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New FTC Advertising Guides Take Effect

THIS IS THE BEST ARTICLE EVER – OR AT LEAST THAT’S WHAT WE WANT YOU TO SAY ON YOUR BLOG

Important updates to the Federal Trade Commission’s Guides Concerning Use of Endorsements and Testimonials in Advertising¹ took effect December 1. In particular, the revised Guides identify potential liability for claims not directly made by advertisers through the on-line activities of others on blogs, social networks and other digital media. Advertisers and bloggers (and Twitterers and Facebook friends and virtual avatars and so on) now face liability in enforcement actions under Section 5 of the FTC Act if they fail to disclose “material connections” affecting statements deemed to be endorsements or testimonials.

Let’s start with a definition: an endorsement needs to be both an advertising message and a statement which consumers are likely to believe reflects the opinions, beliefs, findings or experiences of someone other than the advertiser. So the review of a movie in a film critic’s newspaper column would meet the second test, but not the first — unless the critic’s words are being quoted in an ad for the film. Then it meets both.

So shouldn’t a blogger’s personal opinion also fall outside the rule? Not if the blogger is part of an effort to market virally, or there are “connections” between seller and blogger that “might materially affect the weight or credibility of the endorsement,” and would not reasonably be expected by the audience. Section 255.5. So while my blog about new videogames may be the bible of the on-line set, if the advertiser has fed me a steady stream of \$300 videogames for free, that’s a material connection, which my readers should know about (Section 255.5, Example 7).

¹ 16 C.F.R. Part 255.

But it's not just pricey freebies that require disclosure, as the FTC's Example 8 to Section 255.0 illustrates:

A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.



Are you connected?

The "material connection" can be even subtler than that. If I own a restaurant and go onto a popular food blog under a fake name and praise my restaurant, or if I work for a well-known brand and blog about how great the Spring line is without disclosing my link to the brand, I've also committed a violation (see Section 255.5 Example 8).

At the end of the day, the FTC explains, the question is whether the consumer-generated statement should be considered "sponsored" by the advertiser. The Commission provides a non-exhaustive list of factors it would consider:

" . . . whether the speaker is compensated by the advertiser or its agent; whether the product or service in question was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers, or the likelihood of future receipt of such products or services; and the value of the items or services received."

Not only the advertiser, but the endorser as well can be liable for statements made. The advertiser also can be liable for false statements by the blogger. (See FTC Section 255.1 Example 5; a skin care products advertiser signs up for

a blog advertising service but never claims its product can cure particular skin conditions. When a blogger says the product cures eczema, and urges her followers with that condition to try it, both blogger and advertiser may be liable for that claim and the blogger also may be liable for failing to disclose she is being paid.) Moreover, the FTC says advertisers should be providing guidance and training to bloggers about the need to make sure statements are truthful and substantiated, and also should be monitoring paid bloggers and halting the publication of deceptive statements.

Celebrities and Testimonials

The Guides have separate provisions dealing with statements by experts in endorsements, endorsements by organizations and celebrity endorsements. In particular, an advertiser with a promotional contract with a celebrity now seems obliged to take steps to make sure the celebrity knows what he or she has to say to disclose any material connection. In one example, where a celebrity in an unscripted television interview promotes a clinic, the FTC says the advertiser bears the responsibility to tell the celebrity what should or should not be said about the clinic, and also what disclosure to make. Even though the advertiser can't control what will be said or broadcast, it still may wind up responsible; but if it alerts the celebrity ahead of time, it "would provide a strong argument for the exercise of the Commission's prosecutorial discretion" not to pursue the advertiser if the celebrity gets it wrong.

Another major change from the 1980 Guides concerns "non-typical" testimonials ("I lost 50 pounds!"). The old Guides had a safe harbor protection if such advertising indicated that the results reflected in the testimonial were not typical. That safe harbor is now gone, and claims made in a testimonial will be treated the same as, and require the same substantiation as, any other performance claim.

It is not hard to imagine other situations not outlined in the Guides where someone could get in trouble. Suppose a Twitterer unconnected to any advertiser writes a 140-character-short-but-superlative rave about a product, and everyone in the product maker's home office and at its marketing firm hops on Twitter and "retweets" that great review, pushing it to the top of the trending topics, is that a violation? If I offer members of my frequent buyer program a chance to write reviews on products they've bought, which I track through the discounts they get on them by being program members, do those reviews require disclosure? What if I design shoes, and Mary designs jewelry, and Francesco designs handbags, and we have a round-robin mutual admiration society praising one another's products on Facebook without disclosing our arrangement: have we broken the rules? Preliminarily, the answer would seem to be yes.



“...the FTC says advertisers should be providing guidance and training to bloggers about the need to make sure statements are truthful and substantiated...”

The Guides represent administrative interpretations of the law by the FTC. Whether to commence an enforcement proceeding in any particular situation will depend on the facts, and the FTC has discretion whether to proceed. But following the Guides has our endorsement.

Lead Us Into Frustration

MORE CPSC DEVELOPMENTS ON LEAD IN FASHION, ACCESSORIES

As required by the Consumer Product Safety Improvement Act of 2008 (see Fall, 2008, Winter, 2008-2009 and Spring, 2009 *In Fashion* issues), the permissible level of lead in products for children 12 years old and younger dropped from 600 to 300 parts per million on August 14. Also that day, new requirements for “permanent, distinguishing marks” to allow tracking for safety and recall purposes came into force. Meanwhile, the U.S. Consumer Product Safety Commission (CPSC) had a mixed bag of actions for those in the fashion and accessories industries as it promulgated a final rule on lead content limits for children’s products.



Good news: CPSC exempted a range of textile materials from otherwise required testing for lead. Natural fibers, such as cotton, linen, silk, wool, flax and jute, among others, as well as synthetics, such as rayon, acetate, polyester and nylon, among others, were determined not usually to have levels of lead that might affect children, and therefore were exempted from testing. Other exempted items include precious gemstones; natural or cultured pearls; wood; coral; amber; most but not all kinds of stainless steel; many precious metals; feathers; furs; and untreated leather. Outside the exemption: any fabrics with prints or decals added after dyeing or finishing, as well as leather items with pigment-based coatings.



Bad news: The CPSC refused to exempt glass, crystals and rhinestones from lead testing, despite the urging of various groups, and previously also had refused to exclude such items from the lead content limits. The Commission generally also did not exempt across the board plastic, metal and painted components, such as zippers, buttons or decorations.



Separately, Mattel, a big player in the toy industry with highly publicized experience with lead level problems, recently won CPSC approval to do its own testing in-house.

A Suit By Any Other Name **JOSEPH ABBLOUD WINS A ROUND ON USE OF HIS NAME**

What's in a name? Quite a bit when it's also a trademark. In 2000, famous designer Joseph Abboud and his Houndstooth Corporation sold to JA Apparel Corp., his licensee, the exclusive rights to commercial use of the name "Joseph Abboud" and trademarks containing that name for over \$65 million. Or at least that's what JA Apparel thought and a federal district court initially found. In a June decision,² however, the U.S. Court of Appeals for the Second Circuit found the agreement was ambiguous and reversed and remanded for further findings.

The 2000 agreement had called for Abboud to stay on with JA for five years, and then to observe a two-year non-compete provision thereafter. As the non-compete window drew to a close, Abboud's plans for a new, high-end line of men's clothing under the name "jaz" came to light. After the trade press ran stories, JA brought suit, seeking a declaratory judgment that the planned use of Joseph Abboud's name in connection with the jaz line (for example, "jaz – by designer Joseph Abboud") violated the sale agreement and constituted trademark infringement, among other things.

All of the rights at issue flowed from the 2000 sale agreement; the court's analysis concluded that agreement was ambiguous as to the scope of the right to use Abboud's name that it conveyed and, more particularly, whether the term "names" in the agreement referred to trade names or took in all names. The court concluded:

"[T]he fact that JA paid a large price for the Joseph Abboud brand (and existing licensing agreements) does not necessarily mean that JA purchased the right to prohibit Abboud from using his name to refer to himself in a non-trademark sense. There is no provision in the Sale Agreement conveying 'all of Abboud's right to use his name for commercial purposes,' . . . and the district court was not entitled to supply such a provision in the name of common sense, much less to call it 'express[]'."

If a contract is unambiguous, the court construes it as a matter of law; when it's ambiguous, the parties are allowed to introduce evidence beyond the contract's terms ("extrinsic evidence") to argue its meaning. Because the trial court had received but not considered such extrinsic evidence, its holding as to

² *JA Apparel Corp. v. Abboud*, 568 F.3d 390 (2d Cir. 2009).

the contract was vacated and the issue remanded for further hearings. On the trademark-related claims, the issue turned on the extent to which Abboud could use his name in advertising for the “jaz” line. Abboud argued identifying himself as the designer would be a form of fair use of JA’s trademarks, permitted by law. That involves a three-part test: was Abboud trying to confuse consumers; was he using his name as a mark or instead just descriptively; and was he acting in good faith? The trial court concluded Abboud might have made out the descriptive nature of the use, but had flunked the other two sub-tests.

Not so, said the court of appeals; Abboud was trying to distinguish his “jaz” line, so it was wrong to find he was trying to confuse. As to bad faith, the district court’s conclusion rested entirely on its finding he had sold the exclusive right to all commercial use of his name in the 2000 agreement – a conclusion defeated by the appellate court’s finding of ambiguity in the contract. The trial court will have to weigh this issue as well, and in light of specific proposed uses, if on remand it finds the contract supports JA’s position.

Short Takes

NEW YORK EXPANDS SCOPE OF EMPLOYMENT DISCRIMINATION LAW:

New York State law now prohibits workplace discrimination against victims of domestic violence. The amendment to Executive Law Section 292 took effect July 7, 2009 and applies to any domestic relationship – marriage; cohabitation; dating – and without regard to gender preferences. New York City’s Administrative Code already had a similar prohibition.

OUT, OUT, GRAY GOODS: We reported in the May 2008 issue on an approach to block gray goods from U.S. distribution when there were actual differences in the goods intended for sale abroad and the gray goods being sold in the United States.³ In June, the U.S. Court of Appeals for the Second Circuit concluded that removing unique production codes from bottles and packages of Davidoff’s “Cool Water” fragrances could constitute trademark infringement, because it interfered with the trademark owner’s ability to police quality as well as to detect counterfeits and because damage to packaging from removal of the codes adversely affected the value of the goods.⁴ More recently, the federal government’s August 27 Customs Bulletin included a notice that it will block certain Chopard and Chopard Genève watches from entering the U.S. because the off-shore versions differ materially from their American cousins with respect to warranties and documentation.

³ *Johnson & Johnson Consumer Companies, Inc. v. Aini*, 540 F.Supp.2d 374 (E.D.N.Y. 2008).

⁴ *Zino Davidoff S.A. v. CVS Corp.*, 571 F.3d 238 (2d Cir. 2009).

Similarly, in a decision involving gray market cigarettes, the United States International Trade Commission entered a general exclusion order under 19 U.S.C. §1337, a powerful weapon indeed for keeping items out of the United States, *Certain Cigarettes and Packaging Thereof*. The material difference on which the ITC relied to presume the grey market goods would cause confusion was the absence of statutorily required English-language warnings from the Surgeon General.

ANONYDISS NO MORE: Think twice before you post a blog tearing someone apart in the confident expectation your identity won't be given up. In a ruling that really should not have surprised as many people as it did, fashion model Liskula Cohen won a pre-action discovery order from Supreme Court, New York County (Justice Joan Madden) compelling Google to give up the name of the person who had accused her of all sorts of highly unladylike sexual conduct in terms we'd sooner not repeat here, *Cohen v. Google, Inc.*, 2009 WL 2883410 (Sup. Ct. N.Y. Co., August 17, 2009). What was mostly unusual was the willingness (and financial ability) of Ms. Cohen to pursue the blogger; courts repeatedly have warned that the old rules of defamation still apply to blogs. The court specifically rejected a defense which urged, in effect, that no one believes what they read on a blog.

COUNTERFEIT SEIZURES FALL WITH ECONOMY: In line with the general trend of the economy, volume was off for seizures by U.S. Customs and Border Protection of goods for violating intellectual property rights in the last fiscal year (October 1, 2008 to September 30, 2009). The total was valued at \$260.7 million, down 4% from the previous year. As last year, counterfeit shoes were the top product seized, and China was the leading source for counterfeit goods. For the first time, jewelry appeared on the top seized items list.

MORE TIME ON RED FLAGS: Enforcement of the FTC's so-called Red Flags Rule, which steps up required identify theft prevention measures and applies to a broad range of businesses, has been delayed. The compliance deadline was pushed back from November 1, 2009 to June 1, 2010 in response to a request from members of the House of Representatives.

“...courts repeatedly have warned that the old rules of defamation still apply to blogs.”



EBAY PUNISHED BY FRENCH COURT OVER ON-LINE SALES OUTSIDE AUTHORIZED CHANNELS:

The Parisian Tribunal de Commerce fined eBay approximately \$2.6 million at the end of November for violating a previously entered injunction barring on-line sales of Christian Dior, Kenzo, Givenchy and Guerlain fragrances and cosmetics outside manufacturer-authorized channels. We reported on the original decision in the Fall 2008 *In Fashion* issue. The court previously had awarded LVMH damages equaling about \$61 million; that's on appeal.

"OMG! Ur TM, © being infringed @ Twitter!" — read the article at http://www.schiffhardin.com/binary/jacoby-roth-law360_0709.pdf

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