

**“TOUR DE FARCE!”  
MISBLURB MARKETING IN FILM AND  
PUBLISHING\***

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## INTRODUCTION

As defined by the American humorist who coined the word in 1914, a *blurb* is “a flamboyant advertisement; an inspired testimonial.”<sup>1</sup> Long before it had a name, blurbing was an established practice with a somewhat tarnished reputation.<sup>2</sup> Today, film and book marketers sift through reviews to uncover that golden sentence, phrase, or even word that can best sell their products.<sup>3</sup> Like the criticism from which it is cut, the blurb may serve a social function, informing choice in a crowded marketplace;<sup>4</sup> but when a quotation is impermissibly altered, that social function is placed in jeopardy and threatens to solidify consumer distrust.<sup>5</sup> Furthermore, the advertiser can face a myriad of legal challenges.<sup>6</sup> The Federal Trade Commission (“FTC”), for example, prohibits, “[a]ny alteration in or quotation from the text of [a] review that does not fairly reflect its substance . . . because it would distort the endorser’s opinion.”<sup>7</sup>

This particular form of deceptive marketing has several

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<sup>1</sup> GELETT BURGESS, BURGESS UNABRIDGED: A NEW DICTIONARY OF WORDS YOU HAVE ALWAYS NEEDED 7 (1914). Gelett Burgess was amused by the tendency of publishing companies to adorn their dust jackets with illustrations of coquettish damsels. Burgess lampooned the practice by using a picture of a particularly buxom blonde called “Miss Blinda Blurb” for the cover of his book *Are You a Bromide?* Burgess further defined his own neologism as, “[f]ulsome praise; a sound like a publisher.” *Id.* As a verb, to blurb is “[t]o flatter from interested motives; to compliment oneself.” *Id.*

<sup>2</sup> *Id.* (“On the ‘jacket’ of the ‘latest’ fiction, we find the blurbs; abounding in agile adjectives and adverbs, attesting that this book is the ‘sensation of the year,’ the blurb tells of ‘thrills’ and ‘heart-throbs,’ of ‘vital importance’ and ‘soul satisfying revelation.’”) See Stephen King, *Stephen King: The “Art” of the Blurb*, ENT. WKLY., Mar. 21, 2008 (“[T]he blurb has its place. Just not a very honorable one.”).

<sup>3</sup> While the practice might have started in publishing it was swiftly adopted by the film industry. See Brooks Barnes, *Hollywood’s Blurb Search*, N.Y. TIMES, June 07, 2009 (“The critic’s quote is perhaps the hoariest tool in the movie marketer’s arsenal. Studios have long used blurbs from reviews to sell films, sometimes taking comments out of context, punctuating them to within an inch of their lives and splashing them across newspaper and television ads.”); see also Laura Reina, *Why Movie Blurbs Avoid Newspapers*, EDITOR & PUBLISHER MAG., Aug. 31, 1996 (“Blurbs are meant to get audiences into the theaters. The words are chosen to entice [sic] audiences, and do not necessarily reflect a review’s conclusion.”).

<sup>4</sup> King, *supra* note 2 (“A blurb is sometimes a better way to point people toward the good stuff than a 2500-word review. It’s certainly more direct.”).

<sup>5</sup> Richard W. Pollay & Banwari Mittal, *Here’s the Beef: Factors, Determinants, and Segments in Consumer Criticism of Advertising*, 57 J. MKTG 3, 99 (1993). A secondary effect of “[h]igh levels of distrust and cynicism” amongst consumers is that it may “put the professions of marketing and advertising in disrepute and ultimately require greater advertising spending and creativity to accomplish the same ends.” Also, “[c]onsumer distrust of advertising is of great importance because it impedes advertising credibility and reduces marketplace efficiencies.”

<sup>6</sup> Legal claims may include tort claims of defamation, state law deceptive trade practices and false advertising, and deceptive practices as a violation of Federal Trade Commission regulations. See 15 U.S.C. § 45 (2006).

<sup>7</sup> Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 (2009).

names: one is *contextomy*, which “refers to the excerpting of words from their original linguistic context in a way that distorts the source’s intentions”;<sup>8</sup> another is a more recent term, *misblurb*, which was coined by the writer Henry Alford to describe what he politely referred to as “[t]he liberal editing of promotional verbiage.”<sup>9</sup> Hollywood has been known to use the word “*frankenquotes*”—“the industry term for questionable snippets of praise cobbled together with ellipses here and exclamation points there.”<sup>10</sup> These terms represent facets of a marketing practice that begin with the semi-innocent misquote and, on occasion, end with the fabrication of an entire review (and reviewer).<sup>11</sup>

While the most immediate injury of misblurb<sup>12</sup> is to the critics whose reviews have been plundered, they have shown little interest in a legal remedy—or any remedy at all.<sup>13</sup> The tendency is to dismiss misblurbs as an amusing, occasionally exasperating, nuisance.<sup>14</sup> Some writers have brought their complaints directly to the offending institution.<sup>15</sup> Others have established strict guidelines on how their reviews may be excerpted.<sup>16</sup> These methods might bring temporary relief to individual writers,<sup>17</sup> but

<sup>8</sup> Matthew S. McGlone, *Quoted Out of Context: Contextomy and Its Consequences*, 55 J. COMM. 330, 330 (2005) (warning that a contextomized quotation can “prompt[] audiences to form a false impression of the source’s intentions”).

<sup>9</sup> Henry Alford, *Literary Misblurb*, N.Y. TIMES, Apr. 29, 2007, Sunday Book Review, at 27. While Alford’s critique is directed at the publishing industry, he concedes that misblurb is just as evident, if not more so, in movie promotions.

<sup>10</sup> Barnes, *supra* note 3.

<sup>11</sup> See *Rezec v. Sony Pictures Entm’t, Inc.*, 10 Cal. Rptr. 3d 333 (Cal. Ct. App. 2004) (where a class of film viewers sued a major film studio seeking injunctive relief, restitution, and disgorgement after the studio’s marketing department fabricated enthusiastic reviews and attributed them to an imaginary critic named David Manning).

<sup>12</sup> For the purposes of this Note, I will use “misblurb” as an umbrella term to cover the entire spectrum of the practice. Furthermore, I will limit the thrust of my analysis to the twinned industries of publishing and film. Of course, not all blurbs are misblurbs: many are volunteered willingly and these endorsements are less likely to misrepresent the author’s opinion. See Edwin McDowell, *The Media Business: Publishing for Some, Best Prose Is in Blurbs*, N.Y. TIMES, Apr. 22, 1991 (“Few books appear without at least one testimonial to their value or to the skill of their authors. No matter that many blurbs on book jackets and in advertisements amount to literary backscratching, in that they are written by friends of the author, the agent or the editor.”).

<sup>13</sup> Adam Conner-Simons, *Don’t Quote Me, But...*, GELF MAGAZINE (Sept. 21, 2007), [http://www.gelfmagazine.com/archives/dont\\_quote\\_me\\_but.php](http://www.gelfmagazine.com/archives/dont_quote_me_but.php). One writer is quoted as saying, “[blurb] can sometimes annoy me’ . . . ‘but it seems to me to be such a permanent part of the landscape. It’s not something that’s consistently on my mind.” *Id.* Another movie critic, Manohla Dargis takes a pragmatic approach: “If you start to think about how advertisers can fuck with your work, you are self-censoring.” *Id.*

<sup>14</sup> See Alford, *supra* note 9.

<sup>15</sup> *Id.* For example, a *New York Times* book critic, Christopher Lehmann-Haupt, confronted one publisher for misblurb his review: “Back off if you want your books reviewed by me anymore’ . . . ‘He got the message.” It is worth noting that Mr. Lehmann-Haupt, unlike most critics, had over thirty years of experience at a major newspaper and enough clout to challenge the publisher head-on.

<sup>16</sup> See, e.g., Conner-Simons, *supra* note 13. Film critic, Manohla Dargis has been known to send out a list of rules to publicity departments with directives like, “you have to use ellipses” and “you can’t subtract punctuation.”

<sup>17</sup> See *id.* (“Several of the critics interviewed say that publicists have become more diligent about clearing quotes over the past few years.”).

they are unlikely to result in an industry-wide change in marketing practices.

The courts may provide more concrete solutions, but there appears to be little impetus amongst the critical ranks to seek redress at law as well as very few cases that are directly on point.<sup>18</sup> Furthermore, the FTC has been unwilling to litigate the issue aggressively.<sup>19</sup>

This Note poses two questions: (1) does the deceptive marketing practice of misblurbng affect any real societal harm; and (2) if a remedy is necessary, what form should it take? For the consumer, if not for the critic, the immediate injury is likely to be negligible, such as the retail price of a book or movie ticket. There are other countervailing considerations including, but not limited to, judicial marshalling of legal resources. These must be weighed against the potential dangers of leaving this marketing practice unchecked; the public trust will, in the smallest increments, become eroded and the role of the impartial critic diminished. Of even greater concern is the loss of trust in the printed word and in the true meaning of quotations.

Part I of this Note examines the different facets of misblurbng. Part II considers the harm, if any, both to critics and consumers, suggests potential causes of action, and examines the obstacles facing private litigants who seek redress. Part III examines the failure of the film and book industry to effectively self-regulate and evaluates two possible legal defenses. Part IV questions whether the FTC is the appropriate body to tackle the problem and looks to recent European initiatives as a potential model. Part V concludes that FTC enforcement is the most appropriate solution and suggests that a single adjudication against one media conglomerate might spur self-regulation across the film and publishing industry.

### I. MISBLURBING IN PRACTICE

Misblurbng can take many forms but always involves a distortion of the written word. Intentional or otherwise, shifting a single letter may have dramatic consequences.<sup>20</sup> For example, the author, Henry Alford, saw his 600-word *Newsweek* review of the David Sedaris memoir *Naked* boiled down to three words: “tour de

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<sup>18</sup> Some of these cases will be discussed at greater length in Part II of this Note.

<sup>19</sup> Quarterly Federal Court Litigation Status Report, Office of the General Counsel, No. 108, June 30, 2011, <http://www.ftc.gov/ogc/status/status.pdf>. Of the ninety-two injunction and consumer redress cases litigated in the last quarter there was not one case involving advertising in the entertainment industry. The two largest areas of litigation involved mortgage services and weight-loss products.

<sup>20</sup> See Alford, *supra* note 9.

force.”<sup>21</sup> The actual phrase he used was “tour de *farce*.”<sup>22</sup> While the alteration changed the meaning of his words, the overall impression of the advertisement did not significantly distort the underlying opinion of the review.<sup>23</sup> Alford argues that “the genteel world of book publishing” is not above the use of “near-hysterical reviews from marginal or even non-existent critics”—a practice more commonly associated with movie advertisements.<sup>24</sup>

In film advertising, the most common misblurb involves the generous apportioning of exclamation marks,<sup>25</sup> creating the impression of frenzied enthusiasm when the reality is often decidedly more muted.<sup>26</sup> As evidenced by these examples, the tiniest editorial shift may have a dramatic effect on the meaning of a sentence. Misrepresentations may include “letter capitalization, tagged-on punctuation marks, and one-word adjectives taking the place of lengthy, nuanced descriptions.”<sup>27</sup>

Another tool marketers use to mine a critic’s review is the ellipsis. Former publicist, Laura Zigman, admitted to the creative use of ellipses when excerpting reviews for her website: “Sometimes you have to eliminate 9 or 10 words to find the praise in there’ . . . ‘I’ll sit and think, ‘Oooh, there’s something salvageable.’”<sup>28</sup> In one case an advertisement for the film *Live Free or Die Hard* included a quote from the *New York Daily News* that read, “[h]ysterically . . . entertaining!”<sup>29</sup> The original words, as written by critic Jack Matthews, were: “[h]ysterically overproduced and surprisingly entertaining.”<sup>30</sup> The ellipsis artfully excised the

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* In one case, the author Bernard Cooper saw that a positive review had been blurbed and the publishers had seen fit to add a gratuitous “Bravo!” onto the end. “I certainly thought her book was deserving of a hearty exclamation,” Cooper said. *Id.* “It’s just that my saying ‘Bravo!’ is about as likely as my saying ‘Touché!’ It made me sound like someone who wears an ascot.” *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* The excessive use of exclamation marks is equally prevalent in the publishing industry: one “prominent book editor” confessed that, “[t]here’s latitude with exclamation points. Anything looks better with an exclamation point . . . .” *Id.* (internal quotation marks omitted).

<sup>26</sup> See Conner-Simons, *supra* note 13. The marketing for the film *Kung Fu Hustle* read: “A thrill ride! Hectic and eclectic! Show stopping fight sequences! ‘*Kung Fu Hustle*’ can be watched again and again!” *Id.* (internal quotation marks omitted). The actual *New York Times* review was decidedly mixed: “‘*Kung Fu Hustle*’ can be watched again and again. This is only partly a compliment: for all its punches, kicks, whacks and thumps, the movie does not have much impact . . . .” See A.O. Scott, *Fists Fly and Feet Spin in a Place Called Pig Sty*, N.Y. TIMES, Apr. 8, 2005, at E1.

<sup>27</sup> See Conner-Simons, *supra* note 13.

<sup>28</sup> Alford, *supra* note 9.

<sup>29</sup> Jack Matthews, *Never Say ‘Die’*. *Awesome Stunts Make It ‘Hard’ to Pass Up*, N.Y. DAILY NEWS, June 25, 2007, at 3.

<sup>30</sup> *Id.*; see also David Goldenberg, *‘The American’ is ‘a Test for Attention Deficit Disorder,’* GELF MAGAZINE (Sept. 20, 2010), [http://www.gelfmagazine.com/archives/the\\_american\\_is\\_a\\_test\\_for\\_attention\\_deficit\\_disorder.php](http://www.gelfmagazine.com/archives/the_american_is_a_test_for_attention_deficit_disorder.php). The use of a creative ellipsis to alter a review may be harmless. It is more worrying when the underlying review is fundamentally negative. The blurb “Elegantly crafted!” was used on publicity materials for the film *The American*

negative content while simultaneously creating a new and unintended association. Even if the change is minimal and only serves to amplify an already positive review, it is still a distortion of the writer's chosen expression.

Writers and critics tend to be more concerned when the critical thrust of their review is reversed—turning a mediocre or damning review into a hearty endorsement. As *Boston Globe* critic, Ty Burr, pointed out, such a transformation is easily achieved: “you can make a negative review positive if you take out the right words.”<sup>31</sup> When *Washington Post* writer, Jonathan Yardley, saw how his damning review of a Shirley Conran novel had been turned around, he could not help but laugh at the brazen distortion.<sup>32</sup> Nevertheless, Yardley felt compelled to take the publisher, Simon & Schuster, to task.<sup>33</sup> In a subsequent column, he accused Simon & Schuster of eroding the trust he had earned from the reading public: “[i]t is for this reason that I find myself distressed and angered by what I would otherwise dismiss, with a degree of amusement, as a cynically resourceful piece of salesmanship.”<sup>34</sup> This inevitable by-product of misblurb—the erosion of consumer trust—is a theme this Note will return to as part of a discussion as to whether there are public policy reasons for imposing corrective measures.

Deceptive editing by creative marketing teams is only a starting point. Occasionally an advertisement will feature a quote seemingly taken from a review when the quote actually comes from some other source, like a profile, preview, or even someone else's review.<sup>35</sup> At one point, it was not uncommon for movie studio publicity departments to make up quotes and then ask critics to put their names on them.<sup>36</sup>

In 2001, *Newsweek* broke the story of one of the most outlandish examples of misblurb to date.<sup>37</sup> David Manning, a critic at a small Connecticut weekly, *The Ridgefield Press*, was quoted

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when the actual quote was, “[w]ith its retro pacing, its pretentious lapses and its narrow emotional range, this elegantly crafted existential thriller risks alienating its audience; at times it feels like a test for attention deficit disorder.” Joe Morgenstern, *An 'American' in Italy, and in Existential Pain*, WALL ST. J., Sept. 3, 2010, at W16.

<sup>31</sup> Conner-Simons, *supra* note 13.

<sup>32</sup> Alford, *supra* note 9.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Other writers do not feel as strongly when they are benefitting from the blurb. Novelist Stephen Elliott saw the funny side: “I had no problem with it. It was kind of a snarky review.”

<sup>35</sup> See Conner-Simons, *supra* note 13. A review by then-*New York Times* critic, Elvis Mitchell, was attributed to Manohla Dargis in relation to a different film altogether. Some critics are troubled by this marketing tactic while others like James Berardinelli argue that there is no actual misrepresentation: “they are letting the reader imply something that's not there. Is it legal? Yes. Is it ethical? Probably not.” *Id.*

<sup>36</sup> Carl Bialik, *The Blurb Racket*, GELF MAGAZINE (Mar. 20, 2005), [http://www.gelfmagazine.com/archives/the\\_blurb\\_racket.php](http://www.gelfmagazine.com/archives/the_blurb_racket.php).

<sup>37</sup> John Horn, *The Reviewer Who Wasn't There*, NEWSWEEK, June 2, 2001.

in the marketing materials for four movies released by Sony's Columbia Pictures.<sup>38</sup> Amongst his ecstatic praise, was a description of the Rob Schneider comedy, *The Animal*, as "another winner!"<sup>39</sup> When *Newsweek* challenged Sony over the reviewer's authenticity, Sony was forced to admit that Manning had been invented by the studio's advertising department.<sup>40</sup> In response, Sony suspended two employees without pay for one month<sup>41</sup> and promised to create "a new system of checks and balances involving both the publicity and advertising departments . . . to ensure the accuracy of quotes contained in future advertising campaigns and to prevent this from happening again."<sup>42</sup> Despite this promise to mend its ways, the Attorney General of Connecticut launched an investigation into Sony's conduct<sup>43</sup> and two filmmakers brought a class action suit against the studio in Los Angeles.<sup>44</sup>

## II. THE CRITIC AND THE CONSUMER: MISBLURB INJURIES AND LEGAL REMEDIES

### A. *The Critic: Where's the Harm?*

As previously noted, many film and book critics begrudgingly accept misblurb as an unavoidable irritant that comes with the job.<sup>45</sup> If unwilling to sue, some writers have voiced their concerns in public: Kenneth Turan, a critic for the *Los Angeles Times*, was aggravated by advertisements that condensed full-length reviews that took "a lot of time to write" into just a few words.<sup>46</sup> Turan complains that the blurb is "a devaluation of what I do or what any critic does."<sup>47</sup> Jeff Strickler, who writes for the *Minneapolis Star Tribune*, described how his newspaper would try to prevent movie studios from blurbing reviews by waiting to publish until the day the film opened.<sup>48</sup> Other critics, concerned that their words would

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> David Ansen, *Arts Extra: "A Brilliant . . . Astonishing . . . Story!"*, NEWSWEEK, June 14, 2001. Newsweek's chief movie critic, David Ansen, doubted whether Sony went far enough, describing the suspensions as little more than "a month's unpaid vacation." *Id.* He added that, "[t]o any real critic, this was more insulting than the actual crime itself. Sometimes, when I write a sentence that could look tantalizing if taken out of context, I have to stop and ask myself: they wouldn't dare, would they?" *Id.*

<sup>42</sup> John Horn, *Blockbuster at Sony*, NEWSWEEK, June 7, 2001.

<sup>43</sup> *Id.*

<sup>44</sup> See *Rezec v. Sony Pictures Entm't, Inc.*, 10 Cal. Rptr. 3d 333, 333 (Cal. Ct. App. 2004).

<sup>45</sup> See Conner-Simons, *supra* note 13.

<sup>46</sup> See Reina, *supra* note 3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also Ansen, *supra* note 41. When Ansen had his negative review of the comedy *Foul Play* twisted into a positive blurb in a full page *New York Times* advertisement, he called Paramount to complain. The quote was subsequently removed from further advertisements. Only a small collection of well-established critics, like Ansen, may have sufficient influence to put pressure on studio marketing departments. This Note will

be taken out of context, have taken more drastic measures, avoiding any language that might be tempting to marketers.<sup>49</sup> One writer has suggested that newspapers should tell unscrupulous marketers to “get lost,” in the same way that people complain to the press when they are misquoted.<sup>50</sup>

Inevitably, a central concern for more established writers is the potential damage to their reputation. Critics who are not offended by misblurbings will often draw the line when a blurb misrepresents their opinion of the book or movie.<sup>51</sup> David Ansen, *Newsweek’s* film critic, confessed that he will usually let studio publicists make alterations to his words but only “[a]s long as it doesn’t distort the meaning of the review.”<sup>52</sup>

The prevalence of blurbs in advertising in film and publishing creates a market for positive reviews that could, foreseeably, dilute the pool of honest, thoughtful, artistic criticisms and, in the aggregate, defeat its informational purpose.<sup>53</sup> The consuming public, as well as the institution of criticism, are both affected. For example, publishers who want to preserve the good relationships they have built up with critics,<sup>54</sup> might be tarred merely because of their association with other less scrupulous houses.

## B. *The Critic: Avenues of Redress*

### 1. Libel

There are two potential injured parties when a quote is misrepresented in the marketing of movies and books: the first is the consumer, who has not always fared so well in civil actions;<sup>55</sup> the second is the critic herself who has seen her written words and professional opinion distorted, in some cases quite radically.<sup>56</sup> A film or book critic’s reputation as a trustworthy guide to consumer

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argue that the number of these brand-name critics has been steadily declining. Furthermore, the power of one critic to remedy a single infraction is unlikely to result in widespread reform.

<sup>49</sup> Reina, *supra* note 3. In 1996, Howie Movshovitz, who was the movie critic at the *Denver Post* at the time, explained that, “[i]f I ever write a line I think can be quoted, I change it.” *Id.*

<sup>50</sup> See Bialik, *supra* note 36.

<sup>51</sup> Conner-Simons, *supra* note 13 (“The critics aren’t an easily-offended lot, and stress that there are bigger fish to fry than exclamation-point-wielding movie marketers. ‘If they quote me—as long as I like the movie—then I don’t mind,’ [Carrie] Rickey says.”).

<sup>52</sup> Ansen, *supra* note 41.

<sup>53</sup> See Bialik, *supra* note 36. (“Some critics are victims of selective quoting. But others appear to be willing accomplices, consciously or unconsciously biased toward praising films because of the potential for career advancement.”).

<sup>54</sup> See Alford, *supra* note 9 (“Paul Slovak, the publisher of Viking, says part of what keeps the house honest is the desire to maintain “good relationships” with book reviewers.”).

<sup>55</sup> *E.g.*, Donahue v. Ferolito, Vultaggio & Sons, 786 N.Y.S.2d 153, 154 (N.Y. App. Div. 2004).

<sup>56</sup> See *infra* Part I.



choice is certainly a valuable commodity. For that reason, it is unsurprising that in the few private actions brought by critics over the misappropriation of their words, they have often chosen to sue for libel.<sup>57</sup>

While courts may differ on the precise formulation, the elements of the tort of libel include “a false and unprivileged publication . . . which exposes a person to distrust, hatred, contempt, ridicule, or obloquy . . . or which has a tendency to injure such person in his office, occupation, business, or employment.”<sup>58</sup> If that injury is a natural and proximate consequence of the false and unprivileged publication, then that wrong and injury will be presumed and implied such that the publication is actionable per se.<sup>59</sup> Unfortunately, for a critic who brings a defamation suit, showing an actual injury to her reputation “depends upon the opinions of those to whom it is published.”<sup>60</sup> For some critics, this has proved to be a significant obstacle to recovery.

### 1. Injury to Reputation

The applicability of libel to the misuse of a critic’s work for use in marketing was put to the test in an early case, *Thompson v. G. P. Putnam’s Sons*.<sup>61</sup> Thompson’s libel claim failed for reasons that directly bear on the success of this cause of action in protecting authors from egregious misblurbing. Thompson was a literary critic and Putnam had used some quotations from Thompson’s reviews in an “Introduction” and “Note” for a book entitled *Memoirs of a Woman of Pleasure*.<sup>62</sup> Thompson argued that the blurbs were taken “out of context” and in such a way as to conceal his unfavorable opinion of the book.<sup>63</sup>

The central thrust of Thompson’s argument was that his reputation had been injured and he had been “held up to ridicule

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<sup>57</sup> See RESTATEMENT (SECOND) OF TORTS § 568(1) (1977) (defining libel as “the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words”).

<sup>58</sup> *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 582 (5th Cir. 1967); see also Cal. Civ. Code § 45 (Deering 2011) (codifying this iteration of libel); but see *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 1002 (N.Y. Sup. Ct. 2005) (“The elements of libel are: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff”).

<sup>59</sup> *Belli*, 389 F.2d at 582.

<sup>60</sup> *Defamation*, 69 HARV. L. REV. 875, 882 (1956).

<sup>61</sup> *Thompson v. G. P. Putnam’s Sons*, 243 N.Y.S.2d 652 (N.Y. Sup. Ct. 1963).

<sup>62</sup> *Id.* at 653.

<sup>63</sup> *Id.* The excerpt in question described the book as “more nearly immortal than anything . . . great men of the time wrote.” *Id.* The critic juxtaposed that extravagant rave with his actual written opinion describing *Memoirs* as “tediously and bewilderingly pornographic” and “humorless indecency unadorned.” *Id.* (internal quotation marks omitted).

and contempt as a result of the publication.”<sup>64</sup> The flaw in his reasoning was expressed by the court: “[p]laintiff cannot be damaged, by being falsely charged with having expressed the opinion that the book possesses literary merit, unless the reading public considers that opinion erroneous.”<sup>65</sup> For the purpose of showing actual damages, the critic’s real opinion was irrelevant so long as the public might conceivably agree with the distorted version.<sup>66</sup> Furthermore, the reputation of the author cannot be injured unless the consumer takes the advertisement seriously—that is by no way assured when the public is bombarded by over-the-top blurbs and may have effectively switched off.<sup>67</sup>

## 2. Proving Material Change in Meaning

In one Supreme Court decision, *Masson v. New Yorker Magazine*, a noted psychoanalyst brought a libel action against the author of a magazine article and book alleging that his reputation was injured by fabricated quotations.<sup>68</sup> The Supreme Court rejected Masson’s assertion that any alteration of his words, more extensive than minor grammatical or syntactical changes, constituted falsity sufficient to be considered in a First Amendment determination of actual malice.<sup>69</sup> The Court found that the alteration of words or their meaning alone was not relevant if that alteration did not make a “material change in meaning,” and, in the absence of a material change, “the speaker suffers no injury to reputation that is compensable as a defamation.”<sup>70</sup> This *material change* standard would appear to preclude a large swathe of potential defamation actions by critics

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<sup>64</sup> *Id.* at 655.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 654-55. While Thompson’s libel claim floundered, he had more success on a separate claim for violation of New York’s Civil Rights Law (N.Y. Civ. Rights Law §§ 50-51 (McKinney 1999)). The court concluded that because the book was not designed to disseminate information with a “legitimate public interest,” and both the “Note” and the “Introduction” were designed to promote commercial sales, the cause of action was *prima facie* sufficient to avoid dismissal on a pleading motion.

<sup>67</sup> Daniel Attas, *What’s Wrong with “Deceptive” Advertising?*, 21 J. BUS. ETHICS 49, 56 (1999) (“Above a certain threshold this may cause a complete breakdown of trust that will result in consumers mentally switching off whenever they get exposed to advertising.”).

<sup>68</sup> *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). The action was primarily based on six passages where petitioner, Jeffrey Masson, was quoted and yet no identical passages were found in the more than forty hours of interviews recorded by the author, Janet Malcolm. In the book, Malcolm quotes Masson bragging that he had been called an “intellectual gigolo” by Sigmund Freud’s daughter, Anna. In the recorded interviews, Masson had actually described himself as “much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with [him].” *Id.* at 503. (internal quotation marks omitted).

<sup>69</sup> *Id.* at 514-15; *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (where a public official brought a libel action based on a full-page advertisement in the *New York Times*, the Supreme Court ruled that the plaintiff could not sustain his action without a showing of actual malice).

<sup>70</sup> *Masson*, 501 U.S. at 516.

who have been misblurred.

The Supreme Court chose not to employ the more forgiving standard for showing malice expressed in their earlier decision, *Time, Inc. v. Pape*.<sup>71</sup> The *Pape* decision effectively excused errors of interpretation, rather than errors of fact, when the source was ambiguous.<sup>72</sup> The written words of a critic's review are hardly an ambiguous source.

In *Masson*, Justice Kennedy distinguished *Pape* because that case did not involve the actual fabrication of quotations.<sup>73</sup> Kennedy warned that to apply a rational interpretation standard to quotations would "give journalists the freedom to place statements in their subjects' mouths without fear of liability."<sup>74</sup> He recognized that there are significant policy concerns involved and he addressed them squarely: "[b]y eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations."<sup>75</sup> While it might prove difficult for many individual plaintiffs to show a sufficiently material misuse of their writing to succeed in a libel suit, Kennedy's dicta in *Masson* recognizes that if the public is to retain any trust in the written word, some efforts must be taken to protect meaning from the distortion of deceptive quotation.

## 2. Copyright Infringement and Fair Use

As an original work of authorship fixed in a tangible medium, a critic's review has copyright protection from any infringement of his or her exclusive rights.<sup>76</sup> The use of "quotation of excerpts in a review or criticism for purposes of illustration or comment"<sup>77</sup> is one of the favored purposes set out in the preamble to Section 107 of the Copyright Act.<sup>78</sup> Regarding blurbs, the commercial

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<sup>71</sup> *Id.* at 518; see *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (holding that *Time* magazine's misuse of a quotation from a Civil Rights Commission report was a "rational interpretation" of the report, insufficient to create a jury issue of malice).

<sup>72</sup> See *Time, Inc.*, 401 U.S. at 291.

<sup>73</sup> See *Masson*, 501 U.S. at 518.

<sup>74</sup> *Id.* at 520.

<sup>75</sup> *Id.*

<sup>76</sup> See Copyright Act of 1976, 17 U.S.C. §§ 102(a), 501(a) (2006); see also *Amana Refrigeration, Inc. v. Consumers Union of U.S., Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1971) (copying of three sentences of review in a promotional brochure was found not to be fair use. Plaintiff argued that the article in question was not copyrightable as merely a statement of fact without originality. The court held otherwise: "[t]he excerpt . . . is more than mere statement of fact. It contains defendant's original analysis and conclusion and is copyrightable and use by others for economic gain may properly be enjoined."). One exception to a critic's copyright ownership would be if the work was "made for hire," in which case the critic has no rights upon which to sue without an express agreement to the contrary. See 17 U.S.C. §§ 101(1)–(2), 201(b) (2006).

<sup>77</sup> H.R. REP. NO. 94-1476 (1976) (citing to the Register's 1961 Report).

<sup>78</sup> 17 U.S.C. § 107 (2006).

exploitation of copyrighted material in advertising, without the author's permission, has been held to be a presumptively unfair exploitation of the monopoly privilege enjoyed by the copyright owner.<sup>79</sup> This does not mean that fair use by the publisher or movie studio may never exist in the context of pure commercial speech, and the Supreme Court has established that the presumption is rebuttable.<sup>80</sup> In fact, quoting *favorable* reviews even for commercial gain is generally considered a fair use of copyrighted material.<sup>81</sup>

The courts are less likely to find fair use, though, when the advertisement distorts the true meaning of the quote.<sup>82</sup> This may be the case even when only a small portion of the original review is used.<sup>83</sup> The use of a snippet of occasional, but not complete, word-for-word similarity<sup>84</sup> may be actionable but it must represent more than "a small and insignificant portion of the plaintiff's work."<sup>85</sup> This *de minimis* rule<sup>86</sup> is an effective defense to an infringement claim, but "[e]ven if the quantity of copied material is relatively small, it may still be deemed substantial if it is of great qualitative importance to the [pre-existing] work as a whole."<sup>87</sup>

Suing a publisher or movie studio for copyright infringement based on an incident of misblurb might very well fail the *de minimis* test, but neither the Copyright Act nor case law offers any bright line rule for deciding when a limited use becomes actionable.<sup>88</sup> Furthermore, as Part I of this Note illustrated,

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<sup>79</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>80</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994) ("The [copyright] statute makes clear that a work's commercial nature is only one element of the first factor enquiry into its purpose and character, and Sony itself called for no hard evidentiary presumption.").

<sup>81</sup> See *Consumers Union, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049–50 (2d Cir. 1983). The court there held that the use of Consumer Reports' favorable rating in advertising was not piracy. "Where an evaluation or description is being made, copying the exact words may be the only valid way precisely to report the evaluation." *Id.* Nevertheless, this case dealt with reviews that were "primarily informational" and unlikely to enjoy the same level of protection as, for example, the opinions expressed in a movie review. See generally *id.*

<sup>82</sup> See *Amana Refrigeration, Inc. v. Consumers Union, Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1971) ("[P]laintiff was attempting to convey the impression that defendant approved of plaintiff's microwave oven . . . when the exact opposite was true.").

<sup>83</sup> See *id.*

<sup>84</sup> *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1234 n.26 (3d Cir. 1986) (citing Professor Nimmer's application of a "fragmented literal similarity standard" in gauging the substantial similarity of the allegedly infringing work) (citation omitted).

<sup>85</sup> *Neal Publ'ns v. F & W Publ'ns, Inc.*, 307 F. Supp. 2d 928, 931 (N.D. Ohio 2004).

<sup>86</sup> See *Gottlieb Dev. L.L.C. v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) ("The legal maxim 'de minimis non curat lex' – 'the law does not concern itself with trifles' – applies in the copyright context. For example, if the copying is *de minimis* and so 'trivial' as to fall below the quantitative threshold of substantial similarity, the copying is not actionable.") (citation omitted).

<sup>87</sup> *Neal*, 307 F. Supp. 2d at 932 (citation and internal quotation marks omitted).

<sup>88</sup> *Id.* at 931 n.2 ("Mere enumeration of the extent of copying is, however, not particularly helpful, and courts have reached apparently inconsistent results, if their decisions are looked at simply from the standpoint of the numbers of words copied.").

misblurb does not always involve literal word-for-word copying. In fact, from the writer's perspective, it is the alteration of quoted language, not the underlying use, that is most objectionable.<sup>89</sup>

A court might consider the transformation of the original quote as a factor favoring a determination of fair use.<sup>90</sup> Copyright's goal to aid the "Progress of Science and the useful Arts"<sup>91</sup> is generally furthered by the creation of transformative works that alter the original meaning and expression of the original work without superseding the object of its creation.<sup>92</sup> While the commercial purpose of blurb and the danger of misrepresenting the author's expressive opinion weigh against a finding of fair use, both the *de minimis* amount copied and any transformative effect might steer a court the other way. Overall, there is no guarantee that an author who objects to misblurb will have any success bringing an action for copyright infringement.

### C. *The Consumer: Where's the Harm?*

Author Stephen King, who admits that he is more than happy to supply blurbs for material that he likes, worries that the consumer has grown increasingly cynical of marketing blurbs such that even honest praise is discounted.<sup>93</sup> He writes that, "[e]very good blurb of bad work numbs the consumer's confidence and trust."<sup>94</sup> Arguably, it is the consumer, far more than the critic, who is harmed by deceptive blurb. Considering how rarely consumers notice the names beneath the quotes, most critics avoid any potential damage to their reputation.<sup>95</sup> Furthermore, TV critic Milan Paurich has admitted that "[t]he quote [itself] is going to matter more to a [moviegoer] than the source of the quote."<sup>96</sup>

It is not always clear what harm results from the deceptive advertisement; in its most basic form, the consumer is tempted to

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<sup>89</sup> Ansen, *supra* note 41 ("As long as it doesn't distort the meaning of the review," Ansen writes, "I'll usually say OK.")

<sup>90</sup> Copyright Act of 1976, 17 U.S.C. § 107 (2006) (this section of the Act includes four non-exclusive factors to be considered when determining if a particular use is fair. Courts often look to the transformative effect of the use when examining the first factor: "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."); *see, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

<sup>91</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>92</sup> *Campbell*, 510 U.S. at 579.

<sup>93</sup> King, *supra* note 2.

<sup>94</sup> *Id.*

<sup>95</sup> Paul Farhi, "The Feel-Good Movie Blurb Credit of the Year": *There's a Reason You've Never Heard Of Those Critics Cited in the Ads*, WASH. POST, Oct. 14, 2007, at M04 (quoting critic Milan Paurich on the subject of inaccurate blurb: "[t]his might reflect badly on me and everybody else in this business, but unless you're Roger Ebert, people don't necessarily check the name beneath the quote . . .") (internal quotation marks omitted).

<sup>96</sup> *Id.*

buy a movie ticket or a book having been misled by an advertisement, and in this way gets less value than expected.<sup>97</sup> This assumes that other, more affordable, options are available, which is far from guaranteed.<sup>98</sup> By itself, the effect of being misled does not necessarily constitute a quantifiable harm.<sup>99</sup>

Nevertheless, there are other societal consequences of permitting the dissemination of such advertisements.<sup>100</sup> The institution of media criticism may be irreparably damaged, impairing consumer decision-making and, as a result, denying consumers the effective means to combat uncertainty over the value of cultural goods.<sup>101</sup> The critic is a first line of defense, offering to the public an independent evaluation based on the merits;<sup>102</sup> the question arises whether that purpose is defeated when a substantial source of critical commentary comes in the form of short, amped-up blurbs, riddled with exclamation marks, that might, or might not, be an accurate representation of the underlying review.<sup>103</sup> This potential harm is even more dramatic when the blurb copy contains invented language, or even an invented critic.<sup>104</sup> Of course, not all critics are blameless as evidenced by the symbiosis between perk-craving “blurbmeisters” and the media corporations who demand their enthusiastic support.<sup>105</sup>

Two fundamental questions are raised. First, does the consumer suffer some diffuse harm when we allow even small distortions in quotations?<sup>106</sup> Second, are media misblurbs a symptom of a larger cultural disease?<sup>107</sup> The extent of the harm is,

<sup>97</sup> Attas, *supra* note 67, at 54.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* There might also be consequences for the corporate entities themselves. See Rhea Ingram, Steven J. Skinner, & Valerie A. Taylor, *Consumers' Evaluation of Unethical Marketing Behaviors: The Role of Customer Commitment*, 62 J. BUS. ETHICS 237, 237 (2005) (“If corporate actions are perceived as unethical, the company stands to lose favor . . .”).

<sup>101</sup> Stéphane Debenedetti, *The Role of Media Critics in the Cultural Industries*, 8 INT'L J. ARTS MGMT. 30, 31 (2006).

<sup>102</sup> *Id.* at 32 (“Another fundamental characteristic of critics is their independence from the producers of cultural goods. . . . resistant to all forms of economic, political and religious influence.”).

<sup>103</sup> See Leora Broydo, *(Not Such a) Thriller!*, MOTHER JONES, Nov./Dec., 1997 (“In the end, a mediocre film is ‘GREAT!’ A real loser is ‘A WINNER!’ And nothing is sacred . . .”).

<sup>104</sup> Horn, *supra* note 37.

<sup>105</sup> See King, *supra* note 2; see also Debenedetti, *supra* note 101, at 34 (“Critics can . . . be influenced by explicit or implicit solicitation from commercial interests—for example, in the form of press passes or advertising contracts.”).

<sup>106</sup> See *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991) (impermissible alterations to the quoted word “would diminish to a great degree the trustworthiness of the printed word and eliminate the real meaning of quotations”).

<sup>107</sup> See Matthew S. McGlone, *Contextomy: The Art of Quoting Out of Context*, 27 MEDIA, CULTURE & SOC'Y 511, 515 (2005). One historical example of non-commercial, but purposeful misquotation involves Julius Streicher who was the editor of the Nazi newspaper, *Der Sturmer*. Streicher successfully aroused anti-Semitic sentiments by publishing “truncated quotations from Talmudic texts” that appeared to advocate “greed,

perhaps, hard to quantify, but whether we look to an individual act of deceptive marketing, the industry wide practice, or the resulting damage, if any, to consumer trust, there is something broken here that requires fixing.

#### D. *The Consumer: Avenues of Redress*

##### 1. Fraud and Negligent Misrepresentation

In most jurisdictions, a movie-goer or book-buyer can claim an injury if she relied on a representation, like a critic's endorsement made in an advertisement that proved not to be as represented.<sup>108</sup> In New York, for example, several elements must be shown to demonstrate this kind of common-law fraud: (1) the advertisement or book jacket contained a material false representation; (2) the studio or publishing house, through its marketing agents, intended that the consumer buy the book or see the movie as a result of that false representation; (3) the consumer did not know the representation was false and also relied on it in making her decision to buy the particular book or attend a particular screening; and (4) there were damages incurred as a result of reliance on the misrepresentation.<sup>109</sup>

To bring a negligent misrepresentation action, on the other hand, is not always necessary to show actual intent to deceive on the part of the studio or publisher.<sup>110</sup> Rather, the plaintiff need only show that the marketers failed to exercise reasonable care or competence when communicating the false information.<sup>111</sup> Since the expenditure on a book or movie ticket is relatively small and only involves pecuniary loss, courts have insisted on limited liability—part of the rationale for this is “the extent to which misinformation may be, and may be expected to be, circulated . . .”<sup>112</sup>

The distinction between a fraudulent and negligent misrepresentation is particularly relevant to misblurbings because the practice, as we have seen, runs the gamut from sloppiness to outright dishonesty. Honesty may be reasonably expected in a

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slavery, and ritualistic murder.” *Id.*

<sup>108</sup> See generally John F. Major, *False Representation As to Quality or Character of Product*, 35 AM. JUR. PROOF OF FACTS 2D 255 (1983).

<sup>109</sup> See *Abernathy-Thomas Eng'g Co. v. Pall Corp.*, 103 F. Supp. 2d 582, 595 (E.D.N.Y. 2000).

<sup>110</sup> See Major, *supra* note 108.

<sup>111</sup> RESTATEMENT (SECOND) OF TORTS § 552(1) (1977) (“One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”).

<sup>112</sup> *Id.* at cmt. a.

commercial context, but

the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect.<sup>113</sup>

Under this formulation, liability is relative to the purpose of the advertisements and the damage any misrepresentation would cause. Money spent on a movie ticket, while an actual loss, might not be sufficient to show damages in a court of law: the deceptive blurb itself does not represent “both act and injury.”<sup>114</sup> Furthermore, it is far from clear that every misblurb catalogued in this Note represents a misrepresentation of fact.

Overall, claims in state courts under the traditional common law fraud theory have proved unhelpful to consumer litigants.<sup>115</sup> Because establishing fraudulent intent is so difficult, many legitimate claims have no remedy.<sup>116</sup> Furthermore, an individual consumer is less likely to enjoy the same protections provided by commercial law.<sup>117</sup> More often than not, prohibitive legal costs, and an uncertain result, are enough to deter consumers from seeking redress for a deceptive trade practice.<sup>118</sup>

## 2. “Little FTC Acts”: Unfair Acts and Practices

In response to the deficiencies of common law actions (and the limited reach of the Federal Trade Commission Act (“FTCA”)),<sup>119</sup> every state has passed some form of unfair or deceptive acts or practices statute, commonly referred to as “Little FTC Acts.”<sup>120</sup> For example, under New York Penal Law section 190.20, “[a] person is guilty of false advertising when, with intent

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<sup>113</sup>*Id.*

<sup>114</sup> *Donahue v. Ferolito, Vultaggio & Sons*, 786 N.Y.S.2d 153, 154 (N.Y. App. Div. 2004) (finding that plaintiffs failed to show actual damages resulting from the purchase of beverages that included deceptive labels claiming to improve memory and health. The court was not shown evidence that the cost of the drinks was inflated by the misrepresentations or that the consumers’ health was adversely affected.).

<sup>115</sup> See Jack E. Karns, *State Regulation of Deceptive Trade Practices Under “Little FTC Acts”: Should Federal Standards Control?*, 94 DICK. L. REV. 373, 374 (1990) (“Due to difficulties encountered in establishing fraudulent intent, many legitimate [common law fraud] claims were not appropriately recognized and remedied.”).

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2006).

<sup>120</sup> Bob Cohen, Annotation, *Right to Private Action Under State Consumer Protection Act—Precondition to Action*, 117 A.L.R. 5th 155 (2004). The FTC may well have encouraged state legislation, “given a conceded inability to remedy most deceptive trade practices due to scarce budget resources and the difficulty of monitoring local conditions.”



to promote the sale or to increase the consumption of property or services, he makes or causes to be made a false or misleading statement in any advertisement . . . .”<sup>121</sup> Interpreting section 190.20, courts have ruled that the expression of a mere “opinion” is not a violation because the law is only concerned with representations of fact.<sup>122</sup> A misblurb is undoubtedly an opinion, albeit professional.

While the FTC has never allowed a private right of action for consumers, nearly every state now allows a private action to enforce state laws prohibiting deceptive or unfair acts and practices in the marketplace.<sup>123</sup> For example, New York General Business Law section 349 declares that “deceptive acts or practices” are unlawful<sup>124</sup> and creates a private action for anyone who has been injured as a result of the deceptive act.<sup>125</sup> If the defendant “willfully or knowingly” violates the statute, damages may be tripled with a ceiling of one thousand dollars.<sup>126</sup> In particular, false advertising is defined as any advertising that is misleading to a consumer in “a material respect.”<sup>127</sup> That the misrepresentation be material, is another potential obstacle to a successful misblurbing complaint under this cause of action.

### 3. Class Actions and Consumer Watchdogs

In 2001, a class of filmgoers filed suit against Sony Pictures Entertainment seeking injunctive relief and restitution under California’s Unfair Competition Law,<sup>128</sup> False Advertising Law,<sup>129</sup> and the Consumers Legal Remedies Act,<sup>130</sup> claiming that the filmgoers had been deceived by several “laudatory reviews” by the imaginary critic David Manning.<sup>131</sup> As it turned out, the critic never existed and was the invention of a Sony employee.<sup>132</sup> Notably, in dismissing Sony’s anti-SLAPP<sup>133</sup> claim, the court held

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<sup>121</sup> N.Y. PENAL LAW § 190.20 (McKinney 2010). Notably, this current version of the statute adds an affirmative defense if “the allegedly false or misleading statement was not knowingly or recklessly made or caused to be made.”

<sup>122</sup> *People v. Clarke*, 297 N.Y.S. 776, 779 (1st Dep’t 1937).

<sup>123</sup> See Karns, *supra* note 115; see also Cohen, *supra* note 120 (“[I]t has been stated that the enactment of private rights of action was a response to the inability of state attorneys general and other enforcement agencies to address each and every unfair or deceptive practice within their state through enforcement actions.”).

<sup>124</sup> N.Y. GEN. BUS. LAW § 349(a) (2004).

<sup>125</sup> *Id.* § 349(h).

<sup>126</sup> *Id.*

<sup>127</sup> N.Y. GEN. BUS. LAW § 350-a (2004); see *Paltre v. General Motors Corp.*, 810 N.Y.S.2d 496, 498 (2d Dep’t 2006) (holding that for plaintiffs to recover damages, the alleged misrepresentations must be materially deceptive and be directed at consumers).

<sup>128</sup> CAL. BUS. & PROF. CODE § 17200 (West 1992).

<sup>129</sup> CAL. BUS. & PROF. CODE § 17500 (West 1998).

<sup>130</sup> CAL. CIV. CODE § 1750 (West 1970).

<sup>131</sup> *Rezec v. Sony Pictures Entm’t, Inc.*, 10 Cal. Rptr. 3d 333, 334–35 (Cal. Ct. App. 2004).

<sup>132</sup> *Id.* at 335.

<sup>133</sup> CAL. CIV. PROC. CODE § 425.16 (West 2011) (deterring a Strategic Lawsuit Against Public Participation).

that while “the films themselves enjoy full First Amendment protection, the film advertisements do not.”<sup>134</sup> In the end, Sony agreed to pay \$1.5 million into a fund to settle the case.<sup>135</sup> In addition, Sony had to pay a fine of \$326,000 to the State of Connecticut for the false attributions.<sup>136</sup>

It has been suggested that the *Rezec* settlement, and the public scrutiny that surrounded the case, put pressure on the studio to adopt “slightly higher ethical standard[s].”<sup>137</sup> Even still, there is no official film industry “check” on the practice of running misleading blurbs.<sup>138</sup> For example, the Motion Picture Association of America vets movie advertisements for tone and content but does not investigate the accuracy of the cited quotes.<sup>139</sup>

In another example, *Variety*, a Hollywood trade magazine, reported that a group called Citizens for Truth in Movie Advertising filed ten class-action lawsuits in 2001 against all the major studios alleging fraudulent concealment, unfair business practices, and false and misleading advertising.<sup>140</sup> Admittedly, the suits did not concern misblurbs *per se*—the complaint alleged that reviewers had received undisclosed perks, including expenses, airfare, meals, and hotels.<sup>141</sup> In theory, consumer watchdog groups are a useful counterbalance to industry transgressions. In this particular case, though, there is no evidence that any of the suits progressed beyond the pleadings and the organization itself does not appear to have updated its website since 2001.<sup>142</sup>

As a separate line of defense, several Internet sites have appeared that scrutinize the use of critic reviews in advertising and, at the very least, raise public awareness about deceptive practices while providing an invaluable catalogue of ongoing abuses.<sup>143</sup>

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<sup>134</sup> *Rezec*, 10 Cal. Rptr. 3d at 335.

<sup>135</sup> *Sony Agrees to Settle Suit over Fake Critic-Source*, REUTERS (Sept. 2, 2004).

<sup>136</sup> Christopher Beam, “[Best] Film Ever!!!”: How Do Movie Blurbs Work?, SLATE (Nov. 25, 2009), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/11/best\\_film\\_ever.html](http://www.slate.com/articles/news_and_politics/explainer/2009/11/best_film_ever.html).

<sup>137</sup> Conner-Simons, *supra* note 13.

<sup>138</sup> Beam, *supra* note 136.

<sup>139</sup> *Id.*

<sup>140</sup> Janet Shprintz, *Lawsuits Aim to Curb Blurbs by Freebie Set*, VARIETY, July 9, 2001, at 4.

<sup>141</sup> *Id.*

<sup>142</sup> See Bialik, *supra* note 36.

<sup>143</sup> E.g., GELF MAGAZINE, <http://www.gelfmagazine.com> (last visited Nov. 9, 2011); METACRITIC, <http://www.metacritic.com> (last visited Nov. 9, 2011); HOLLYWOOD BITCHSLAP, <http://www.hollywoodbitchslap.com> (last visited Nov. 9, 2011).

## III. The Industry Perspective

A. *Self-regulation and Changing Dynamics in Misblurb Marketing*

Almost ten years since the David Manning scandal, there is no uniform, industry-wide “system of checks and balances . . . to ensure the accuracy of quotes.”<sup>144</sup> Furthermore, it is impractical for critics to track down every potential misquote of their work.<sup>145</sup> There may be some positive signs though: one writer has suggested that we are unlikely to see another David Manning because the Internet makes it far too difficult to get away with it.<sup>146</sup> Economics may also spur industry self-regulation: Paul Slovak, the publisher of Viking Press, said that what keeps his publishing house “honest” is the desire to maintain good relationships with reviewers.<sup>147</sup> Another publisher, Richard Nash of Soft Skull Press, has spoken of establishing a “threshold” to control the use of blurbs in marketing: “you can’t take something that’s a C+ or below and pull positive stuff out.”<sup>148</sup> Likewise, some critics have noticed a positive trend of publicists clearing quotes before using them in marketing.<sup>149</sup>

Despite this muted enthusiasm, misblurb is alive and well.<sup>150</sup> One explanation is that while publicists are wary of crossing more established critics, the dynamics of critical influence have shifted radically with the advent of blogs and online review sites that are more than willing to be quoted (and potentially misquoted) by large media companies.<sup>151</sup> Inevitably, film studios have been tempted by the vast range of available quotes from online sources “from which to pluck the right word or phrase.”<sup>152</sup> In fact, a large crop of review sites have emerged to fuel that

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<sup>144</sup> Horn, *supra* note 42 (internal quotations omitted).

<sup>145</sup> Conner-Simons, *supra* note 13 (“Pragmatically speaking, it’s simply too much work for critics to pore over every newspaper in America to make sure they aren’t being misquoted.”). *But see* Barnes, *supra* note 3. Film critic, Manohla Dargis is known to “aggressively” police the blurbing of her work: “The studios and smaller companies usually ask my permission, and I always check the ads to make sure I haven’t been misquoted.” *Id.*

<sup>146</sup> Bialik, *supra* note 36.

<sup>147</sup> Alford, *supra* note 9.

<sup>148</sup> *Id.*

<sup>149</sup> *See* Conner-Simons, *supra* note 13 (“Several of the critics interviewed say that publicists have become more diligent about clearing quotes over the past few years.”); *see also* Barnes, *supra* note 3 (“Hollywood has become more careful in recent years in the way it wields these quotes.”).

<sup>150</sup> *See* Barnes, *supra* note 3 (“As Hollywood’s blockbuster season kicks into overdrive . . . bet on one thing: regardless of the truth, it’s going to be a ‘Riveting! Explosive! Non! Stop! Thrill ride!’”).

<sup>151</sup> *See id.* (“[T]he blurbing game is also evolving as newspaper film critics disappear and studios become more comfortable quoting Internet bloggers and movie Web sites in their ads, a practice that still leaves plenty of potential for filmgoers to be bamboozled.”).

<sup>152</sup> *Id.*

studio appetite.<sup>153</sup> Studio marketing heads have noticed that many websites and blogs are “eager for the attention” and “don’t fuss as much over how their quotes are spliced together.”<sup>154</sup> The well-known and venerated critic, arbiter of taste, might be a dying breed. For example, between 2006 and 2009, at least fifty-five movie reviewers were laid-off or reassigned from newspapers.<sup>155</sup>

The film industry, which enjoys more economic clout than the publishing industry, has succeeded in co-opting the critical dialogue to some extent—at least, when it comes to younger audiences.<sup>156</sup> *Variety* has suggested that today’s youth “more often get their movie info straight from the studio marketing departments, who couldn’t be happier. . . . As they surf the Web, bits of movie flotsam and visuals planted by the studios on MSN Movies or IGN or JoBlo eventually cross their eyeballs.”<sup>157</sup>

While the reach of marketing has broadened, consumer distrust of blatant “hype” remains high even among younger audiences.<sup>158</sup> Partially to blame are the rash of so-called critics, or “blurbmeister[s],” who are more than willing to give film companies short, eye-catching raves ideally suited to film promotions.<sup>159</sup> While most critics are innocent victims of “selective quoting,” there are many others who appear to be willing participants.<sup>160</sup> It has even been suggested that these “video-box quotes are so obviously a work-for-hire deal that you can’t help but shake your head.”<sup>161</sup> The implication is that critics might be

<sup>153</sup> *Id.* While some sites may take themselves more seriously, others like *Ain’t It Cool News* “make no secret of their cheerleader approach to certain film genres.” *Id.*

<sup>154</sup> *Id.* On the defensive, Michael Moses, who is now Co-President of Marketing for Universal Studios, said in 2009 that “[s]ome of the best film writing and most substantive reviews are found online. . . . Those sources are as legitimate as any other.” *Id.*

<sup>155</sup> *Id.* See also Anne Thompson, *Crix’ Cachet Losing Critical Mass*, VARIETY, Apr. 07, 2008 (“For a generation of film lovers weaned on Pauline Kael and Roger Ebert, imagining a world where moviegoers make their pic choices without the help of film critics is nearly unthinkable. Fact is, that world is already here.”).

<sup>156</sup> See Thompson, *supra* note 155.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> King, *supra* note 2; see also Chris Parry & Erik Childress, *Earl Dittman Exposed – Film Criticism’s Greatest Shame*, EFILMCRTIC.COM (Mar. 28, 2003),

<http://efilmcritic.com/feature.php?feature=712&highlight=Earl+Dittman+exposed> (One particularly infamous critic is Earl Dittman, who writes for a magazine called *Wireless*, which might consist of a single page on the Wireless Dealer’s Association website. Some examples of his work include: “as perfect as any film could get”—*The Legend of Bagger Vance*; and “100% pure fun and excitement!”—*Catwoman*); Farhi, *supra* note 95 (“Some of the reviewers doing the blurbing aren’t always what they seem. Often, there’s less than meets the eye.” Marc Doyle, co-founder of *Metacritic.com*, which tracks film reviews, suggested that studios will use a network title or affiliation in concert with a blurb “even if it isn’t quite accurate.”).

<sup>160</sup> Bialik, *supra* note 36 (“[O]ther [critics] appear to be willing accomplices, consciously or unconsciously biased toward praising films because of the potential for career advancement. . . .”).

<sup>161</sup> Parry & Childress, *supra* note 159; see also Michael Sampson, *The Bottom of Things*, ASITECALLED FRED.COM (Apr. 16, 2003), <http://www.asitecalledfred.com/bottom/39.html> (“Junket whores” are defined as those “who seem to find no problem delivering their

“lining up for free gifts and pictures with the stars” in exchange for writing artificially positive reviews, while the more principled reviewers are unwilling to police their own industry.<sup>162</sup> Providing critics with desirable press junket perks and free publicity in exchange for flattering reviews is an advertising practice that raises legal concerns beyond the scope of this Note,<sup>163</sup> but it does provide a useful measuring stick to gauge the relative impropriety of misblurring and, thus, the urgency of its reformation.

### B. *The Economic Context*

If misblurring represents an attack on truth in advertising, what economic pressures, if any, would persuade major entertainment and media conglomerates that this practice is acceptable? One answer is that aggressive marketing is an economic necessity. Publishing is a case in point. The book business has traditionally been viewed as a “mature” industry, meaning that it “jog[s] along at a steady pace,” avoiding unsustainable highs and devastating lows.<sup>164</sup> These days, though, sales are sagging and several powerful CEO’s have lost their jobs.<sup>165</sup> For example, the 2010 second-quarter results showed a decline in the price paid per book (which can be partially attributed to the sale of lower-priced e-books), as well as a decline in both the number of books purchased per buyer, and the overall amount of money spent by each consumer.<sup>166</sup> The way entertainment, information, and ideas are delivered is in the midst of radical change, and it seems more than likely that “[t]here will be more

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unabashedly, overly positive review for every film that comes down the pike from a studio nice enough to put them up at the Four Seasons for a long weekend and foot their in-room porno bill.”)

<sup>162</sup> Parry & Childress, *supra* note 159; *see also* Reina, *supra* note 3 (“[M]ost of the blurbs in newspaper movie pages come out of press junkets hosted by movie studios. Publicists solicit quotes from ‘journalists,’ and, in exchange for positive opinions, provide free trips, celebrity interviews and the certainty of more junkets.”); Ahmed E. Taha, *Controlling Conflicts of Interest: A Tale of Two Industries* at 3–4 (Berkeley Elec. Press, Working Paper No. 750, Aug. 26, 2005), *available at* <http://law.bepress.com/cgi/viewcontent.cgi?article=3635&context=expresso>. It is suggested that conflicts of interest are created when critics are employees of large media conglomerates.

<sup>163</sup> Section 255.5 of the revised FTC Guides Concerning Use of Endorsements and Testimonials in Advertising could very well apply to this situation: “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.* the connection is not reasonably expected by the audience), such connection must be fully disclosed.” *See* 16 C.F.R. § 255.5 (2009); *see also* Louis Altman & Malla Pollack, *Trademarks and Monopolies*, in 1A CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 5:44 (4th ed. 2010) (“The revised Guides also add new examples to illustrate the long-standing principle that ‘material connections’ (sometimes payments or free products) between advertisers and endorsers—connections that consumers would not expect—must be disclosed.”).

<sup>164</sup> Boris Kachka, *The End*, N.Y. MAG., Sept. 22, 2008.

<sup>165</sup> *Id.*

<sup>166</sup> Jim Milliot, *Spending on Books Dips*, PUBLISHERS WKLY., Oct. 4, 2010.

upheaval to come.”<sup>167</sup> While its efficacy as a marketing tool has not been proven,<sup>168</sup> misblurb is a tempting option when more reputable sales devices do not appear to be working.<sup>169</sup> One industry commentator suggested that publishing houses would have more luck if they assumed greater responsibility for the quality of their books and reduced the “hyperbole found in catalogue copy and flap copy.”<sup>170</sup> Morgan Entrekin, the publisher of Grove/Atlantic, Inc. Books, insisted that “we try to obey the rules,” and yet mistakes are made: “[w]e get tempted and we get desperate” he confessed.<sup>171</sup> Another publisher, though, was unwilling to concede that his own dubious marketing practice reached the level of false advertising.<sup>172</sup>

As of 2005, there were signs that the film industry, like the publishing industry, was also in decline: box office and movie attendance were suffering and it was “setting the movie industry on edge.”<sup>173</sup> Some of the blame was directed at the rise of alternate forms of entertainment, the price of gas, and even a failure of movie marketing.<sup>174</sup> Like the publishing industry, a lack of quality product was also a potential culprit.<sup>175</sup> The dire predictions for the demise of the movie industry appear to be unfounded. Nevertheless, summer box office returns, which account for as much as forty percent of yearly totals were down half a percent from last year,<sup>176</sup> and DVD sales have fallen by around thirty-three percent.<sup>177</sup> With an over-abundance of new marketing avenues like *Twitter* and *Facebook*, film marketers are tempted to spend increasingly large sums advertising across multiple platforms.<sup>178</sup> As one distributor explained, “[t]he single biggest issue is how do we cut through the noise?”<sup>179</sup>

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<sup>167</sup> Jonathan Karp, *This Is Your Wake-up Call: 12 Steps to Better Book Publishing*, PUBLISHERS WKLY., Apr. 20, 2009, at 18.

<sup>168</sup> Conner-Simons, *supra* note 13. One critic is quoted as saying, “I’m baffled by [advertisers’] belief that critics’ quotes help or hurt movies.” *Id.*

<sup>169</sup> See McDowell, *supra* note 12 (“‘When 55,000 books are published each year, you are desperate for ways to distinguish your books from everybody else’s,’ said Paul Gottlieb, president of Harry N. Abrams Inc. ‘The right person writing a blurb for the right audience can sometimes make a tremendous difference in sales.’”).

<sup>170</sup> *Id.*

<sup>171</sup> Alford, *supra* note 9.

<sup>172</sup> See *id.* Tom Perry, who is presently Deputy Publisher at Random House attempted to justify the blurb, “Genius!” which, as it turned out, did not even originate in the critic’s review of the book. “We were being very short and punchy,” he explained. “We have limited space.” *Id.*

<sup>173</sup> Sharon Waxman, *Summer Fading, Hollywood Sees Fizzle*, N.Y. TIMES, Aug. 24, 2005, at E6.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Bob Tourtellotte, *UPDATE 1 -“Sex” Fails to Ignite Slumping US Box Office*, REUTERS, May 31, 2010.

<sup>177</sup> Peter Bart, *Little Upside to Downsizing in Hollywood*, VARIETY, Feb. 21, 2010.

<sup>178</sup> Pamela McClintock & Lauren Zima, *Executives Mull Art of Sell at Marketing Summit*, VARIETY, Oct. 6, 2010.

<sup>179</sup> *Id.* Screen Engine CEO Kevin Goetz was specifically referring to the premium on-demand market.

Economic pressure is only one explanation for media misblurb; apathy is another—hardly anyone is complaining.<sup>180</sup> Modifying quotes has become a *de facto* industry standard in publishing and film marketing and very few critics or authors seem to mind (or, at least, they try not to think about it).<sup>181</sup> The question is whether this only encourages marketers and advertisers to take the practice to new extremes. One author and book distributor pointed out that not only has the problem become worse, but “[t]here’s a feeling of, ‘Ah, no one’s looking anymore.’”<sup>182</sup>

### C. *Two Industry Defenses*

#### 1. First Amendment Protection

If the media industry is unwilling, or unable, to successfully police its own marketing practices, then the solution to misblurb must lie in the courts. The First Amendment provides a potent defense to such actions. The Supreme Court has recognized that the use of an erroneous statement, such as a deceptive misblurb, is “inevitable in free debate” and any punishment of such “error” might restrict the exercise of free speech.<sup>183</sup> Nevertheless, a commercial transaction does not receive the same level of protection as other constitutionally guaranteed expression.<sup>184</sup>

As regards First Amendment protections for misblurb, the critical distinction is whether the blurb will be characterized by a court as proposing nothing more than a commercial transaction.<sup>185</sup> Even when confronted with the same underlying set of facts, courts have not agreed on how to apply this commercial speech doctrine: in two class actions, *Keimer v. Buena Vista Books* and *Lacoff v. Buena Vista Publishing*, plaintiffs brought suits against Disney based on the book cover and flyleaf of a “how to” investment guide that bragged of investment returns that turned out to be significantly inflated.<sup>186</sup>

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<sup>180</sup> Conner-Simons, *supra* note 13.

<sup>181</sup> *Id.* Manohla Dargis, the *New York Times* film critic, said, “If you start to think about how advertisers can fuck with your work, you are self-censoring.” *Id.* Carrie Rickey of the *Philadelphia Inquirer* confessed, “If they quote me—as long as I like the movie—then I don’t mind.” *Id.*

<sup>182</sup> Alford, *supra* note 9.

<sup>183</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974) (“The *First Amendment* requires that we protect some falsehood in order to protect speech that matters.”).

<sup>184</sup> *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993).

<sup>185</sup> *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

<sup>186</sup> *Compare* *Keimer v. Buena Vista Books, Inc.*, 89 Cal. Rptr. 2d 781 (Cal. Ct. App. 1999) (reversing the trial court and holding that the use of inaccurate facts in book cover and videotape blurbs constituted commercial speech and was not protected by the First Amendment even though the blurbs originated in the books and videotapes themselves)

The court in *Keimer* distinguished between the statements made within the book and the statements on the cover, deciding to analyze the cover blurbs in isolation.<sup>187</sup> The court concluded that the book covers were advertisements that referred to a specific product and that Disney must have had an economic motivation in making the statements, “for what other reason would it have for publishing the books?”<sup>188</sup> Finding that the blurbs constituted commercial speech does not “strip them of all free speech protections.”<sup>189</sup> Nevertheless, in assessing the validity of that speech it must be lawful and not misleading, and it was on this point that Disney’s case floundered.<sup>190</sup> In a jurisdiction favoring the *Keimer* model, a misblurb defense would surely fail on the same grounds.

The court in *Lacoff* reached a different conclusion.<sup>191</sup> The New York decision did not agree that the blurb was necessarily an advertisement: it did not involve a traditional commercial product, but referred instead to the contents of a book that enjoyed First Amendment protections.<sup>192</sup> Under this approach, a court considering a First Amendment defense for misblurbing would be influenced by the eminently protectable qualities of the film or book benefitting from the blurb.<sup>193</sup> If, indeed, the misleading aspect of a blurb does not diminish its Constitutional protection it is hard to imagine a private individual having any success rebutting a First Amendment defense. Nevertheless, there is one central difference between the deceptive use of a critic’s quote and the false return figures cited by Disney: in the latter case, the blurb came directly from the text of the protected book and the court in *Lacoff* was concerned that if they ruled otherwise the “contents of the underlying speech could be chilled.”<sup>194</sup> This policy rationale would not apply to the misblurb because the quote has a separate existence from the protected speech it purports to describe.

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with *Lacoff v. Buena Vista Publ’g., Inc.*, 705 N.Y.S.2d 183 (N.Y. Sup. Ct. 2000) (based on the same set of facts in *Keimer*, the court held that the statements on the book’s cover and flyleaf, while false, were protected non-commercial speech protected by the First Amendment).

<sup>187</sup> *Keimer*, 89 Cal. Rptr. 2d at 787.

<sup>188</sup> *Id.* at 787.

<sup>189</sup> *Id.* at 788.

<sup>190</sup> *See id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–66 (1980)) (employing the first of a four-pronged analysis articulated by the Supreme Court).

<sup>191</sup> *Lacoff*, 705 N.Y.S.2d at 191.

<sup>192</sup> *See id.* at 189.

<sup>193</sup> *Id.* at 192 (“[T]he First Amendment protects even erroneous statements in the contents of the Book, and on its cover, flyleaf and in the introduction, and to create a duty on defendants’ part to investigate or verify the factual statements made therein would run counter to that protection.”).

<sup>194</sup> *Id.* at 191.



To conclude, the Supreme Court has specified that any First Amendment protection for commercial advertising is limited to its “informational function.”<sup>195</sup> As a result, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”<sup>196</sup>

## 2. Puffery

Assuming that the First Amendment will not shield the book and film industry from liability for deceptive blurbing, a puffery defense might prove more fruitful. Puffery in advertising has been defined as “[c]laims that are not capable of objective proof, or that are so vague, hyperbolic or humorous that consumers would not take them seriously.”<sup>197</sup> Author Camille Paglia argues that in the case of publishing blurbs, “[n]o informed person takes them seriously because of their tainted history of shameless cronyism and grotesque hyperbole.”<sup>198</sup> Notably, the *Lacoff* court found that the cover blurb’s claim to provide “secret recipe for investment success” was not actionable as it was “simply puffery or opinion.”<sup>199</sup> Presumably, the same argument could be made in the context of an extravagant, over-the-top review used in film and book marketing. Nevertheless, it is hard to imagine that misblurbing would have survived if it did not convince some consumers that the hyperbole was, in some measure, deserved.<sup>200</sup>

In particular, the FTC refrains from pursuing cases “involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.”<sup>201</sup> However, exaggeration by itself is not enough to guarantee that the

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<sup>195</sup> *Cent. Hudson Gas*, 447 U.S. at 563.

<sup>196</sup> *Id.*

<sup>197</sup> Richard A. Kurnit, *Advertising and Promotion Liability*, in *PRODUCT DISTRIBUTION AND MARKETING* 480 (A.L.I.-A.B.A., Coursebook, 2010).

<sup>198</sup> Doreen Carvajal, *MEDIA: PUBLISHING; Book Jacket Blurbs Are, by Definition, Shameless. Want Attention? Pan Your Own Author*, N.Y. TIMES, Oct. 13, 1997, at D7. It is unclear whether the average consumer of books and films is sufficiently “informed” to escape the lure of a colorful blurb.

<sup>199</sup> *Lacoff v. Buena Vista Publ’g., Inc.*, 705 N.Y.S.2d 183, 191 (N.Y. Sup. Ct. 2000); *see also* Kurnit, *supra* note 197 (“Grandiose claims couched in extraordinary superlatives, incapable of any kind of verification and not addressing any specific or absolute characteristic of the product are mere ‘puffery.’ They get the consumer’s attention, but they are just ‘hot air.’ They are not likely to convince the consumer to purchase the product on any basis which the consumer cannot evaluate.”).

<sup>200</sup> Bialik, *supra* note 36 (“Like other long-discredited ad techniques that endure—calling food ‘light,’ or using fake doctors to tout supplements—these blurbs survive because they work enough of the time.”).

<sup>201</sup> Letter from James C. Miller III to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (Oct. 14, 1983) (on file with author) [hereinafter *Deception Policy Statement*] (the letter is reprinted in the appendix to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (rejecting respondent’s argument that the words “electronic miracle” to describe a television antenna was puffery)).

consumer will not take it seriously and, in such a case, a claim may still be actionable.<sup>202</sup> Books and movie tickets are relatively inexpensive, but neither product can be easily evaluated prior to purchase and sellers are thus less concerned with repeat purchases. In this way, there are fewer market incentives to avoid deceptive advertising techniques, and the FTC will be more willing to pursue a complaint in such circumstances.<sup>203</sup>

Logically, a consumer will be more likely to distrust a claim if it comes directly from the producer. This is not necessarily the case when the hyperbolic claim is in the form of a review quote. The FTC will act if the opinion is “not honestly held” or if there is a misrepresentation of the “qualifications of the holder or the basis of his opinion or if the recipient reasonably interprets them as implied statements of fact.”<sup>204</sup> A misblurb is, by definition, a misrepresentation of an opinion and more often than not it is that very distortion which creates hyperbole.

While a puffery defense might fail on these grounds, it appears that consumer cynicism is on the rise.<sup>205</sup> This creates a kind of self-generating immunity: the more that truth in advertising is eroded, the more distrustful the consumer becomes, and the less likely that a governmental agency like the FTC will pursue the claim.

#### IV. THE FTC FRAMEWORK AND THE EUROPEAN MODEL

##### A. *Misblurbs and FTC Enforcement Authority*

The Bureau of Consumer Protection division of the FTC enforces federal truth-in-advertising laws with the goal of preventing harm to consumers from deceptive advertising.<sup>206</sup> Enforcement power stems from Section 5 of the FTC Act, which declares that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>207</sup> To qualify as “unfair,” the practice in question must “be likely to cause substantial injury to consumers which is not reasonably avoidable

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<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *Id.*

<sup>205</sup> King, *supra* note 2 (“[C]onsumers aren’t stupid, and they’ve grown increasingly cynical about the dubious art of the blurb. After you’ve been tricked into paying for a couple of really bad movies because of one, you realize the difference between real praise and a plain old con job. Every good blurb of bad work numbs the consumer’s confidence and trust.”).

<sup>206</sup> Anne V. Maher & Lesley Fair, *The FTC’s Regulation of Advertising*, 65 FOOD & DRUG L.J. 589 (2010); *see also* 15 U.S.C. § 52(a) (1994) (Section 12 of the FTC Act prohibits the dissemination of false advertisements).

<sup>207</sup> 15 U.S.C. § 45(a)(1) (2006).

by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>208</sup>

Whether the reasonable consumer would be substantially injured by a solitary encounter with a misblurb appears unlikely but is open to dispute. Nevertheless, if an administrative adjudication against a single respondent is inappropriate, the FTC does have the authority to use trade regulation rules as a remedy if the practice of deceptive marketing is “industry-wide.”<sup>209</sup> This standard is not particularly lenient: the deceptive acts or practices must be “prevalent.”<sup>210</sup> This statutory obstacle of “prevalence,” though, could be overcome if (1) misblurbing in the film and publishing market fails the FTC’s endorsement guidelines, and (2) there is sufficient factual evidence of a “widespread pattern.”<sup>211</sup> Part I of this Note demonstrates that this second prong of the FTC test has been met.

### B. The FTC Endorsement Guides

As regards the unfair or deceptive use of blurbs, the FTC has published a set of guidelines that are directly relevant. The FTC’s revised *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (“Guides”) became effective on December 1, 2009.<sup>212</sup> The Guides “provide the basis for voluntary compliance with the law by advertisers and endorsers” and any practice inconsistent with those guidelines “may result in corrective action by the Commission . . . .”<sup>213</sup> The FTC’s definition of an endorsement includes “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser . . . .”<sup>214</sup> As the Introduction to this Note illustrated, the FTC Guides clearly view a critic blurb as an example of an endorsement worthy of regulation.<sup>215</sup>

Not only has the FTC recognized a need to regulate the

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<sup>208</sup> 15 U.S.C. § 45(n) (2006).

<sup>209</sup> Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, Op. Legal Counsel, F.T.C. (July 2008), <http://www.ftc.gov/ogc/brfovrw.shtm>.

<sup>210</sup> The prevalence standard can be shown in two ways: (1) the commission must have already issued cease and desist orders regarding the practice; or (2) any other information that indicates a “widespread pattern of unfair or deceptive acts or practices.” 15 U.S.C. § 57a(b)(3)(A)–(B) (2006).

<sup>211</sup> *Id.*

<sup>212</sup> 16 C.F.R. § 255.0 (2009).

<sup>213</sup> *Id.* § 255.0(a).

<sup>214</sup> *Id.* § 255.0(b).

<sup>215</sup> *See id.* § 255.0 ex. 1 (“A film critic’s review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic’s own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser’s opinion.”).

misuse of critic “endorsements” in media marketing, but the Commission has retained the right to enforce such a trade regulation rule.<sup>216</sup> Civil penalties of up to \$10,000 per violation will be imposed on anyone who violates the rule “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.”<sup>217</sup> Additionally, Section 13(b) of the FTC Act provides a means for the Commission to seek preliminary and permanent injunctions when they have reason to believe the rules have been violated.<sup>218</sup>

As regards the manipulation of a critic’s words, the Guides would likely forgive some variation from the original text.<sup>219</sup> Nevertheless, “the endorsement may not be presented out of context or reworded so as to distort in any way the endorser’s opinion or experience with the product.”<sup>220</sup> While it seems evident that misblurbings falls under the FTC’s mandate for correction, the Commission and federal courts will still need to show that the individual blurb is deceptive under Section 5 of the FTC Act.<sup>221</sup>

### C. *The FTC’s Deception Policy*

The FTC’s *Deception Policy Statement* sets out a three part test: *first* there must be a representation, omission, or practice that is likely to mislead the consumer; *second*, the practice must be examined from the perspective of a consumer acting reasonably in the circumstances; and *third*, the representation, omission, or practice must be material.<sup>222</sup>

The first prong would not require that a consumer was actually misled by a misblurb—it is enough that the deception is likely.<sup>223</sup> Furthermore, the misrepresentation can be either express or implied, and can even result from an omission.<sup>224</sup> The second prong requires that the court adopt a reasonable consumer standard.<sup>225</sup> As this Note suggests, there is a strong likelihood that potential book and film purchasers have a healthy (or unhealthy) distrust of blurb marketing and are, thus, less likely to be deceived.<sup>226</sup> In a similar vein, it is doubtful that the FTC would pursue a claim if the blurb is deemed to be puffery and is

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<sup>216</sup> See *id.* § 255.0(a).

<sup>217</sup> 15 U.S.C. § 45(m)(1) (2006).

<sup>218</sup> See 15 U.S.C. § 53(b)(2) (2006).

<sup>219</sup> See 16 C.F.R. § 255.1(b) (2009).

<sup>220</sup> *Id.*

<sup>221</sup> See Maher & Fair, *supra* note 206.

<sup>222</sup> See Deception Policy Statement, *supra* note 201.

<sup>223</sup> Maher & Fair, *supra* note 206.

<sup>224</sup> Deception Policy Statement, *supra* note 201.

<sup>225</sup> *Id.*

<sup>226</sup> See King, *supra* note 2; Pollay & Mittal, *supra* note 5.

unlikely to be taken seriously.<sup>227</sup> Nevertheless, for the Commission to take notice of this deceptive practice, it is not necessary that a majority of reasonable consumers are misled—all that is required is that a “significant minority” are likely to “take away the misleading claim.”<sup>228</sup>

The third, and vital, prong of the test depends on whether the act or practice is sufficiently material to affect a consumer’s conduct or decision with regard to a product or service.<sup>229</sup> The misrepresentation, express or implied, must invoke information that is “important” to consumers in making their choice.<sup>230</sup> Assuming materiality is found, injury to the consumer can be presumed because she is likely to have chosen differently but for the deception.<sup>231</sup>

While a critic’s opinion is still a guiding authority and remains a potent marketing tool (as evidenced by their continued use in media marketing), the “importance” of an individual review might be waning: consumers are increasingly influenced by online amateur reviews and word-of-mouth “buzz marketing.”<sup>232</sup> As one writer put it: “Opinion in a distributed culture is abundantly, excessively, available, and as electronic self-construction accelerates the transformation of the private interior landscape into a Facebook page for public approval, personality becomes a debased currency.”<sup>233</sup> By eroding consumer trust in the informational value of criticism, the practice of misblurb may only increase this digital shift from expert to non-specialist opinion.<sup>234</sup>

While private litigants are unlikely to sue without demonstrable injury, the FTC has been charged with protecting the public interest from deceptive practices even if that harm has not been realized.<sup>235</sup> The misblurb clearly falls within the FTC’s

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<sup>227</sup> *Removatron Int’l Corp. & Frederick E. Goodman*, 111 F.T.C. 206, 296 (1988) (“Puffing claims are highly subjective, not capable of measurement and are not taken seriously.”); *see also supra* Part III(C)(2).

<sup>228</sup> *Telebrands Corp., TV Savings, L.L.C., and Ajit Khubani*, 140 F.T.C. 278, 291 (2005).

<sup>229</sup> Deception Policy Statement, *supra* note 201.

<sup>230</sup> *See Maher & Fair, supra* note 206; *see also* Deception Policy Statement, *supra* note 201 (“The *basic* question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.”) (emphasis added).

<sup>231</sup> Deception Policy Statement, *supra* note 201.

<sup>232</sup> Stephen Burn, *Beyond the Critic as Cultural Arbiter*, N.Y. TIMES, Dec. 31, 2010 (“The age of evaluation, of the Olympian critic as cultural arbiter, is over.”); *see also* Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415 (2010).

<sup>233</sup> Burn, *supra* note 232.

<sup>234</sup> Sprague & Wells, *supra* note 232 (“The increase in use of the Internet as a marketing medium gives rise to a conundrum: consumers are bombarded by, skeptical of, and generally ignore overt commercial messages, but consumers are more likely to pay attention to—even seek out—and regard as credible, reviews and opinions by fellow consumers.”).

<sup>235</sup> Jef I. Richards & Ivan L. Preston, *Proving and Disproving Materiality of Deceptive Advertising Claims*, 11 J. PUB. POL’Y & MKTG. 45, 46 (1992).

express regulatory purview and, depending on the individual facts of a case, the practice may be deemed sufficiently deceptive to require the imposition of monetary and/or injunctive penalties.<sup>236</sup> Nevertheless, as previously discussed, the FTC has not chosen to tackle this form of deceptive marketing—it is certainly not a priority.<sup>237</sup> As a result, there is no indication of what impact a negative ruling might have on the industry, but one can only imagine that, going forward, marketing departments would be less cavalier in their use of review blurbs.

#### D. *Europe and the Unfair Commercial Practices Directive*

In May 2005, the European Parliament adopted the Unfair Commercial Practices Directive (the “Directive”)<sup>238</sup> with the intent of boosting consumer confidence while facilitating easy cross border trading for businesses.<sup>239</sup> These new rules, which became applicable across the European Union in December 2007, target “sharp practices,” like misleading and aggressive marketing.<sup>240</sup>

The European Parliament recognized that marked differences amongst member states in tackling unfair commercial practices resulted in “appreciable distortions of competition and obstacles to the smooth functioning of the internal market.”<sup>241</sup> FTC regulations can play a similar harmonizing role in the United States but they do not prevent the states from adopting their own unfair competition statutes or “little FTC acts”—conversely European member states must abide by these new uniform rules but cannot adopt measures that offer more extensive protection.<sup>242</sup> While the Directive is primarily focused on commercial practices that directly influence consumer transactional decisions, the European Parliament recognizes that practices that harm consumers may also indirectly harm businesses, particularly when

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<sup>236</sup> See 15 U.S.C §§ 53–54 (1994).

<sup>237</sup> See *Division of Advertising Practices*, FED. TRADE COMMISSION (Apr. 21, 2011), <http://www.ftc.gov/bcp/bcpap.shtm> (laying out six enforcement priorities: deceptive weight loss advertising; deceptive Internet marketing on public health; monitoring new advertising techniques like “word-of-mouth” marketing; food advertising directed at children; marketing of violent movies, games and music to children and; reporting on alcohol and tobacco marketing practices. See also FEDERAL TRADE COMMISSION, ANNUAL REPORT, SECTION TWO: CONSUMER PROTECTION MISSION (Mar. 2009) (establishing priorities such as subprime lending and fraudulent claims by mortgage foreclosure rescue and credit repair operations).

<sup>238</sup> Council Directive 2005/29/EC, 2005 O.J. (L 149) 22–39 (EC) [hereinafter U.C.P.D.].

<sup>239</sup> *The Unfair Commercial Practices Directive*, EUROPEAN COMMISSION (Aug. 11, 2011), <http://ec.europa.eu/consumers/rights>; see also Chris Willett, *Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive*, 33 J. CONSUMER POL’Y 247, 247 (2010) (the UCPD “seeks to regulate the fairness of business to consumer trading practices by reference to a ‘high level of consumer protection.’”).

<sup>240</sup> U.C.P.D., *supra* note 238; see also *The Unfair Commercial Practices Directive*, *supra* note 239.

<sup>241</sup> U.C.P.D., *supra* note 238, ¶ 3.

<sup>242</sup> *Id.* ¶ 5 (It is for this reason that the new guidelines set the minimum levels of protection at a very “high level of consumer protection”).

competitors have not played “by the rules.”<sup>243</sup>

The Directive specifically addresses misleading advertising, such as a misblurb, which “by deceiving the consumer prevent him from making an informed and thus efficient choice.”<sup>244</sup> Such a commercial practice will be deemed “unfair” if it “materially distorts” the economic behavior of the average consumer.<sup>245</sup> Advertising practices fall under one of two sub-headings: “misleading” or “aggressive.”<sup>246</sup> Amongst the list of practices, which “in all circumstances” are considered unfair, is any claim that a product has been “approved, endorsed or authorized” when it has not.<sup>247</sup> Each individual member state must adopt its own “adequate and effective means” to combat such unfair commercial practices so as to comply with the Directive.<sup>248</sup> Remedies may include court actions against the advertisement or bringing the advertisement before a competent administrative body to rule on the complaint.<sup>249</sup>

The United Kingdom provides one example of how the new Directive has changed the landscape of consumer protection.<sup>250</sup> The Directive became part of British law in May 2008 under the name, the Consumer Protection from Unfair Trading Regulations, and it is generally left to Local Authority Trading Standards Services to enforce the regulations, with the assistance of industry-created, self-governing bodies like the Advertising Standards Authority.<sup>251</sup> Some are concerned that the Directive was drafted in terms that were too general and vague for local enforcement agencies to apply evenly, preventing harmonization and creating potential disparities as individual member states interpret the law. Similarly, it has been argued that the “average consumer” concept will also result in interpretative inconsistency.<sup>252</sup>

Regarding misblurbs, the legal consensus in the United Kingdom appears to be that the European Directive demands legal action.<sup>253</sup> At the outset, it was unclear what kind of offenses

<sup>243</sup> *Id.* ¶ 8.

<sup>244</sup> *Id.* ¶ 14.

<sup>245</sup> *Id.* at ch. 2, art. 5, § 2(b).

<sup>246</sup> *Id.* at ch. 2, art. 5, § 4(a)–(b).

<sup>247</sup> *Id.* at Annex I, § 4.

<sup>248</sup> *Id.* at ch. 4, art. 11, § 1.

<sup>249</sup> *Id.* at ch. 4, art. 11, § 1(a)–(b).

<sup>250</sup> Andrew B. Ulmer et al., *Codified Sources of Advertising Law: United Kingdom*, in 2 MEDIA, ADVERTISING & ENTERTAINMENT LAW THROUGHOUT THE WORLD § 36:31 (2010) (coming into force on May 26, 2008, the Consumer Protection from Unfair Trading Regulations was designed to implement the UCPD).

<sup>251</sup> Jane Williams & Caroline Hare, *Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland*, 33 J. CONSUMER POL’Y 377, 378 (2010).

<sup>252</sup> Georgios Anagnostaras, *The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?*, 47 COMMON MKT. L. REV. 147, 149 (2010).

<sup>253</sup> Kate Lunau, *Courting Trouble with Misblurbs*, MACLEAN’S, June 11, 2007, at 75, 75 (“Soon promoters who take liberties with critics’ reviews could face legal action—maybe even jail time—under a new European Union directive . . .”).

would result in criminal sanctions.<sup>254</sup> While there might not be many high-profile examples, one case arose in the context of an advertisement for a theatrical production of *The Shawshank Redemption* in London's West End.<sup>255</sup> The misblurb described the play as "a superbly gripping, genuinely uplifting drama"—the only problem was that the quote was from a review in the *Daily Telegraph* of the original 1994 film.<sup>256</sup> The critic's actual review of the stage version was decidedly less enthusiastic, describing it as "inferior to the movie."<sup>257</sup> The office of the Westminster Trading Standards decided that this "misleading" advertisement fell foul of the new European mandated consumer protection legislation and was, at the very least, worthy of investigation.<sup>258</sup> As one reporter commented, "[t]he investigation is the first in West End history, and it could have huge implications for advertising, films, books, and plays."<sup>259</sup>

It is still unclear whether the Local Trading Standards Offices will police misblurbings aggressively, but it is unlikely that private suits by critics will be a factor in addressing the problem—like in the United States, British critics are rarely willing to complain.<sup>260</sup> Nevertheless, there is anecdotal evidence that the imposition of the stricter consumer protection law has already led some theater producers to clean up their act and encouraged English public relation firms to get approval before they use a critic's quote in advertising.<sup>261</sup> Despite this promising example, some American critics remain skeptical that the United States is ready to adopt a similarly aggressive stance on misblurbings.<sup>262</sup>

#### CONCLUSION

This Note answers two questions: (1) does misblurbings result in any real societal harm and (2) if a remedy is necessary, what form should it take? Immediate injury, whether to consumer or

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<sup>254</sup> *Id.*

<sup>255</sup> Jonathan Prynn, *The Shawshank Reinvention . . . Inquiry After Theatre Used Quote About Film to Promote Play*, LONDON EVENING STANDARD, Nov. 25, 2009.

<sup>256</sup> *Id.*

<sup>257</sup> Prynn, *supra* note 255.

<sup>258</sup> *Id.* (prosecution could result in "a maximum of two years in jail and an unlimited fine—although a few hundred pounds would be most likely").

<sup>259</sup> *Id.*

<sup>260</sup> Lunau, *supra* note 253 ("The Critics' Circle, an association that represents British critics, only gets about five complaints from individual critics on the matter each year . . .").

<sup>261</sup> See Michael Billington, 'Surprising! Shocking!' Theatre Marketing Isn't Always What It Seems, GUARDIAN, Nov. 26, 2009.

<sup>262</sup> Conner-Simons, *supra* note 13 ("[N]one of the critics interviewed had even heard that the European Union passed a directive taking effect in December banning misleading movie ads. 'I can't begin to see something like that happen in America,' [film critic Stephen] Hunter says. 'The attitude [here] seems to be more benevolent amusement than radical anger.'").



critic, is likely to be negligible: the price of a movie ticket or a reputational nick. Misblurbing, though, is a practice that harms in the abstract and in the aggregate. Consumer confidence is replaced by cynicism that has the ironic result of causing less deception—insulating the industry from private suits. The traditional institution of criticism has been damaged by association and can no longer effectively serve its essential role of guiding consumer choice in the market. As the venerable critic becomes an anachronism, industry stooges and blurbmeisters have filled the void, along with an army of Internet surfers who are more than willing to post their “expert” opinion.

This wave of change could very well prove unstoppable, and maybe that is for the best. Even still, the unchecked practice of misblurbing has another more fundamental danger, as foreseen by Justice Kennedy in the *Masson* decision, that we may diminish the trustworthiness of the printed word and eliminate the true meaning of quotations.

This Note explored some of the causes of action that an individual critic or consumer may pursue but finds them largely ineffectual and often untested. Prohibitive legal costs and uncertain results are one explanation for the paucity of cases on point. The FTC is well-situated to combat the practice and has already expressly condemned it in its Endorsement Guides. Nevertheless, misblurbing is not an FTC priority and remains essentially unchecked.

In Europe, the impact of the stringent new consumer protection laws might not be evident for some time, but local enforcement authorities recognize that misblurbing should be investigated. More importantly, arts producers have responded in kind and are taking measures to avoid violating the UCPD. Certainly, it would be an inefficient use of resources if the FTC were to investigate every individual misblurb in media marketing—or even to limit the scope of its enforcement to the most egregious iterations. Nevertheless, this Note argues that, when sufficiently prodded, the arts industry will respond by adopting protective, self-regulatory measures. The *Rezec* settlement is one example of a high-profile suit that has, at the very least, led a major movie studio to crackdown on its more outlandish marketing techniques. The threat of investigation has had a similar impact on theater advertisements in the United Kingdom.

This Note concludes that an administrative adjudication against a single respondent may have industry-wide effect. An indication that the FTC is poised to enforce its own regulations could be an invaluable deterrent to future misblurbing. Now, more than ever, in our uncharted digital age, the sanctity of the

printed word is in jeopardy and the law must respond.

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