APPlied Deceptive Advertising

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APplied Deceptive Advertising: When an app is more than an attachment to your phone
ABSTRACT:

This Comment determines whether a game marketed as an app may be considered a deceptive practice under the Federal Trade Commission (“FTC”) Act. Using a hypothetical company and the company’s app, this Comment discusses when an app may be regulated under the current law under the FTC Act. Second, this Comment discusses when an app may be a franchise or business venture under the Franchise Rule and, therefore, regulated by the FTC Act. Next, the Children’s Advertising Review Unit (“CARU”) is discussed as a self-regulating entity. Last, the hypothetical app is analyzed under current case law, which has interpreted the previous regulations and policies to determine when a practice is deceptive. Based on current regulations and case law an app may be deemed a deceptive practice if it represents a company or product as a game instead of an advertisement for the company or product.

This Comment recommends that both the FTC and CARU add updates to current deceptive practices regulations to include app specific guidelines. The FTC should increase CARU’s enforcement scope and allow for a deceptive practices safe-harbor. Last, this Comment recommends a business include clear disclosures on any app it may distribute and treat the app as it would any advertisement on television or other media.
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I. Introduction

In an ever-changing technological world, businesses continue to find new ways to advertise.¹ Recent innovations include online gaming applications that are available via the Internet or as downloadable “apps” for smart phones or tablets.² These apps are advertising tools with implications for businesses that may be greater than just increased product

¹ See, e.g., Douglas MacMillian, Peter Burrows & Spencer E. Ante, Inside the App Economy, Bloomberg Businessweek (Oct. 22, 2009), available at http://www.businessweek.com/magazine/content/09_44/b4153044881892.htm (foreshadowing the expected “app culture” to come consisting of advertising, business relationships, competition, full online marketplaces, and a “new frontier” for businesses to explore).

placement; but, could include charges of engaging in deceptive practices.³

An app is a “newly prominent” word used in the business setting as “an abbreviation for ‘Web application’ or ‘online application.’”⁴ Colloquially, an app is a word that describes an additional program that can be downloaded and used on a smart


phone or tablet.⁵ One of the major perks of an app is that it can “extend the reach and productivity of your business”⁶ as recognized by companies such as the International House of Pancakes (IHOP) and ICEE, who both created apps resembling games with the results of advertising their respective products.⁷ IHOP,

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⁵ See “App” Voted 2010 Word of the Year by the American Dialect Society (UPDATED), ADS (Jan 8, 2011), http://www.americandialect.org/app-voted-2010-word-of-the-year-by-the-american-dialect-society-updated (describing both what an “app” is and the impact an app may have on device and the device’s user).

⁶ Anita Campbell, supra note 4.

⁷ See CARU recommends IHOP modify ‘IHOP.com’ Website to Better Disclose Advertising Within Game, ASRC, New York (Sept. 12, 2012), http://www.asrcreviews.org/2012/09/caru-recommends-ihop-modify-ihop-com-website-to-better-disclose-advertising-within-game/ (portraying the games in the apps as advertisements that are deceptive to the targeted children); The ICEE Co. Launches ICEE Maker App, CSNews FoodService (July 26, 2011), http://www.foodservice.csnews.com/top-story-the_icee_co._launches_icee_maker_app-948.html (introducing the deceptive nature of the ICEE app to the public and the corollary ICEE app’s benefits to business).
for example, released a game that included all of its promotional dishes and the Lorax with a prize drawing for those children that played. Likewise, Sunstorm created an app for ICEE that allows an individual to pick colors for a cup and mix different ICEE flavors in an ICEE factory. These apps are advertising tools and have alerted the Children’s Advertising Review Unit (“CARU”) and the Federal Trade Commission (“FTC”) to the reality of an app equating to a deceptive practice.

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8 See CARU recommends IHOP modify ‘IHOP.com’, supra note 7 (explaining IHOP’s cooperation with CARU after the online promotion but little action due to the nature of a promotion with an end date).

The FTC was created by statute to regulate and enforce the FTC Act prohibiting unfair and deceptive practices. The relevant sections include the Franchise Rule and section five of the FTC Subchapter, which states “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” The Franchise Rule states, “when prescribing a rule under . . . this section, the Commission shall proceed in accordance with section 553 of Title 5.” Last, in 1974, the National Advertising Review Council established CARU as a self-regulatory program to promote responsible children’s


\[\text{\textsuperscript{11}} \text{15 U.S.C. §§ 57(a)-(b) (2006) (defining the FTC’s enforcement power over businesses partaking in a deceptive or misleading practice).} \]

\[\text{\textsuperscript{12}} \text{Id. § 45.} \]

\[\text{\textsuperscript{13}} \text{Id. § 57a(b)(1); see 5 U.S.C. § 553 (2006) (dictating that any new rules created by the FTC must put the affected persons on notice, give the opportunity to participate, and give the right to petition the rule or aspects of the rule).} \]
advertising. CARU became a safe harbor of the FTC concerning children’s privacy rights and advertising. If a company complies with CARU privacy regulations, it is not subject to suit under the FTC Act.¹⁵

This Comment argues that a business is misleading a child and engaging in a deceptive practice under the FTC Act when it creates a game, distributed as an app, but neither properly discloses the advertising nature nor takes into account that children will be the target audience. This Comment discusses whether a business acts within the scope of the FTC Act, the


¹⁵ See id. (establishing a safe-harbor program to create a balance between regulations and freedom in advertising).
Franchise Rule as included in the FTC Act, CARU regulations, and interpretive case law when distributing an app geared toward children that advertises a product or service. Part II provides background information to understand each of the moving pieces necessary to determine whether an app may be considered under the FTC and whether an app may amount to a deceptive practice under the appropriate regulatory tests. Part II concludes with a hypothetical app based on the IHOP game and the ICEE app. Using the hypothetical app, Part III argues that an app is an advertisement and, as demonstrated by case law, a deceptive practice under the FTC Act when there is improper product placement without disclosure. Part III notes that a court would likely determine whether an app is appropriate under the FTC Act based on common law tests. Part IV recommends that a business fully disclose the app’s purpose, follow CARU guidelines in any gray areas, and increase the visibility of disclosures with the knowledge that an app is more readily accessible by children without a parent’s knowledge. Finally, Part V concludes that this responsibility cannot only fall on businesses if there is any desire for uniformity; the FTC must take action in defining an app as an advertisement and proper disclosure.
II. Distinguishing acceptable practices from deceptive practices.\textsuperscript{16}

This section describes the federal regulations on a business’s ability to advertise and its evolution through case law. In addition to federal regulations, this part discusses current case law and guidelines released by both the FTC and CARU. To better understand the regulations in the context of game apps geared towards children, this section concludes by explaining a hypothetical company, Company H, that recently released an app intended to serve both as a game and an advertisement to be analyzed in Part III.

\textsuperscript{16} See \textit{15 U.S.C.} § 45, 57(a) (2006) (defining deceptive practices in a statutory context); About the Children’s Advertising Review Unit, supra note 14; See also “FTC Strengthens Kids’ Privacy, Gives Parents Greater Control Over Their Information By Amending Children’s Online Privacy Protection Rule,” (Dec. 19 2012), http://www.ftc.gov/opa/2012/12/coppa.shtm (amending COPPA to keep up with technology by strengthening safe-harbor programs, but specifically stating the modified definitions do not “extend liability to platforms, such as Google Play or the App Store, when such platforms merely offer the public access to child-directed apps.”).

The FTC is "an independent agency of the United States government created by statute" to protect consumers from deceptive practices.\textsuperscript{17} The FTC Act charges the Commission with enforcing the prohibition of unfair or deceptive acts that affect commerce.\textsuperscript{18} Further, the "Commission has [the] responsibility to protect consumer[s] from being misled by governing conditions under which goods and services are advertised and sold to individual purchasers."\textsuperscript{19} This section acts as the driving force behind both CARU regulations and case law interpretations.\textsuperscript{20}


\textsuperscript{18} 15 U.S.C. § 45(a)(4)(B)(b) (allowing the Commission to issue notice and begin show cause proceedings to determine why a business implemented what the Commission reasonably believes to be a deceptive practice).

\textsuperscript{19} National Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 685 (D.C. Cir. 1973), cert denied, 415 U.S. 951 (describing generally the role of the FTC Act).

\textsuperscript{20} See 15 U.S.C. § 45(a)(2) (empowering and directing the FTC to “prevent persons, partnerships, or corporations . . . from using
The FTC Act applies to unfair methods of competition when “such methods of competition have a direct, substantial, and reasonably foreseeable effect.”\textsuperscript{21} Recently, the FTC released a set of compliance guidelines specific to the “burgeoning” app business.\textsuperscript{22} In accordance with existing FTC regulations under section five, the new guidelines target companies distributing unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”); 15 \textsc{U.S.C.} § 57 (driving litigation after implementation of FTC regulations to prevent antitrust and, accordingly, deceptive practices).

\textsuperscript{21} 15 \textsc{U.S.C.} § 45(a)(3)(A).

\textsuperscript{22} See generally Federal Trade Commission, Marketing Your Mobile App: Get it Right From the Start, 

\textbf{Bureau of Consumer Protection Business Center} (Aug. 2012) [hereinafter Marketing Your Mobile App], available at http://business.ftc.gov/documents/bus81-marketing-your-mobile-app (advocating for compliance with the FTC Act regardless of the advertisement’s form or the form of the business); See, \textit{e.g.}, Claire Cain Miller, \textit{supra} note 2 (explaining that the industry must find new ways to advertise in the technological world).
apps that are not truthfully advertised.\textsuperscript{23} The “Truthful Advertising” guidelines modify the FTC Act’s scope to include stipulations requiring businesses to both “tell the truth” about what the app does and “disclose key information clearly and conspicuously.”\textsuperscript{24} The FTC created these two guidelines for apps because “once you start distributing your app, you become an advertiser” and the regulations require the average person be able to understand an app is an advertisement.\textsuperscript{25} To achieve understanding, the regulations insist that the disclosure be “big and clear enough” that an average person can understand the

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\textsuperscript{23} See Marketing Your Mobile App, supra note 22 (specifying disclosure requirements and truthful claims requirements apply to apps just as other forms of advertising and appropriate enforcement mechanisms may be implemented towards deceptive apps).
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\textsuperscript{24} See id. (reiterating necessary functions of a “truthful” advertisement include disclosure statements that do not bury important terms and statements that confirm the accuracy of the advertisement).
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\textsuperscript{25} See id. (rationalizing including apps in the scope of the FTC Act by identifying the aspects of an app that are, in fact, advertisements that may deceive the consumer).
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disclosure.\textsuperscript{26} The Commission has made clear that advertisements in newspapers and on television must be “prominently accompanied by the word ‘ADVERTISEMENT’ . . . [because] it is in the public interest that publishers and advertisers avoid any possible deception.”\textsuperscript{27} As a general rule, courts have not interpreted advertisements without disclosures to be “designed with the intent to deceive and exploit unsuspecting consumers” and courts have interpreted the FTC act to disregard intent as a necessary element to determine whether a practice is deceptive.\textsuperscript{28} However, when deception is intentional, the FTC will immediately require the practice be modified or ceased.\textsuperscript{29}

\textsuperscript{26} See id. (attempting, again, to ensure that the reasonable consumer is not deceived by an app that is actually an advertisement).


\textsuperscript{28} Cf. id. at *5 (noting that the FCC waivers of sponsorship in feature films does not affect the analysis of a deceptive practice).

\textsuperscript{29} Cf. id. at *5-6 (suggesting invoking a more harsh punishment in intentional cases because the “intentional deception
The FTC may enforce these purposes and regulations under section seventeen of the FTC Act, which extends the reach of the FTC as an administrative enforcement mechanism.\textsuperscript{30} False or deceptive advertising is within the proscription of the sections of the FTC Act prohibiting unfair or deceptive acts or practices.\textsuperscript{31}


\textsuperscript{31} 15 U.S.C. § 57(a); see 576 F. Supp. at 298 (including deceptive practices as enforceable actions); see, e.g., FTC v. Tashman, 318 F.3d 1273, 1276 (11th Cir. 2003) (holding that disclosure statements containing only favorable facts without a basis for claims was a deceptive practice); A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement
b. The Franchise Rule may also enforce the FTC Act.  

The Franchise Rule states that it is an unfair or deceptive practice or act under section five of the FTC Act “for any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor’s current disclosure document.” A “franchise” is defined as “any continuing commercial


Id. § 436.2(a); see J. Howard Beales, Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present, 12 Geo. Mason L. Rev. 873, 876 (2004) (categorizing deceptive practices into the categories of “inducing unsafe behavior” and as “economic injury to parents”).
relationship or arrangement” as defined by contract.\textsuperscript{34} Formally, a “franchisee” is “any person who is granted a franchise” and a “franchisor” is any person who grants and participates in the relationship.\textsuperscript{35}

The Rule defines “disclosure” as any way to “present all material facts accurately, clearly, concisely, and legibly in plain English.”\textsuperscript{36} The Rule continues to dictate that “plain English” must be written so a person “unfamiliar with the franchise business” could understand the goals of a particular advertisement.\textsuperscript{37}

c. CARU regulations specially target and protect child consumers.

When establishing a potential violation of the FTC Act or CARU regulations specifically, CARU may seek voluntary cooperation from the business to invoke a change in the advertisement.\textsuperscript{38} CARU has eight principles that apply to “all

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\item \textsuperscript{34} 16 C.F.R. § 436.1(i).
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. § 436.1(d).
\item \textsuperscript{37} Id. § 436.1(o).
\item \textsuperscript{38} See Scope, CARU Guidelines, 3-4 (2009), available at http://www.caru.org/guidelines/guidelines.pdf (evaluating
practices covered by the self regulatory program." These eight principles are: (1) younger children lack the capacity of adults to distinguish advertisements from games and advertisers have special responsibilities to these children, (2) the FTC Act should be applied to advertising, (3) advertisers should base claims in fact, (4) advertisers should not create unreal expectations for children, (5) advertisers should not promote unsafe activities or products, (6) advertisers should promote education, (7) advertisers should not promote stereotypes, and (8) advertisers should encourage a strong parent-child relationship.

CARU bases its eight core principles on three concepts that apply to the subject matter of this Comment. First, CARU sets a higher standard for the advertising industry to assure advertising directed towards children is not deceptive, unfair,

39 Id. at 5 (including recommendations and cooperation with advertisers to ensure children are not deceived).

40 See id. (building off of these principles to determine when recommendations versus actions against an advertiser are appropriate).
and that it is appropriate for the intended audience. They define an advertiser as “any person or other legal entity that engages in ‘national advertising,’ and includes, under Part II of the Guidelines, those who operate a commercial website or an online service.” Last, CARU defines national advertising in four parts. Part I of the CARU guidelines covers deception, product presentations and claims, material disclosures and disclaimers, endorsements, the blurring of advertising and editorial/program content, sweepstakes and contests, online sales, sales pressure, and unsafe and inappropriate advertising to children. The CARU

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41 See id. (remembering that the protected target audience on the Internet is thirteen and younger).

42 Id.

43 See id. at 4-5 (defining a national advertisement as any type of medium that “(a) has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; (b) it is disseminated nationally or to a substantial portion of the United States . . . . and (c) the content is controlled by the advertiser”).

44 See id. at 6-13 (delving into greater depth within each subsection to inform advertisers of both the importance of
guidelines reference television advertising, “media other than television,” videos, DVDs, and websites directed towards children.\textsuperscript{45} An app is not specifically mentioned under any of the relevant sections; it may merely be included under “media other than television” if it may be regulated.\textsuperscript{46} But, regardless of the format, CARU requires that “advertising should not be presented in a manner that blurs the distinction between advertising” and the programming content.\textsuperscript{47}

d. The deceptive app under case law.

Case law defines deceptive advertisements as acts that may misstate or fail to disclose a material fact that the FTC may

careful marketing towards children and how to avoid deceptive practices).\textsuperscript{45}

See id. at 9 (listing and defining the different types of media an advertiser may utilize within the confines of the FTC Act and CARU regulations).\textsuperscript{46}

See generally, id. (inferring an app may be included under the CARU guidelines if the guidelines were meant to apply to technological advances).\textsuperscript{47}

Id. at 9.
readily infer were also meant to induce consumer actions. The FTC may prevent deceptive practices because these misleading practices have the same effects on commerce as practices that create a monopoly. Further, the FTC has the initial burden to prove that the advertisement made a material representation accessible by the public, the reasonable public would rely on the representation, and the material representation was actually relied upon.

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49 Consolidated Book Publishers v. FTC, 53 F.2d 942, 945 (7th Cir. 1931) (stating that businesses using deceptive practices harm businesses that are not misrepresenting products and the FTC is charged with preventing antitrust behavior in addition to deceptive practices).

50 See FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988) (using precedent and FTC policy statements to create a consolidated test); FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (applying and tweaking the test from World Travel).
For the FTC to be successful in a “false advertising” claim under the enforcement mechanism of the Franchise Rule, the advertisement must “demonstrate a likelihood of ultimate success as to the falsity of this representation.” To demonstrate this likely success, the FTC may claim that the advertisement is false because it misstates fact or fails to disclose a material fact. The FTC may also attempt to prove that the advertisement

51 See World Travel Vacation Brokers, Inc., 861 F.2d at 1028-29 (finding a difference between the analysis of a preliminary injunction request under the Franchise Rule and a deceptive practice analysis if the case continues).


53 E.g., FTC v. Direct Marketing Concepts, Inc., 569 F. Supp. 2d 285, 301-03 (D. Mass. 2008) (holding an infomercial claiming “Supreme Greens” can heal a number of ailments was deceptive because there was no reasonable basis of fact in which to base the claims), FTC v. Commerce Planet, Inc., 878 F. Supp. 2d 1048, 1054-55 (C.D. Cal. 2012) (demonstrating a deceptive practice includes charging customers a monthly fee when only shipping and handling prices were quoted); FTC v. EDebit Pay, LLC., No. CV-07-4880 ODW (AJWx), 2011 WL 486260, at *3 (C.D. Cal. Feb. 3, 2011) (displaying prominent statements that indicate customers will receive a general line of credit instead of the actual
does not counter false assumptions about the product.\textsuperscript{54} Once a claim is established, the court considers the advertisement in full.\textsuperscript{55} While a court will not single out specific words or phrases to deem an advertisement deceptive, it may consider all interpretations of an advertisement and deem an advertisement deceptive even if there is an “alternative nonmisleading impression.”\textsuperscript{56}

\textsuperscript{54} See Pharmtech Research, Inc., 576 F. Supp. at 300 (expanding the test to include non-action by advertisers).

\textsuperscript{55} Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976), \textit{cert denied}, 430 U.S. 983 (1977) (determining that isolated words, alone, cannot make an advertisement deceptive).

\textsuperscript{56} Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977) (considering the advertisement as a whole and under a reasonable person standard allows for multiple interpretations of an advertisement to prevail).
In addition to being considered a deceptive advertisement, the FTC must prove that the advertisement was meant to encourage commercial activity.\(^{57}\) An advertisement is considered commercial activity if the advertiser releases it to the public with the intent to induce any action by the consumer.\(^{58}\) After the FTC is able to establish these facts, a judge may grant a preliminary injunction\(^{59}\) or the burden of proof then shifts to the defendant to prove the act was not deceptive.\(^{60}\)

e. The hypothetical “deceptive” gaming app.

A current example of an app that may reasonably be considered an advertisement is an app created by Sunstorm Interactive that allows a person to create ICEEs in an ICEE

\(^{57}\) See Pharmtech Research, 576 F. Supp. at 300 (ensuring the FTC Act is in compliance with interstate commerce provisions).

\(^{58}\) See id. at 301 (inferring that an advertisement released to the public is more likely than not interstate commerce).

\(^{59}\) See id. (applying the FTC Act in its entirety to enforce, under the proper procedure, clauses disallowing deceptive practices); 15 U.S.C. § 53 (2006) (listing preliminary injunctions as a proper form of enforcement).

\(^{60}\) FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988) (discussing the burden-shifting test that allows the advertiser to defend himself in further depth).
factory. Sunstorm released at least three ICEE apps in the past two years that either allow children to run an entire ICEE store, create different ICEE drinks, race the ICEE bear down a snowy slope, and access all the paid and free Sunstorm apps via the home screen. A hypothetical situation provides the opportunity for an appropriate thorough analysis that a company may consider before introducing its app to the public.

See ICEE Maker, supra note 9; The ICEE Co. Launches ICEE Maker App, CSNews FoodService (July 26, 2011), http://www.foodservice.csnews.com/top-story-the_icee_co._launches_icee_maker_app-948.html (“The ICEE app allows users to make a virtual ICEE by designing their own cup and lid and mixing flavors.”).

See generally ICEE, http://www.icee.com/home.html (last visited Feb. 2, 2013) (displaying each of the ICEE apps and, as a link below the main image, ICEE’s policy promising to comply with the FTC Act in light of advertising towards children).

See CARU Recommends IHOP Modify ‘IHOP.com’, supra note 7 (explaining how the Lorax game contents, current related media attention, and CARU statements recommending the online Lorax game be reconsidered if released again have essentially mooted the issue of a deceptive practice concerning this game); Anton Trojanovski, Child’s Play: Food Makers Hook Kids on Mobile
Company H attempts to take advantage of the burgeoning app market by contracting with an app distributor and creator to produce and market an app.\textsuperscript{64} Company H creates the idea for a free app that includes the opportunity to buy add-ons within the app itself in the appropriate venues for smart phones and tablets.\textsuperscript{65} The app is a game that allows children to win an


\textsuperscript{64} See \textit{Mobile Apps for Kids: Disclosures Still Not Making the Grade, FTC Staff Report}, 6 (Dec. 2012) [hereinafter \textit{Mobile Apps for Kids}], available at http://www.ftc.gov/os/2012/12/121210mobilekidsappreport.pdf (reporting an increased number in apps and a high incidence of advertising within apps).

\textsuperscript{65} Cf. \textit{FTC v. Tashman}, 318 F.3d 1273, 1275 (11th Cir. 2003) (“The record points to an intricate web of sales pitches by the defendants that ultimately consisted of untruthful, baseless assertions.”); \textit{ICEE Maker, supra} note 9 (advertising a gaming app that includes an opportunity to buy add-ons from Sunstorm and ICEE at each “step” in the game).
imaginary prize of their own creation at the end of the game.\textsuperscript{66} The child playing runs the factory creating Company H products branded with Company H’s logo and may complete different levels of difficulty as the game continues.\textsuperscript{67} As a free app, typically, it is more readily available to a child because a paid app requires further information.\textsuperscript{68} A parent allows her child to download this app.\textsuperscript{69} This app does not have a disclosure statement; nowhere does it claim responsibility for potential

\textsuperscript{66} See CARU recommends IHOP modify ‘IHOP.com’, supra note 7 (“The game’s closing screen displayed . . . the Lorax character at an IHOP cashier station next to photos of IHOP Lorax-inspired breakfast menu options that could be purchased at IHOP.”)

\textsuperscript{67} Cf. ICEE Maker, supra note 9 (allowing children to put ICEE logos on the straws and cups created during the course of the game).

\textsuperscript{68} See Marketing your Mobile App, supra note 22 (distinguishing privacy concerns from deceptive practice concerns but concluding that, once targeted, children are a special group under the FTC Act).

\textsuperscript{69} See Ideal Toy Corp., 64 F.T.C. 297, *2 (Jan. 20, 1964), 1964 WL 73189 (deciding that an advertisement geared towards children may be deceptive especially because it further takes advantage of parents).
advertising or make clear, in writing, that Company H endorses the app.\textsuperscript{70} The app merely launches into a game with different levels of difficulty recommended for children “five and up.”\textsuperscript{71} At the end of the game, the app congratulates the child and creates an opportunity for the child to play again with another company product, play again with the same product, and an opportunity to go to the Company H’s website to buy products.\textsuperscript{72}

\textsuperscript{70} See FTC v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1257 (S.D. Fla. 2007) (finding a violation of the Franchise Rule when a business did not properly disclose relevant information to use a product and begin a business).

\textsuperscript{71} See CARU Guidelines, supra note 38, at 4 (applying the guidelines to children twelve and under in all media and thirteen and under for internet sources).

\textsuperscript{72} See CARU recommends IHOP modify ‘IHOP.com’, supra note 7 (endorsing IHOP products throughout the game and showing a purchase at the end); Hasbro, Inc., A Corporation, Agreement Containing Consent Order to Cease and Desist, 1993 WL 766981, *2 (F.T.C. 1993) (ordering Hasbro cease and desist any implicit or explicit misrepresentations of the actual performance of the toys and the contents of advertisements).
III. An app may be considered an advertisement and a violation of the FTC fair practice regulations without proper precautions.

Until August 2012, there was little to no guidance specifically addressing the regulations concerning apps.73 However, The FTC Act and the Franchise Rule inherently have a broad application to regulate commerce and ensure fair practices among businesses.74 The FTC Act has also been found to have exceptions when there are other agencies or laws better fit to regulate a specific form of commerce.75 However, in the case of

73 See Marketing your Mobile App, supra note 22 (offering limited guidance concerning the application of the deceptive practice language in the FTC Act and focusing more on children’s privacy under the Act).

74 Accord J. Howard Beales, supra note 33, at 879 (arguing the FTC’s history requires broad, “workable solutions”). But see FTC v. Verity Intern., Ltd., 443 F.3d 48, 56-57 (2d Cir. 2006) (discussing whether the Common Carrier Exception to the FTC’s powers applies to a telephone billing service and concluding that, while the definition of a “common carrier” is the same under the FTC and FCC regulations, the defendant in this case is not a common carrier nor subject to the FCC instead of the FTC).

75 See Verity Intern., Ltd., 443 F.3d at 60 (avoiding interagency conflict under the Primary-Jurisdiction Doctrine by deferring to
advertising, the FTC Act almost always dictates the recourse for a deceptive practice.\textsuperscript{76}

CARU guidelines apply to the FTC Act and the Franchise Rule as the absolute minimum when an advertisement targets a child.\textsuperscript{77} And, with rapid expansion of the app marketplace, CARU has been quick to warn companies about regulations concerning children, but no warnings have blossomed into formal court proceedings.\textsuperscript{78}

\textsuperscript{76} See \textit{id.} (clarifying that Congress did not intend for the FCC to interpret deception or unfairness).

\textsuperscript{77} See \textsc{CARU Guidelines}, supra note 38, at 4 (applying the CARU guidelines to a broad range of children twelve and under).

\textsuperscript{78} See Genie N. Barton and C. Lee Peeler, \textit{Re: Multistakeholder Process to Develop Consumer Data Privacy Codes of Conduct}, \textsc{National Advertising Review Council}, 1-2 (April 2, 2012), available at http://www.ntia.doc.gov/files/ntia/narc_privacy_comment_final_4_2_12.pdf (encouraging the Department of Commerce to maintain self-regulating agencies instead of purely implementing judicial action to maintain a proper balance between business sense and truthful advertising); \textit{e.g.}, \textsc{CARU Recommends IHOP Modify}
In addition to the growing use of apps in everyday life, the proposed regulations concerning children’s privacy does not further address how or when an app is a deceptive practice in comparison to other forms of media. The guidelines exhibit the importance of truthful advertising but do not extend the language of the FTC Act or CARU. This Comment uses the above

‘IHOP.com’, supra note 7 (documenting IHOP’s verbal response to consider CARU warnings when fashioning future games); CARU Recommends Kellogg Modify ‘Froot Loops’ Website to Better Disclose Advertising Within Games, Activities, ASRC, New York (Aug. 27, 2012) [hereinafter CARU Recommends Kellogg Modify ‘Froot Loops’ Website], http://www.asrcreviews.org/2012/08/caru-recommends-kellogg-modify-froot-loops-website-to-better-disclose-advertising-within-games-activities/ (demonstrating a successful cooperation between Kellogg and CARU where Kellogg agreed to display a written disclosure stating “This is advertising for Kellogg’s” within each game).

79 See, e.g., Dominique R. Shelton, et al., supra note 3 (applying the FTC Act provisions against mobile app developers to privacy concerns only).

80 See CARU Guidelines, supra note 38, at 3 (introducing the role and responsibilities of CARU); 15 U.S.C. § 45 (codifying the illegality of a deceptive practice). See generally Marketing
hypothetical to demonstrate when each individual enforcement mechanism may find a deceptive practice within the app. The likelihood of a successful case for the FTC against the company will be analyzed under the relevant sections of the FTC Act, under the Franchise Rule, solely under CARU regulations, and under case law interpretations.


The FTC released a statement in 1983 compiling a test determining whether an act is deceptive under the FTC Act. The Commission listed elements found in each deception case and concluded by applying a reasonable person standard to the

Your Mobile App, supra note 22 (attempting to join the Guidelines and the Code to create a comprehensive scheme for the target audience of businesses but falling short of mentioning CARU regulations in full).


[hereinafter FTC Policy Statement].
language of section five of the FTC Act. In each deceptive practices case, there is a “representation, omission or practice that is likely to mislead the consumer.” Second, a reasonable person must find the practice to be deceptive. The Commission continues to explain that, if the advertisement targets a specific group, the advertisement should be evaluated based on a reasonable person in that group. Third, “the representation,

82 See generally id. (synthesizing appropriate rules into three universally applicable parts and making clear that a company cannot be held liable for every single possible interpretation of an advertisement).

83 Id. at Part I.

84 See id. (clarifying further that an unfavorable interpretation for the advertiser “does not have to be the only one” to deem an advertisement deceptive); Catherine J. K. Sandoval, Disclosure, Deception, and Deep-Packet Inspection: The Role of the Federal Trade Commission Act’s Deceptive Conduct Prohibitions in the Net Neutrality Debate, 78 Fordham L. Rev. 641, 667 (2009) (reasoning that a disclosure may still be deceptive to a reasonable person if the placement, proximity, and prominence are inappropriate).

85 See FTC Policy Statement, supra note 81, at Part III (following the conclusion in Ideal Toy Corp., 64 F.T.C. 297, *10 (Jan. 20, 1964)) (agreeing that children, by nature, do not have
omission, or practice . . . is likely to affect the consumer’s conduct or decision with regard to a product or service.”

The proposed hypothetical demonstrates a number of issues under the statutory language of the FTC Act. First, for the purposes of statutory interpretation, the FTC Act applies because Company H is affecting commerce. Company H is affecting commerce because the app has an effect on consumers and other companies just by promoting its name and products.

the ability to understand representations put forth by advertisements); Catherine J. K. Sandoval, supra note 84, at 665 (evaluating whether the advertisement was deceptive by also determining whether it was directed at a particular group and a reasonable person in that group found the advertisement deceptive).

86 FTC Policy Statement, supra note 81, at Part I.

87 See 15 U.S.C. §§ 45(a)(1), 57a(a)(1)(B) (allowing the FTC to regulate deceptive commercial activity); FTC v. Verity Intern., Ltd., 443 F.3d 48, 64 (2d Cir. 2006) (misrepresenting a claim in an advertisement may be considered commerce for purposes of the FTC Act).

88 See Catherine J. K. Sandoval, supra note 84, at 658 (arguing broadband internet falls under commerce regulated by the FTC); National Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 685 (D.C.
Not only does Company H put its name on each piece of the assembly puzzle, it allows players the option to buy a product after completion.

Second, according to the FTC Policy Statement released in 1983, businesses face higher scrutiny when advertising to children.\textsuperscript{89} Company H’s app advertises itself to those “five and up” and most likely appeals to those of younger ages. The FTC Act applies, in this sense, and must be considered in light of the ages of those using the app.\textsuperscript{90} This alone, however, is typically not enough to start proceedings against Company H. The FTC allows companies to edit advertisements that it deems deceptive and many cases become moot before the FTC can

\textsuperscript{89} FTC Policy Statement, supra note 81, at Part III (naming children among susceptible groups in addition to the elderly, those attempting to diet, and other impressionable groups).

\textsuperscript{90} See Ideal Toy Corp., 64 F.T.C. 297, *10 (Jan. 20, 1964), 1964 WL 73189 (naming children as a vulnerable group because of their general inability to distinguish between representations and reality).
Further, First Amendment free speech rights impede statutory interpretation of the FTC Act to protect children from deceptive advertising practices because the FTC must be careful when attacking existing disclosures and the actual content of the advertisement. While it is unlikely Company H may claim its First Amendment rights are violated if the app is deemed deceptive and the FTC requires a disclosure, the rights are a considerable defense that the FTC Act usually cannot touch.

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91 See Roscoe B. Starek, III, Commissioner, The ABCs at the FTC: Marketing and Advertising to Children, 1997 WL 441740, at *2, *8 (Jul. 25, 1997) (describing remedies for deceptive practices and the evolution of the FTC’s role in protecting children from deceptive advertising); e.g., CARU Recommends Kellogg Modify ‘Froot Loops’ Website, supra note 78 (alleging the company agreed to add clear disclosures to online games without further enforcement than a recommendation from the self-regulated agency).

92 Roscoe B. Starek, supra note 91, at *3 (aligning First Amendment protections with disclosure requests by ensuring disclosures need not be overly broad and disclosure statements themselves are speech protected by the First Amendment).

93 Compare Roscoe B. Starek, supra note 91, at *3 (noting that narrow corrections preventing future deception and fixing past
Last, the hypothetical app creates a material representation because its logo is placed on each item. The placement of each product will likely affect the conduct necessary to create a material deception. Not only does Company H create a material deceptive representation comparable to product placement in children’s programming, it does not offer the disclosure of advertising mechanisms required by the FTC to avoid deceptive practices.

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deception are not First Amendment concerns), with M. Neil Browne, Lauren Frances Biksacky & Alex Frondorf, Advertising to Children and the Commercial Speech Doctrine: Political and Constitutional Limitations, 58 Drake L. Rev. 67, 70 (2009) (arguing that government regulation may be broad to protect children from deceptive advertising without affecting First Amendment rights).

94 See Unfair and Deceptive Acts, 1991 WL 640030, *4 (F.T.C. May 30, 1991) (“Since people don’t think of product placements as advertising, they don’t discount what they see.”); Catherine J. K. Sandoval, supra note 84, at 664 (stressing that the FTC has presumed materiality for claims that intentionally imply an advertisement or statement favoring the company).

95 See Unfair and Deceptive Acts, 1991 WL 640030, at *6 (describing a possible disclosure before movies or children’s
As is, the FTC Act must avoid conflict with the current enforcement mechanisms for deceptive practice regulations. The FTC may determine product placement is a deceptive practice based on the FTC Act, but if another agency determines a specific media does not have to comply, that agency may prevail. 96 If it is found that an agency other than the FTC may regulate apps, then the action must go to a court to determine which agency’s regulations prevail. 97 Otherwise, the actions of Company H amount to a deceptive practice under the FTC Act.

programming that should be included to inform children that companies paid for their products to be displayed in the program); CARU Guidelines, supra note 38, at 9 (prohibiting integrated advertisements without proper disclosure).

96 See FTC v. Verity Intern. Ltd., 443 F.3d 48, 56-61 (2d Cir. 2006) (explaining the primary-jurisdiction doctrine questions whether one specific agency has the discretion to enforce its regulations over another’s exceptions or regulations).

97 See id. at 61 (requiring a court to consider whether the other agency was contacted and if inconsistent rulings will occur); Unfair and Deceptive Acts, 1991 WL 640030, at *7 (determining that the FCC, instead of the FTC, most likely has jurisdiction over children’s movies).
b. The Franchise Rule allows the FTC to enforce apps deceptively advertised as games.

If there is a commercial relationship between Company H and the individual using the app, the FTC may regulate that commercial activity.\(^9\) Otherwise, the Franchise Rule is not a basis for the FTC to regulate deceptive practices.\(^9\) The app may be either reasonably considered under the Franchise Rule or not based on the definitions included within the Rule.\(^10\) Because the Franchise Rule has applied to companies selling products, the attempted sale at the end of the app may qualify the app as

\(^9\) See 16 C.F.R. § 436.2 (obligating franchisors to supply documents that act as disclosures in accordance with the FTC Act).

\(^9\) See FTC v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1269 (S.D. Fla. 2007) (emphasizing the need for one of the parties to be a business and there be a business relationship between the two parties).

\(^10\) See id. (listing further interpretations of the Rule to include a need for a reasonable basis for representations, substantiated earnings claims, and necessary disclosures concerning the nature of the venture).
a business venture. Further, assuming both Company H and the individual using the app are willingly in the relationship, the FTC can regulate the activity and require a clear and conspicuous disclosure statement from Company H. The individual in this situation willingly acquired and played the game created by Company H and Company H purposefully disseminated its app to the appropriate venues. Therefore, the FTC may regulate Company H’s actions under the Franchise Rule’s enforcement power.

See 16 C.F.R. §§ 436.2(a)(1)(II), (a)(2) (defining business ventures as one type of franchise).

See id. § 436.8 (exempting a transaction from the requirements in the FTC Act only if the franchisor can establish the necessary monetary or time limits); Cf. Avalon Indus., Inc., 83 F.T.C. 1728, *1 (1974), 1974 WL 175248 (naming the use of oversized containers to mislead consumers about the size of a product as a deceiving practice especially when there is no disclosure on the box).

See ICEE Maker, supra note 9 (describing the app that is the basis for the hypothetical); 16 C.F.R. § 436.8 (assuming the exemptions do not apply to either the individual playing the app or Company H).
The issue here lies in what Company H must disclose to the public when it distributes an app as an advertisement. Company H did not disclose in clear and conspicuous language that it was the power behind the app.\(^{104}\) The Franchise Rule also requires the goals of the advertisement are clear, in plain English, and understandable to the target audience.\(^{105}\) Because Company H offers no disclosure concerning the promotion of the app or the company’s products before the app is launched or after the game is won and an individual may buy the product, the Franchise Rule applies.\(^{106}\) The only name associated with Company H’s app is the

\(^{104}\) See Marketing Your Mobile App, supra note 22 (recognizing that “clear and conspicuous” is subjective but informing the public that “burying” terms in legalese or large paragraphs will not constitute an appropriate disclosure); See, e.g., Transnet Wireless Corp., 506 F. Supp. 2d at 1257 (requiring the identities of those running the company, the name of the company, and facts relevant to the sale be included in the disclosure to participants).

\(^{105}\) See 16 C.F.R. § 436.1(d) (defining a disclosure).

\(^{106}\) See, e.g., Ideal Toy Corp., 64 F.T.C. 297, *11 (Jan. 20, 1964), 1964 WL 73189 (holding that direct or implied representations must be truthful especially when targeting children or children’s parents); see also Avalon Indus., 83
contracted company that creates numerous apps for different companies and individuals. A clear disclosure naming Company H as the true owner of the advertisement/app on the first main screen and on the screen before a product may be purchased may be an appropriate disclosure.107

c. This app is a deceptive practice because the CARU definition is fulfilled.

Like the FTC, CARU examines the entire advertisement to determine whether the “net impression” misleads children.108

F.T.C. 1728 at *19 (reiterating a higher need for disclosure when children play a significant role in purchasing a product). See generally 16 C.F.R. § 436 (outlining the necessary actions a business must take and the repercussions through the FTC Act if ignored).

107 See Transnet Wireless Corp., 506 F. Supp. 2d at 1257 (requiring, at least, the most basic disclosure allowing customers to delve deeper and research the intricacies of a company because the nature is disclosed to the reasonable person).

108 See CARU Guidelines, supra note 38, at 6 (considering both implied and express claims); see also CARU Recommends Ontel Modify Ad Claims for “Dream Lites” Including ’Restful Sleep’ Claim, ASRC, New York (Jan. 3, 2013),
CARU also assesses the deceptive nature of the advertisement based on the reasonable child in the targeted group. Further, the company must disclose a sponsor of an online service. Last, a company must be sure to keep advertisements distinct from the content of the app or game. If the company integrates advertisements into a game, there must also be a

http://www.asrcreviews.org/2013/01/caru-recommends-ontel-modify-ad-claims-for-dream-lites-including-restful-sleep-claims-2/ (identifying express advertisement claims as unsubstantiated as a whole and implied claims concerning inclusion of batteries to be deceptive without disclosure).

109 See CARU Guidelines, supra note 38, at 6 (guiding an advertiser to consider both the content of the advertisement and the age of the target audience when formulating a disclosure).

110 Accord id. at 8 (“This could be done by using wording such as ‘Sponsored by ____.’”); see Transnet Wireless Corp., 506 F. Supp. at 1258 (stating the same standard when sending documents to adults: a name and basic contact information must be included in a disclosure statement).

111 See id. at 9 (blurring the lines between program content and advertisements gets to the core of the difference in capacity between adults and children to understand entertainment and advertisement).
clear statement of disclosure that is understandable by the target age group.\textsuperscript{112} When CARU "determine[s] that the [advertisement] in its entirety, including the audio and visual components, focus[ ] children’s attention primarily" on the premium or the prize, CARU can only recommend that the advertiser discontinue or modify the advertisement or game.\textsuperscript{113} The app clearly attempts to trigger a child’s memory when the Company H logo is prominently displayed throughout the game and, after completing the level, the child sees he can go buy a prize. Unfortunately, CARU has few options for recourse: it may (1) recommend Company H remove or modify the app or (2) wait for the FTC to take action.\textsuperscript{114}

\textsuperscript{112} See id. (distinguishing advertisements from content must be distinct and targeted to the age group, not the parents of the children).


\textsuperscript{114} See CARU Guidelines, supra note 38, at 3 (utilizing a team of education, child psychology, marketing, and communication
While the hypothetical app fails CARU’s regulating criteria, CARU alone can do very little to resolve any lingering deceptions.\footnote{115} The hypothetical app may be regulated by CARU as a self-regulating review board and, if extended to deceptive practices, a safe-harbor of the FTC.\footnote{116} A safe-harbor is appropriate because the FTC Act may regulate the hypothetical app and children are the target audience, the higher standards experts to consult with the CARU regulatory board over potentially deceptive advertisements).

\footnote{115} See Ellen J. Fried, Assessing Effectiveness of Self-Regulation: A Case Study of the Children’s Advertising Review Unit, 39 Loy. L.A. L. Rev. 93 (2006) (concluding that, in the scheme of food advertisements targeting children, CARU has not been an effective regulating force); \textit{Contra} CARU Recommends Ontel Modify Ad Claims, supra note 108 (quoting appreciative statements about the intervention from the company and a promise to modify both the implied and express deceptive claims).

\footnote{116} See \textit{CARU Guidelines}, supra note 38, at 3-4 (discussing the procedure for review of advertisements and CARU’s role in conjunction with the FTC; CARU uses the FTC Act as the lowest scrutiny to evaluate children’s advertisements).
established by CARU apply.117 CARU regulations, however, do not list standards for apps.118 Applying the general regulations, Company H’s app does not label Company H as a sponsor, does not distinguish between the content of the game and the advertisements, and, again, does not disclose any other information about Company H.119 In theory, CARU regulations should dictate and Company H should succumb to CARU advisory

117 See id. at 3 (proceeding with the self-regulatory program to seek voluntary cooperation); see also About the Children’s Advertising Review Unit, supra note 14 (establishing the self-regulatory program under the National Advertising Review Council and the Council of Better Business Bureau); Catherine J. K. Sandoval, supra note 84, at 663-64 (discussing the similar process to fight a deceptive practice through the FTC; complaints may not be filed in federal court).

118 See generally CARU Guidelines, supra note 38 (referencing only online forums, television, radio, videotapes, CD-ROMS, DVDs, and “area[s] created in cyberspace”).

119 See id. at 9 (applying the prohibited practices and expected practices outlined for websites).
proceedings. The guidelines, however, are both helpful and hurtful because they are “deliberately subjective, going beyond the issues of truthfulness and accuracy to take into account the . . . vulnerable child audience.” The subjective aspect of the CARU guidelines leads to a “lack of adherence” to CARU’s recommendations and guidelines. So, without a stronger enforcement mechanism, CARU cannot effectively regulate advertisements directed towards children.

120 See Roscoe B. Starek, supra note 91, at *9 (labeling the FTC as the last resort in claims over deceptive practices in advertisements targeting children).

121 About the Children’s Advertising Review Unit, supra note 14.

122 See Ellen J. Fried, supra note 115, at 137 (implying CARU’s lack of power to enjoin specific ads or sanction advertisers limits CARU’s impact); Elizabeth L. Lascoutx, Children’s Advertising Review Unit, 16 St. John’s J. Legal Comment., 649, 650 (2002) (“Some of our [CARU] guidelines have no backup in law, so somebody can actually blow us off and all we can do is publish the results and give them bad publicity.”).

123 See Ellen J. Fried, supra note 115, at 94-96 (concluding self-regulation successes have been exaggerated); M. Neil Browne, supra note 93, at 79 (examining the effectiveness and lack thereof of CARU regulations as they currently stand).
d. Case law jurisprudence determines that this app is likely a deceptive practice.

The app does not clearly disclose the advertising nature of the game and the game is meant to induce children to recognize specific products. After 1984, the court’s reliance on both statements made by the FTC and prior jurisprudence to determine whether a company is committing a deceptive practice offers an applicable comprehensive analysis of deceptive advertising.°124 While there are currently very little proceedings concerning apps and deceptive practices towards children, the number of administrative decisions concerning companies and deceptive practices towards children generally offer an effective guide.°125

°124 See Cliffdale Assocs., Inc., 103 F.T.C. 110, 164 (1984), 1984 WL 565319 (discussing for the first time in one opinion the three elements the FTC requires to determine a deceptive practice); FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988) (applying the three part test named in Cliffdale Assocs.)

°125 See, e.g., Ideal Toy Corp., 64 F.T.C. 297, *1 (Jan. 20, 1964), 1964 WL 73189 (reviewing claims that a children’s toy could perform actions by voice control when, in reality, it could not); Unfair and Deceptive Acts, 1991 WL 640030, *2 (F.T.C. May 30,
Arguably applying a correct, specific standard because children are able to influence parents and parents are not always able to monitor each advertisement a child sees, the reasonable child standard attempts to protect children and parents, alike, from being deceived.\(^{126}\) For example, the courts may compare an app portraying itself as a game to a movie.\(^{127}\) Product placement in a movie may be deceptive and is definitely advertising because “[m]otion pictures are presented to the public as pure entertainment . . . [and] [p]roduct placements are deceptive because they exploit the relaxed sensibilities . . . of the [] audience.”\(^{128}\) Using the three part test\(^{129}\) determined by the FTC, the courts will determine whether

\(^{126}\) See Avalon Indus., 83 F.T.C. 1728, *19 (May 20, 1974), 1974 WL 175248 (understanding that parents are not always able to control every action of a child or correct a child’s beliefs).


\(^{128}\) Id.

\(^{129}\) See World Travel Vacation Brokers, Inc., 861 F.2d at 1029 (determining that, in addition to the test for deception, the
an app presenting itself as a game creates the same deception as a movie by examining relevant facts and whether those facts amount to a deceptive practice.\textsuperscript{130}

The court will also determine whether Company H is regulated by the FTC, as discussed in “Section a” of this part.\textsuperscript{131} The app is within the realm of commerce because it may be considered an advertisement that reaches a considerable amount of people.\textsuperscript{132} Further, if considered a business venture, which the FTC claims an app likely is,\textsuperscript{133} the app may be

court should consider whether the FTC can succeed on the merits and balance the equities of regulation and advertising freedom).

\textsuperscript{130} See FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (disregarding facts about the business being “new” and the actions of migrant workers as irrelevant facts to determine whether the claims made to consumers were deceptive).

\textsuperscript{131} See 15 U.S.C. § 45 (exploring the role of the FTC in regulating apps).

\textsuperscript{132} See, e.g., FTC v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1253-54 (S.D. Fla. 2007) (recognizing the FTC’s control over advertisements, business ventures, and the included representations of products).

\textsuperscript{133} See Marketing Your Mobile App, supra note 22 (“Regardless the size of your business, the Federal Trade Commission . . . has
regulated by the Franchise Rule and, accordingly by the FTC Act.\textsuperscript{134} The courts may integrate CARU guidelines and policy concerns when assessing the reasonable person standard dictated by FTC guidelines and prior jurisprudence.\textsuperscript{135}

i. Game or advertisement? What the public thinks.\textsuperscript{136}

It is likely that a court will determine this app is a representation to the public. While the representation is not a strict advertisement, precedent shows that placement may be considered a deceptive practice in the right settings.\textsuperscript{137} Here, guidelines to help you comply with truth-in-advertising standards.

\textsuperscript{134} See Transnet Wireless Corp., 506 F. Supp. 2d at 1269 (violating the Franchise Rule is an indirect violation of the FTC Act).

\textsuperscript{135} See FTC v. Verity Intern., 443 F.3d 48, 62-63 (2d Cir. 2006) (balancing a fair system between freedom in advertising and the protection of children from deceptive advertisements requires an aspect of policy discovered in the reasonable person standard).

\textsuperscript{136} See FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003) (establishing liability requires the FTC or the complainant to prove there was a representation of a product).

\textsuperscript{137} But see Unfair and Deceptive Acts, 1991 WL 640030, at *4 (F.T.C. May 30, 1991) (declaring that although the FCC may have
Company H places its logo on each of the part a child must assemble. In addition, the Company does not label itself as a sponsor and offers no disclosure statement to the children. A clear disclosure statement, understandable to children, would satisfy CARU requirements.\textsuperscript{138}

\textbf{ii. Is the app misleading to the reasonable child or parent?}

The app is likely to mislead children, again, because there is no disclosure and it is acting under the guise of a game with a “prize” at the end. A reasonable child is likely to rely on the app being only a game, not an advertisement.\textsuperscript{139} A court would likely consider CARU guidelines about sweepstakes, contests, and online sales to analyze the deceptive nature of jurisdiction over enforcing the matter, the placement of products in attempts to increase revenue without disclosure is a deceptive practice).

\textsuperscript{138} See \textbf{CARU Guidelines}, supra note 38, at 9 (simplifying the requirements to the bare minimum in a website or online game).

\textsuperscript{139} See, \textit{e.g.}, CARU Recommends IHOP modify ‘IHOP.com’, supra note 7 (advising IHOP to disclose its game for children as an advertisement even though advertisements were subtle within in the game).
the app.\textsuperscript{140} The option to buy the created product at the end of the app must clearly be depicted as a sale to children.\textsuperscript{141}

A clear, conspicuous disclosure has been described as one that an individual could be made readily aware.\textsuperscript{142} The option to buy a product at the end of the game should be reasonably offset from options returning a child to the game itself.\textsuperscript{143} Company H’s app is more reasonably considered a game to children than an advertisement.

iii. Is the representation material?

Because Company H has not complied with FTC regulations, the Franchise Rule, or CARU regulations; it is highly likely the

\begin{footnotes}
\footnote{\textsuperscript{140} See Elizabeth L. Lascoutx, supra note 122, at 654 (describing procedural concepts and avenues used when enforcing anti-deception practices).}

\footnote{\textsuperscript{141} See CARU Guidelines, supra note 38, at 11 (advertising a prize at the end of a game sequence, a contest, or sweepstakes must be careful; all disclosures must be calculated, clearly identified, and rules must be clearly explained).}

\footnote{\textsuperscript{142} See id. at 6 (presenting a product as an item for sale should not be confused with presenting an element of a game or program).}

\footnote{\textsuperscript{143} See id. 11-12 (including an option to buy a product should be clear and must also include a disclosure stating required parental permission).}
\end{footnotes}
court will find a material misrepresentation.\textsuperscript{144} While Company H did not present misleading facts, the omission of a disclosure statement, sponsor, or availability to make purchases at the end of the game is a violation of the FTC Act regardless of intent.\textsuperscript{145} Company H wanted to advertise, not to deceive about a product’s attributes or abilities; however, neither good faith nor innocent intent in making claims matter when determining

\textsuperscript{144} See, e.g., Avalon Indus., Inc., 83 F.T.C. 1728, *19 (1974), 1974 WL 175248 (emphasizing that the general public was unfamiliar with the product and advertising the product to children was even more deceptive because parents were reasonably deceived by false advertisements).

\textsuperscript{145} Accord FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7th Cir. 1988) (citing Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1154 (9th Cir. 1984)) (compiling holdings from a number of past cases to find that deception is subjective in the eye of the reasonably deceived consumer). But cf. Unfair and Deceptive Acts, 1991 WL 640030, at *4 (F.T.C. May 30, 1991) (intending to advertise products to children and adults alike and making money from the promoted products in movies is a different business venture covered by FCC regulations instead of the FTC’s deceptive practice language).
whether an app is deceptive.\textsuperscript{146} Most blatantly, because Company H omitted its own name as a sponsor of the app, Company H committed a material misrepresentation.\textsuperscript{147}

e. A questionable impression of the self-regulating system.

Used in conjunction with the IHOP Lorax game to create the hypothetical for this Comment, the ICEE apps demonstrate programming closest to product placements in movies.\textsuperscript{148} The

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\textsuperscript{146} See World Travel Vacation Brokers, Inc., 861 F.2d at 1029 (citing Chrysler Corp. v. FTC, 561 F.2d 357, 363 (3d Cir. 1963) (shifting the burden of persuasion to the defendants only to prove the representation was not relied upon by a reasonable member of the target group irrelevant of good or bad faith)).

\textsuperscript{147} See CARU Guidelines, supra note 38, at 9 (guiding businesses using an “area of cyberspace” to include the names of sponsors); CARU Recommends Kellogg Modify ‘Froot Loops’ Website, supra note 78 (requiring the games on Kellogg’s website contain disclosures stating both the Kellogg name and information stating the games are advertisements).

\textsuperscript{148} See ICEE Maker, supra note 9 (opening the free app to an automatic unrelated advertisement, the title “ICEE Maker” in large print at the top of the screen, and unlabeled images used as links to different parts of the game); ICEE Arcade, supra note 9 (disclosing only that games could be played all day long
\end{small}
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gaming apps are different, however, because a child may instantly make a purchase and the apps are specific to one product. Like Company H, ICEE allows children to download the free “ICEE Store” game where the child may pick an avatar and run the whole store. Company H does not specify whether additional ads will litter the app for extra revenue, how many steps are required to actually purchase a product at the end of a level, or how readily available the links to the company’s website will be for children. In both cases, the sponsor is without ads if the child clicks “Tokens: Buy Here,” clicks a $0.99 picture asking to remove ads, and confirming that purchase with the final click of “Buy”).

Cf. Mobile Apps for Kids, supra note 64, at 17 (objecting to apps including advertisements and “in-app purchases” for privacy concerns).

See Sunstorm Interactive, ICEE Store, iTunes Preview, https://itunes.apple.com/us/app/icee-store/id482081134?mt=8 (last updated Apr. 5, 2012) (previewing the game with Sunstorm Interactive as the creator and without disclosure as to whether ICEE is a definite sponsor of the app).

See Claire Cain Miller, Advertising Relearned, supra note 2 (demonstrating the ability of a company to sponsor an app or earn revenue from the advertisements within an app); Ellen P.
obvious from the products. Labeling each product with a “Company H logo” or an “ICEE logo” may make it clear to the reasonable adult that these games are, while entertaining, advertisements for the products.\textsuperscript{152}

\textit{CARU} has advised a number of online games to include clear, written sponsorship disclosures even in situations where it is obvious which company owns the game.\textsuperscript{153} The differences in enforcement lie in the type of programming; regulating the ICEE

\textsuperscript{152} See \textit{Troianovski, supra} note 63 (quoting mothers believing the apps are constant commercials and marketing advisors agreeing that the apps target kids to advertise the product); \textit{cf. \textit{CARU Guidelines, supra}} note 38, at 9 (prohibiting program personalities from endorsing products because children cannot distinguish between an advertisement and a television program or online game).

\textsuperscript{153} See, e.g., \textit{CARU Recommends Kellogg Modify ‘Froot Loops’ Website, supra} note 78 (faulting the site because it is otherwise appealing for children due to the characters and vibrant colors); \textit{CARU Recommends IHOP modify ‘IHOP.com’, supra} note 7 (believing IHOP’s game was lacking disclosures because of the numerous IHOP products found throughout the levels).
app is a new concept. Still, for Company H to feel pressure to edit its app and disclose to both children and parents that the game is meant to increase revenue as a traditional advertisement on television would, CARU and the FTC must apply the deceptive practice language in uniform with games on websites. Until the self-regulating agencies can create enforcement language, case law is the appropriate guide because it effectively combines statutory language, policy, and legal jurisprudence to create a remedy for the injured party.

IV. Regulatory committees and businesses may change their practices to better protect children.

Ultimately, increased regulations and enforcement mechanisms specific to apps will prevent deceptive practices but,

154 See Marketing Your Mobile App, supra note 22 (releasing a recent preemptive press statement to ensure apps are also in compliance with the FTC Act).

155 See Ellen P. Goodman, supra note 29, at 118 (promoting a product or service of any kind or in any media will have an affect on the public’s conduct).

156 But see, Roscoe B. Starek, supra note 91, at *4 (recognizing the congressional bar on relying on public policy considerations when determining whether an advertisement is unfair or deceptive).
until there are increased regulations, indiscriminate disclosure by businesses may prevent CARU action. The FTC should consider editing regulations on deceptive practices in addition to the forthcoming edited privacy regulations to further encourage businesses to avoid deceptive practices.\footnote{See Jeff Sovern, Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model, 52 \textit{Ohio St. L.J.} 437, 462 (suggesting rewriting deceptive practices acts into three sections including: (1) deceptive practices defined, (2) stipulations allowing for new media to fall under the act, and (3) allowances for enforcement agencies); Cf. FTC, FTC Strengthens Kids’ Privacy, Gives Parents Greater Control Over Their Information by Amending Children’s Online Privacy Protection Rule: Rule Being Modified to Keep Up with Changing Technology (Dec. 19 2012), available at http://www.ftc.gov/opa/2012/12/coppa.shtm (listing the final amendments to COPPA that edit definitions to allow for the inclusion of apps). But see Troianski, supra note 63 ("I think it’s clear there’s no congressional appetite for even government-proposed voluntary guidelines, much less regulation.") (quoting Mary Engle, head of the FTC’s advertising practices division).} Realistically, the
regulations should increase the enforcement powers of CARU.\textsuperscript{158} In the meantime, businesses may adjust their advertisements by ensuring each distributed app has a full, clear disclosure and adheres strictly to CARU guidelines.\textsuperscript{159}

To ensure proper enforcement, each regulation and each regulatory body cannot act alone. CARU, for example, does not have the power to sanction companies or businesses responsible for deceptive advertising or to stop those specific advertisements from running.\textsuperscript{160} As a self-regulating unit, CARU should have a regulatory advantage in the advertising

\textsuperscript{158} See Jeff Sovern, supra note 157, at 445 (indicating the courts may be the appropriate venue to restrict broad FTC guidelines); Cf. 15 U.S.C. § 7704 (2006) (codifying protections against deceptive e-mail subject headings).

\textsuperscript{159} Accord Marketing Your Mobile App, supra note 22 (advocating this same sentiment but without making mention to CARU regulations).

\textsuperscript{160} See Ellen J. Fried, supra note 115, at 136-137 (critiquing the effectiveness of CARU, by nature, as a self-regulating entity on businesses with the sole purpose to increase revenue).
industry.\textsuperscript{161} While self-regulation creates voluntary guidelines for businesses to follow, it could also create stringent, flexible, and more aggressive regulations if and when those guidelines are adopted during court proceedings.\textsuperscript{162} Further, utilizing and enforcing the CARU guidelines gives the FTC options to effectively take a step back or pave the way for federal regulations including specific regulatory measures.\textsuperscript{163} However, to allow for the CARU regulations to carry weight, the FTC and the courts must be willing to enforce the guidelines as depicted by the unit.\textsuperscript{164}

\textsuperscript{161} See About the Children’s Advertising Review Unit, supra note 14 (acknowledging the subjective aspect of a self-regulating entity as an effective means of enforcement).

\textsuperscript{162} See M. Neil Browne, supra note 93, at 84-85 (assessing the pros and cons of private self-regulation versus government approved FTC regulations).

\textsuperscript{163} Cf. 15 U.S.C. § 7704 (prohibiting the deceptive practices in commercial electronic mail to increase consumer protection).

\textsuperscript{164} But see Jeff Sovern, supra note 157, at 466 (concluding that for regulations to truly be effective and enforceable, there must be a movement towards more specific anti-deception statutes instead of repeatedly attempting to interpret broad regulations).
The definition of “deceptive practice” or an “advertisement” within an app will remain a contested issue if Congress continues to disregard CARU as an effective enforcement mechanism.\textsuperscript{165} Especially when considering a vulnerable group, such as children, the state interest outweighs the interest of a business to advertise freely.\textsuperscript{166} CARU acts as an effective safe harbor for businesses concerning children’s privacy concerns.\textsuperscript{167} Implementing a similar scheme for deceptive practices legislation or guidelines, in the least, will only require assessment based on the established guidelines.\textsuperscript{168}

\textsuperscript{165} See generally Mobile Apps for Kids, supra note 64 (discussing the high rates of advertisements within an app and the lack of disclosures); see J. Howard Beales, supra note 33, at 879 (describing the FTC staff’s negative recommendation concerning children’s advertising rulemaking and deceptive practices); Ellen J. Fried, supra note 115, at 136 (inferring a need for a stronger CARU).

\textsuperscript{166} But see M. Neil Browne, supra note 93, at 118 (countering that a paternalistic protection over children is unnecessary).

\textsuperscript{167} See About the Children’s Advertising Review Unit, supra note 14 (discussing the established safe-harbor program).

\textsuperscript{168} See CARU Safe-harbor Program Requirements, Council of Better Business Bureau, Inc. (2008),
The deceptive practice guidelines will be more effective if specifically recognized by the FTC or the courts as enforceable regulations or a safe-harbor, as are the privacy guidelines.\footnote{Ellen J. Fried, supra note 115, at 136 (applying CARU guidelines to food advertising directed at children creates an outcome that show CARU is ineffectively keeping up with the changing advertising atmosphere).} To enforce CARU guidelines and avoid confusion, the language listing media under the CARU guidelines should be edited to specifically include gaming apps.\footnote{Julian Lee, supra note 3 (extending deceptive practice regulations to misleading comments on a Facebook wall about Smirnoff vodka; naming Facebook as an advertising medium in Australia).} Congress’s historic tendency avoiding specifics in legislation further requires the collaboration between CARU guidelines, existing regulations, and case law interpretations.\footnote{J. Howard Beales, supra note 33, at 878-79 (portraying Congress’s attempt to pass specific legislation banning}
because Congress is attempting to pass legislation protecting children’s privacy within apps.\textsuperscript{172} Congress’s attempt to legislate an app may extend to require disclosure in all aspects. Naming the sponsor, for example, may be a broad, sufficient, and acceptable regulation. The benefits of this collaboration outweigh the restraints that may inhibit a business’ full use of technology.\textsuperscript{173}

Currently, a business has little consolidated information to use as guidance when fashioning an advertisement.\textsuperscript{174} A

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\textsuperscript{172} See Mobile Apps for Kids, supra note 64, at 1 (examining the inadequate privacy disclosure statements).

\textsuperscript{173} See M. Neil Browne, supra note 93, at 72-85 (introducing advertising’s adverse effects on children and the political limitations restricting the FTC from implementing more stringent regulations).

\textsuperscript{174} See Marketing Your Mobile App, supra note 22 (providing a cursory overview of an app as an advertisement and access to more reference materials); Arthur B. Cornell, Jr., Federal Trade Commission Permanent Injunction Actions Against Unfair and Deceptive Practices: The Proper Case and the Proper Proof, 61 St. John’s L. Rev. 503, 510 (1983) (claiming the “clear
business, truly, has even less precedent to consult when crafting an app for the public.\textsuperscript{175} To ensure a business is releasing the most appropriate app for children, it should follow CARU guidelines and the most recent report from the FTC.\textsuperscript{176} The report offers very little guidance concerning


\textsuperscript{176} See Advertising and Marketing, \textit{Bureau of Consumer Protection: Business Center}, http://business.ftc.gov/advertising-and-
deceptive practices and focuses mostly on privacy.\textsuperscript{177} The guidelines that are posted offer insight into which guidelines and regulations a business should apply from other sources to ensure truthful advertising.\textsuperscript{178} In plain English, the guidelines inform businesses that apps are advertisements and omissions are just as deceptive as misleading or ill-informed statements.\textsuperscript{179}

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marketing (last visited Feb. 3, 2013) (urging advertisers to fulfill the legal obligation to truthfully advertise with a section clearly marked “children” and a link to the CARU Guidelines).
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\textsuperscript{177} See id. (allowing access to claims and decisions concerning children’s products but many of which are unrelated to the Internet or apps). See generally Marketing Your Mobile App, supra note 22 (discussing the definition of “Truthful Advertising” for two paragraphs and guidelines for proper “Privacy” disclosures for seven paragraphs).

\textsuperscript{178} See Advertising and Marketing, supra note 176 (linking resources for businesses questioning particular practices of target-group specific regulations, relevant judicial decisions, documents, and workshops on one page for easy access).

\textsuperscript{179} See Marketing Your Mobile App, supra note 22 (defining an advertisement as anything that tells the public about a product and the attributes of a product). But see Troianski, supra note
The clear language in this FTC release serves another purpose of
guidance to businesses; easy, simple sentences are understood
best by the consumer.  

The release by the FTC also shows a
trend towards more stringent regulations such as the CARU
guidelines.

63 (offering a counter-argument claiming apps are not
advertisements and regulation would equate to “super parenting”).

See generally Marketing Your Mobile App, supra note 22
(displaying the content of the website in short sentences,
headings, and with contrasting colors).

Compare Marketing Your Mobile App, supra note 22
(foreshadowing a movement towards enforcing the FTC Act against
app producers for deceptive practices), and The Children’s
Advertising Review Unit Self-Regulatory Guidelines for
Children’s Advertising, Exhibit C, 9 (revised Feb. 2000),
available at
http://www.ftc.gov/privacy/safeharbor/caruselfreg.pdf
(reproducing CARU regulations to emphasize a broad application
towards advancing technology), with Troianovski, supra note 63
(introducing the opinions of app producers that an app is not
and should not be covered by current regulations because an app
is not an advertisement).
The CARU guidelines should be followed to avoid any legal entanglement because a business becomes an advertiser the second an app is distributed.\textsuperscript{182} The CARU guidelines, again, are stricter than standard FTC deceptive practice legislation because children are a target group.\textsuperscript{183} Due to the nature of a mobile app, the potential of advertising to children is much higher.\textsuperscript{184} Using the CARU guidelines, a business will best situate by completing and submitting self-assessment forms and attestations to CARU for ongoing monitoring and protection under CARU.\textsuperscript{185} With CARU as a safe-harbor, businesses are more aware

\textsuperscript{182} See \textit{Marketing Your Mobile App}, supra note 22 ("Once you start distributing your app, you become an advertiser.").

\textsuperscript{183} See \textit{About the Children’s Advertising Review Unit}, supra note 14 (explaining the purpose of CARU).

\textsuperscript{184} See \textit{Mobile Apps for Kids}, supra note 64, at 3-4 ("[T]he market for mobile apps has continued to grow at an explosive rate . . . nearly nine out of ten U.S. adults have a cell phone and more than 40\% [have apps] . . . [f]urther, a number of apps contained interactive features – such as advertising . . . without disclosing . . . ").

\textsuperscript{185} See id. (applying the current requirements to a prudent business avoiding violating the FTC Act).
of deceptive acts and the courts may better establish rules based on the established, written guidelines.

However, many, such as Justice Scalia and Justice Stevens, argue that limiting advertising and increasing narrow regulations leads to an unnecessary paternalistic society. The argument, both based in policy and First Amendment freedom of speech, states that it is a parent’s responsibility to monitor what games a child is playing, what app that child may access, and all other media choices the child may experience. This argument has little merit because of the number of other laws protecting or prohibiting children. Like the movies, the

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186 Accord M. Neil Browne, supra note 93, at 119 (“One major concern that critics of regulating commercial speech cite is the tendency of the government to be paternalistic in regulation.”); see J. Howard Beales, supra note 33, at 880 (recognizing technology that allows parents more control over children’s viewing, such as TiVo and commercial-free programming).

187 See M. Neil Browne, supra note 93, at 120 (citing a hesitancy to regulate any speech that may only amount to unfavorable knowledge; not a deceptive advertisement).

188 See Id. (promoting policy that does not support paternalistic government in the scheme of advertising to children is contrary to the number of other regulations intended to protect children).
hypothetical app exhibits a classic “product placement” form of deceptive advertising where “placement agencies” determine the most “natural” setting to accommodate a “client’s product.” Instead of making a scene look natural, a “placement agency” creates an endorsement for a product. These endorsements, when targeting children should be regulated by CARU guidelines under the FTC Act.

Further, with technology advancing as quickly as it currently is, avoiding the subject of deceptive advertising within an app seems irresponsible. If all other media is regulated, Congress should make the effort to address existing regulations in the context of an app as a deceptive practice to put businesses on notice of potential deceptive acts. Requiring a business to add disclosure statements to gaming apps, specifically, merely recognizes an app as a different advertising avenue.

189 See Unfair and Deceptive Acts, 1991 WL 640030, at *3 (F.T.C. May 30, 1991) (integrating products into movies and games to make the scene more realistic and comparable to a child’s every day life).

190 See id. (showing the purpose of product placement in a movie does not fit as a purpose for product placement in a game).
V. Conclusion

An app is comparable to an online game or “area of cyberspace” and, as of now, comparing an app to these categories of media is the best option to determine a deceptive practice. The hypothetical created is similar to the IHOP game that received media attention near the end of 2012 but in the form of an app instead of an online game. CARU deemed the IHOP game an advertisement and, therefore, a deceptive practice requiring proper disclosure for children and the parents of children. An advertisement, well considered a practice that may be regulated by the FTC Act, does not need to intend to deceive the consumers, nor does the sponsoring company need to relinquish all First Amendment rights to sell a product. An advertisement must, however, not omit material information or include material information that will deceive the consumers.

An advertisement under the guise of an app must also be regulated by the FTC Act to prevent further deceptive practices. The FTC was created to prevent unfair competition between businesses and protect consumers from deceptive advertising. CARU was created years later to act as a self-regulating organization specializing in the protection of children from deceptive advertising. Allowing apps to act as an advertisement without proper regulation and enforcement defeats the purpose of
regulating other forms of media. While apps were not prevalent in past years, they are becoming a great part of society in the technological era. Both to protect children from deceptive advertising and the status of CARU and the FTC Act, increased regulations should exist specific to apps.

A company is misleading a child when an app omits its name as the sponsor or places its logo on a number of the images in the app, or engages in the many other advertising techniques discussed. Not only is a child misled when an app is deceptive, but the parents are deceived when an app presents itself as a game instead of an advertisement. Rather than including false statements, apps of this nature are more likely to be deceptive because of their omissions.