



# TIP SHEET™

an informational newsletter on intellectual property matters

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## Short attention spans



BY RACHEL BLUE

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LIKE IT? TWEET IT? PIN IT? Online advertising is becoming more critical to marketing departments and brand owners everywhere. Using Facebook, Twitter, Pinterest and other social media avenues to promote brands is a seismic shift – much like the move to websites only a couple of decades ago. How you market may have changed, but what you can say hasn't. Deceptive advertisements aren't OK, whether they're on the back of your favorite magazine or on your

smartphone. This spring, the Federal Trade Commission (FTC) released new guidelines for advertising in these new platforms and formats.

The FTC's regulations and guidelines are focused on making sure that the advertisements that bombard us every day are truthful. Now that we use more abbreviated media to advertise, it's more of a challenge to balance communication so that it grabs a consumer's attention but doesn't mislead. The basic rule is that "if a disclosure is needed to prevent an online ad claim from being deceptive or unfair" then it must be clear and conspicuous. That can be tough when you're limited to 140 characters or a tiny mobile device screen, but the FTC says that doesn't matter – if you can't make the clearly and conspicuously on a device or platform, then that device or platform shouldn't be used.

Size isn't all that matters. The nature of the limitations or disclosures may dictate *how* you make them when you're advertising. There's nothing inherently wrong with using a hyperlink or a pop-up to save space, but an advertiser should think about the nature of the product and the information that would appear in the hyperlink or pop-up. For instance, if you're advertising a new drug, a hyperlink (that a consumer might ignore) isn't the best place to disclose a dangerous side effect. In general, the FTC advises avoiding hyperlinks for any disclosures that involve product cost or certain health and safety issues. If you do use



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hyperlinks, they should be labeled as specifically as possible, and you should stop to think about how they'll function on various programs and devices – will they be routinely blocked? If the ads are created specifically for mobile devices or using responsive design that automatically detects the kind of device the consumer is using to access the site, the content can be arranged so that the consumer doesn't have to zoom in and out on a tiny screen where it might be easy to miss important information.



Advertisements should incorporate relevant limitations and qualifying information with the relevant claim, not in a separate disclosure that, let's face it, no one would read anyway. The idea is that the information in the disclosure is something consumers need to make a decision about a purchase so they must be provided in some format that makes it hard to ignore them. Disclosures should appear "as close as possible" to the relevant claim, and must be made at some point before the consumer can add the item to his/her online shopping cart. If the online ad is directing a consumer to a brick and mortar establishment or another page

of a website to make a purchase, the disclosure should be made online, but repeated IRL (in real life) or on the next page.

Many companies have addressed the technological difficulty of complying with guidelines that were designed for other types of media by using links to provide additional information (like limitations on an offer or details about the product). However, the new guidelines indicate that any notice to consumers that there *are* limitations should clearly indicate *the nature* of the limitations. So providing a link to additional information might still work if you need to save space, but instead of a link to "further details" or reference to fine print "details below" the new guidelines advise a more specific approach: "click here for restocking fees" or "see below for more information on restocking fees."

A picture's worth a thousand words, so as advertisers compress literal communication, they increase visual cues to direct customers to necessary information. For instance, advertisers who might have simply spelled out exactly what they wanted to say with words, now use visual designs (color, text style, animation) that direct a user to continue scrolling down on a page to get all information and hyperlinks that clearly convey the nature of the linked information. The FTC recommends that advertisers keep abreast of studies and information about click through rates, where and how often consumers look at screens, and other consumer behaviors that might impact whether or not a consumer is likely to see and absorb information about the product itself.

If you're thinking there must be an easier way ... you're right. You only need a disclosure to keep an ad from being deceptive. So the best way to avoid advertising fraught with hyperlinks, pop-ups, and platform decisions? Just the facts. ■

» [The FTC's Online Advertising Guidelines can be found here](#)

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# When the stars align: Negotiating celebrity endorsement deals



**BY JAY SHANKER**

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So you've decided your brand could use a little shine, and you're considering hitching your brand to a star. You are presumably a fan of the celebrity, and with a little luck, it's mutual. Whether this is a short-term "hook up" for a single event or seasonal promotion or a potentially long term "marriage," there are a few things to keep in mind to avoid a cosmic crash when seeking a celebrity endorsement.

## The services and the rights

Does the celebrity have to actually do anything other than permitting use of a name and likeness? If so, spell out the specifics: e.g., photo or film shoots, voice taping sessions, appearances at events or trade shows. Where, when and how often? Will any services be subject to guild jurisdiction for taping radio or TV commercials (e.g., Screen Actors Guild, American Federation of Musicians, etc.)?

What will be most effective in promoting the brand or event? Consider what use of the celebrity's name and image as well as which media will be most effective in reaching your audience: print, TV, radio, billboards, websites, mobile apps, Twitter feeds, etc. The audience for your brand (age, gender, geographic location, etc.), whether it's the celebrity's fan base, a niche demographic, or the general public, may also help determine what the contract with the celebrity needs to cover. Keep in mind that case law and the Federal Trade Commission require the celebrity disclose any commercial relationship with advertisers when making endorsements outside the context of traditional ads, such as on talk shows or in social media.



Think about whether you want an express endorsement where the celebrity is shown using or praising your product or services, or a soft (i.e. "indirect") endorsement where the celebrity name or photograph appears in your advertisement, but without a direct link to the product? FTC guidelines provide that in direct endorsements, the celebrity must actually be a client or user of the endorsed service or product.

Will the celebrity have any right to approve the scope of the endorsement (selected photographs or film, the ad, or commercial layout) or elements of the product? This may be important to

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the celebrity in light of revised guidelines that place liability on both the brand owner and the celebrity for false claims in an endorsement.

If the celebrity's name or likeness will appear on the product or its packaging, or will become part of the brand (e.g., "George Forman Grill"), who will own the trademark rights, and what happens to that brand after the endorsement contract is over? Licensing a longer-term use of the celebrity's name as a permanent part of a brand or expanding the endorsement to several products or even the whole company is likely to change the price point and other material items of the contract.

Other factors to consider:

- Where will the campaign appear – local, regional, national, international?
- Do you want to restrict endorsements for competing products/companies/markets?
- Do you need confidentiality and non-disparagement provisions to protect the brand (or the celebrity)?

One area of tension can be that most brand owners entering into endorsement agreements will insist that the celebrity waive any right to stop distribution or advertising of the product or service if a dispute arises, while the celebrity will typically insist that mere money can't compensate for reputational damage if something goes awry with the product, the promotional campaign, etc. Also consider that deals with celebrity musicians will generally require separate negotiation with a record label and music publisher for use of the celebrity's recordings and musical compositions (so-called "master" recording use and "synchronization" licenses) for inclusion of music in the celebrity's commercials.

### Term and termination

What's the initial period (short for an event/season or perhaps for a year or longer)? Keep in mind that once a celebrity or expert has endorsed a product, the advertiser has an obligation to make sure the endorsement continues to reflect the endorser's opinion. If it doesn't, what sorts of "out clauses" will the parties require? Since the goal is to tie the brand and the persona together, changes in the celebrity's appearance, behavior, artistic or athletic reputation, or activities may be triggers for terminating the contract. Likewise, the celebrity may need an out in the event that the brand's "behavior" or reputation (e.g., a product recall, major lawsuit or corporate scandal) tarnishes the image of the celebrity linked to it.

### Show me the money

Recently revised FTC guidelines require that "material connections" (payments of cash or free products) between advertisers and endorsers – connections the FTC believes consumers have a right to know about in making purchase choices – must be disclosed. Both the brand owner and the celebrity may be liable for failure to disclose material connections between the advertiser and endorsers.

Endorsement agreements can be for fixed, all-in fees, where payments are tied to actual work/appearance days, and/or the launch of a single buyer ad/media campaign or product, etc. for a fixed duration. Structuring compensation can be creative (and sometimes complex): you can fix a set price, include a percentage of gross or net revenue associated with the company or product, set an initial fee as an advance against some contingent royalty or bonus, or utilize some combination of these strategies to build incentives into the contract for both parties to incentivize their performance.

If the deal is for an extended length of time, you can build in increases in guaranties and royalties over time, or tie performance bonuses to the brand's or product's success, which can be

measured by sales or other revenue targets. Or, you can structure performance bonuses based on the celebrity's success. A celebrity athlete being named MVP, or an artist being nominated for or winning an Emmy, Oscar or Grammy, whether he's wearing your athletic shoes or wristwatch or driving your car to the red carpet or not, may add to the brand's cache if he or she has endorsed it.

Be sure to also address housekeeping items like expense budgets, reimbursements, and accounting and audit rights. A celebrity contemplating the deal will take into account perceived value to him/her in forfeited "opportunity costs" (other deals that may have to be rejected because of scheduling, territory or category exclusions, for example), as well as how the engagement will impact his/her image and fan base (i.e., is the tie-in a natural extension of the celebrity's own brand, or will it be perceived as a "sell out"?). There are licensing consulting services that publish annual surveys of royalty structures and typical percentages for endorsement deals, as well as agencies that serve as matchmakers for these relationships, which are worth consulting in advance. ■

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## It's not easy saying you're green

### *Avoiding unfair and deceptive environmental marketing claims by adhering to the FTC Green Guides*



**BY JESSICA JOHN BOWMAN**

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As a famous amphibious Muppet once noted, it's not easy being green. This sentiment is shared by the Federal Trade Commission, which has issued Guides for the Use of Environmental Marketing Claims (also known as the "Green Guides") in response to recent incidences of "greenwashing" and other deceptive practices touting otherwise-ordinary products and practices as "green" or "environmentally friendly."

The Green Guides set forth the FTC's current views on the use of environmental claims in advertising and are intended to help companies avoid making unfair or deceptive statements regarding the environmental benefits of their products or services. The Green Guides provide limitations and instructions on the use over a wide range of environmental representations, from the use of generic terms such as "environmentally friendly," to the use of specific phrases such as "refillable" or "compostable." In general, however, the Green Guides are intended to ensure that customers know and understand the environmental benefits of whatever product they are purchasing. With this in mind, a company seeking to promote the environmental benefits of its products or services should, at a minimum, do the following:

- Avoid broad or unqualified language: Broad statements, such as "greener," "less plastic," or "more eco-friendly" don't send a clear message to the consumer, and may overstate the benefit of using a particular product. Whenever possible, use clear qualifying language, setting forth the specific facts that make your product or process environmentally sustainable.

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- Don't overstate the benefits of your product, directly or by implication: The Green Guides indicate that the FTC is particularly concerned with comparative statements, such as "50% more recycled content than our previous packaging" or "fewer VOCs than our competitors' products." These statements, without more, don't tell the customer how much better the advertised product is than the competing or previous product. Increasing the amount of recycled content in a product's package by 50% sounds desirable, but if the previous packaging used very little recycled content, the actual environmental benefit is likely to be small. Similarly, using "fewer VOCs" than a competitor might sound like a good thing, but if the difference in the VOC content of a product is slight, there is a risk of consumer confusion. Whenever possible, provide specific, quantifiable details on the extent to which a product uses "more" of a beneficial product or "less" of a hazardous one.
- Make sure the customer has enough information to take advantage of the claimed environmental benefit: If the environmental benefit depends upon how a consumer uses a product, make sure to provide the consumer with enough information to obtain the benefit. For example, if an item is "compostable" in a commercial compost facility, but not a home compost bin, say so. If an item is "refillable," make sure that there is a readily available means for the ordinary consumer to obtain a refill. And if an item is biodegradable, make sure to specify whether the consumer must dispose of the item at a special facility (other than a landfill or incinerator) in order to obtain the benefit of purchasing an item made from biodegradable materials.
- Back up your claims, and keep backing them up: Make sure you've conducted the research to support any claim you make – particularly those comparing your products to your competitors' products – and follow up with additional testing and analysis to ensure that your representations remain accurate as your products and your competitors' products change.
- Consult the Green Guides before indicating that your product or process has any of the following benefits: Benefits from the use of carbon offsets; is compostable, biodegradable, recyclable, non-toxic, ozone-safe or ozone-friendly; uses recycled content; is refillable; uses renewable energy or materials; is "free of" certain materials; uses "less" of any particular source material; and meets with any particular seal of approval or certification. Such claims are subject to specific limitations on use as set forth in the Green Guides.



It is important to note that the FTC's guidelines represent only the FTC's current views, so they are not binding on the agency. Adherence with the guidelines do not trump federal, state or local laws and cannot be viewed as protection from future liability, but adherence to the Green Guides, and the steps outlined above, will reduce the risk that you will be found liable for "greenwashing" your products and services. ■