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The Price Of An Improperly Disclosed Social Media Ad

By **Leslie Schafer and Vera Golosker** (February 8, 2019, 12:07 PM EST)

The age of social media-driven commerce is upon us. With millions of social media followers, celebrities and others with influence over consumers' buying patterns are being paid to post about brands — the strategy is known as "influencer marketing."^[1] However, without the proper disclosures of a financial arrangement between a brand and an influencer, the payoff may come at a cost if deemed a violation of the Federal Trade Commission Act.

This article explores the remedies available to the Federal Trade Commission against companies and social media influencers for a breach of the FTC Act's rules against deceptive advertising, including ways in which monetary remedies might be calculated.

#Influencer

Celebrity endorsements garner considerable sales for brands. Academic research shows that endorsements by celebrity athletes, for example, are associated not only with increasing sales in an absolute sense but also relative to competing brands.^[2]

Social media exposure has also been linked to increased sales.^[3] Global soccer star Cristiano Ronaldo is estimated to have generated \$176 million in value for his sponsors in the 12-months ending June 2016 just from mentions and hashtags on social media.^[4] Even influencers with fewer than 1 million followers can generate more than \$8,000 in earned media value from a single post on Instagram.^[5]

Realizing this potential, companies are embracing influencer marketing. Of brands surveyed by Gartner's L2 Inc., on average, 70 percent use influencers on Instagram as a component of their marketing. That statistic rises to 91 percent for luxury brands.^[6] Advertisers are projected to spend more than \$2 billion annually on Instagram influencer marketing by 2019.^[7]

But, as evidenced by recent litigation over the failed Fyre Festival, social media promotional content is not risk-free. Organizers of Fyre Festival spent millions of dollars on promotions, reportedly paying model Kendall Jenner \$250,000 for one Instagram post about the event.^[8] These ads were considered a significant factor in ticket sales.

On Jan. 28, 2019, a federal bankruptcy judge ruled that 24 talent agencies representing high-profile influencers, including Jenner, can be subpoenaed to examine the festival organizer's payments for promotional services.^[9] Though the FTC has yet to weigh in on this matter specifically, social media marketing may become the commission's new frontier for tackling misleading advertising practices.

FTC's Historical Stance Against Deceptive Advertising in Digital Media

Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce.^[10] In 2000, the FTC released guidance called "Dot Com Disclosures," which confirmed that Section 5 of the FTC Act applied to online advertising.^[11] These disclosures work in concert with the FTC's "Endorsement Guides" to help understand the FTC's interpretation of how Section 5 applies to endorsements and testimonials in online advertising.^[12] In 2013, the FTC updated those disclosures with specific guidance about making financial relationships clear.^[13]

The FTC followed its updated disclosures with a series of settlements with brands and advertising agencies. In 2014 it announced a settlement with Sony and its advertising firm Deutsch LA Inc. involving social media endorsements of the PlayStation Vita gaming console.^[14]

The FTC alleged Deutsch LA encouraged its employees to use their personal Twitter accounts to generate buzz



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about the PlayStation Vita and use the hashtag #gamechanger without disclosing their affiliation to Deutsch LA or to the agency's client, Sony. The FTC considered the posts deceptive since they purported to be endorsements by actual users. In a 2016 example, Lord & Taylor LLC allegedly gave 50 fashion influencers each a dress and paid them to post photos of themselves on Instagram wearing it, with no disclosures.[15]

FTC's Recent Actions Against Deceptive Advertising by Social Media Influencers

The FTC's message over time has remained the same: Failing to disclose a business relationship with a brand in online posts may run afoul of the FTC Act's rules. It's merely the magnitude of the digital application that's growing.

In April 2017, the FTC sent out 90 letters to athletes, celebrities, and other influencers and marketers reminding them that if influencers are endorsing a brand and have a "material connection" to the marketer, that relationship must be clearly disclosed.[16] In September 2017, the FTC sent 21 follow-up "warning" letters, citing specific social media posts that might not be in compliance with the guidelines.[17]

In addition to sending warning letters, the FTC brought its first administrative action against individual social media influencers, In the Matter of CSGO Lotto Inc., et al, which settled in September 2017. The complaint alleged that Trevor Martin and Thomas Cassell made posts endorsing the online gambling site Counter-Strike: Global Offensive Lotto without disclosing that they own the company.[18] Upon settlement, pursuant to the FTC's order, the company is required to disclose material connections, take steps to ensure compliance of its endorsers, abide by record-keeping obligations and submit reports regarding compliance, among other obligations.[19]

In February 2019, the FTC approved final orders settling allegations related to an administrative action in In the Matter of Creaxion Corporation, et al., against two Georgia companies and their principals for allegedly engaging Olympic gold medalists as endorsers to post about a mosquito repellent on social media without disclosing that the athletes were paid for the posts.[20] The settlement contains a consent order prohibiting the companies from misrepresenting that influencers are independent consumers, and requiring them to institute procedures to avoid the misleading posts, among other reporting and record-keeping requirements. If such an order is violated, the FTC can seek a daily civil penalty in federal court.[21] The FTC has not sought such civil penalties, monetary remedies or injunctive relief in such matters — for now.

Private parties in litigation have also referenced the FTC guidelines to support civil claims. Plaintiffs in a class action fraud lawsuit concerning the Fyre Festival, Chinery, et al v. Fyre Media Inc., et al, alleged that the sponsored posts were in direct violation of the FTC guidelines, stating that the influencers "made no attempt to disclose to consumers that they were being compensated for promoting the Fyre Festival. Instead, these influencers gave the impression that the guest list was full of the Social Elite and other celebrities." [22] Reportedly, only one of the numerous paid model influencers promoting the event on social media labeled the post as an ad as required by the FTC.[23]

The FTC Act: Types of Remedies Available

To seek remedies from brands and social media influencers, the FTC could either enforce the provision in an administrative proceeding or by filing a lawsuit in federal court. On the administrative end, the commission may issue a complaint, such as in the CSGO Lotto case, when it has reason to believe that the law has been or is being violated, and a proceeding is in the public interest.[24] The commission may eventually issue a consent order, which carries the force of law with respect to future actions.[25] Each violation of such an order may result in a civil penalty of up to \$41,484 per day.[26]

If the commission has issued a final cease-and-desist order in an administrative proceeding, the commission may seek penalties from third parties who violate the standards if it shows that it provided the violator with a copy of the determination.[27] The FTC may file a lawsuit in federal district court to seek the civil penalty for violation of a consent order discussed above, to enjoin violations of the FTC Act and to secure monetary equitable relief such as restitution for any injury suffered by consumers and disgorgement of ill-gotten profits. [28]

Calculating Remedies

While the FTC has not sought financial penalties or monetary remedies for influencer marketing disclosure infractions, it could do so in cases down the road. For example, it may seek to disgorge from an influencer the fees earned and/or the implicit value of any free goods provided for making the post.

Were the FTC to seek monetary remedies from the brand, it would be important to distinguish between sales garnered during the ordinary course of business (e.g., due to other advertising channels) and ill-gotten profits from the deceptive advertising. The latter may necessitate proving that a relationship exists between the social media posting and incremental sales.

An economist could build a regression model to identify how much revenue is generated by the influencer marketing, if any. The assessment involves predicting the sales which would have occurred but-for the deceptive advertising and how that differs from the magnitude of the sales which actually occurred. Known colloquially as a “before and after” analysis, an intervention model is commonly used to measure the effects of advertising. [29]

An intervention model involves an examination of sales over a period of time prior to the social media event to identify normal relationships between market supply and demand factors. Using these relationships, the model can then be used to estimate the level of sales that would have been expected in the time period of, but absent, the deceptive advertising. The difference between the predicted amount and the actual sales is an estimate of the impact of the post.

The model includes an indicator for when the social media post (or posts) occurred as well as a set of variables controlling for other influences on sales during the same time period, such as seasonality, price promotions or other advertising activities—for the brand in question and potentially also for rivals. The model may also be extended to compare changes in sales of the brand in question to changes in sales of competing brands over the same time period.[30]

Conclusion

The FTC has a breadth of remedies available for violations of the FTC Act related to deceptive marketing. The growing prominence of social media marketing suggests that more cases are to come that will reveal which remedies the FTC will seek, as well as how remedies might be measured. #staytuned.

Update: This article has been updated to include information about the FTC's recent action in In the Matter of Creaxion Corporation, et al.

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[28] 15 U.S.C. § 53(b)

[29] See, e.g., Elberse and Verleun.

[30] See Kumar et al.

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