract the attention from the disclosure, whether a disclosure needs to be repeated at different places on the website, and whether the language of the disclosure is understandable to the intended audience.⁸² Specifically, the FTC warns against designs where "scrolling" is needed to get to a disclosure because having to scroll increases the risk that consumers will miss a disclosure.⁸³ When scrolling is absolutely necessary,

⁷⁹ FTC Disclosure of Material Connections, 16 C.F.R. § 255.5 (Jan. 1, 2012).

⁸⁰ F.T.C., *supra* note 69, at 6.

⁸¹ *Id.*

⁸² F.T.C., *supra* note 69, at i-ii.

⁸³ *Id.* at 6 ("Advertisers should keep in mind that having to scroll increases the risk that consumers will miss a disclosure."); *Id.* at ii ("Preferably, design advertisements so that 'scrolling' is not necessary in order to find a disclosure.").

the advertiser should use text or visual cues to encourage consumers to scroll and reach the disclosure.⁸⁴ The FTC staff guidance further elaborates that the mere presence of scroll bar along the edges of a screen are not a sufficiently effective visual cue as to encourage the consumer to scroll and reach the disclosure.⁸⁵ Repetition may also be appropriate where consumers are likely to miss a disclosure as the case may be on lengthy websites.⁸⁶ The FTC staff guidance on disclosure cautions that websites may display differently depending on the program and devices used, so advertisers should make effort in ensuring the disclosure displays clearly and conspicuously across all mediums.⁸⁷

3. The Problem: Inconsistency in Disclosure and Lack of Conspicuousness

The preceding paragraphs establish that videos under the first two categories (sponsored and affiliated links) and most videos under the third category (free product sampling) fall under the mandate of the Guide, therefore disclosure of such relationships are legally necessary.⁸⁸ Applying the factors from the FTC staff guidance,⁸⁹ two prominent issues with disclosures on YouTube are inconsistent formats and inconspicuous placement.

For many sponsored videos, the disclosures often appear at the very bottom of the description box, which requires a user to actively click on a “show more” button and sometimes

⁸⁴ *Id.* at ii.

⁸⁵ *Id.* at 9 (“Although the scroll bars may indicate to some consumers that they have not reached the bottom or sides of a page, many consumers may not look at the scroll bar and some consumers access the Internet with devices that don’t display a scroll bar.”).

⁸⁶ *Id.* at 19 (“Advertisers should consider whether consumers who see only a portion of their ad are likely to be misled because they will either miss a necessary disclosure or not understand its relationship to the claim it modifies.”).

⁸⁷ F.T.C., *supra* note 69, at 17 n.28; *see also supra* note 69, at ii (“Take account of the various devices and platforms consumers may use to view advertising and any corresponding disclosure.”).

⁸⁸ *See supra* Section V.A.1.

⁸⁹ *See supra* text accompanying note 82.

scroll down through a long field of text before finally reaching the disclosure (see Appendix Six). This renders the disclosure neither unavoidable nor proximately close to the claim in the video. The FTC warns that the presence of scroll bar alone is not sufficiently effective of a visual cue to encourage viewers to reach the disclosure.⁹⁰ The FTC also iterates the need to consider the disclosure across different mediums, such as displaying on web browsers, smartphones, and tablets.⁹¹ While YouTube in personal computer web browsers display a “show more” button for users to expand the description box, YouTube on smartphone devices display a down arrow next to the video title for expanding the view (see Appendix Seven for display on android phones and iPhones).⁹² A down arrow is less “visually cuing” than a “show more” button, and this calls into question whether the inclusion of disclosure in the description box is clear and conspicuous enough for viewers to notice.

The FTC staff guidance also calls for audio disclosures when making audio claims.⁹³ This calls into question whether a YouTuber should also make disclosures orally in the video itself rather than the mere inclusion in the description box. Some YouTubers orally urge the viewers to look at the description box for more information on products featured in the video. Albeit the YouTubers’ intention of pointing viewers to the description box is probably to encourage viewers to purchase the sponsored product, this communication demonstrates an effort to draw attention to the disclosure as delineated in the FTC staff guidance.⁹⁴ However, the effectiveness of disclosure

⁹⁰ See *supra* text accompanying note 85.

⁹¹ F.T.C., *supra* note 69. See *supra* text accompanying note 87.

⁹² See YouTube videos generally. *E.g.*, TheDiamondMinecraft, *Minecraft | THEME PARK TO OURSELVES / Custom Mod Adventure*, YOUTUBE (Feb. 12, 2015), https://www.youtube.com/watch?v=7iJSY_PLjMg.

⁹³ F.T.C., *supra* note 69, at iii (“Use audio disclosures when making audio claims, and present them in a volume and cadence so that consumers can hear and understand them.”).

⁹⁴ See, *e.g.*, MeejMuse, *MUST-HAVE: Best Korean Makeup & Beauty Products!!*, YOUTUBE (Nov. 13, 2014), <https://www.youtube.com/watch?v=13e4LdDZ-6M> (prompting viewers orally to check out the description box for more product information).

in the description box rather than in the video itself is undermined by evidence from the comments section showing that a substantial amount of viewers do not open the description box to read its contents.⁹⁵

It is common practice on YouTube for parenthetical notations after a link in the description box to indicate links are affiliated, where the YouTuber will get a commission for sales resulting from the link.⁹⁶ Parenthetical information following the link will most likely be clear and conspicuous enough under the FTC guidelines, but a problem arises with the inconsistency of notating of such affiliations. Some YouTubers have their own system of notation, for instance, products mentioned in the video are listed in the description box with one asterisk to mean “received for free from companies” and two asterisks denoting “affiliated relationship” (See Appendix Eight for example).⁹⁷ Some YouTubers, rather than notating the affiliation after each link, provide a general disclaimer at the bottom of the description box to indicate that some of the links are affiliated.⁹⁸ Setting aside the question of whether a general disclaimer at the bottom

⁹⁵ E.g., Djeserit Sojourner, Comment to *Best Third Wheel in the World*, WongFuProductions, YOUTUBE (June 25, 2014), <https://www.youtube.com/watch?v=DNV2ttK6UxA> (“What kind of phone is that?”); Scott Huang, Comment to *Best Third Wheel in the World*, WongFuProductions, YOUTUBE (June 25, 2014), <https://www.youtube.com/watch?v=DNV2ttK6UxA> (“What phone was Phillip using”); *see generally*, WongFuProductions, *Best Third Wheel in the World*, YOUTUBE (June 25, 2014), <https://www.youtube.com/watch?v=DNV2ttK6UxA> (noting how users are nonetheless inquiring what the phone featured in the video was, despite the content creators having provided the phone model is a LG G3 in the description box); ThatsHeart, *What I Do for a Living?!*, YOUTUBE (Nov. 3, 2014), <https://www.youtube.com/watch?v=R-6Q5i2bMfU>. At the very end of the description box the content creator prompts her viewers to comment “Beyoncé sent me!” as a practical joke to confuse those who did not read the description box. Some confusion resulted from this in the comments section, with viewers inquiring whether the content creator personally knows the famous singer Beyoncé, evidencing that viewers generally do not read the contents of the description box.

⁹⁶ E.g., Video Creators, *How Online Community is Formed: Patrick Hanlon*, YOUTUBE (Dec. 4, 2013), https://www.youtube.com/watch?v=7_6ot6nMiA4 (providing an Amazon affiliate link in the description box to a book with parenthetical disclosure noting “affiliate”).

⁹⁷ E.g., RachelJade, *YouTubers getting FREE STUFF? Behind The Tube*, YOUTUBE (Sept. 20, 2014), <https://www.youtube.com/watch?v=FBxHmkMmbkQ>.

⁹⁸ E.g., ItsJudyTime, *Thank You for 1 Million*, YOUTUBE (May 9, 2014), <https://www.youtube.com/watch?v=JPY1bDPMRW4> (“*Amazon link(s) are affiliate links.”); FrmHeadtoToe, *January 2015 Favorites*, YOUTUBE (Jan. 31, 2015), <https://www.youtube.com/watch?v=JOt7NAXsWQc>

constitutes sufficient disclosure, the inconsistencies across YouTube may be problematic in itself to adequately warn viewers.

Videos in the free product sampling category have perhaps the most discrepancies in disclosure. First, it is unclear whether YouTubers who receive free products even disclose such a receipt a hundred percent of the time. As one content creator mentioned, it is entirely likely for successful YouTubers to lose track of what was given for free and which products were purchased with their own money, since successful YouTubers are frequently on the receiving end of free products to try.⁹⁹ Secondly, if it is disclosed that a product was sent for free, there are various ways YouTubers annotate such occurrences. For instance, some YouTubers annotate products received for free with an asterisk marked after the product in the description box without orally mentioning it in the video,¹⁰⁰ some mention the products were received for free in the video orally without a written disclosure in the description box,¹⁰¹ while others fastidiously notate the precise products that were gifted to them in the description box.¹⁰²

B. YouTube Terms of Use and Limited Guidance on Disclosure

Under YouTube's Terms of Service, a content creator may not use YouTube for commercial purposes without YouTube's approval. For example, such commercial uses include

("Disclaimer: This video is not sponsored by any of the companies mentioned. Some of the links above are affiliate links. Thanks for your love & support!").

⁹⁹ Jade, *supra* note 97.

¹⁰⁰ E.g., AndreasChoice, *My Current Obsessions! ♡ Makeup, Electronics, Clothing, Etc.!! | Andreaschoice*, YOUTUBE (Sept. 13, 2013), <https://www.youtube.com/watch?v=L-8J7-Y8Ezo> (including a written disclosure in the description box "FTC: Nothing was paid for...everything was bought for me" without mention in the video).

¹⁰¹ E.g., Gasparian, *supra* note 25.

¹⁰² E.g., Ingrid Nilsen, *July Favorites 2014*, YOUTUBE (Aug. 3, 2014), <https://www.youtube.com/watch?v=5o-Sz579i8g> ("Disclaimer: I purchase most of the products in my videos myself. Sometimes I'm lucky enough to have the opportunity to try and review products sent by brands for consideration. I also have amazingly lovely friends that may give me a gift or two from time to time. If used, these items (both gifts and products sent for review) will be marked with a (*).").

the sale of access to YouTube and the sale of advertising, sponsorships, or promotions placed on YouTube.¹⁰³ However, YouTube’s help page expressly allows for paid product placements as long as the content creator notifies YouTube by checking the appropriate box under the monetization setting of the video.¹⁰⁴ The purpose of notification is primarily for alerting YouTube as to avoid running ads that may conflict with the product featured in the video.¹⁰⁵ A paid product placement is defined as a “piece of content that is created specifically for a sponsor and where that sponsor’s brand, message, or product, is integrated directly into the content” on YouTube’s help page. The help page further provides that a typical example of product placement is one where the marketer pays the YouTube content creator to specifically mention the brand or product in what would normally constitute the editorial part of the content.¹⁰⁶ Permissive use of paid product placements is only open to YouTube Partners. YouTube forbids the use of pre-roll advertisements for a paid product placement because it conflicts with YouTube’s own advertisers where YouTube offers a comparable ad format.¹⁰⁷

YouTube has provided little guidance on disclosure, perhaps limited by geographical concerns and difference in laws applicable to its worldwide content creators. Rather than actively presenting disclosure rules to content creators, YouTube takes on a more passive role in providing some guidance on disclosure for those who seek it. For instance, YouTube provides on its “help

¹⁰³ *Terms of Service*, YOUTUBE, <https://www.youtube.com/static?gl=CA&template=terms> (last visited Dec. 19, 2014).

¹⁰⁴ *Paid Product Placement*, YOUTUBE, <https://support.google.com/youtube/answer/154235?hl=en> (last visited Dec. 19, 2014).

¹⁰⁵ *Id.* (“In some cases a paid product placement can create a conflict with ads that YouTube otherwise sells and serves to partner videos. For example, if you upload a video with brand mentions and product placements for Car Company A, then it would present a conflict to sell ad space around that video to Car Company B. To protect the value we offer advertisers, in these situations YouTube may disable monetization and promotion on videos with such product placements.”).

¹⁰⁶ *Paid Product Placement*, YOUTUBE, <https://support.google.com/youtube/answer/154235?hl=en> (last visited Dec. 19, 2014).

¹⁰⁷ *Id.* See also discussion *supra* Section III.C stakeholder analysis.

page” that content creators should check with their local rules to satisfy their legal and regulatory obligations.¹⁰⁸ The official Google Webmasters account on YouTube also provides some information on disclosure for those looking for it. A Google Webmasters video provides that disclosure should be clear and conspicuous, and viewers should not have to “dig around” for the disclosure.¹⁰⁹ Considering that this particular help video only has 32,000 views to date, compared to any of the videos mentioned in this paper with views in the millions, the effect of these YouTube and Google disclosure guidance is speculative.

VI. PROPOSAL TO INCREASE THE TRANSPARENCY IN YOUTUBE MARKETING TO BENEFIT ALL STAKEHOLDERS

Enormous marketing opportunities exist in the relationship between YouTube content creators and companies, and the ultimate victor and beneficiary from the scheme are the businesses. Businesses can achieve much higher penetration rates and efficacy through YouTube, with significantly lower advertising expenses compared to traditional above-the-line marketing. However, the existing dynamics among YouTubers, companies, and viewers call for a balancing of powers to protect those in a more vulnerable position, namely the consumer-viewers, but also certain YouTube content creators. As noted in the Part V *supra*, the FTC Guide does not have the force of law, but the FTC can bring an enforcement action against persons engaging in deceptive practices in violation of Section 5 of the FTC Act (15 U.S.C. § 45).¹¹⁰ So far, the FTC has yet to

¹⁰⁸ *Id.* (“Do I need to notify anyone else about a paid product placement? Maybe. Different jurisdictions have various requirements for creators and marketers involved in paid product placements and endorsements. For example, paid product placement may not be allowed in certain types of content or may not be allowed for certain types of products or services. . . . So, be sure to check your local rules and use our tools to help you comply with your legal and regulatory requirements.”).

¹⁰⁹ GoogleWebmaster, *Advertorials and Native Advertising*, YOUTUBE (May 29, 2013), <https://www.youtube.com/watch?v=1SmlsfSqmOw> (“If you are doing disclosure, you need to make sure that it’s clear to people. So a good rule of thumb is there should be clear and conspicuous disclosure. It shouldn’t be the case that people have to dig around, buried in small print, or have to click and look around to find out . . .”).

¹¹⁰ *See supra* text accompanying note 75.

bring an enforcement action upon marketing practices on YouTube in general. To ensure the sustainability of YouTube marketing, it is necessary for companies and YouTubers to increase the transparency in marketing practices to avoid inviting additional regulatory measures, heightened scrutiny and distrust from viewers.

A. For Content Creators: Placement of Disclaimers Should be Conspicuous and towards the Top of the Description Box

There is an urgent need to increase transparency in YouTube sponsorship marketing, where consumers should be informed of the endorsement/sponsorship relationship between the company and the YouTuber, if any. While some YouTubers do disclaim endorsement relationship either in the description box or in the video itself, such disclaimers at times are not conspicuous enough. Sponsored YouTube videos sometimes only go as far as including a short note at the very end of the description box (which requires the viewer to actually click and expand view of the description in order to reach the end) stating “video sponsored by X” or “thank you X company for the opportunity”.¹¹¹ Depending on the nature of sponsorship, videos that are full-on sponsored should be required a more flagrant disclaimer than a short statement disguised and buried in the description box. For videos that are predominantly sponsored in nature, a disclaimer towards the *top* of the description box as well as a *verbal disclosure* in the video itself should be required. Factoring in considerations for proximity and unavoidability as prescribed by the FTC guidance, disclosures should be integrated into the video itself coupled with an additional written disclaimer

¹¹¹ See Section V.A.3. *E.g.*, Zoella, *Topshop Haul & £500 Giveaway | Zoella*, YOUTUBE (Feb. 3, 2013), https://www.youtube.com/watch?v=IH8rWvom_oc (YouTuber noted at the bottom of description box “Big thank you to Topshop for sponsoring the giveaway and enabling one of you the chance to win £500! They are a nice bunch.”); ItsJudyTime, *Effortless Mermaid Waves hair tutorial! – itsjudytime*, YOUTUBE (May 13, 2014), <https://www.youtube.com/watch?v=UNYKmtHtREY> (YouTuber noted “This video is sponsored by NuMe” at the bottom of description box); EvelinaBarry, *Metallic Holiday Look*, YOUTUBE (Dec. 2, 2014), <https://www.youtube.com/watch?v=Rl5emID1Ktk> (YouTuber noted “This video was made in collaboration with Lord & Taylor”).

in the description box, because a disclaimer in the description box alone is “avoidable” by viewers and also not situated close enough to the claim in the video. Furthermore, for the affiliated links, it is recommended that disclaimers are placed right next to the links (either in the form of an asterisk or the words “affiliated link”) rather than a general remark at the end disclaiming some links are affiliated. This ensures the disclosure is as close to the claim as practicable.

B. For YouTube: YouTube Should Adopt a Uniform Notation System for Disclosures

In addition to the lack of conspicuousness for disclosures, inconsistency in disclosure format on YouTube reduces the effectiveness of disclosures.¹¹² To foster more transparency in the system, this paper recommends that YouTube adopt a uniform notation system, providing a consistent format of notating various sponsorship relationships in the description box or in the video itself. As mentioned in Part V *supra*, some YouTubers have their own system of notation,¹¹³ and while such notation systems may be helpful for viewers, the notations would be even more beneficial if promoted as a site-wide system where all YouTube videos are annotated the same way so viewers are more familiar with what each notation means. As YouTube currently provides a convenient way for partners to notify YouTube that the video contains product placement by checking a box when uploading,¹¹⁴ YouTube can similarly provide a “check-the-box” feature for content creators to annotate sponsorship relationship for viewers (see Appendix Nine for YouTube’s notification box during upload).

Though some viewers are aware of the presence of a commercial relationship between a YouTuber and a company in certain videos, others may not be as wary. A more conspicuous

¹¹² See *supra* Section V.A.3 (discussing how inconsistent disclosure formats can result in ineffective disclosures that ultimately do not reach viewers).

¹¹³ See *supra* text accompanying note 97.

¹¹⁴ *Paid Product Placement, supra* note 104. The primary purpose for such notification is for YouTube to refrain from running its own ads that may conflict with the video’s sponsored content, not for disclosure purposes to viewers.

disclaimer on the YouTubers' end coupled with viewer awareness can prevent the consumers from being marketed to without their knowledge.

C. For Companies: Fostering Trust in Viewers Will Benefit Companies and YouTubers

The business community frequently catapults the argument that regulation and disclosure requirements will stifle market growth and development.¹¹⁵ In addressing this argument, the FTC repudiated by stating that there is a lack of evidence substantiating this claim.¹¹⁶ The FTC defends its position stating that the Guide merely interprets the meaning of 15 U.S.C. § 45 on unfair competition rather than expand the scope of the statute.¹¹⁷ The FTC further reasons that by mandating disclosure, consumers may be more willing to trust and rely on those sources of information.¹¹⁸ The FTC is correct in suggesting that the maintenance of consumer trust is vital in the upkeep of the blogosphere and the online community. Without the underlying trust, consumer doubts and the state of wariness in viewing videos is a social cost imposed by general nondisclosure, which puts consumers in a precarious position, having to second guess whether the content is commercialized and whether it is trustworthy.¹¹⁹ This “cautionary filter” and general

¹¹⁵ *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. at 53142 n.14 (“If the Commission were to adopt guidelines addressing new media without a sufficient understanding of how such new technologies are being harnessed or may be used in the future, the Commission might risk dissuading the development of novel means of advertising that effectively serve the interests of consumers in ways not yet imagined Regulating these developing media too soon may have a chilling effect on blogs and other forms of viral marketing, as bloggers and other viral marketers will be discouraged from publishing content for fear of being held liable for any potentially misleading claim.”).

¹¹⁶ *Id.*, at 53127 (“The commenters who expressed concerns about the future of these new media if the Guides were applied to them did not submit any evidence supporting their concerns.”).

¹¹⁷ *Id.* (“The Commission disagrees with those who suggest that including in the Guides examples based on these new media would interfere with the vibrancy of these new forms of communications, or that the Commission should, instead, defer to industry self-regulation. Whether or not the Guides include examples based on these new media does not affect the potential liability of those who use these media to market their products and services. The Guides merely *elucidate* the Commission’s *interpretation* of Section 5, but *do not expand (or limit)* its application to various forms of marketing.”) (emphasis added).

¹¹⁸ *Id.* (“Moreover, to the extent that consumer’s willingness to trust social media depends on the ability of those media to retain their credibility as reliable sources of information, application of the general principles embodied in the Guides presumably would have a *beneficial, not detrimental*, effect.”) (emphasis added).

¹¹⁹ Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 87 (2006) (“Audiences that are highly skeptical that editorial content is what it seems are not deceived. And yet, it is in producing such skepticism

distrust is a social cost not only hindering this form of public communication, but could also erode consumer confidence in businesses.¹²⁰

It might be true to a certain extent that disclosing a relationship between the YouTuber and an advertiser may slightly undermine the effectiveness of the advertisement in the short run. However, the alternative of non-disclosure where some viewers somehow discover such undisclosed relationships will not only hurt the credibility of the content creator, but may cause the sponsoring brand to be stigmatized. Furthermore, the dynamics between a loyal viewer and a YouTuber suggest that viewers often believe in the YouTubers' integrity and would only recommend a product which they genuinely deem worthy. Frequently, it is up to the YouTubers to manage their personal branding and maintain subscriber relationships. To maintain credibility in a sponsored video, some YouTubers emphasize in a disclaimer that even though the message is sponsored, the YouTuber personally believes in the product.¹²¹ Other YouTubers defend their credibility on sponsored messages by interacting with users in the comments section, clarifying that they personally vouch for the product notwithstanding the sponsored nature of the video.¹²² In conclusion, the solution to the general concern that regulation for disclosure will have a chilling effect on the market is not to avoid disclosure altogether, but to promote "correct-pairing" and

that stealth marketing does its greatest damage. Stealth marketing harms, I argue, by *degrading public discourse* and *undermining the public's trust* in mediated communication." (emphasis added).

¹²⁰ *Id.* ("Doubt that an editor has an authentic voice leads to an overgeneralization of distrust as audiences come to believe that mediated speech is inauthentic or untrue even when it is not."). See generally F.T.C., *supra* note 69, at iii ("Negative consumer experiences can result in lost consumer goodwill and erode consumer confidence. Clear, conspicuous, and meaningful disclosures benefit advertisers and consumers.").

¹²¹ *E.g.*, AndreasChoice, *Date Night Makeup*, YOUTUBE (July 18, 2013), <https://www.youtube.com/watch?v=xX21KpXW0dQ> ("All smashbox products were gifted to me for free when I shot another vid with them. Opinions are mine.").

¹²² *E.g.*, MichellePhan, *Fun Holiday Gift Ideas*, YOUTUBE (Dec. 20, 2014), <https://www.youtube.com/watch?v=VbviHNHXRwU> (replying to a user comment expressing dissatisfaction over the sponsored nature of the video that "this video is a gift guide, of course it's going to feel like I'm "advertising" but I'm not. My only sponsored partner in this video is Nintendo, but even if they didn't partner with me, guess what, I'd still recommend the 3DS and Super Smash. I'm sorry if this video didn't come across as genuine to you everything in this video . . . I truly recommend.").

branding between advertisers and content creators where endorsements occur based on the YouTuber's genuine belief in the underlying product. If and when a YouTuber refuses endorsing certain products, businesses have an incredible market-study opportunity where they can obtain realistic feedback on its products. In other words, YouTubers serve as an "information facilitator" between the producers and consumers both ways. For the consumers, since consumers self-select YouTube channels according to their preference, resulting in YouTube channels having specific viewer demographics, YouTubers lessen the "disconnect" and information asymmetry between a specific product out in the vast market and its target audience. For the producers/businesses, it is likely that they will also benefit from valuable market information as to better improve and tailor its product to intended demographics. Overall, increasing transparency in YouTube endorsement marketing should promote ideal results for all stakeholders in the long run.

Currently, the terms in the agreements and contracts between YouTubers and companies are largely open to speculation.¹²³ Very few YouTubers actually expose and speak openly about the terms in any sponsorship agreement. To avoid corporate exploitation of YouTubers, agreements between YouTubers and companies could also use more transparency, where individual YouTubers can benefit from an open forum of knowledge about market prices and standard practice in endorsement deals. It is clear that companies are benefiting from an effective form of marketing while significantly curbing advertising expenditure; it is only equitable for content creators to be compensated fairly.

¹²³ Laurel, *supra* note 33 ("Some YouTubers try to be transparent about this stuff, while others let that information go by the wayside."). *See also supra* note 32.


VII. CONCLUSION

While marketing through YouTube sponsorship and endorsement can be tremendously effective, companies and YouTubers should exercise caution in providing clear and conspicuous disclosures to viewers. Introducing transparency into YouTube sponsorship marketing will help ensure the sustainability of such practice by avoiding regulatory incentive to impose additional restrictions, as well as consumer distrust in contents generally. Transparency can be increased in YouTube marketing if YouTubers and companies self-initiate clear and conspicuous disclosure coupled with YouTube's effort to standardize disclosure formats. The YouTube community as well as any digital forum today is as vibrant as can be, with new forms of communication constantly evolving and being developed. YouTube marketing arguably has provided value-added for all stakeholders, but honest dealing is an important pillar to uphold the vivacity of the online world.

Appendix

Appendix 1. YouTube beauty guru Michelle Phan monthly sponsored video by Lancôme

YouTube




Teint Idole Ultra Oil Free Foundation

Clubbing Makeup Tutorial

Michelle Phan 3,336,710

6,267,659

YouTube



Present

LANCÔME PARIS

Perfect Red Lips

Michelle Phan 3,336,710

3,255,809

Appendix 2. TheFineBros collaboration with Friskies Brand cat food

Next in ALL: LPLISODL'S LVLR MAUL
Kids React to Phancell - Happy Friends
by TheFineBros
4,551,751 views

You Tubers React to Japanese Commercials (EY #5)
by TheFineBros
10,531,071 views

FILMERS REACT TO HOWTO
by TheFineBros
10,379,813 views

KIDS REACT TO Keyboard Cat
by TheFineBros
5,322,277 views

Best Cat Vines - The Best Cat Corruption (25 MINUTE 5)
by TheFineBros
10,450,333 views

CELEBRITIES REACT TO VIRAL VIDEOS
by TheFineBros
12,020,883 views

Kids React to 10 Bets You Will Win
by TheFineBros
5,075,330 views

CATS REACT TO VIRAL VIDEOS
TheFineBros
Subscribe 12,561,448
9,496,343

Appendix 3. Byron Talbot's collaboration with Truvia

byron talbot brown butter cookies

131 / 022

Brown Butter Cookies
Byron Talbot
Subscribe 140,470
127,508

#TruviaBakingStar

11:00kuchen (11:00)
by ByronTalbot
664,183 views

Rainbow Sherbet
by ByronTalbot
455,665 views

Passion-Fruit Creme
by ByronTalbot
474,561 views

"Candy cane" Macaro
by ByronTalbot
445,895 views

A Composed Dessert
Samsung's "Chef Col
by ByronTalbot
424,007 views

Divorce | Why
by ChristalBenny
Recommended for you

Draw My Life- Jenna?
by JamesGardner
Recommended for you

Homemade "Nutella"
by Byron Talbot

Appendix 4. Affiliated link in YouTube description box



The image shows a YouTube video player interface. The video title is "Holiday GIFT GUIDE | for girls & guys!" by the channel "From Head To Toe". The video has 126,181 views and 3,086 likes. The description box contains the following text:

Published on Dec 11, 2014
Here are my top picks for the perfect presents this year! A few things for her, a few for him, and maaaaaybe something for you too. :)
Subscribe to my 2nd channel for VLOGMAS! <http://youtube.com/fmjen>

blog <http://www.fmheadtotoe.com>
twitter <http://twitter.com/fmheadtotoe>
facebook <http://www.facebook.com/fmheadtotoe>
instagram <http://instagram.com/fmheadtotoe>

—

PRODUCTS MENTIONED:

Urban Decay Naked On The Run
<http://bit.ly/1BbkiD>

Too Faced La Belle Carousel
<http://bit.ly/1zyj62n>


Smoko USB Heated S'mores Slippers
<http://bit.ly/1BzPp37>

The right sidebar shows a list of recommended videos:

- 8 PU Bang by Jim Raccoon (7:46)
- SEX! Bang by Jim Raccoon (20:14)
- SEX! Bang by Jim Raccoon (16:29)
- The L His & by chl 300.23 (7:33)
- URBU Palet by Shl 307.31 (8:16)
- Gift Ideas for Men 2015 by sss 32,741 (11:06)
- DIY H by Ros 349.33 (7:36)
- 5 DIY by Mia

Appendix 5. YouTube beauty gurus receiving free products providing reviews

YouTube




Urban Decay 2013 Fall Collection Review

Sona Gasparian 251,335

46,601

- Pencils**
By Sona Gasparian
57,436 views
- Review / Haul: Collection**
By Sona Gasparian
16,116 views
- Drift! Makeup**
By Sona Gasparian
1,325,759 views
- Winged Eyeliner**
By Sona Gasparian
102,501 views
- Urban Decay Fix & Lip Swatches**
By Sona Gasparian
11,347 views
- YSL Rouge Vol & Swatches**
By Sona Gasparian
275,001 views
- New! Urban Decay Lipsticks/Liner**
By TheBeautyPizz
11,540 views
- Kids Lamer to F**
By TheBeautyPizz

YouTube



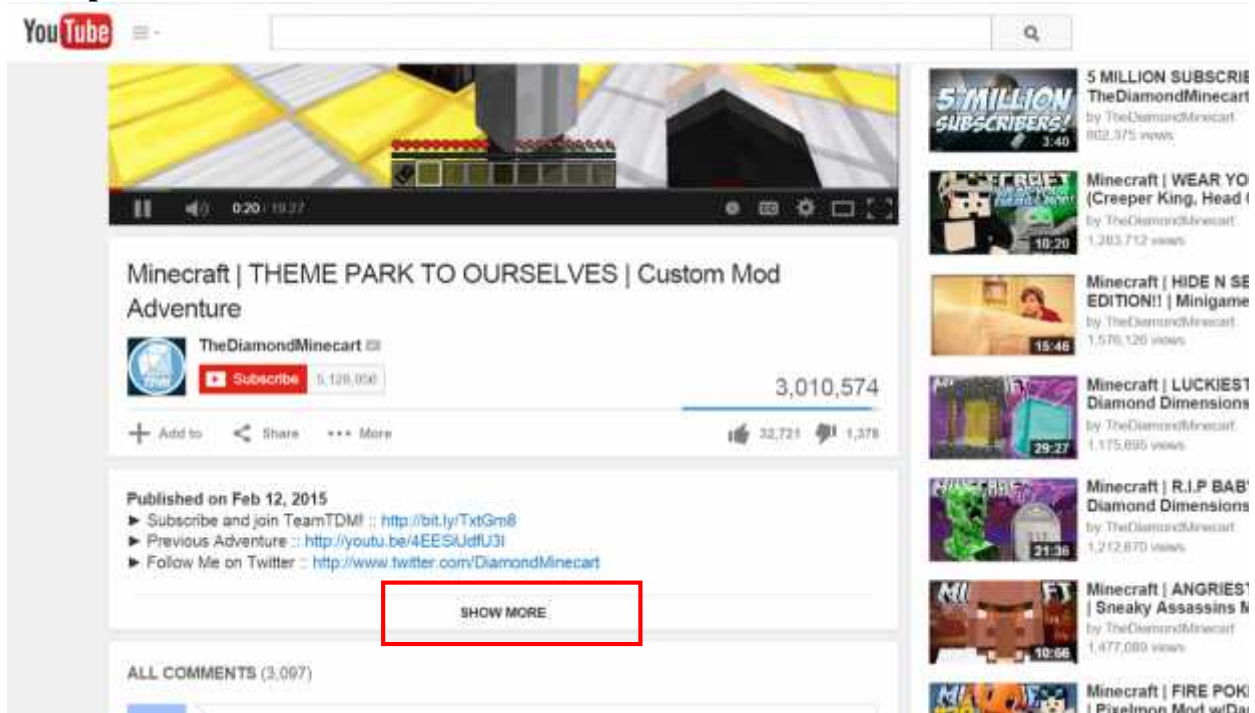
GIFT IDEAS - URBAN DECAY - THE VAULT!

gossmakeupchat 224,985

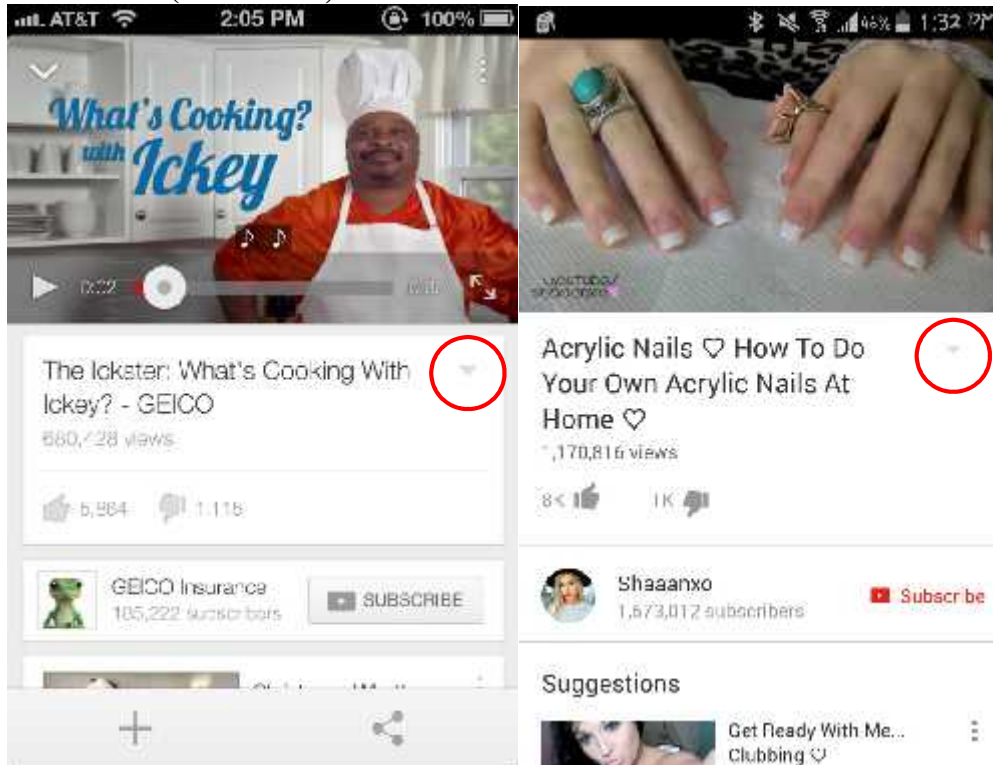
36,022

- Urban Decay Fix & Lip Swatches**
By gossmakeupchat
25,211 views
- Urban Decay Palette**
By gossmakeupchat
166,764 views
- Urban Decay Naked 2**
By gossmakeupchat
178,897 views
- Urban Decay Naked 3**
By gossmakeupchat
95,032 views
- Urban Decay Naked 4**
By gossmakeupchat
1,124 views
- Urban Decay Naked 5**
By gossmakeupchat
76,072 views
- James St. James Transformation**
By TheBeautyPizz
188,000 views
- Diapers | Why?**
By TheBeautyPizz

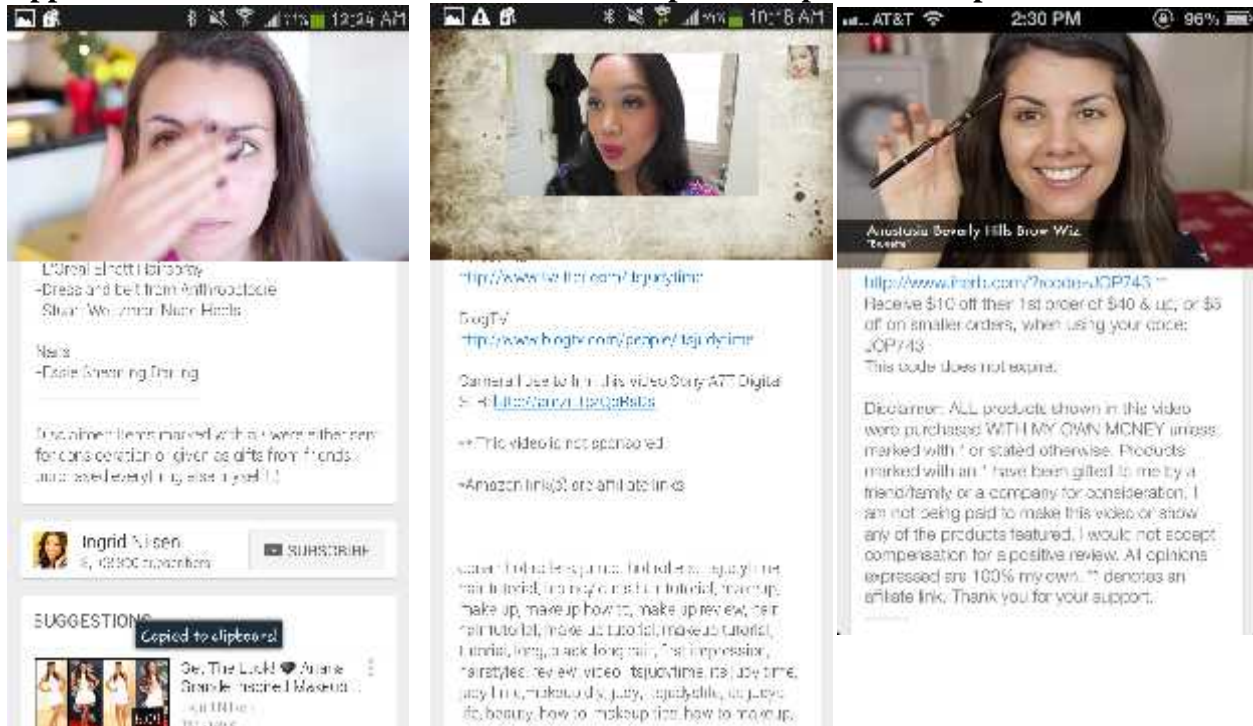
Appendix 6. Users required to click on “show more” in order to reach content in description box



Appendix 7. Visual cues to expand description box on Samsung Galaxy (android on right) and iPhone (iOS on left)



Appendix 8. Notations on YouTube for various sponsorship relationships



Appendix 9. YouTube upload page allowing content creators to notify YouTube if video contains product placements

Monetize my videos

Ad Formats

Overlay in-video ads [Preview](#)

TrueView in-stream ads [Preview](#)

Videos contain a product placement [Learn more](#)

Display ads are shown by default. [Preview](#)

Important: By monetizing videos on YouTube, you confirm that you own all necessary commercial use rights for all visual and audio elements. YouTube may disable monetization for accounts that have repeatedly not been able to prove commercial use rights. [Learn more.](#)