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IN PRACTICE

Marketing your brand with influencers? Make sure the FTC hits the "Like" button

Brand owners and their attorneys are grappling with an important question: how to disclose their connections to luminaries like PewDiePie.

If you haven't heard of PewDiePie, don't worry—he's a 26-year-old Swedish college dropout who likes to sit at his computer, play video games and shoot movie clips. But he also happens to operate the most popular YouTube channel in the world. He has nearly 50 million subscribers, and his commentary wields huge influence over the success of a video game release. Marketers pay him to exercise it. Last year, PewDiePie's production company reported an operating profit of about $8.1 million.

Brands have long valued "native advertising," promotional content that is similar to the news, articles and entertainment that surrounds it. But they are increasingly spending their dollars on the particular subspecies known as influencer marketing, in which individuals—ranging from stars (LeBron James) to quasi-stars (Kim Kardashian) to everyday people (a little-known blogger)—endorse products with messages that are personal, direct and authentic. The dollars at stake are substantial. According to a recent report, the most popular influencers (three to seven million followers) command an average of $187,500 per YouTube post, $75,000 per Instagram or Snapchat post, and $30,000 per Twitter post. Even lesser influencers (between 50,000 and 500,000 followers) command average payouts of $2,500, $1,000 and $400, respectively.

The proliferation of social platforms has created many new marketing opportunities for brands. But in these formats it is often impossible to distinguish between products that influencers happen to like and those that they are paid to endorse. Today, brand owners struggle with how to harness their authenticity without deceiving customers or falling afoul of federal disclosure requirements.

The Federal Trade Commission is watching carefully. Guided by Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce," the FTC has increasingly focused on influencer marketing. Last December, it updated its guidance with a policy statement on deceptively formatted advertisements. In its long-held view, messages not identifiable as advertising are deceptive if they mislead consumers into believing that they are independent, impartial or not from the sponsoring advertiser. It explores this principle in the context of influencer marketing.

Increasingly, its enforcement focuses on influencers too. In July, the FTC settled charges against Warner Bros. that it used influencers deceptively to generate buzz for the video game "Middle Earth: Shadow of Mordor." The complaint alleged that Warner paid internet influencers, including PewDiePie, tens of thousands of dollars to post positive videos about the game without disclosing that they were being compensated. PewDiePie's video was viewed over 3.8 million times.

Traditional brick-and-mortar retailers are not immune either. In May, the FTC finalized a consent order with retailer Lord & Taylor regarding its marketing of a now-infamous article of clothing: its "Design Lab paisley asymmetrical dress." The complaint alleged that Lord and Taylor paid over 50 fashion influencers to promote this dress deceptively on Instagram. While their posts referenced the retailer's @lordandtaylor Instagram handle and the campaign hashtag, #DesignLab, there was no indication that the posters had received the dress for free, been paid for the post, or were participating in an advertising campaign.

The FTC is not walking this enforcement road alone. For example, the consumer watchdog group Truth In Advertising recently investigated "Snapchat king" DJ Khaled (a hawker of everything from Dove soap to Ciroc vodka), and it filed a formal FTC complaint against five members of the Kardashian family, naming over 100 disclosure violations on behalf of brands including Calvin Klein, Revlon and Puma. Similarly, Kim Kardashian's notorious promotion of Diclegis morning sickness pills also drew ire from the Federal Drug Administration for its dubious medical claims.

What can brand owners do to ensure that they do not fall afoul of these disclosure rules?

BE TRANSPARENT

At bottom, the FTC's guidance boils down to a common-sense principle: Be honest about the advertising relationship. Ensure that the influencer is, too. Ask yourself: If consumers learned about it, would it affect their view of the endorsement? In most cases, the answer is yes. Practically speaking, being evasive also doesn't help a brand longterm. Consumers value influencers precisely because their voice is authentic and trustworthy. If consumers later feel betrayed, both the endorser and the product lose their appeal.

CONSIDER THE CONTEXT

There is no bright line rule to ensure that a disclosure is adequate. Rather, the FTC considers the ad's "net impression." This depends upon context. Sometimes, it is immediately apparent that content is an advertisement, and disclosure is unnecessary. But where the marketing connection is not reasonably clear, disclosure is needed. In making this assessment, consider not only the nature of the message and its distribution channel but also the expectations of the target audience.

WORK WITH THE FORMAT

A disclosure must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." Recognize the format's unique characteristics to ensure that the disclosure satisfies this test. For example, Facebook and blog posts lend themselves to natural language disclosures. On Twitter, where space is limited, a succinct hashtag like #ad may suffice.

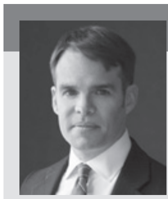
Clarity and placement matter. Vague hashtags, like #spon, or #sp, are insufficient. But even clearer designations, like #paid_ad or "[sponsored]", will not make the grade if they are insufficiently prominent. For example, they might lurk at the bottom of a blog post or the end of an Instagram caption. Consider how the message will reach consumers.

BE SPECIFIC

While the disclosure rules apply to everyone, the onus of compliance ultimately falls on brands. Be specific: indicate to your influencers what you expect in terms of a disclosure. Don't assume they will disclose appropriately. Give them room to do what works for their audience and platforms where possible, but make sure that whatever they do satisfies the rules.

FOLLOW THE GUIDANCE

Besides its most recent policy statement, the FTC has offered a raft of information and guidance on its current policies. In particular, its "Native Advertising Guide" and ".com Disclosures" guide provide concrete examples. Of course, FTC policy is always evolving with technology and advertising practice. Just last Thursday, the FTC hosted a workshop in Washington to assess the effectiveness of disclosure, featuring leaders in cognitive science, decision modeling, and labeling. Its future guidance will doubtless reflect what it has learned.



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