American Bar Association

Section of Intellectual Property Law

CLE Program: Social Media Promotions and the Potential Implications of the Right of Publicity and Other Intellectual Property Issues

* * *

An Overview of Social Media Platforms
and Associated Copyright and Trademark Risks

Materials Prepared by:

Alexis E. Payne
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson, LLC

American Bar Association
2012 Annual Meeting

August 5, 2012
Chicago, Illinois

The FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising

I. Overview of the Guides

The Federal Trade Commission (FTC) is the main federal agency enforcing consumer protection laws. On December 1, 2009, the FTC adopted its Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Guides").[1] The Guides represent administrative interpretations concerning the use of endorsements and testimonials in advertising. They are advisory in nature and are intended to give guidance to the public in conducting its affairs in conformity with Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices."[2]

The Guides updated earlier FTC advertising guidelines with particular attention to the use of endorsements and testimonials on blogs and on new media platforms. In part, FTC clarified its position that advertisers, their agencies, and bloggers must disclose when they have marketing arrangements or other material connections when providing reviews or endorsements on blogs and social networks. When there exists a connection between the advertiser and endorser of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed. This disclosure requirement extends to affiliate marketers who are compensated for advertising and providing reviews of an advertiser's products or services. Furthermore, the Guides clearly state that both advertisers and affiliate marketers may be liable for false or unsubstantiated claims made in an endorsement or for failure to disclose material connections between the advertiser and marketer when the connection is not reasonably expected by the audience.

The Guides also provide that celebrity endorsements and testimonials do not require disclosure of the fact that the celebrity is being paid if the connection between the celebrity and the celebrity is reasonably obvious to consumers. However, if the endorsement is made in a context where this connection may not be reasonably assumed, such as on a talk show, the fact that the celebrity is a paid spokesperson must be disclosed.

In addition to the FTC authority, a failure to disclose a material connection between the advertiser and endorser could trigger other causes of action, such as false advertising actions by State Attorneys General or private lawsuits (by competitors or consumers). The failure to disclose a material connection could be found to violate the false advertising provision of the Lanham Act, as well as states' consumer protection and/or deceptive business practices laws.

II. FTC Enforcement of The Guides

A. Ann Taylor

[1] 16 C.F.R. Part 255.

[2] Section 5 of the FTC Act, 15 U.S.C. § 45. The penalty range for a violation of this provision is $11,000 - $16,000.

The FTC's first public investigation since the Guides went into effect in 2009 involved women's apparel retailer Ann Taylor LOFT and "compensated bloggers."[3] LOFT held a fashion show to promote its 2010 collection and encouraged attendees to blog about the show by offering them an opportunity to win a ten dollar gift card. Ann Taylor posted signs directing the potential bloggers to disclose the gift card incentive, but some of the bloggers failed to make the disclosure. The FTC investigated but ultimately decided not to pursue an enforcement action, citing mitigating factors such as the one-time only nature of the show, the nominal number of bloggers and the even smaller number of bloggers who failed to disclose the gift card incentive. The FTC also noted Ann Taylor's subsequent adoption of a formal policy providing that Ann Taylor would not give gift incentives to any blogger without first requiring the blogger to disclose the gift incentive in the blog. The leniency the FTC showed in that case may be attributable to the fact that the Guides had just been adopted and it was the FTC's first investigation under the Guides.

B. Reverb Communications

The FTC's second public investigation resulted in an enforcement proceeding finding that Reverb Communications, a public relations agency, was liable for failing to sufficiently disclose its material connection to a client while promoting the client's gaming software with favorable public reviews on the iTunes store.[4] The FTC determined that the reviews created the false impression that they originated from ordinary users of the software rather than compensated parties working on the behalf of the software developer. The FTC considered this undisclosed relationship to be material to consumers' purchasing decisions. Accordingly, the FTC required Reverb to take reasonable steps to remove the endorsements and barred Reverb from publishing reviews of any product where a material connection exists unless the connection is "clearly and prominently" disclosed. The settlement did not call for Reverb to pay any monetary penalties.

In the Reverb case, the FTC also discussed the standard for "clear and prominent" disclosure with reference to various media. In text communications, the disclosure must be "sufficiently noticeable" for an "ordinary consumer" to read and comprehend. The same standard applies to disclosures in video advertisements with the additional requirement that disclosures appear for a sufficient time on screen. For audio communications, the disclosure must be of sufficient volume and cadence for an ordinary consumer to hear and understand. Similarly, disclosures in interactive media advertisements, such as Internet and software, must be "unavoidable" and consistent with the requirements for text, audio and video disclosures.

C. Legacy Learning

In the FTC's next action against Legacy Learning Systems, Inc., the FTC elaborated on an advertiser's obligation to monitor endorsers.[5] In that case, the advertiser, Legacy, solicited online endorsements by "Review Ad Affiliates," who would receive commissions on each

---

[3] *Ann Taylor Stores Corp.*, FTC File No. 102-3147.
[4] *Reverb Communications, Inc.*, FTC Docket No. C-4310.
[5] *Legacy Learning Systems Inc.*, FTC File No. 1023055.

product sale resulting from one of their referrals. Although Legacy required the affiliates to sign a contract pledging their compliance with the Guides, the FTC nevertheless found that it failed to implement a reasonable monitoring program to ensure the affiliates clearly disclosed their relationship to Legacy. According to the FTC, many affiliates provided inconspicuous disclosures or no disclosures at all. The FTC found that the reviews were false and misleading and that the failure to disclose was a deceptive practice. Legacy agreed to a consent order including a $250,000 civil penalty, requirements for clear and prominent disclosures and a 20-year monitoring program with monthly reporting requirements.

D. Hyundai Motor America

In late 2011, the FTC closed an investigation of Hyundai, whose marketing agency gave bloggers gift certificates as an incentive to "include links to Hyundai videos in their posts and/or to comment on . . . forthcoming Super Bowl ads."[6] The FTC cited several reasons for closing the case. First, it appears that Hyundai did not know in advance about the use of the incentives. Second, a relatively small number of bloggers received the gift certificates, and some of them did, in fact, disclose this information. In addition, the FTC determined that the actions at issue were taken not by Hyundai employees, but by an individual who was working for a media firm hired to conduct the blogging campaign. Although advertisers are legally responsible for the actions of those working directly or indirectly for them, the FTC explained that the actions at issue were contrary both to Hyundai's established social media policy, which calls for bloggers to disclose their receipt of compensation, and to the policies of the media firm in question. Moreover, upon learning of the misconduct, the media firm promptly took action to address it.

In a follow up explanation of its decision, the FTC recommended the following for complying with the Guides: "Mandate a policy that complies with the law. Make sure your people know about it. And monitor what they're doing."

E. Russell Dalbey and Marsha Kellogg

The FTC and the Colorado Attorney General charged Russell Dalbey, the CEO and founder of the company behind the "wealth-building" program "Winning in the Cash Flow Business," with defrauding consumers with phony claims that they could make large amounts of money quickly and easily by finding, brokering, and earning commissions on seller-financed promissory notes.[7] Millions of consumers nationwide saw infomercials for the "Winning in the Cash Flow Business" program, which were hosted by TV personality Gary Collins. The program supposedly teaches consumers how to find, broker, and earn commissions on seller-financed promissory notes – privately held mortgages or notes that are often secured by the home or land that is the subject of the loan.

---

[6] *Hyundai Motor America*, FTC File No. 112-3110.

[7] *Federal Trade Commission and State of Colorado, ex rel. John W. Suthers, Attorney General, Plaintiffs v. Russell T. Dalbey; DEI, LLLP; Dalbey Education Institute, LLC; IPME, LLLP; Catherine L. Dalbey and Marsha Kellogg, Defendants* No. 11-CV-1396-RBJ-KLM (D. CO. Oct. 11, 2011).

Them marketing of the program included “testimonials” from consumers who claimed to have made “$1.2 million in 30 days,” “$79,000 in a few hours,” and “$262,216 part time,” for example. Such claims were far from the typical consumer experience. The complaint charges that Dalbey and the other defendants violated the FTC Act and Colorado law by making false and unsubstantiated claims that consumers are likely to quickly and easily find, list, and broker promissory notes and earn substantial amounts of money; and that defendants’ additional products and services, such as coaching programs, workshops, seminars, note holder leads, and other resources, will meaningfully increase the likelihood that consumers will succeed in the note business.

In addition, the complaint alleges that consumer testimonials in the defendants’ advertising are inaccurate and do not reflect the results that customers are likely to achieve if they buy the program. For example, some testimonialists stated earnings claims that were total earnings figures accumulated over several years, rather than in one year.

The FTC and Colorado Attorney General also charged Marsha Kellogg, one of the consumers who provided a testimonial in an infomercial, with falsely claiming that she earned $79,975.01 from one promissory note transaction using Dalbey’s program, and that her total earnings were more than $134,000. The complaint alleges that Kellogg made this statement even though she earned $50,000 less than what she claimed. Kellogg agreed to an order settling the FTC charges, which is the first time the FTC charged a consumer with making misrepresentations in a product or service testimonial. It prohibits Kellogg from making several types of misrepresentations in the future.

In October 2011, the court entered a stipulated order for preliminary injunction that prohibits Russell Dalbey from making certain claims the plaintiffs allege are misleading. The FTC and the Colorado Attorney General filed their complaint in court on May 26, 2011. As of this time, there has been no final Court decision.

F. **Acai Marketers**

The FTC has brought over ten cases against online marketers of acai berry products who engaged in deceptive practices by operating “fake news” sites directly and through affiliate marketers to promote acai berry products. For example, in its case brought against IMM Interactive, Inc.[8] the FTC alleged that one set of defendants posted what looked like objective investigative reports on websites designed to appear as legitimate news websites. The FTC made similar charges against Coulomb Media, Inc., but also alleged that the defendants in that case maintained websites purporting to be independent consumers’ blogs reporting their experience using the acai products. In both cases, the FTC alleged that the defendants and their affiliate marketers made false and deceptive claims regarding weight loss benefits resulting from the use of their products, when the defendants did not possess any substantiation for the claims. In the *Coulomb* case, the FTC also charged that the defendants failed to disclose in a clear and conspicuous manner that the blogs were not objective evaluations of the products.

---

[8] *IMM Interactive, Inc*., FTC File No. 102-3232.

The settlement terms in these and the other acai marketing cases include, among other things, significant monetary payments, agreements not to engage in deceptive acts, required monitoring of affiliate marketers, and reporting requirements to the FTC.

III. Recommended Best Practices

As the cases brought by the FTC demonstrate, the Guides apply to both the advertiser and affiliate marketers.[9] Moreover, recent cases show that an advertiser must monitor its affiliate marketers to ensure they are clearly disclosing their relationship with the advertiser.

To protect against potential liability under the Guides and other consumer protection laws, advertisers should consider taking the following measures, which comport with the terms the FTC required in the cases it has brought under the Guides:

1. Establish an affiliate marketing agreement that clearly identifies how affiliate marketers must disclose their relationship to the advertiser.

2. Implement procedures to enforce the terms of the advertiser's affiliate marketing agreement and regularly and routinely monitor the affiliate marketers' ads and the traffic being generated by those ads.

    a. At a minimum, advertisers should monitor its top grossing affiliate marketers' web sites on a monthly basis at times not disclosed in advance and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is conducted.

    b. For the remainder of an advertiser's affiliate marketers, the advertiser should monitor and review a random sample of their web sites on at least a monthly basis at times not disclosed in advance to the affiliate marketers and in a manner reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted.

3. Consider providing a pre-drafted or pre-approved disclaimer for affiliate marketers' use that complies with the FTC Guides that covers various media platforms, including Facebook, Twitter, etc., taking into account space limitation.

4. Strictly enforce compliance and monitoring programs and do not process orders generated from non-compliant affiliate marketers who have:

    a. Misrepresented, in any manner, the status of such affiliate marketer, including, but not limited to, the misrepresentation that such affiliate marketer is an independent user or ordinary consumer; or

---

[9] To date, the FTC has not brought any formal complaints against celebrity spokespeople for violations of the Guides.

    b. Has failed to disclose, clearly and prominently, a material connection, when one exists, between such affiliate marketer and the advertiser.

5. Create and maintain reports sufficient to show the results of the advertiser's monthly monitoring of its affiliate marketers.