

5 KEY TAKEAWAYS

Advertising and Technology: Reaching Consumers in a Digital World

[Barry M. Benjamin](#), partner in the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to present at a recent Practising Law Institute Bridge the Gap program discussing legal issues confronting advertisers in the digital age. The program, titled "Technology and Consumer Engagement: Reaching Consumers in a Digital World," covered social media legal issues and risks, the celebrity right of publicity, intellectual property concerns, compliance obligations under the [FTC's Endorsement Guides](#), and text message compliance.

Takeaways from the program include:

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The First Amendment provides a lower level of protection for commercial advertising speech than personal, editorial, or political speech. Whereas politicians have always been able to stretch the truth (to put it mildly) relying on the First Amendment to defend their right of free speech, it has long been the case that companies cannot similarly defend accusations of false advertising premised on the same First Amendment. Commercial speech – that is, speech with a commercial motive or intent – benefits only from a lower level of First Amendment protection, meaning that false advertising can be prohibited when other types of speech could continue unimpeded.

The FTC has long insisted on giving consumers the ability to distinguish commercial advertising content from editorial, organic content. As media platforms have evolved over the years, the FTC has been consistent in mandating that consumers are informed and understand when content placed before them has a commercial motive. More than 50 years ago, the FTC warned publishers to avoid printing advertising that had the look of traditional news, lest consumers be confused. The FTC's stance towards ensuring a hard dividing line between the look and appearance of advertising and editorial content has been applied to many areas over the years, including advertorials, direct mail ads disguised as book reviews, infomercials that look like regular television programming, emails with deceptive headers, and even distinguishing between organic and paid internet search results. The FTC has also recently directly addressed a new version, Native Advertising.

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"What's the Worst that Can Happen?" Unfortunately for advertisers, when posing this question to their lawyer, the response is a veritable parade of horrors that could result in almost unimaginable negative consequences and liabilities. For one instance of false advertising, assuming it is bad enough, the advertiser could be sued by the FTC, multiple State Attorneys General, local district, county, and municipal attorneys, by consumers on a class action basis, and even by competitors whose sales may or may not have suffered. While remedies may clearly overlap depending on the plaintiff, the legal theory of liability, and the jurisdiction, advertisers who engage in false advertising put far more than their reputation at risk by doing so.

The FTC's Endorsement Guides require disclosure of any "material connections" between the influencers who post on social media and the advertiser. A material connection can include direct payment, an employment relationship, giving free goods or services, or even incentivizing a social media post through entry into a sweepstakes or contest. The FTC views all posts induced by any material connection to be a commercial advertisement, rather than organically posted, personal content.

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Communicating with consumers via text message brings along a host of potentially massive liabilities. While many consumers, particularly younger ones, may prefer communications by text message rather than email, implementing a safe, compliant text message advertising program is exceptionally difficult and fraught with peril. Unlike email marketing which is an opt-out system, text messaging is an opt-in system, requiring the recipient's express, written consent to send text messages. The applicable regulatory statute and its regulations, the Telephone Consumer Protection Act and the FCC implementing regulations, contain definitions and language that are not necessarily clear and do not affirmatively address all situations. The law also applies an unforgiving and strict liability standard, with statutory damages sums that can quickly rise to the thousands, hundreds of thousands, and even millions of dollars, depending on the scope of the campaign. When advising clients about text message marketing, it is crucial for counsel to aggressively require strict adherence to the letter of the law.

Advertising in the digital age brings a host of new and different risks for advertisers. Nevertheless, traditional advertising concepts and commercial speech limitations still apply. People must be able to distinguish between organic, editorial content and posts that were prompted by a commercially oriented purpose. Lawyers in the advertising arena must be fluent in a whole host of laws, regulatory schemes, and potential risk factors that vary depending on the channel of communication. While we may be in a golden age of ease of communication, getting one's message across has never felt so hard.

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