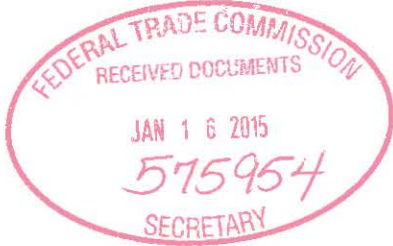


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeney



In the Matter of)

Jerk, LLC, a limited liability company,)
also d/b/a JERK.COM, and)

DOCKET NO. 9361

John Fanning,)
individually and as a member of Jerk,)
LLC.)
)
)
)
_____)

COMPLAINT COUNSEL'S REPLY TO RESPONDENT
JERK, LLC'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR SUMMARY DECISION

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I. INTRODUCTION

Respondent Jerk, LLC (“Jerk”) does not dispute any of the material facts and supporting evidence presented by Complaint Counsel. Jerk does not even contest Count II of the Complaint. Its entire opposition is an attack on the viability of Count I as a matter of law. Along with Respondent John Fanning’s (“Fanning”) opposition, which similarly challenged only the Complaint’s legal sufficiency, Jerk’s arguments underscore the absence of any factual dispute to be resolved at trial. In light of the law and the undisputed facts, the Commission should grant summary decision in favor of Complaint Counsel.

II. BECAUSE RESPONDENTS DO NOT DISPUTE THE MATERIAL FACTS, THIS MATTER SHOULD BE RESOLVED ON SUMMARY DECISION.

A. Jerk’s Opposition Does Not Dispute Any Material Facts Presented By Complaint Counsel.

Summary decision is warranted because Respondents Jerk and Fanning have not genuinely disputed any material facts presented in Complaint Counsel’s Statement of Material Facts (“CCSMF”). In order to move past summary decision to trial, the opposing party must “demonstrate that there is indeed a material issue of fact that precludes summary judgment.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). A party cannot rely on conclusory statements, but must show that “the evidence presents a sufficient disagreement to require submission to a [fact-finder].” *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-52 (1986) (courts must determine “whether there is the need for trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact”).

Like Fanning, Jerk has failed to identify a single material fact that necessitates an

evidentiary hearing.¹ The CCSMF presents the evidence supporting the Complaint's allegations through deposition testimony, business records, party admissions, and other material. Rather than challenge this evidence, Jerk expressly concedes that it "does not dispute the facts . . . set forth in Complaint Counsel's Statement of Material Facts." (Jerk Opposition to Complaint Counsel's Motion for Summary Decision ("Jerk Opp.") p. 2 (emphasis added)). Aside from a passing reference to Respondent John Fanning's opposition, Jerk's opposition brief does not address Count II of the Complaint at all, essentially conceding liability. *See* 16 C.F.R. § 3.24(a)(3) (the opposing party "must set forth specific facts showing that there is no genuine issue for trial. If no such response is filed, summary decision, if appropriate, shall be rendered"). On Count I, Jerk does not dispute the material facts, including that:

- Jerk operated Jerk.com during the time period alleged (CCSFM 3);
- Jerk disseminated on Jerk.com and Twitter the statements and images pleaded in Paragraph 8 of the Complaint (CCSFM 40-46);
- Jerk intended to make these representations (CCSMF 47-50); and
- Jerk itself, not third party users, created the vast majority of profiles displayed on Jerk.com (CCSMF 57, 60).

Jerk's opposition also does not dispute the facts demonstrating Fanning's controlling role at the company, including his authority over and participation in the alleged misconduct. (CCSMF 97-

¹ Fanning's opposition to summary decision, like Jerk's, did not dispute any of the material facts presented in the CCSMF. (*See* Complaint Counsel's Reply to Respondent Fanning's Opp. pp. 1-6). Moreover, both Respondents did not submit a separate statement detailing any material facts at issue, as required by Commission Rule of Practice 3.24(a)(2). 16 C.F.R. § 3.24(a)(2). This failure alone provides sufficient basis to deem Complaint Counsel's facts admitted and to grant summary decision against both Respondents. *See* Complaint Counsel's Reply to Fanning's Opposition to Complaint Counsel's Motion for Summary Decision pp. 2-3; *Coseme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted") (citation omitted).

157). In short, Jerk concedes all relevant facts.

B. After Filing Its Opposition, Jerk Conclusively Admitted The Material Facts Establishing Its Liability.

In addition to conceding Complaint Counsel's presented material facts and evidence, Jerk has now conclusively admitted the material facts establishing its violation of Section 5 as alleged in the Complaint. Jerk failed to respond to Complaint Counsel's Second Request for Admissions ("RFAs"), even after requesting and receiving a second chance to do so.² Thus, the matters in the RFAs are now "conclusively established." 16 C.F.R. § 3.32(c); *see also United States v. 2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992) (defendants' failure to respond to requests for admissions constituted conclusive admission on decisive matters); *Luick v. Graybar Electric Co.*, 473 F.2d 1360, 1362 (8th Cir. 1973) (holding that, under the Federal Rules of Civil Procedure, "[u]nanswered requests for admissions render the matter requested conclusively established for the purpose of that suit").

Specifically, Jerk has admitted, *inter alia*, that:

- Paragraphs 4 through 14 of the Complaint accurately describe Jerk's acts and practices.
- Jerk has made deceptive representations in violation of Section 5(a) of the FTC Act as described in Paragraphs 15 through 19 of the Complaint.
- John Fanning has been a managing member of Jerk.

² After Jerk's initial failure to timely respond to these Request for Admissions by the 10-day deadline prescribed by Rule 3.32(b), the Commission permitted Jerk to seek relief from the ALJ for their failure. Comm'n Order of Dec. 15, 2014. Jerk did so, and Chief Administrative Law Judge Chappell ordered Jerk to file its responses to the RFAs no later than January 13, 2015. ALJ Order of Jan. 9, 2015. Despite that order, Jerk has not responded to the RFAs (Burke Dec. ¶ 3), thereby conclusively admitting to the matters in the RFAs. *See* 16 C.F.R. § 3.32(b). In light of these circumstances, Jerk's failure to respond to the RFAs a *second* time can only be construed as a deliberate choice to concede the case without affirmatively admitting its misconduct.

- John Fanning has had authority to control Jerk's acts and practices.
- NetCapital.com, LLC has been the majority shareholder of Jerk.

(Declaration of Beatrice Burke, attached hereto ("Burke Dec.") ¶ 2, Att. A (Admission Request Nos. 1-5)).

The Commission can rely on Jerk's admissions on a standalone basis, independent of Complaint Counsel's evidence, to grant summary decision against Jerk. *See Kingstro v. Cnty. of San Bernardino*, No. CV 12-4673, 2014 WL 3571803, at *6 (C.D. Cal. July 18, 2014) (relying on deemed admissions as dispositive in granting summary judgment); *cf. Rainbolt v. Johnson*, 669 F.2d 767, 768 (D.C. Cir. 1981) (reversing the district court for failing to give binding and conclusive effect to deemed admissions).

C. Because Jerk Challenges Only The Legal Viability Of Count I, This Case Should Be Resolved on Summary Decision.

Jerk's opposition, as well as its recent admissions, make it clear that there is no dispute of material fact to resolve at trial. Similar to Fanning's opposition, Jerk's opposition, instead of challenging the facts and evidence, mounts only a legal challenge to Count I of the Complaint. Therefore, although styled as an opposition to Complaint Counsel's Motion for Summary Decision ("CCMSD"), Jerk's filing is really a motion to dismiss Count I on three threshold legal arguments: (1) the representation alleged in Count I was not actually made, despite Respondents' express statements; (2) even if it was made, that representation is not material; and (3) in any event, the First Amendment precludes this action.³ As described in

³ Jerk's assertion that summary decision should be granted in *its* favor on Count I (Jerk Opp. p. 1), reinforces the conclusion that its present filing is really a motion to dismiss Count I on legal grounds, since Jerk does not—as it must on summary decision—present a statement of material facts upon which it contends there is no issue for trial. 16 C.F.R. § 3.24(a)(1). Therefore, the Commission should not construe Jerk's assertion as a serious request for summary decision in its favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (the party seeking summary

Section III, *infra*, this attack fails. The Complaint is legally sound and supported by uncontroverted evidence.

However the Commission interprets Jerk's opposition, one thing is clear: there is no genuine dispute about the material facts and evidence in this case. Therefore, there is no need for an evidentiary hearing, and the Commission should resolve this matter on summary decision. *Clark*, 929 F.2d at 608 ("To have required a trial when it was clear from the materials in the record that [the party] could not prove her claim would have been a waste of time and resources, and would have unnecessarily restricted the proper use of summary judgment."). Indeed, summary judgment is not only "fully appropriate," but is "indeed mandated, when the evidence is insufficient to support the non-moving party's case." *Distasio v. Perkins Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998).

III. JERK'S LEGAL CHALLENGE TO COUNT I FAILS.

A. Jerk Made The Representation Alleged in Count I.

Jerk attacks Count I on the ground that it did not make the alleged representation. Specifically, Jerk claims that statements on its Jerk.com website and Twitter page, which Jerk does not dispute making, do not actually mean what they state on their face. (Jerk Opp. pp. 4-8). This attack is unconvincing. The representation alleged in Count I is plainly evidenced by Jerk's statements. Furthermore, the entirety of the extrinsic evidence in the record supports that plain reading of Jerk's statements.

decision "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact"). Jerk has moved neither for summary decision nor for dismissal.

1. The representation alleged in Count I was plainly conveyed by Jerk's unambiguous statements.

Count I alleges that Respondents represented, expressly or by implication, that Jerk.com's profile pages were created by third-party users and reflected those users' views of the profiled individuals.⁴ The Commission possesses the expertise to determine whether Jerk made this representation. *In re Daniel Chapter One*, 2009 FTC LEXIS 259, at *27 (F.T.C. 2009). In making that determination, the Commission need not look beyond statements' "reasonably clear" meaning to determine what representation they convey. *In re Pom Wonderful*, 2013 FTC LEXIS 6, at *25 (F.T.C. 2013) (citing *Kraft Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992)). Moreover, in determining what representation a defendant conveyed, the Commission can examine the entire message and "assess[] the overall 'net impression' it conveys." *Id.* at *21 (citing *Deception Statement*, appended to *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 178 (1984)).

Here, it is beyond dispute that Jerk made the representation alleged in Count I through multiple explicit and clearly implied statements. Jerk.com, which Jerk controlled when these claims were made (CCSMF 3), stated in the "Online Content" section of its "About Us" page that "information or content made available through jerk.com are *those of their respective authors and not of Jerk LLC.*" (CCSMF 43; CX0273) (emphasis added). On the "Remove Me" page, Jerk.com stated "Jerk is where you find out if someone is a jerk, not a jerk, or a saint *in the eyes of others.*" (CCSMF 44; CX0275) (emphasis added). Jerk reinforced these express statements about the source of Jerk.com profiles with statements unambiguously implying that the profiles were created by other people, as opposed to being auto-generated by Jerk. For example, on its "Welcome" page, Jerk.com invited consumers to "join the millions of people

⁴ Count I also alleges that, in fact, that the majority of Jerk.com profile pages were created not by third-party users, but by Jerk itself. Jerk does not dispute this allegation.

who already use Jerk for important updates for business, dating, and more[.]” (CCSMF 42; CX0272). Similarly, Jerk.com’s “Post a Jerk” section invited consumers to “create a profile on jerk” and to include a picture of the profiled person. (CCSMF 45; CX 0274). Jerk.com’s Twitter page likewise clearly implied that Jerk.com displayed people-created profiles by enticing consumers to “[f]ind out what your ‘friends’ are saying about you behind your back to the rest of the world.” (CCSMF 46; CX0282). No party disputes that Jerk disseminated these statements to consumers.

The representation conveyed in these statements is clear from the plain meaning of the words stated: Jerk told consumers that Jerk.com’s profile pages were created by real, third-party users, not auto-generated by Jerk.com itself. Therefore, the Commission can and should determine on summary decision that Jerk did make this representation. *See Kraft*, 970 F.2d at 320 .

Jerk does not dispute that it made the above statements. Instead, Jerk focuses on a single statement in the “Online Content” section of Jerk.com’s “About Us” page, and argues that it “contain[s] no factual representations at all” because Jerk intended it to serve as “a disclaimer and an assertion of Jerk’s rights under Federal law.”⁵ (Jerk Opp. 4-5). Both the law and the facts undercut this contention. First, Jerk’s characterization of a deceptive statement as a legal disclaimer does not shield it from liability. *See FTC v. AMG Servs., Inc.*, 2014 U.S. Dist. LEXIS

⁵ Jerk sidesteps the other express statements alleged in Count I and highlighted above, which together reinforced the net impression that third-party users were the ones responsible for creating the profiles displayed on Jerk.com. To the extent that Jerk argues that these other statements were truthful because Jerk did give third-party users the ability to create Jerk.com profiles (Jerk Opp. p. 7-8), this argument is unavailing. The Complaint does not allege that Jerk prevented users from creating profiles while representing that they could do so. Instead, the Complaint alleges that Jerk itself created the vast majority of profiles on Jerk.com while representing to consumers that all of the profiles on Jerk.com were user-generated.

73285, at *26-27 (D. Nev. May 28, 2014) (predicating deception violation on statements made in a Truth In Lending Act disclosure box and fine print in a payday loan document). Second, Jerk.com did not display the deceptive statement pleaded on the “About Us” page as part of its “Terms & Conditions” section (section 1). (CCSMF 43; CX0273). Instead, Jerk displayed it as part of a different section—the “Online Content” section (section 4). (*Id.*).

Next, Jerk argues that a literal interpretation of this “Online Content” section would lead to an absurd outcome, because it would suggest that even content obviously created by Jerk.com’s operators, such as the website’s logo and the description of its services, was authored by third party users. (Jerk Opp. p. 6). This argument is nonsensical. Jerk.com’s main function was displaying profiles about people. Jerk.com’s profile pages comprised the vast majority of the site’s webpages. (CCSMF 32). And Jerk expressly invited users to create profile pages. (CCSMF 42, 45). There is no indication that Jerk invited users to create any other content on the site besides profiles, such as Jerk’s logo. Thus, it is plainly obvious that Jerk’s representation that “information or content made available through jerk.com are those of their respective authors and not of Jerk LLC” applied only to the Jerk.com profiles, as third-party users were invited to “author” only that content.

Finally, Jerk argues that the statement “the information or content made available through jerk.com are those of their respective authors and not of Jerk LLC” is technically correct because the term “author” would apply not to Jerk, but to whoever originally created the content that Jerk.com published and displayed. This argument is as untenable as it is baseless. Accepting it would mean that a website would not be the author—*i.e.*, the creator—of webpages that it itself generates and publishes on the Internet (with or without proper attribution), as long as it seeds those pages with content taken (lawfully or not) from other sources. Courts have rejected such

brazen attempts to sidestep liability for online content creation. *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (“the party responsible for putting information online may be subject to liability [for that content], even if the information originated with a user”).

2. The entirety of the extrinsic evidence demonstrates that Jerk made the representation alleged in Count I.

Because the representation alleged in Count I was conveyed through express and conspicuous implied statements, the Commission need not look to extrinsic evidence to unearth a deeper meaning behind what is plain on its face. *Kraft*, 970 F.2d at 319-20. However, to the extent the Commission chooses to assess the extrinsic evidence on the record, all of it points toward the plain interpretation pleaded in Count I.⁶ In their Motion for Summary Decision, Complaint Counsel attached deposition transcripts, consumer declarations, and internal emails from Fanning Jerk staffers. This uncontroverted evidence shows that Respondents intended Jerk.com to be perceived as displaying user-generated (*i.e.*, organically created) profiles. (CCSMF 47-50). For example, Fanning brainstormed with his Jerk teammates website language that would convey to consumers that Jerk.com is a site where “*someone* i[s] going to tell you the answer” to the question, “Are you a jerk?” (CX0357) (emphasis added). Fanning also circulated a draft Wikipedia entry for Jerk.com that compared the site to Facebook:

Jerk.c[o]m was the first website defining the category of anti-social networks on the [I]nternet. On facebook.com internet users were able to tell the world about [t]hemselves. Jerk.com search engine was the first website to popularize posting [a]bout others without their consent.

⁶ Jerk’s opposition does not challenge any extrinsic evidence, and Jerk does not present any extrinsic evidence of its own about the meaning of the pleaded statements.

(CX00670). Jerk insiders also characterized Jerk.com as a user-generated social network to prospective investors, competitors, and government agencies. (CCSMF 49-50)

The extrinsic evidence also shows that Jerk's efforts succeeded in convincing consumers that Jerk.com profiles were created by other people. (CCSMF 51-53). For example, one consumer declared that, upon visiting the Jerk.com profile page that featured him and upon seeing a photograph of himself there, he "immediately thought that someone who didn't like me put me on there." (CX0037). Another consumer had the same reaction when she ran a Google search on her name and found her Jerk.com profile of her displaying a picture that she posted on Facebook with a friends-only privacy setting. (CX0036). Indeed, an expert analysis of Jerk.com concludes that the majority of visitors to the site would view the profiles as user-generated. (Burke Dec. ¶ 4, Att. B).⁷

Against the plain reading of Jerk's own statements, supported by the full weight of the extrinsic evidence establishing that Jerk represented to consumers that the Jerk.com profiles were user-generated, Jerk's contention that it did not make that representation is untenable.

B. Uncontroverted Evidence Establishes That The Representation Alleged In Count I Was Material.

1. Jerk does not rebut the presumption of materiality.

In their opening brief, Complaint Counsel established, through uncontroverted evidence,

⁷ Although this expert report was not included in the CCSMF because it had not been completed when the CCSMF was filed, since Jerk has reopened briefing on summary decision two months late, Complaint Counsel are now able to present these expert findings to aid the Commission's determination on summary decision. Jerk will not be prejudiced by its inclusion here. Complaint Counsel timely produced the report to Jerk on December 1, 2014, more than a month before Jerk filed its opposition. Jerk has not objected to or moved to strike any part of the report. Nor has Jerk elected to depose the expert, Professor Piskorski, during expert discovery. In any event, given the Commission's plenary authority to determine the meaning of Jerk's claims on their face, the weight accorded to this report on summary decision should not change the outcome.

that the deceptive representation alleged in Count I was material because it was express, intentional, pertained to the central characteristic of the Jerk.com website, and affected consumers' conduct regarding Jerk.com. (CCMSD pp. 19-22) Because Complaint Counsel have demonstrated that the representation alleged was express and intentional, and therefore presumptively material, the burden shifted to Respondents to rebut that presumption by "com[ing] forward with sufficient evidence to support a finding that the claim at issue is not material." *In re Novartis Corp.*, 1999 FTC LEXIS 63, *27 (F.T.C. 1999). Jerk has not done so.

Jerk appears to attack the materiality of the claim in Count I by challenging just one of its statements set forth in Count I—the "Welcome" page enticement: "Want to join the millions of people who already use Jerk for important updates for business, dating, and more?" (Jerk Opp. pp. 8-10 (citing CCSMF 42)). Ignoring all the other statements pleaded in Count I and their net impression, Jerk argues that this "millions of people" statement, taken in isolation, is not material because consumers would not have cared about or relied upon a representation about the exact number of Jerk.com users. Jerk also contends that the reference to "millions" should be ignored as mere puffery.⁸

In addition to being completely speculative, Jerk's argument misses the point. Complaint Counsel highlighted the "millions of people" statement, in conjunction with the other pleaded (and uncontroverted) statements that Jerk disseminated, to demonstrate that Jerk conveyed the

⁸ Jerk's claim that this representation constitutes puffery misses the mark, except to highlight Jerk's concession that millions of people did not actually use Jerk.com. The statement is not puffery, since "[p]uffing refers generally to an expression of opinion not made as a representation of fact," *FTC v. US Sales Corp.*, 785 F. Supp. 737, 746 (N.D. Ill. 1992) (internal citation and quotation marks omitted), whereas "specific and measurable claims that may be literally true or false are not puffery, and may be the subject of deceptive advertising claims." *FTC v. Direct Mkt'ing Concepts, Inc.*, 624 F.3d 1, 11-12 (1st Cir. 2010) (internal citation and quotation marks omitted). Whether Jerk.com did, in fact, have millions of users at the time Jerk made this statement is susceptible to a measurable determination.

message that Jerk.com was a website where consumers could see what *other people* were saying about them and their friends, colleagues, and romantic interests. This message added to the net impression created by Jerk that Jerk.com's profiles were user-generated. *See FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (advertisements may be deceptive by virtue of their net impression). Consumers very much cared about *that* representation, as established through uncontroverted evidence demonstrating how it affected consumers' conduct regarding Jerk.com. (CCMSD pp. 7-9, 20-21; CCSMF 53, 79, 93, 158-165).

2. Jerk cannot sidestep the evidence demonstrating its intent to deceive by arguing that it intended to deceive everyone *except* consumers.

In addition to arguing that the representation alleged in Count I was not made, and therefore was not express, Jerk contends that the representation was not intentionally made. Specifically, Jerk maintains that while Complaint Counsel's evidence may demonstrate Jerk's intent to make this deceptive representation to "investors and other non-consumers," it does not establish Jerk's intent to likewise deceive "consumers." (Jerk Opp. p. 10). Jerk is mistaken. Complaint Counsel has presented uncontroverted evidence showing Jerk's intent to represent *to consumers* that Jerk.com's user profiles were created by users. Not only did Jerk make this representation to consumers on Jerk.com and Twitter, company insiders also discussed how best to convey this message to consumers. (CCSMF 47). They even drafted a Jerk.com entry for Wikipedia, a publicly available website commonly used by consumers for information gathering, that described Jerk.com as a user-generated social network. (CCSMF 48). As explained in Complaint Counsel's opening brief, this intent to deceive consumers was not accidental. It was imperative for Jerk to portray Jerk.com as an organic, user-generated social network to drive traffic to the site and to encourage consumers to buy Jerk.com memberships. (CCMSD pp. 5-6, 20-21).

Contrary to Jerk's contention (Jerk Opp. p. 10), Jerk's representations about the source of Jerk.com profiles to prospective investors, a competitor (Facebook), and various government agencies is relevant to demonstrating Jerk's intent to make the same representation to consumers. (CCSMF 49-50). Since Jerk's deceptive statements to "non-consumers" were the same as its deceptive claims to consumers, they buttress the obvious conclusion that Jerk attempted to deceive all outsiders in the same way. Jerk's argument that it intended to privately deceive a small set of parties while broadcasting the contradictory truth to the public defies common sense.

3. Consumers cared about more than just the website's name.

Jerk argues that really what mattered to consumers was that they were profiled on a website called Jerk.com, not the perception, created by Jerk's representation, that Jerk.com profiles were created by actual people. The uncontroverted evidence, however, shows that consumers were concerned about not only about the name Jerk.com, but also about someone—likely a person they knew—posting a profile of them on a website named Jerk.com. (CCSMF 51). Accordingly, consumers reacted based on their perceived understanding, engendered by Jerk's representation, that some other, real-life person profiled them on Jerk.com. (CCSMF 53, 79, 93, 158-159). As online social media expert Professor Piskorski explained, "Internet users fundamentally care about their online reputations, particularly when they believe real human beings contributed content about them." (Burke Dec. Att. B p. 12).

To be sure, as Jerk suggests in its opposition, consumers may not have had the same reaction if they believed someone profiled them on WonderfulPeople.com, as opposed to Jerk.com. (Jerk Opp. p. 11). This hypothetical just proves Complaint Counsel's point. Jerk did not name its website *WonderfulPeople.com*. It named the site *Jerk.com*, intending for the name to cause controversy, while creating the perception that profiles on this controversial site were user-generated. (CCSMF 47-50; CX0438 at 22:7-11). Jerk intended for *both* the controversial

name and the perception of user-generated profiles to work hand-in-glove to generate buzz for the site and improve Jerk's business. (CX0117-003; -004) ("the content is growing organically from the users themselves and reflect the view of the people who have first-hand knowledge of the profiled individual"; "New Idea which is controversial and disruptive, hence likely to get good PR attention."). Having intentionally forged this association, Jerk cannot now absolve itself from liability for deceiving consumers about what Jerk.com was by shifting all blame to the site's name.

C. The First Amendment Does Not Immunize Jerk's Deceptive Conduct.

Jerk's First Amendment argument is *non sequitur*. Complaint Counsel have presented uncontroverted facts, supported by evidence, demonstrating that the representation alleged in Count I was deceptive and was made for a commercial end—to drive traffic to Jerk.com, generate advertising revenue, and sell memberships, all to raise the company's value. (CCMSD pp. 5-6, 20, 28-29).

Jerk disputes neither this evidence nor the conclusion that its speech was commercial. Yet inexplicably, Jerk still raises the First Amendment in its opposition, presenting general doctrinal principles regarding companies' First Amendment rights, discussing the scrutiny courts apply to governmental restrictions on non-commercial speech, and asserting the unremarkable proposition that the Commission cannot usually restrict *truthful* commercial speech. (Jerk Opp. pp. 3-4). Jerk's exposition on First Amendment law does not alter the well-established rule that the FTC can act against false commercial speech without violating the First Amendment. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."). Since Count I is predicated on Jerk's false

commercial speech, Jerk's invocation of the First Amendment is hopelessly amiss.

IV. CONCLUSION

For the reasons stated herein and in Complaint Counsel's briefing in support of summary decision, the Commission should grant Complaint Counsel's Motion for Summary Decision.

Dated: January 16, 2015

Respectfully submitted,



Sarah Schroeder
Yan Fang
Boris Yankilovich
Ken Abbe
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103
Telephone: (415) 848-5100

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2015, I served a true and correct copy of COMPLAINT COUNSEL'S REPLY TO RESPONDENT JERK, LLC'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION on:

The Office of the Secretary:

Donald S. Clark
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

The Office of the Administrative Law Judge

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Room H-106
Washington, D.C. 20580

Counsel for John Fanning:

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Counsel who have entered an appearance for Jerk, LLC:

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Dated: January 16, 2015



Keny Ortiz (kortiz@ftc.gov)
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Phone: 415-848-5100
Fax: 415-848-5184

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright
 Terrell McSweeney

In the Matter of)	
Jerk, LLC, a limited liability company, also d/b/a JERK.COM, and)	
John Fanning, individually and as a member of Jerk, LLC.)	DOCKET NO. 9361
)	PUBLIC
)	
)	

**DECLARATION OF BEATRICE BURKE IN SUPPORT OF
COMPLAINT COUNSEL’S REPLY TO RESPONDENT JERK, LLC’S OPPOSITION
TO COMPLAINT COUNSEL’S MOTION FOR SUMMARY DECISION**

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, and I am a citizen of the United States. I am employed by the Federal Trade Commission (“FTC”) as a paralegal in the FTC’s Western Regional Office in San Francisco. I have worked and continue to work as a paralegal for Complaint Counsel in the above-captioned matter, and I have personal knowledge of the facts set forth herein. I am currently a member of the California Army National Guard Reserve and a United States Army veteran from active duty.

2. Attached hereto as **Attachment A** is a true and correct copy of Complaint Counsel’s Second Request for Admissions to Respondent Jerk, LLC in this action and designated as exhibit CX0781.

3. Respondent Jerk, LLC did not provide responses to Complaint Counsel’s Second Request for Admissions on January 13, 2015, as required by Chief Judge Chappell’s Order. I

conferred with the Office of the Secretary and confirmed that, as of the date of this declaration, Jerk has still not provided responses to Complaint Counsel's Second Request for Admissions.

4. Attached hereto as **Attachment B** is a true and correct copy of the Expert Report of Mikołaj Jan Piskorski, designated as exhibit CX0108.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2015, in San Francisco, CA.



Beatrice Burke

Exhibit A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright
 Terrell McSweeney

In the Matter of)	
)	
)	
Jerk, LLC, a limited liability company,)	
also d/b/a JERK.COM, and)	
)	DOCKET NO. 9361
John Fanning,)	
individually and as a member of)	
Jerk, LLC.)	
)	
)	

**COMPLAINT COUNSEL’S SECOND REQUEST FOR ADMISSIONS TO
RESPONDENT JERK, LLC**

Pursuant to Commission Rule of Practice 3.32, Complaint Counsel request that Respondent Jerk, LLC admit the truth of the statements set forth below within ten (10) days after service of this Request.

INSTRUCTIONS

For the purposes of this Request for Admissions, each paragraph constitutes a separate statement and is to be admitted or denied separately.

Pursuant to Rule 3.32(b), you must specifically admit or deny the requested admission, or set forth in detail the reasons why you cannot admit or deny the matter. A denial must fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the requested admission, you must specify what portion of it is true and qualify or deny the remainder. In addition, you may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

Rule 3.32(b) requires that your responses be sworn to under oath.

It is not grounds for objection that the requested admission relates to opinions of fact or the application of law to fact. Your belief that the matter on which an admission is requested

presents a genuine issue for trial does not, on that ground alone, provide a valid basis for objection.

For the purposes of this Request for Admissions, the term "profile" shall mean a page on the website Jerk.com that displayed a person's name, picture (or a blank square or avatar in lieu of a picture), buttons to vote the profiled person a "jerk" or "not a jerk," a tally of the vote results, and a space to enter comments and add other information about the profiled person.

Unless otherwise specified, the relevant time period is from January 1, 2008 to the date of full and complete compliance with this Request for Admissions.

ADMISSION REQUESTS

Complaint Counsel requests the following admissions:

1. Paragraphs 4 through 14 of the Federal Trade Commission's Complaint in this action (the "Complaint") accurately describe Jerk, LLC's acts and practices.
2. Jerk, LLC has made deceptive representations in violation of Section 5(a) of the Federal Trade Commission Act as described in Paragraphs 15 through 19 of the Complaint.
3. John Fanning has been a managing member of Jerk, LLC.
4. John Fanning has had authority to control Jerk, LLC's acts and practices.
5. NetCapital.com, LLC has been the majority shareholder of Jerk, LLC.
6. Jerk, LLC does not currently carry out any activities, including any ongoing business.
7. Jerk, LLC does not currently have any place of business.
8. Jerk, LLC does not currently have any members, officers, directors, managers, or employees.

Date: November 4, 2014

/s/ Sarah Schroeder
Sarah Schroeder
Federal Trade Commission
Bureau of Consumer Protection
901 Market Street, Suite 570
San Francisco, CA 94103
Phone: (415) 848-5100

Exhibit B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Jerk, LLC, a limited liability company,)	
Also d/b/a JERK.COM, and)	
)	Docket No. 9361
John Fanning,)	
Individually and as a member of)	
Jerk, LLC,)	
)	
)	

**Expert Report of Mikołaj Jan Piskorski
Professor of Strategy and Innovation
at IMD Business School**

Executive summary

1. On the basis of my professional experience, my prior research, and data made available to me by FTC staff, I undertook an analysis of jerk.com. The analysis led me to conclude that the design and content of jerk.com was likely to lead a significant percentage of reasonable consumers to believe that:
 - a. personal profiles featuring someone's name and personal photographs were created on jerk.com by a real person, rather than through automated means, and,
 - b. if additional personal information was available on an individual's profile, that information was posted by real people rather than through automated means.

Only a small proportion of highly experienced and well-informed Internet users were likely to have concluded that most of the profiles on jerk.com profiles were generated through automated means.

Biographical information

2. I hold a Masters' degree in Economics and Politics from University of Cambridge, a Masters' degree in Sociology from Harvard University, and a PhD in Organizational Behavior from Harvard University. Between 2001 and 2004, I was an Assistant Professor of Organizational Behavior at the Graduate School of Business at Stanford University. From 2004 to 2009, I was an Assistant Professor of Business Administration at Harvard Business School. Between 2009 and 2014 I was an Associate Professor of Business Administration at Harvard Business School. Since June 1, 2014 I have been a Professor of Strategy and Innovation at IMD Business School in Lausanne, Switzerland.

3. In June 2014, I published a book entitled *Social Strategy: How We Profit from Social Media* with Princeton University Press, which summarizes over 10 years of my research on this topic. This is the first academic book to examine the phenomenon of social interactions online, and establishes a theoretical framework for understanding why and how people interact with each other socially on the Internet. The book is unique in that it uses 12 different large-scale datasets obtained from various social platforms online, such as Facebook, Twitter, eHarmony, Yelp and Wikipedia, to provide extensive statistical analyses of these datasets and furnish empirical support for the theoretical framework.

4. I have also authored or co-authored a number of Harvard Business School case studies on social websites such as Facebook, Twitter, MySpace, eHarmony, Yelp, Wikipedia, and Zynga. These case studies are based on extensive set of interviews, and archival research. I am also an author of "Social Strategies That Work" in *Harvard Business Review*, "When Should a Platform Give People Fewer Choices and Charge More For Them?" in *CPI Antitrust Chronicle*, "When More Power Makes Actors Worse Off: Turning a Profit in the American Economy" in *Social Forces*, and "Power Imbalance, Mutual Dependence and Constraint Absorption: A Closer Look at Resource Dependence Theory" in *Administrative Science Quarterly*. For a full list of publications, see the Appendix.

5. The extensive research on various types of online social platforms, the various academic publications, and my prior experience, give me all the necessary tools to evaluate jerk.com and the functionalities it offered.

Connection to parties in the case

6. I have no personal or business connection to Jerk LLC or John Fanning. The FTC is compensating me at the rate of \$700/hour for work on this case.

Brief introduction to user-generated content websites

7. In the 1990s, a majority of Internet websites featured static content produced by the website owners for Internet users to see. In the 2000s, a new generation of websites emerged, allowing Internet users to generate content for other website users to see. These sites are referred to as user-generated content, or Web 2.0, websites.

8. Two types of user-generated content sites are relevant to our analysis: those where users generate information about themselves for others to see, often known as "online social networks," and those where users generate content about other people, entities, organizations, or general knowledge.

9. The first set—online social networks—help users form and strengthen social relationships through online interactions (Rainie and Wellman, 2012). These platforms allow Internet users to contribute personal information about themselves for others to see and solicit a response (Goyal, 2012). There are many various types of platforms (Piskorski, 2014). Some, such as dating sites, make the content available mainly to strangers (Lewis, 2013). Others, such as Facebook, restrict visibility of content mainly to friends (Lewis, Kaufman, Gonzalez, Wimmer and Christakis, 2008). Yet another set of

platforms, such as LinkedIn, make the content visible to both friends and strangers (Skeels and Grundin, 2009).

10. The second set of sites allows users to produce and broadcast general information. Some sites, such as Wikipedia, focus on having users create a fact-based encyclopedia. Others, such as YouTube, ask users to contribute videos that can be broadcast to others. Yet, another set encourage users to provide reviews. Thus, sites such as Yelp and TripAdvisor have Internet users review various establishments, such as restaurants, hotels, and shops. Angie's List does the same for local service providers, such as plumbers, or painters. Glassdoor allows Internet users to submit anonymous reviews of working conditions at various companies, including salaries attached to various positions, while film review sites, such as Rotten Tomatoes, aggregate various film reviews.

11. At the intersection of the two types of websites sits a category of user-generated content sites that provide *reviews of people* provided by other people. This category includes websites such as HotOrNot which allows users to upload photographs of themselves or others, and allows anyone who visits the site to vote whether the users were "hot" or "not"; RateMyProfessors and RateMyTeachers which allow students to write reviews of various university professors and high school teachers; or Don't Date Him Girl which allowed users to contribute information to online profiles of people who were deemed to be cheating in relationships.

12. Jerk.com belongs to that last category of websites. Like HotOrNot, RateMyProfessors, or Don't Date Him Girl, it purports to give Internet users the ability to create profiles for strangers, upload their photographs and personal details, and provide commentary on their character. Once the profile was created, users had the ability to contribute additional content. The content was made publicly available and could be found easily through search engines, such as Google.

Data sources

13. Prior to writing this report, I had no personal knowledge of jerk.com, jerk.be, and jerk.org, and to the best of my knowledge, I had never visited the site. I first heard about the site during a phone conversation with FTC staff in June 2014.

14. Once I was retained as an expert, FTC staff provided me with:

- a. Declaration of Craig Kauffman (CX0047) with the following attachments:
 - o Kauffman Attachment A (CX0048) ("website www.jerk.com as it appeared on May 1, 2012" in pdf format)
 - o Kauffman Attachment B (CX0049) ("5/1/12 video of the website www.jerk.com")
- b. Declaration of Kelly Ortiz with the following attachments (CX0258):
 - o CX0259 ("select jerk.com profiles")
 - o CX0266 ("11/14/2012 video of Hzla McDnel 'search' on jerk.com")
 - o CX0272 ("jerk.com Sign-in page")
 - o CX0273 ("jerk.com Terms & Conditions page")

- o CX0274 ("jerk.com Post a Jerk page")
 - o CX0275 ("jerk.com Remove page")
 - o CX0276 ("jerk.com subscription payment page")
- c. CX0231 ("Reper: Executive Summary")
- d. CX0375 (John Fanning email)
- e. CX0397 (John Fanning email)
- f. CX0443 ("Google Analytics Overview for Jerk.com")
- g. Expert Report of Brian Rowe, Ph.D. with the following attachments (CX0063):
- o CX0064 ("jerk_1-50.wmv")
 - o CX0065 ("jerk_51-100.wmv")
 - o CX0066 ("profiles_101_150.wmv")
 - o CX0067 ("jerk_151-200.wmv")
 - o CX0068 ("jerk_201-250.wmv")
 - o CX0069 ("profiles_251_300.wmv")
 - o CX0070 ("jerk_301-400.wmv")

15. I used QuickTime to view the videos and Adobe Acrobat Pro to view the PDF documents.

Analysis

16. Existing academic research shows that Internet users vary dramatically in how familiar they are with various Internet sites, how well they understand the functionalities offered by the sites, and consequently, what attributions they make in response to the same website (Billon, Marco, and Lera-Lopez, 2009; Hargittai and Hsieh, 2013; Stern, Adams, and Elsasser, 2009). For this reason, any analysis of an Internet website must account for the variety of user types.

17. To help us with this analysis, I adapted prior analyses of Internet literacy, first advanced by Horrigan (2007), to develop a typology of different jerk.com users and their likely reactions to the site. The objective of developing this typology is not to focus on the descriptive analysis of jerk.com users. Instead, the typology is intended to help us identify what we must assume about a set of jerk.com users to claim that they believed that the content they saw on the site was or was not generated by automated means.

18. To analyze jerk.com, I developed the following user typology, which consists of three types of Internet users who visited jerk.com:

- I. Type I user: An Internet user who is familiar with online social platforms, such as Facebook, MySpace or Twitter, but possesses *limited* knowledge and understanding of the features offered by these websites.

- II. Type II user: An Internet user who is familiar with online social platforms, such as Facebook, MySpace or Twitter, and possesses *substantial* knowledge and understanding of the features offered by these websites.
- III. Type III user: An Internet user who is familiar with online social platforms, such as Facebook, MySpace or Twitter, *and* with sites that provide user-generated reviews of people on the Internet, as well as machine-generated online databases that purport to have personal information, and possesses *substantial* knowledge and understanding of the features offered by these websites.

19. Although it is difficult to estimate what percentage of Internet users who visited jerk.com fell into each of these three user categories, it is likely that, when jerk.com was operational, a great majority of the users fall into Type I, and only a small percentage fall into Type III, with the remainder falling into Type II (Brandtzæg, Heim, and Karahasanovič, 2011).

20. As part of my analysis, I also took into account Google Analytics data. Google Analytics is a service offered by Google providing detailed statistics about a website's traffic and traffic sources. The data suggest that a great majority of users discovered jerk.com through Google or another search engine (CX0443). As seen in a video screen capture of the website made available by FTC staff, when a user searched Google for his or her own name or a name of their friend, the search engine gave them a link to jerk.com, among other results (CX0266). Upon clicking the link, the user was taken to his or her own profile or someone else's profile on jerk.com (CX0266). Google Analytics data suggest that 9% of users who visited the site left it immediately (CX0443-004). The remaining 91% of users viewed on average 7 additional pages on the website, spending approximately one minute doing so (CX0443-003). This average page view number likely obscures substantial variance between users. While some users looked at only a few pages, another set looked at a large number of pages, navigating not only to other profile pages, but also to other pages on the site, including the jerk.com homepage, where they could see thumbnails of selected user profiles, which they could then click on to explore further. To reflect this difference between user behaviors, for each of the three user types, I split my analysis into users who merely viewed a small number of pages on the site, and those who visited a larger number of pages.

Type I user

21. A Type I user is a user familiar with online social platforms, such as Facebook, MySpace or Twitter, but possesses limited knowledge and understanding of the features offered by these websites. As a consequence, this type of user would look for simple and generally understood clues to give him or her insights into the nature of the site and determine whether the content was generated by other users or by automatic means.

Type I user who viewed a small number of profiles

22. Although it is impossible to know exactly how users inferred who created a profile on jerk.com and populated it, we can rely on existing research which suggests

that users examine website characteristics to infer the source of its content (Metzger, 2007). I follow this approach here.

23. When a Type I user encountered someone's profile on jerk.com, the user likely looked at basic characteristics of the profile. First, as extensively shown by research on similar sites, the user was likely drawn to the photographs found on the site (Piskorski, 2014). Many of the photographs on user profiles were very personal in nature showing users engaged in social situations. Some users were likely to recognize that the pictures on jerk.com profiles were exactly the same as they posted or saw on other user generated content sites, such as Facebook.

24. However, given that a Type I user had limited knowledge of functionalities offered by Facebook or other online social platforms, he or she was very unlikely to know that it was possible to move personal data and photographs from Facebook to jerk.com through automated means. Thus, when a Type I user saw a profile of themselves or someone they knew, or a personal photograph of themselves or someone else they knew, the user likely believed that someone who knew them or was familiar with the person in the profile created that profile.

25. Some of the available profile data shows quite directly that some users believed that someone created the profile. For example, a young person wrote on his own profile **"Someone put me on here for some reason"** (CX0259-001) indicating that the user believed that another person created the profile for this user. Similarly, two users posted the following comments: **"Hey Brayden you're not a jerk!"** (CX0259-006) and **"[...] is an amazing person and in no way a jerk shes sweet kind and funny and always cares about people :)"** (CX0259-054) on their friends' profiles expressing their surprise that someone on the Internet claimed that their friends were jerks.

26. Taken together, these factors suggest that a Type I user who viewed a small number of profiles was likely to believe that content on jerk.com was user generated rather than automatically generated.

Type I user who navigated through many pages on the site

27. A Type I user who navigated through many pages on the site, including the home page and other profiles, would also likely notice that some of the profiles contained very personal information, such as email addresses or telephone numbers. As shown in many profiles (e.g. CX0259-004, CX0259-010, CX0259-037, CX0259-044), a user would likely discover that a personal email address was available, sometimes with numerous email addresses available for the same profile. A user would also discover that many profiles featured a mobile telephone number, complete with dialing codes (e.g. CX0259-004), and country codes, e.g. 0049 for Germany (e.g. CX0048-075). As there is no easily accessible directory of mobile phone numbers, a user was likely to make an attribution that someone who was familiar with the person posted the profile.

28. A Type I user who navigated through many pages on the site would also encounter a number of comments in the Reports + Stories section of the profile (e.g. CX0259-037:039) that were likely to convince a user that content was contributed by human beings rather than by automated means. First, the site itself very explicitly

indicated that anonymous Internet users wrote the comments in the Reports + Stories section (e.g. CX0259-032). Second, some comments were written in proper English, while others were written in internet slang, further suggesting that real people contributed these comments (e.g. CX0259-036). Some comments contained misspellings, were written in slang or were offensive in nature (e.g. CX0259-003). For example, an anonymous Internet user wrote a comment stating: "I heard he tried to shove a hotdog up his [] and he put it up to [sic] far and the paramedics came to remove it" (CX0259-005), another one wrote: "Omg I hate this kid he\'s such a loser" (CX0259-16), or "[expletives] OWNS A BUSINESS CALLED [...] HE WILL ONLY TRY TO RIP YOU OFF LIKE THE DOG HE IS" (CX0259-035 combined with CX0049-12:00), and yet another one wrote: "your ugly as sh[]t, not even your parents love no one loves you your adopted i hope that guy down there does hit you with his....TRUCK" (CX0259-038). All of these comments were likely to lead a Type I user who viewed many pages on jerk.com to believe that content on the site was generated by other people rather than automatically generated.

29. Finally, such a Type I user who viewed many pages was also likely to note that it was possible to vote whether a person showcased in the profile was a jerk or not a jerk and that a tally of such votes was available on every profile. A Type I user would likely have seen that some profiles had a number of votes (e.g. CX0048-009) while others did not (e.g. CX0259-010), leading such a user to further conclude that content on jerk.com was contributed by other users rather than through automated means.

Type II user

30. When a Type II user encountered jerk.com, he or she was likely to use the same criteria that a Type I user would use to evaluate the source of the website's content and would reach the same conclusions about the website as a Type I user. However, since a Type II user also possessed *substantial* knowledge and understanding of the *features* offered by these websites, the user was likely to evaluate the *features* of jerk.com. As I discuss below, this evaluation would further convince a Type II user that content on jerk.com was generated by other users rather than through automatic means.

31. As before, I split my analysis between two types of Type II users – a user who viewed a small number profiles on the site, and another who viewed many profiles and other content on the site, including the homepage.

Type II user who viewed a small number of profiles

32. There were at least three features of jerk.com that would have led a Type II user to believe that jerk.com profiles were posted by other users rather than created through automated means. First, such a user would likely notice the Post a Jerk functionality, which purported to allow users to create a profile of a "jerk" on the site (CX0048-031). This feature would remind a Type II user of the posting feature on other user-generated sites, such as Facebook or Twitter, which prominently display the ability to post content to a user's or other users' profiles. These websites provide such functionality because the very existence of these social user-generated sites depends on users contributing content (Rainie and Wellman 2012).

33. Furthermore, if a Type II user clicked on the link "Post a Jerk," he or she would see a form used to generate a new profile asking the user to submit the first name, the last name, the email, the university, the city and the country of a new "jerk" (CX0048-031). It is very likely that a Type II user would find the level of detail in this form to be indicative of a user-generated site. In fact, other user-generated sites, such as Facebook, also ask their users to indicate their location, their "mood" and names of any other people that might be present when the user is generating content (Lewis, Kaufman, Gonzalez, Wimmer, and Christakis, 2008).

34. Next, a Type II user would also notice the Remove functionality, which purportedly allowed users to request that their profile be removed from the site (CX0275-001). The fact that the site allowed users to suggest that content be removed from the site would remind a Type II user of other user-generated sites that also offer similar functionalities, such as Facebook. For example, Facebook users can post content indicating that a particular person was present with them at a particular location or in a particular photograph. Facebook provides users who are so indicated in a post or a photograph with a functionality that allows them to remove their name from being widely displayed. Users are also given the tools to remove remarks made by their friends on their profile, and to ask Facebook to remove certain content in most egregious cases (Madden and Smith, 2010).

35. These feature similarities were likely to lead a Type II user who viewed a small number of profiles to conclude that the site had typical features of a user-generated content site, thus implying that content on jerk.com was contributed by other users rather than through automated means.

Type II user who navigated through many pages on the site

36. A Type II user who navigated through many pages on the site was likely to examine the features in the same way as a Type II user who only viewed a few pages. However, in addition a Type II user who navigated through many pages on the site was likely pay attention to other content available in various parts of the profiles, i.e. (i) Reports + Stories, (ii) Online, (iii) About, and (iv) Character.

37. I have already discussed the Reports + Stories segment above, which I believe would have led Type I and Type II users to believe that human beings filled out this section. Additionally, it is likely that a Type II user would also notice that many of the comments posted in this section were repeated with the exact same wording (CX0259-006). A Type II user would recognize this as a problem that shows up on some user-generated sites, when users want to post a comment, but the site does not inform them that the comment was posted, when in fact it was. This leads users to post the comment again, and again, resulting in repeated comments. This would further convince a Type II user that content on jerk.com was generated by users rather than through automated means.

38. Next, a Type II user could have examined a section named Online, which offered small sized photographs of the individual named in the profile (e.g. CX0259-016, CX0259-018). A Type II user, who is more familiar with user generated sites, was likely to recognize that these photographs were not directly uploaded to the website. Instead,

he or she would likely conclude that the photographs were gathered from online social platforms, which might have a profile of the person named in the jerk.com profile. This would have led a Type II user to believe that at least the Online section of the profile was generated through automated means, rather than by users.

39. Next, a Type II user could have examined a section named About, which would lead him or her to a box describing the individual in question (e.g. CX0049-8:30). When there was no information available, jerk.com would inform the user that "Biography for [...] does not exist yet. Be the first one to write about this person's life story." (CX0049-8:30) Given that a Type II user was likely to make inferences about the content of the site on the basis of its functionalities, this type of user was likely to infer that the About section of the profile was generated by users rather than automatically generated.

40. Next, a Type II user could have navigated to a section named Character, which would reveal a set of different personality characteristics, showing 15 of them at a time (e.g. CX0049-8:42 to 9:15). Each characteristic was accompanied by a bar indicating the percentage of users agreeing that the user possessed this particular characteristic. Next to the bar was a number indicating the number of votes cast along this particular characteristic. While some Type II users might not be able to identify the source of these votes, it is likely that many of them would notice that, right above the photograph of the person featured in the profile, there was a question asking the user about a personality characteristic of the person featured in the profile, together with the "agree" and "disagree" buttons (e.g. CX0049-5:55 to 6:00, CX0049-9:30 to 9:35). Most Type II users would notice that the personality questions asked match those in the Character section, leading them to conclude that most of the character evaluations were user generated.

41. Separately, a Type II user, familiar with other user-generated sites, would also notice that every profile page had a count of times that users of Google+ (another user-generated platform owned by Google) chose to "like" that particular profile (e.g. CX0049-1:14). Furthermore, such a user would notice that the count of these Google+ "likes" varied across profiles (e.g. CX0049-7:59, CX0049-1:53), suggesting that users generated these "likes."

42. And finally, some Type II users could also have read the Terms of use (CX0048-078 and 079). Here, a Type II user would discover that the terms of use was very explicit about posting content, proprietary rights and grant of exclusive rights, and information supplied by users, all of which would lead a Type II user to believe that profiles on jerk.com were generated by users rather than through automated means.

43. Taken together, these analyses indicate that such a Type II user was likely to believe that a great majority of content on jerk.com was user-generated. The only exception to this is the Online section, which a Type II user was likely to believe was generated by computer software.

Type III users

44. A Type III user is the most advanced and sophisticated type of user and is likely to use his or her knowledge of various types of user-generated content websites, as well

as other related sites on the Internet, to draw inferences about the nature of content found on jerk.com.

45. Although it is impossible to precisely identify which other websites were in a Type III user's consideration set, it is likely that a user of this type was familiar with:

- At least one site that provided user-generated reviews of people, such as dontdatehimgirl.com
- At least one site that provided user-generated reviews of restaurants and establishments, such as Yelp.com
- At least one site that explicitly garnered information from publicly available databases, but actually disclosed that this is what it was doing, such as peoplefinders.com
- At least one site that aggregated various social networking profiles into one profile, such as spokeo.com

46. In addition, it is likely that a Type III user knew how user-generated sites such as Facebook and Twitter work. Such a user was likely to be familiar with Facebook and Twitter Application Programming Interfaces, which allow third-party applications, such as jerk.com, to obtain and store private user data from the platforms. A Type III user also likely understood that it is possible for the third-party applications to obtain private data about a user from Facebook or Twitter without explicit permission of that user.

Type III user who viewed a small number profiles

47. Because a Type III user possessed expert knowledge and understanding of various user generated content sites, the user was likely to compare jerk.com and the features it offered to a host of other user-generated content websites, machine-generated online databases that purport to have personal information. By engaging in these comparisons, at least some proportion of Type III users who viewed a small number of profiles was likely to conclude that profiles on jerk.com were created through automatic means. Furthermore, a Type III user also possessed knowledge of capabilities offered by Facebook Application Programming Interface, which would lead user to suspect that at least some of the profiles on jerk.com were populated by automatically importing Facebook profile content, possibly without profile owner's permission.

48. Thus, if a Type III user was familiar with Don't Date Him Girl, or another site featuring reviews of individuals, he or she would know that most profiles on such sites were created and populated with content by users of the website. By applying an analogy to jerk.com, a Type III user was likely to conclude that profiles on jerk.com were also generated by and populated by users of the website.

49. However, if a Type III user was familiar with Yelp, or another site featuring establishment reviews, he or she would know that most profiles on such sites were created automatically through software from public databases of establishments. However, a Type III user would also know that a great majority of the content on a site like Yelp was provided by other users. By applying an analogy to jerk.com, a Type III

user was likely to conclude that profiles on jerk.com were also generated automatically, but at least some of the content was provided by other users of the website.

50. Furthermore, if a Type III user was familiar with People Finders, or another site featuring personal information, he or she would know that most profiles on such sites were generated by and populated automatically from public databases of people. By applying an analogy to jerk.com, a Type III user was likely to conclude that profiles on jerk.com were also generated and populated through automatic means.

51. If a Type III user was familiar with spokeo.com, or another site aggregating personal profiles, he or she would know that most profiles on such sites were generated by and populated automatically from various Internet sites. By applying an analogy to jerk.com, a Type III user was likely to conclude that profiles on jerk.com were also generated and populated automatically.

52. Finally, if a Type III user was familiar with the Facebook or Twitter Application Programming Interface, he or she would know that it is possible for third-party websites to harvest data from Facebook or Twitter, and store and display it outside of Facebook. If a Type III user understood that, he or she was likely to suspect that jerk.com created user profiles by harvesting profile data from Facebook or Twitter. He or she was likely to have realized that some or all of the profile photographs, and possibly other content, on jerk.com were taken from Facebook.

53. Given these considerations, a Type III user was likely to come to conflicting conclusions. On the one hand, analogies to certain user generated content sites were likely to have a Type III user conclude that profiles on jerk.com were generated and populated by other users. But analogies to another set of user generated content sites were likely to have a Type III user conclude that profiles on jerk.com were generated automatically, but populated by other users. Finally, analogies to yet another set of sites were likely to have a Type III user conclude that profiles on jerk.com were generated and populated automatically. While it is impossible to opine how every Type III user resolved these conflicting conclusions, it is likely that at least some Type III users believed that users generated and populated profiles on jerk.com, and only some proportion of Type III users believed that automated software generated and populated profiles on jerk.com.

Type III user who navigated through many pages on the site

54. A Type III user who navigated through many pages on the site was likely to come to the same conclusions as a Type III user who navigated through a small number of profiles. However, in some cases, the additional page views were likely to lead Type III users to reach different conclusions. I detail these below.

55. If a Type III user was familiar with Don't Date Him Girl, or another site featuring reviews of individuals, he or she would know that most profiles on such sites were created and populated with content by users of the website. However, a Type III user who viewed many pages on the site would also notice that, unlike Don't Date Him Girl, jerk.com had many profiles with no actual user photograph, and no additional content.

This was likely to have led a Type III user to suspect that the profiles were generated automatically, with no actual users of the site contributing content.

56. Furthermore, if a Type III user was familiar with Yelp, or another site featuring establishment reviews, he or she would know that most profiles on such sites were created automatically through software from public databases of establishments, but the reviews were generated by users. However, a Type III user who viewed many pages on the site would also notice that, unlike Yelp, jerk.com had many profiles with no actual user photograph, and no additional content. As before, this was likely to have led a Type III user to suspect that many of the profiles were generated by software, with few actual users of the site contributing content.

57. Furthermore, if a Type III user was familiar with People Finders, or another site featuring personal information, or spoeo.com, or another site aggregating personal profiles, he or she would know that most profiles on such sites were generated by and populated automatically from public databases of people. A Type III user who viewed many pages on the site would also notice that jerk.com had many profiles with no actual user photograph, and no additional content, which would further reinforce his or her belief that the profiles were generated and populated automatically.

58. Given the foregoing considerations, a Type III who navigated through many pages on the site would by-and-large come to the conclusion that the profiles were generated and populated through automatic means.

Summary

59. This analysis suggests that a great majority of jerk.com users believed that the profiles were created and populated by other users. Only a small proportion of experienced Internet users were able to discern that many of the profiles were generated and populated automatically. As Internet users fundamentally care about their online reputations, particularly when they believe real human beings contributed content about them, this misconstrued view of the website negatively impacted the welfare of jerk.com users (Madden and Smith, 2010).

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