

# PATTISHALL

*insights*

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“ THE MOST  
DRAMATIC AREA  
OF CHANGE  
THE FTC HAS  
SEEN IS IN HOW  
CONSUMERS  
RECEIVE  
ADVERTISING. ”

## Trick or Tweet? FTC Cracks Down on Disguised Endorsements

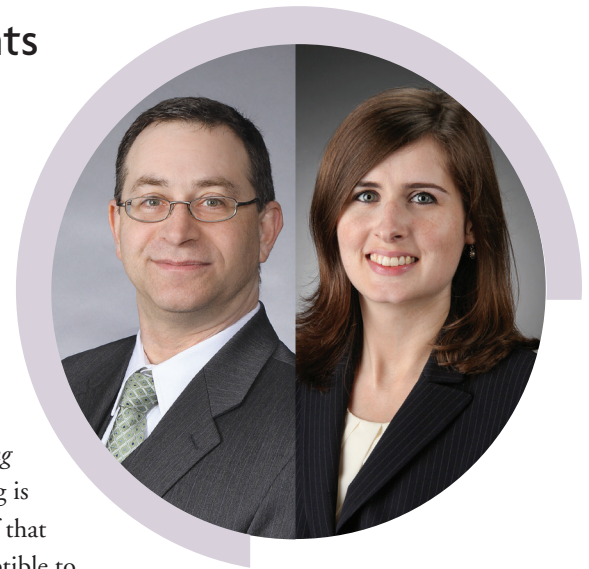
By Bradley L. Cohn and  
Kristine A. Bergman

In the midst of changing technologies and new communication media, the Federal Trade Commission is focusing on endorsements in advertising. Jessica Rich, Director of the FTC's Bureau of Consumer Protection, addressed this in a recent speech, *Our Consumer Protection Agenda: Meeting the Challenges of a Changing Marketplace*. Ms. Rich discussed how advertising is evolving due to new media and the FTC's belief that new avenues for advertising may be more susceptible to deceptive practices.

The most dramatic area of change the FTC has seen, according to Ms. Rich, is in how consumers *receive* advertising. The FTC is concerned that consumers may not perceive that they are obtaining information from a sponsored source because some types of sources — like a blog, a YouTube channel, or an apparent news article—have traditionally been independent.

For businesses, advertising through these media has strong appeal. Some consumers may be more receptive to advertisements that come up naturally in their daily internet and social media use, rather than those that are expressly commercial. Businesses utilizing these new communication media should be aware, however, that the FTC is paying close attention. In her speech, Ms. Rich indicated that the FTC will be issuing guidance by the end of this year on “native advertising”—its term for “the blending of advertising with news, entertainment, and editorial content.”

Until then, businesses should follow the FTC's 2010 Endorsement Guides when implementing new media advertising campaigns. As many advertisers know, the Endorsement Guides explain the FTC's position on acceptable (and unacceptable) uses of endorsements and testimonials in advertising.



“ THE ACTIONS BY  
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The FTC recently refreshed its Endorsement Guides by providing a helpful “Frequently Asked Questions” section on its web site. Newly launched, “The FTC’s Endorsement Guides: What People are Asking” is a user-friendly web page that answers questions raised in connection with these Guides. Many questions address specific issues that arise in social media contexts. For example, all social media posts must disclose an advertiser’s sponsorship if the post was the result of a compensated endorsement.

Those interested in the FTC’s “What People Are Asking” webpage can visit:  
[www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking](http://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking)

For the FTC’s Endorsement Guides webpage, visit:  
[www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf](http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf)

Ms. Rich’s speech also highlighted some of the recent investigations undertaken by the FTC to resolve purported deception in endorsements. For example, in February 2015 a shipment broker was charged with failing to disclose that its online reviews were posted by people who were given discounts and awards as incentives. The FTC also filed a complaint against a company that allegedly arranged for paid endorsers to appear on television program interviews as independent home security experts.

The FTC continues to investigate what it perceives as deceptive advertising on social media. In November 2014, when Sony’s advertising agency directed employees to post positive tweets about Sony’s new game console, the FTC charged Sony with deceptive practices.

In an instructive and recent action, the FTC investigated the payment of video game reviewers who spoke positively of Microsoft’s Xbox One gaming system but failed to disclose that they were being compensated for the reviews. The actions by Microsoft and its advertising agency, Starcom, reveal best practices for companies involved in social media advertising. Although the YouTube campaign for the Xbox One was created by a third-party independent contractor, Microsoft and Starcom could have been charged by the FTC for their involvement through the third-party. Nevertheless, the FTC issued a letter to both companies notifying them that they would not be investigated for this matter. The FTC noted that Microsoft already had a “robust compliance program in place” when the YouTube campaign was launched as well as “relevant training made available to employees, vendors, and Starcom personnel.” Finally, the FTC commended Microsoft and Starcom for implementing additional procedures regarding sponsorship endorsements since the Xbox One campaign, particularly procedures to better monitor campaigns conducted by subcontractors.

As social media platforms and technologies develop, businesses will discover new ways to reach out to consumers. Given the FTC’s monitoring of social media advertising, the best practice for a business is to have—and follow—proper endorsement compliance policies and procedures.

If you have any questions regarding these or other related issues, please feel free to contact Bradley Cohn at [blc@pattishall.com](mailto:blc@pattishall.com) or Kristine Bergman at [kab@pattishall.com](mailto:kab@pattishall.com).

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## NEW ASSOCIATE

### ■ Kristine A. Bergman

Kristine has rejoined the firm as an associate after working as a summer associate in 2014. Kristine received her J.D., *cum laude*, from Loyola University Chicago School of Law, where she served as Executive Editor, Lead Articles for the *Loyola University Chicago Law Journal*. Kristine was an Intellectual Property Law Fellow and a Student Fellow at the Institute for Consumer Antitrust Studies. She also served as President of the Intellectual Property Law Society and competed on Loyola's ABA Negotiations team.



Kristine is a graduate of Amherst College with a degree in Mathematics and English.

Following her undergraduate studies, Kristine worked for the Great Books Foundation in Chicago, an independent non-profit publishing and educational organization that promotes literacy, critical thinking, and social and civic engagement.

## APPOINTMENTS

### ■ Phillip Barengolts

Phil has been appointed the Chair of the North American Subcommittee of the INTA Parallel Imports Committee, and appointed to the INTA Unfair Competition Committee for the 2016-2017 terms. Phil has also been appointed to the CLE Board of the ABA Section of Intellectual Property Law.

### ■ Thad Chaloeontiarana



Thad was selected as the Trademarks Program Chair for the ABA Section of Intellectual Property Law's 31st Annual Intellectual Property Conference in Bethesda, Maryland in 2016, and Chair of the Associates Task Force for the Section's Membership Committee. Thad was also selected as a member of the Section's CLE Board and its TTAB Rules Package "Rapid Response" Task Force.

### ■ Bradley L. Cohn

Bradley has been appointed to the INTA Government Officials Training Committee for the 2016-2017 term.

### ■ Jonathan S. Jennings



Jonathan has been appointed to the INTA Right of Publicity Committee for the 2016-2017 term.

### ■ Belinda J. Scrimenti

Belinda has been appointed to the INTA Famous and Well-Known Marks Committee for the 2016-2017 term.

### ■ Joseph N. Welch II

Joe has been appointed to the INTA Trademark Reporter Committee, the editorial committee for that publication, for the 2016-2017 term.

## PRESENTATIONS

### ■ Phillip Barengolts

Phil will be speaking on a panel on "Branding Strategies: Protecting and Monetizing Your Most Valuable Assets" at the Stout Risius Ross Intellectual Property Symposium in Chicago on November 5.

### ■ Jessica A. Ekhoﬀ

Jessica moderated a Chicago Bar Association CLE Seminar on "Intellectual Property Law Basics for Non-IP Attorneys and New IP Attorneys" on October 6. She also moderated a panel on "The Dos & Don'ts of Self-Evaluations," for the Coalition of Women's Initiatives in Law, on October 7.

### ■ David C. Hilliard



David addressed the Iowa Intellectual Property Law Association on October 2, at their Annual Meeting at the University of Iowa College of Law, on "Opening Statements and Closing Arguments in Intellectual Property Cases."

### ■ Jonathan S. Jennings

Jonathan spoke on "Understanding Identity Rights to Avoid Pitfalls in Pharma Advertising" at the Robert H. McKinney School of Law's annual program entitled "Legal Frontiers in Health Law: IP, Information, Ethics, and Business Practice," in Indianapolis, Indiana, on October 6.

## PUBLICATIONS

### ■ Jonathan S. Jennings

Jonathan's article, "New FDA Guidance Implicates Trade Dress Rights," was published in the September 2015 issue of *Law Lore & Practice*, published by The Pharmaceutical Trade Marks Group (PTMG).

## TEACHING

### ■ Phillip Barengolts

Phil is teaching Trademark Law at The John Marshall Law School this semester.

# *firm* HONORS & AWARDS

## Legal Media Group

Janet A. Marvel has been included in 5th edition of the Women in Business Law Expert Guide.

## Leading Lawyers

Phillip Barengolts and Ashly Boesche have been selected as Emerging Lawyers in Illinois by Leading Lawyers, which recognizes the top two percent of lawyers who are under the age of 40 or practicing law for less than ten years.

## 2016 Best Lawyers in America

Robert M. Newbury was honored as one of the Best Lawyers in America for 25 years in the practice areas of Litigation-Intellectual Property, Patent Law and Trademark Law. David C. Hilliard was honored as one of the Best Lawyers in America for 25 years in the practice areas of Litigation-Intellectual Property and Trademark Law.

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