akerman

Practice Update

The FTC's Analysis of Lord & Taylor's Social Media Marketing Campaign

June 7, 2016

By Ira S. Sacks and Jamie B. Shyman

New ways of monetizing digital media has brought challenges in regulating advertising. The FTC has recently issued guidelines to provide businesses and advertisers with insights as to how to comply with the FTC Act. Despite the new context, the governing legal standard remains fact based and quite familiar.

In December 2015, the FTC issued its "Enforcement Policy Statement on Deceptively Formatted Advertisements." Among other things, the FTC concluded that "native advertising," that is, online advertising which is often indistinguishable from non-commercial content such as news, feature articles and product reviews, has become a business model for companies to easily and inexpensively mask the signals consumers have come to recognize as advertising or promotional content in order to capture the attention of ad-avoiding consumers online. Consequently, the FTC's deceptive format policy requires companies to clearly, conspicuously and contemporaneously disclose sponsorship of natively formatted ads. Although doing so may detract from the perceived effectiveness of the ads, ignoring the FTC's guidance may result in enforcement actions that include cease and desist orders, fines, and injunctions.

Related People

Jamie B. Shyman

Related Work

Intellectual Property

Related Offices

New York

In March 2016, the FTC charged Lord & Taylor with violations of the FTC Act with regard to a specific native advertising campaign it ran in the spring of 2015. According to the FTC, Lord & Taylor deceived consumers by paying for native advertisements, by utilizing Instagram posts and an online article as part of its campaign, without disclosing that they were paid promotions. This was the first case of its kind since the FTC released its December 2015 Enforcement Policy Statement.

The Commission's Complaint specifically charges that as part of Lord & Taylor's roll out of its Design Lab clothing collection, Lord & Taylor launched a comprehensive marketing campaign on social media, called a "product bomb", which was tailored for its target market of women ages 18-35. The FTC claimed that the retailer utilized specifically-timed Instagram posts and a strategic placement in an online magazine to advertise its new clothing collection over the course of a weekend in March 2015.

As part of this "product bomb", the Complaint charges that Lord & Taylor paid 50 online fashion "influencers" to post Instagram pictures of themselves wearing the same paisley dress from the new collection, but failed to disclose that the Company had given each influencer the dress, as well as amounts ranging from $1,000 to $4,000, in exchange for their endorsement.

While the influencers could style the dress anyway they chose, the Complaint alleges that Lord & Taylor contractually obligated them to submit their posts for pre-approval so that Lord & Taylor representatives could ensure the contractually required hashtag #DesignLab and user designation @lordandtaylor was used in the caption of each of their Instagram posts. For example, Exhibit A to the Complaint, features a picture of a young woman styling the paisley dress with a pink jacket and sunglasses and the caption reads:

[spring awakening] Pairing a cropped trench with @lordandtaylor's exclusive #DesignLab handkerchief hem dress [flower emoticon] Really enjoyed seeing how others styled this vibrant piece!

In addition, the Complaint alleged that Lord & Taylor paid *Nylon*, an online magazine, to endorse the same dress from the Design Lab collection by posting a photo of the dress and a Lord & Taylor-edited caption on its website and posting a photo on *Nylon* brand's Instagram account.

According to the FTC, Lord & Taylor did not require the influencers nor the *Nylon* team to disclose that Lord & Taylor had paid for, reviewed and pre-approved their posts. The FTC alleged that there was no disclosure that the fashion influencers had received the dresses for free, that each of the "fashion influencers" and Nylon were compensated for their posts, or that the posts was a part of Lord & Taylor's "product bomb" weekend and were, in fact, paid-for endorsements by Lord & Taylor.

The FTC charged Lord & Taylor with three separate violations of deceptive practices. In Count 1, the FTC alleges that Lord & Taylor falsely represented, expressly and impliedly, that the Instagram posts of the "fashion influencers" reflected their independent statements when they were really paid endorsers of Lord & Taylor. In Count 2, the Complaint states that Lord & Taylor failed to disclose the material connection between the endorsers and the company which constituted a deceptive practice since the fact that the fashion influencers were paid endorsers of Lord & Taylor would have been material to consumers. In Count 3, Lord & Taylor was charged with failing to disclose that the *Nylon* Magazine article and *Nylon* Instagram posts were not independent statements or opinions regarding the retailer's clothing collection, but rather paid advertisements.

In late March, the FTC entered into a significant 20-year consent order with Lord & Taylor. Under the

terms of the proposed settlement, Lord & Taylor is prohibited from misrepresenting – expressly or by implication – that an endorser is an "independent user or ordinary consumer." If there is a material connection between the company and an endorser, Lord & Taylor must clearly disclose it "in close proximity" to the claim. And in settling the charges, Lord & Taylor is further prohibited from suggesting or implying that a paid commercial advertisement is a statement or opinion from an independent or objective publisher or source. In addition, to ensure Lord & Taylor's compliance with the order, it was tasked with creating a system for monitoring and reviewing the representations and disclosures of any future endorsers.

In a business blog post in mid-March relating to the proposed settlement, the Commission advances four discrete takeaways for businesses from the *Lord & Taylor* case:

- First, with regard to "native advertising", the FTC advises that the company should "consider the context" in that, digital advertisers must review the native ads from the prospective of the consumers and ensure that an ad does not suggest anything to a consumer other than that it is an ad.
- Second, companies must make "material" disclosures. Thus, the company should require any of its endorsers to clearly disclose when they have been compensated in exchange for their endorsements.
- Third, disclosures should be "clear and conspicuous" in that they should be "in close proximity" to the claims being advertised so that consumers will see and read them.
- Fourth, the FTC advises that a good practice for social media campaigns would be to monitor what affiliates are doing on behalf of the company to ensure effective compliance with the FTC's guidelines.

Although specific FTC guidance is useful, at bottom, the FTC is not breaking new legal ground. The disclosures that the FTC is "suggesting" are designed to insure that viewers of ads are not likely to be deceived by an ad that would be implicitly false. It has long been held that if a plaintiff can show that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers," a cause of action may lie. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007). An implicit falsity claim requires "a comparison of the impression [left by the statement], rather than the statement [itself], with the truth." *Id.* (quoting *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 229 (2d Cir. 1999)).

"[W]hereas 'plaintiffs seeking to establish a literal falsehood must generally show the substance of what is conveyed, . . . a district court *must* rely on extrinsic evidence [of consumer deception or confusion] to support a finding of an implicitly false message.'" *Id.* (second alteration in original) (quoting Schering Corp., 189 F.3d at 229).

Falsity alone does not make a false advertising claim viable: the plaintiff must also demonstrate that the false or misleading representation involved an inherent or material quality of the product. *Id.* n.3. Such a "requirement is essentially one of materiality ...." *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001). Materiality has been defined as "likely to influence purchasing decisions." *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

The FTC's guidance is easily viewed in that context: the Commission views a native ad failing to disclose that it is an ad or failing to disclose relationships and/or compensation as implicitly and materially misleading.

This Akerman Practice Update is intended to inform firm clients and friends about legal developments. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.