

Federal Trade Commission Poised to Hold Brands and Influencers Responsible for Improper Native Advertising

By Brian J. Goodrich

Social media has brought about a paradigm shift in advertising. User-operated social media platforms have allowed control over brand messaging to shift from brands to consumers and other third-party social media users that influence the brand's messaging ("influencers"). In this new landscape, "native advertising," i.e. advertising content in untraditional forms, has thrived. Yet this new landscape also presents questions and challenges for regulators and brands alike in light of the Federal Trade Commission's ("FTC") position that traditional principles of advertising law apply to new forms of media.

The FTC's straight-forward position raises some not-so-straight-forward challenges. For example, who is to be held responsible when celebrities or YouTube personalities endorse a product without the brand's permission? Moreover, in recent years the marketing industry has seen the growth of third-party advertising networks that connect brands to networks of promoters with the goal of funneling leads to a brand's website. In this environment, one might wonder if traditional legal principles even allow the FTC reach those responsible for improper advertising, or whether the brand or media platform are the actors responsible for all down-stream advertising.

Recent FTC enforcement actions and a recent FTC appellate victory shed some light on these questions. Discussed below, recent developments suggest that the FTC is poised to aggressively take on and hold liable *all* actors responsible for improper advertising on new media.

The Second Circuit's ruling serves to put marketing agencies on notice that they share in brands' liability for improper advertising practices.

#influencerproblems

Social media platforms such as Twitter, Instagram, and Facebook allow brands to promote their products and services to a larger consumer base than ever before; these user-controlled platforms also, however, enable celebrities and other "influencers" to alter a brand's messaging by posting about a particular product or service. Moreover, posts by celebrities showcasing a particular product or service on their personal Twitter or Instagram accounts often come without any disclosures that the celebrity was in fact paid to do so, as is often the case.

This trend has not gone unnoticed by the FTC. At a recent summit co-hosted by Holland & Knight and the Word of Mouth Marketing Association, Mary Engle, Associate Director for

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Advertising Practices at the FTC, reminded attendees in her keynote address of the FTC's expectation that *all* celebrity promotions and native advertising be accompanied by prominent disclosures. This means, according to FTC guidance, prominently using hashtags such as #ad or #sponsored in a tweet or Instagram post. Associate Director Engle also stressed that brands should make a "good-faith effort" at achieving regulatory compliance for all promotional activity. Such an effort, Engle remarked, includes having in place a program to monitor all third-party marketing affiliates endorsing or promoting the brand's products or services.

Engle's remarks are echoed by recent FTC enforcement actions. In a recent settlement with Warner Bros. Home Entertainment Inc., the FTC alleged that Warner Bros. deceived customers when its marketing agency paid YouTube influencers to give Warner Bros. video games positive reviews without disclosing that the posters were paid for the review. The FTC action against Warner Bros. followed the FTC's suit earlier this year against Lord & Taylor, in which the FTC argued that Lord & Taylor violated the FTC Act by paying fashion influencers to post about its dresses on Instagram without disclosing that Lord & Taylor compensated the influencers.

Who Is Liable?

The FTC has successfully held brands liable for paying promoters to promote goods or services without ensuring proper disclosures. But, what about the promoters themselves? Until recently, it remained unclear whether the FTC could hold influencers or even marketing partners that operate networks of influencers liable for deceptive advertising content. A recent appellate victory, however, sheds some light on that question. In *F.T.C. v. LeadClick Media, et al.*, the U.S. Court of Appeals for the Second Circuit issued the first decision by a Court of Appeals holding the operator of an affiliate marketing network liable for deception by third-party marketers. LeadClick Media, LLC, an affiliate marketing network, recruited affiliate marketers that used fake news articles and advertisements on legitimate news websites to drive internet traffic to the website of LeanSpa, a weight-loss supplement.

The Second Circuit's ruling serves to put marketing agencies on notice that they share in brands' liability for improper advertising practices. Additionally, the ruling serves to foreclose a potential defense to such liability under the Communications Decency Act ("CDA"). In its opinion, the Court of Appeals rejected LeadClick's argument that it should not be treated as the "publisher" of the false new stories, which could have entitled it to immunity under § 230 of the CDA. The Court found such liability to be inappropriate because rather than providing neutral assistance to its affiliates, LeadClick directed its affiliates' use of false news articles and advertisements. The Second Circuit's Opinion will likely be a helpful tool in the FTC's mission to hold liable all actors responsible for deceptive advertising.

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Takeaway: Ignorance is Not Bliss

While social media has provided new ways for brands to reach consumers, using it comes with a new set of obligations. The FTC's enforcement actions bear out its efforts to grapple with new forms of media, and hold all actors involved in "deception" liable for the alleged deceptive acts. To adapt to this new landscape, brands should monitor their products' promotion on social media to be sure that the brand is being promoted properly. Otherwise, the brand, influencers, and marketing affiliates may all find themselves with a new, unwanted follower on social media: an FTC enforcement team.

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