



IP Watch™

Intellectual Property Law Alerts from Ober|Kaler's IP Group

In this Issue

"Results Not Typical" — Bloggers and Celebrities (and Advertisers) Must Comply with New FTC Guides

Cookies, Advertising, and the Federal Trade Commission

Intellectual Property Group

E. Scott Johnson, Chair
Royal W. Craig
Jonathan M. Holda
Anthony F. Vittoria
James B. Wieland
Cynthia Blake Sanders
Christopher F. Lonegro
Jed R. Spencer
Kyle E. Conklin

Carlyle C. Ring, Jr.
(Counsel)

DECEMBER 17, 2009

*Many of our clients have an online presence, or deal closely with organizations who do. This edition of IP Watch focuses on providing online content and advertisements, specifically as it is regulated by the Federal Trade Commission (FTC). In the first article, we discuss the FTC's newly promulgated rules for endorsements and testimonials in advertising, and in the second we review the FTC's guidelines for online behavioral advertising. Enjoy the articles, and if you have questions about interpreting or complying with these guidelines, **please contact us.***

"Results Not Typical" — Bloggers and Celebrities (and Advertisers) Must Comply with New FTC Guides

Cynthia Blake Sanders
410-347-7367
cbsanders@ober.com

Grass roots marketing just became a little less green. The Federal Trade Commission (FTC) issued the final updated **Guides Concerning the Use of Endorsements and Testimonials in Advertising**. Effective December 1, 2009, the new Guides expand in scope to include advertising messages in websites, blogs, and other social media. Bloggers failing to follow the Guides could pay up to \$11,000 per violation. Advertisers and agencies connected to a blogger's post may share liability. It's imperative that businesses review current marketing practices with the new Guides now. The FTC can challenge misleading and deceptive advertising anytime.

That's because the new Guides do not change the law. The Guides were developed to help advertisers and agencies determine if their advertising is deceptive under Section 5 of the FTC Act. The Guides provide principles and examples demonstrating how the FTC determines if advertising is misleading. By following the old Guides, advertisers and ad agencies could steer clear of FTC enforcement actions and the class action lawsuits and state enforcement actions that often follow. The new Guides cast a broader net, and in uncharted waters. No, the new Guides do not provide an unambiguously safe path for blogging about products. But they do reveal the types of marketing activities the FTC is targeting.

Last revised in 1980, the new Guides present several major changes. Generally, Section 5 holds advertisers and their agents liable for misleading interpretations of

their advertising messages. Advertisers cannot rely on a single non-deceptive interpretation of their messages to avoid liability from deceptive interpretations of its ad messages — even if it is the primary message. The FTC focuses on "consumer take-away," so any message understood by reasonable consumers to be deceptive is actionable. This is constitutional — the First Amendment does not protect misleading speech. Advertisers must also adequately substantiate performance claims in ads with clinical studies and consumer surveys.

Reflecting the widespread public impression that blogs are a credible source of unbiased product information, the new Guides reflect the FTC's increased scrutiny of product information published on the Internet. The most prominent change to the Guides is the focus on transparency in the sponsorship of advertising messages. Bloggers (including Friends, Connections, astro-turfers, or Tweeps) must disclose material relationships with advertisers whose products are discussed in their posts so consumers can detect and weigh a blogger's bias. A connection or relationship is material if a blogger receives substantial (a "free car") or repeated (a series of "free" inexpensive products) compensation from an advertiser or agent to write about products or services.

Bloggers must also substantiate performance claims in their posts ("I lost 100 pounds in 6 months using the *Extreme Diet* plan") appearing in their posts, even if the blogger isn't paid or hired by the advertiser. The blogger cannot make statements about products or services that the advertiser cannot support. Even if its relationship with a blogger is attenuated, an advertiser may be liable for a blogger's misleading and deceptive messages. The new Guides similarly now hold celebrities responsible for misleading and deceptive messages they deliver. Although the FTC acknowledges celebrities are often unaware of information that would make an ad message misleading, both advertiser and celebrity are charged with fact-checking if a claim about a product seems too good to be true.

The old Guides permitted testimonials to sidestep the substantiation requirement with a "disclaimer of typicality." The new Guides now require substantiation of testimonials containing performance claims, but if the advertised results are truthful but unsupported by substantiation, the testimonial must bear a disclaimer stating the actual results a consumer can expect in the same situation ("most women following the *Extreme Diet* plan for 6 or more months lost more than 15 pounds").

Two main themes run through the new Guides — transparency and mutual responsibility of all participants in marketing activities to ensure advertising messages don't deceive consumers. The new Guides continue to place primary responsibility for averting deceptive messages on advertisers. Whether or not an advertiser sustains liability for a blogger's failure to follow the Guides' disclosure and substantiation requirements depends on what steps the advertiser took to ensure that the blogger understood her responsibilities and what messages about a product were permissible. Advertisers can reduce exposure to FTC enforcement actions by taking a few steps to review and improve their situation: (1) assess current marketing practices in-house and by third parties — including unknown "voluntary" marketing partners; (2) audit present grass roots marketing efforts and prune efforts that fall outside of the recommendations of the new Guides; (3) establish policies and procedures for social media marketing that ensure appropriate disclosure and clearance of ad messages; and (4) establish a monitoring program to keep track of all marketing practices.