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insights

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NAVIGATING THE DIGITAL LANDSCAPE: New FTC Guidelines for Compliant Online Marketing and Advertising

By Novaira Paul

In a world that is now dominated by digital content, Federal Trade Commission (FTC) guidelines and regulations have become crucial in protecting consumers from unfair and deceptive practices.

When the FTC identifies unlawful claims, it may initiate a formal proceeding against the advertiser, resulting in orders enforceable by the federal courts. Violation of an FTC order may entail a substantial monetary civil penalty.

To be proactive and compliant in online advertising and marketing, here are three important trends and shifts of the advertising rules to know and observe.

1. Dark Patterns

When trying to exit or unsubscribe from the countless programs, applications, and websites on the Internet, it is annoying to be lured into clicking into an additional program or website. Chances are, in such situations, the user has been exposed to dark patterns without even knowing it. The FTC defines dark patterns as “sophisticated design practices ... that can trick or manipulate consumers into buying products or services or giving up their privacy.”¹

The FTC cites examples of dark patterns as:

- Advertising deceptively formatted to look like independent, editorial content;
- Purportedly neutral comparison-shopping sites that actually rank companies based on compensation;
- Countdown timers on offers that are not actually time-limited;
- Claims that an item is almost sold out when there is actually ample supply;
- Burying key limitations of a product or service in dense Terms of Service documents that consumers don't see before purchase;
- Hidden fees or “drip pricing” (where only part of a product's price is advertised to lure in customers);

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1. “FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Customers”, FTC.gov (September 15, 2022)
- [See Press Release](#)

- Deceptive offering of a trial period for subscription services;
- Repeatedly prompting consumers to select settings they wish to avoid;
- Highlighting a choice that results in more information collection, while greying out the option that enable consumers to limit such a practice; or
- Presenting confusing toggle settings leading consumers to make unintended privacy choices.²

The FTC has reported a rise in “dark patterns,” resulting in a more aggressive enforcement program. Therefore, the design of consumer-facing websites should be regularly reviewed to ensure they are not using any dark patterns in a way that the FTC might consider deceptive. Ultimately, the key to avoiding dark patterns is to be as transparent as possible, such as in the following ways:

- The website language should be as transparent as possible.
- Privacy messaging should be put prominently up front.
- Cancellation should be made easy.
- Any and all fees should be made clear up-front.

2. Advertising to Children

The FTC has also been aggressively regulating and enforcing advertising to children. It is proposing changes to existing law that regulates how companies can track and advertise to children online.³ The federal Children’s Online Privacy Protection Act (COPPA), requires parental consent on any websites or apps targeting kids that seek to collect information from children under age 13. COPPA was enacted in 1998 and was last updated over eleven years ago.⁴

Some of the proposed changes include:

- *Expanding the scope of COPPA to cover biometric data.* The proposed change expands the definition of “personal information” to include biometric data, such as fingerprints, retina or iris patterns, or data derived from voice.
- *Opt-in for targeted advertising.* Games, apps, and website used by children would be required, under the proposed rules, to obtain “separate, verifiable parental consent” to disclose information about children under 13 to third-party advertisers. Under the current rules, children can be denied access to the games ad apps if a parent does not agree to having its child’s information disclosed, but this proposed rule would forbid such denial.
- *Limits on pushing kids to stay online.* Website and app operators would be prohibited from using online contact information or cookies that track a child’s activity to prompt the child to use the service more.
- *Limits on retention of data.* The proposed rules would allow companies to keep personally identifying information only for “as long as necessary to fulfill the specific purpose for which it was collected.”

THE FTC ALSO CAUTIONED THAT DISCLOSURES SUCH AS #SPONSORED, #PROMOTION, OR #SWEEPSTAKES ARE NOT SUFFICIENT ON THEIR OWN, AND THAT ANY POST THAT IS SPONSORED MUST ALSO INCLUDE THE NAME OF THE SPONSORING PARTY.

3. Influencer Marketing

In June 2023, the FTC announced new Endorsement Guides—governing the use of endorsements and testimonials in advertising and marketing. Most notably, the updated version expands the definition of “endorser” to make virtual influencers, holding agencies, intermediaries, and influencers liable for deceptive endorsements.

The FTC also cautioned that disclosures such as #sponsored, #promotion, or #sweepstakes are not sufficient on their own, and that any post that is sponsored must also include the name of the sponsoring party. In fact, the National Advertising Division of the Better Business Bureau (NAD) has been applying the FTC’s updated guidelines, finding that a “sponsored” disclosure was insufficient.⁵ The NAD reviewed three social media posts featuring Cariuma sneakers on the Instagram and Facebook accounts of *Travel + Leisure (T+L)*, *US Weekly*, and *The Quality Edit*, all of which were labeled “sponsored” below the name of the publisher. The posts invited consumers to “shop more” or “learn more” about the sneakers. According to the NAD, these posts “blurred the line between editorial content and advertising in a way that can confuse consumers.” Ultimately, the NAD determined that the posts were advertising and despite use of the label “sponsored”, it was unclear whether these posts were sponsored by the publisher or Cariuma. Accordingly, NAD recommended that Cariuma “clearly and conspicuously disclose its material connection to the endorser and publisher of the social media posts.”⁶

Therefore, any advertisers using social media or influencers to advertise goods or services should be aware that both the FTC and the NAD will be monitoring content to ensure compliance with the updated Endorsement Guides.

The FTC online advertising rules thus identify pitfalls in a digital world that is as intricate for advertisers as it is for consumers and users. Knowing and avoiding those pitfalls is essential in avoiding the stiff penalties that can ensue. ■

2. “Bringing Dark Patterns to Light”, FTC Staff Report (September 2022) - [See Report](#)

3. Children’s Online Privacy Protection Rule, A Proposed Rule by the Federal Trade Commission on 01/11/2024, Federal Register - [See Rule](#)

4. “Revised Children’s Online Privacy Protection Rule Goes Into Effect Today”, FTC.gov (July 1, 2013) - [See Rule](#)

5. “National Advertising Division Recommends Cariuma Disclose Material Connection Between Cariuma Sneakers and Publisher of Social Media Posts”, BBB National Programs (November 29, 2023) - [See Article](#)

6. *Id.*

firm UPDATE

APPOINTMENTS

■ Thad Chaloehtiarana



Thad has been elected to the Board of Trustees of the Foundation for Advancement of Diversity in IP Law, representing the ABA Section of Intellectual Property Law (ABA IPL Section). Thad has also been

appointed the ABA IPL Section Liaison to the National Asian Pacific American Bar Association for 2024-2025.

■ Robert Sacoff



Bob has been appointed to the 2024 Nominating Committee of the United States Group of AIPPI (Association Internationale pour la Protection de la Propriété Intellectuelle).

PRESENTATIONS

■ Brett Manchel



Brett gave a presentation to the Institute of Patent and Trade Mark Attorneys of Australia entitled, “(Effective) Practice Makes Perfect: Issues, Strategies and Best Practices in U.S. Trademark Prosecution” on May 1.

PUBLICATIONS

■ Robert Sacoff

Bob’s case note, “Trademarks, Parodies, and Free Speech,” was published in the June, 2024, *AIPPI Newsletter*.

firm NOTEWORTHY

Chambers USA – 2024

“Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP represents clients in a variety of industry sectors, including retail, energy, technology, and food and drink. The group brings a wealth of knowledge and experience to the areas of trademarks, copyright and unfair competition cases. Regularly engaged for trademark portfolio management needs, including registrations, clearance searches and the development of protection strategies.” Clients tell Chambers that “the team has a very strong ability to handle complex legal matters,” and that “the quality offered by the Pattishall team is exceptional.”

“**[David Hilliard]** has substantial experience in trademark, copyright and trade dress disputes. He provides expert advice to clients across a range of sectors.”



Intellectual Property Law Association of Chicago (IPLAC)

Novaira Paul was awarded IPLAC’s 2024 Volunteer of the Year award.

IP Stars, *Managing Intellectual Property Magazine*

Pattishall McAuliffe is “Highly Recommended” in the Trade Mark section in Illinois.

Seth Appel, Brett August, Phil Barengolts, Ashly Boesche, Bradley Cohn, David Hilliard, Jonathan Jennings and Janet Marvel have been selected as Trade Mark stars in Illinois and nationally.