

Intellectual Property & Technology Law Journal

Edited by the Technology and Proprietary Rights Group of Weil, Gotshal & Manges LLP

VOLUME 36 • NUMBER 2 • FEBRUARY 2024

The Federal Trade Commission's New Guidelines for Endorsements and Testimonials

By Julie Tortora

The Federal Trade Commission (FTC) has revised its Guides Concerning Use of Endorsements and Testimonials in Advertising (Guides) to address social media influencing and provide businesses with updated guidance for soliciting and using endorsements and testimonials.¹ While truth-in-advertising standards remain unchanged, including the importance of claim substantiation, the Guides offer a modern approach to endorsements and testimonials and define the potential liabilities of parties who procure or offer false or fabricated endorsements.

ENDORSEMENTS

Notably, the new Guides provide an updated definition of “endorsement” to better align with current trends and marketing practices. Endorsements are increasingly encountered on social media platforms through engagement with celebrities, influencers, and other high-volume profiles, making it challenging for consumers to differentiate between “real” posts and “sponsored” posts. To account for this, the term “endorsement” is now defined as “any advertising, marketing, or promotional message for a product that consumers are likely to believe reflects the opinions, beliefs, findings, or

experiences of a party other than the sponsoring advertiser.” Making written or verbal statements, including hashtags in social media posts, and naming a business or organization in a review, are all examples of endorsements.

As with all forms of advertising, endorsements must reflect the honest opinions, findings, beliefs, or experiences of the “endorser,” must not convey any express or implied representation that would be deceptive if made directly by the advertiser, and must not be presented out of context or reworded in a way that distorts the endorser’s opinion or experience with the product. An “endorser,” defined by the FTC as “the party whose opinions, beliefs, findings, or experience the message appears to reflect,” can be an actual or fictitious party and may even include “virtual influencers” powered by computer-generated avatars and artificial intelligence. The new “endorser” definition is intended to combat deceptive practices, as it “encompass[es] the writers of fake reviews and non-existent entities that purport to give endorsements.”

In addition to being truthful, endorsements must be current, meaning that an advertiser may continue to run an advertisement only for as long as the advertiser has good reason to believe that the endorser remains a bona fide user of the product. Advertisers are encouraged to solicit feedback from endorsers at “reasonable intervals,” which is usually

Julie Tortora, an attorney in the New York office of Baker Botts L.L.P., may be contacted at julie.tortora@bakerbotts.com.

when new information becomes available that may impact the endorser's views, such as changes to a product's performance or effectiveness.

CONSUMER REVIEWS

The Guides also tackle the use and misuse of consumer reviews in the commercial context. In addition to prohibiting the creation, purchase, or procurement of fake or misleading consumer reviews and testimonials, the Guides caution advertisers not to distort or otherwise misrepresent reviews such as by sorting reviews by favorability rating, deleting or not publishing negative reviews, labeling reviews as the "most helpful" reviews, buying fake reviews, offering to pay purchasers for writing positive reviews on third-party review websites, and threatening reviewers who post negative reviews on third-party websites.

However, the FTC recognizes that consumer reviews may be incentivized, meaning that a user will receive compensation or other material benefit for leaving the review. While this practice remains permissible, as with other kinds of endorsements, incentivized reviews must "clearly and conspicuously" disclose any "material connection" to the product or entity.

Helpfully, the Guides provide further clarity around the concept "clear and conspicuous," stating that for a disclosure to meet this standard, it must be difficult to miss and be easily understandable by ordinary consumers of the targeted audience. "Material connections" may include endorsers who are connected to the advertiser by employment, family, or personal relationships as well as endorsers who receive monetary payments or free or discounted products from the advertiser. The receipt of other benefits such as early access to a product or the possibility of being paid, winning a prize, or appearing on television can also give rise to a material connection requiring disclosure.

LIABILITIES

According to the Guides, advertisers must be "responsible for and monitor the actions of their endorsers" – an advertiser may also be liable for deceptive statements made by endorsers.

And this responsibility does not just extend to endorsers who've received some benefit from the advertiser for their endorsement; advertisers are also responsible for unsolicited statements about their products or services that the advertiser uses in the context of advertising or promotional statements. The FTC provides that "if, for example, an advertiser retweets a positive statement by an unrelated third party or republishes in an advertisement a positive review by an unrelated third party, that statement or review becomes an endorsement for which an advertiser is liable, despite the lack of any such connection."

Advertising agencies can also be on the hook for statements made by endorsers, as the FTC has expressly included "intermediaries" within its definition of "advertisers," encompassing advertising agencies and public relations firms. Intermediaries may be subject to liability for creating or disseminating endorsements containing representations that they "knew or should have known were deceptive," as well as for their roles with respect to endorsements that fail to disclose unexpected material connections, "whether by disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures."

CONCLUSION

In sum, the FTC's new Guides are intended to protect consumers and businesses alike from deceptive advertising by providing best practices surrounding the use of endorsements and reviews. While marketing practices will undoubtedly continue to evolve as new means of disseminating commercial communication become available, the revised Guides provide a helpful reference for advertisers who value transparency as a key to building strong relationships with consumers.

Note

1. <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-255-guides-concerning-use-endorsements-testimonials-advertising>.

Copyright © 2024 CCH Incorporated. All Rights Reserved.
Reprinted from *Intellectual Property & Technology Law Journal*, February 2024, Volume 36,
Number 2, pages 19–20, with permission from Wolters Kluwer, New York, NY,
1-800-638-8437, www.WoltersKluwerLR.com

