SOCIAL MEDIA AND FALSE ADVERTISING

WRITTEN BY: JOHN CROSETTO
The basic purpose of all false advertising laws are the same--
To protect consumers and competitors from unfair or deceptive business practices by protecting the consumer’s ability to make meaningful choices.

Social Media and False Advertising

Introduction
Social media offer advertisers increased brand recognition, loyalty, and higher conversion rates than traditional print, TV, and radio. The same rules for advertising in traditional media apply to social media, but the dynamics of social media raises new questions as to how those rules apply. The Federal Trade Commission (“FTC”) has deemed that consumers, for the most part, believe that social media are a forum in which real people express real opinions about real products and services. As advertisers explore new ways to exploit the credibility offered by social media, they run new risks of false advertising claims.

The FTC Act, the Lanham Act, and state consumer and unfair competition laws form the regulatory framework for advertising. Whether a claim is brought by the FTC, a competitor, or an individual consumer, the underlying premise is that everyone suffers when consumers are deprived of the ability to make meaningful choices. That is, when a competitor creates fake Facebook accounts to post bad reviews of your restaurant or you fail to mention that the celebrity who tweeted about her fantastic stay at your hotel had been given a free month in the penthouse suite, both are unlawful because the conduct deprives consumers of information they need to make meaningful decisions; and if consumers cannot make meaningful decisions, businesses cannot compete fairly. Whether you accept that premise or not, it’s worth bearing in mind when devising your marketing strategy, if for no other reason than to avoid an investigation by the FTC, a claim brought by a competitor, or a class action lawsuit.

Legal Framework

Unfairness
The FTC Act, enforced directly by the FTC, prohibits “unfair or deceptive” communications in advertising. “Unfairness” has been defined in only the broadest terms to facilitate enforcement on a case by case basis and prevent unscrupulous advertisers from escaping through loopholes. That said, we can discern three elements of “unfair” conduct. The conduct must (1) cause “substantial” injury that (2) is not outweighed by any offsetting consumer or competitive benefits, and (3) that consumers cannot reasonably avoid. These elements are aimed at determining whether a sales technique deprives the consumer of the ability to effectively make his or her decision to make a purchase.

The FTC’s unfairness policy has been criticized for failing to provide businesses sufficient guidelines, let alone a bright-line rule, to determine what types of conduct might be deemed unfair. We might therefore learn more from looking at specific conduct that has come under FTC scrutiny.
Generally, the FTC has taken aim at conduct that is coercive (e.g., failure to return a product submitted for service until a service contract is signed) or that exploits the consumers lack of bargaining power (e.g., unilateral rate increases where consumers are locked into a contract or cannot easily switch to a different provider).  The FTC’s actions against “unfair” conduct on the internet have focused on unsolicited emails, pop-ups, delayed rebate payments, and unauthorized credit-card billing.

As a general rule, make it easy for consumers to opt in (or out, as appropriate) and to get what they bargained for without having to jump through excessive or time consuming hoops.

The same rules apply to social media but the viral quality of this interactive and immersive marketing forum presents new pitfalls. Business should take note that consumer advocates are increasingly wary of social media’s ability to more subtly exploit consumer susceptibilities. Advertisers and retailers routinely exploit consumer susceptibilities to perceived discounts, the new and improved, sex and sugar; so what is there to be concerned about?

A successful online campaign by Frito Lay, which combined “gamification” and social media strategies, provides valuable insight. Gamification has proved to be a successful form of advertising well-suited to social media, but the same dynamics that make gamification successful have come under scrutiny.

In a complaint against Frito Lay, four consumer groups asked the FTC to enforce what is ‘good for kids’ under the FTC Act’s prohibitions against unfair and deceptive business practices. Among other things, the consumer groups took aim at Frito Lay’s “Asylum626.com” game, in which players try to escape from an insane asylum. The game itself contained no advertising, but players could not finish the game without purchasing a bag of Doritos and using an infrared marker on the bag to unlock the ending. Doritos leveraged the teen craving for salty snacks by soliciting social media account information. Doritos then used players’ Twitter and Facebook accounts to send tweets and status updates from the game to players’ followers and friends with the alleged aim of ensnaring more teens in the salty snack trap.

The complaint then cast these tactics in the light of research on childhood obesity and marketing techniques to which teens are particularly susceptible; in particular:

- Virtual environments that present an augmented reality and other immersive techniques that induce “flow,” reduce awareness of marketing techniques, and encourage impulsive behavior.
- Social media techniques that include surveillance of users’ online behaviors without notification.
- Data collection and behavioral profiling designed to deliver personalized marketing to individuals without sufficient user knowledge or control.
- Mobile marketing using location data to track people’s movements and link point of influence to point of purchase.
Neuromarketing designed to trigger subconscious, emotional arousal in response to marketing stimuli.

All of the above made for a highly successful social media advertising campaign, but the it came under fire from consumer groups because the methods employed undermined conscious consumer choice either by mining personal information without the consumer’s knowledge or by reducing consumer awareness the advertisement itself.

To date, the FTC has not commenced an investigation, but the FTC is scrutinizing how social media and other forms of online advertising blur the lines between information and solicitation.

The consumer advocate response to Asylum626 may be a glimpse of things to come. So evaluate your advertising campaign with an eye to how it frames consumer choice, and more specifically, how it allows (or doesn’t allow) the consumer to make a meaningful choice based on real-world information.

**Deceptiveness**

Most false advertising claims are based on deceptiveness. Again, the fundamental purpose of the laws against deceptive or misleading advertising is to protect the consumer’s ability to make a meaningful choice. As with “unfairness,” the definition of “deceptive” is broad: an ad is “deceptive” if it is likely to mislead a reasonable consumer and affect a consumer’s decision about a good or service. In general, this means that ads must provide complete and accurate information. Obviously, a literally false statement of fact will get you in trouble, as will other forms of affirmative deception such as creating a bogus social media account to expand customer lists, or fudging the geographic origin of a product, or making an aspirational claim that your Pomegranate-Blueberry beverage has more than a splash of actual pomegranate and blueberry juice in it.

But an ad need not make an affirmatively false statement to be deemed deceptive. Failing to disclose information necessary for the consumer to make a meaningful decision is also considered deceptive. With social media, space is typically limited, so false advertising claims may easily arise where an advertiser fails to provide sufficient information about its goods or services. For example, in 2011, the Department of Transportation (“DOT”) brought a false advertising claim against Spirit Airlines based on Spirit’s Twitter Feed. DOT rules require disclosure of the amount of taxes and fees at the first point in an
advertisement where a fare is presented.\textsuperscript{\textit{viii}} Spirit’s Tweets invited followers to “Check out our [fares]—just $____ each way!” A link was provided near the Tweet, but it only went to a landing page that mentioned the taxes without providing the amount or the fact that the price required a roundtrip purchase. Because the additional fees and requirements were not in the Tweet or directly linked, Spirit violated the DOT rule. Spirit paid $50,000 to settle the matter.

Omitting information may also be misleading by implication. Accordingly, a factual statement in an ad that lacks competent evidence to support its claims is also considered deceptive. If your Facebook page says “4 out of 5 doctors recommend the Miracle Mud Mask offered exclusively by our on-site spa,” consumers (and the FTC) will expect these “doctors” to be dermatologists cited in a peer-reviewed journal rather than French medievalists polled after attending a conference in your hotel. Whatever you say in your advertising claim itself, keep in mind what the statement implies to a reasonable consumer.

\begin{center}
\includegraphics[width=0.5\textwidth]{image}
\end{center}

\textbf{Endorsements & Testimonials}

Whether the goal is 15 minutes of fame or building long-term brand loyalty, the marketing power of social media lies largely in its ability to efficiently generate and effectively circulate endorsements and testimonials. The rules for traditional media still apply. In its most basic form, a false endorsement conveys the impression that a “person” endorses an advertiser’s goods or services when in fact that person does not.\textsuperscript{\textit{iix}} A false endorsement can take many forms, from a misapplied Good Housekeeping Seal to celebrity name dropping. The list includes the use of any word, term, name, symbol, designation of origin, description of fact, or device that is likely to cause confusion or mistake as to a person’s affiliation, connection, association with or a person’s sponsorship or approval of any good, service, or commercial activity. You may want to honor Michael Phelps by naming your poolside hookah-lounge after him, but without his express consent, you would likely run afoul of the Lanham Act’s prohibition against false endorsement.

The dawn of the 21\textsuperscript{st} century saw exponential growth in the number of users of social media, and advertisers were quick to follow with paid endorsements, sponsored blogs, and interactive marketing. The FTC had first published its Guide Concerning Endorsements and Testimonials in 1980 when we were yet to rocket through cyberspace in our Commodore 64 at 56 Kbps and Mosaic was science fiction. At that time, endorsements were generally understood to come from the advertisers themselves. But the boom in consumer-generated media made it less clear who was pitching the product. Where an
endorsement in a traditional TV ad may not have required disclosure because we all knew it was an ad, the same endorsement in social media might require a clear statement that it’s sponsored by the advertiser. So, in 2009, the FTC updated its guidelines shedding light on how the old rules would apply to new media. The revisions addressed how consumer content might be considered an endorsement subject to the FTC act and when “material connections” between the advertiser and the reviewer or endorser must be disclosed.

Advertisers leveraging consumer reviews, paid endorsements, sponsored blogs, or celebrity Tweets need to be aware of the line between legitimate Liking, Pinning, and Vine Reviews and unlawful astro-turfing (companies using consumers or pretending to be consumers to give opinions of themselves or competitors). Again, the golden rule is to give the consumer a meaningful choice. Advertising law assumes that paid endorsements have a different effect on consumer choice than unpaid testimonials. The consumer must therefore be able to tell the difference to have a meaningful choice. As mentioned above, the advantage of social media is that they blur the line between ad and native content; so it’s important to understand first what falls under the rules for advertising and what does not.

The first question is: “Is it an endorsement?” For purposes of false advertising law, an endorsement is a statement that a consumer is likely to believe is made by someone other than the sponsoring advertiser, even if the statement is identical to that of the sponsoring advertiser. A favorable Tweet about a winery, for example, would be considered an endorsement if a reasonable consumer would believe the person is sharing his or her own view, even if the Tweet simply quotes the winery’s bottle label itself.

Endorsements may also be nonverbal. A mere demonstration of a product by a known professional or celebrity suggests that the person would not use the product unless he or she endorsed it. If a guitar manufacturer’s home page, for example, offers a link to a video of Leo Kottke playing an instrumental tune on the manufacturer’s acoustic guitar, consumers may believe Mr. Kottke endorses that brand of guitars.

In contrast, when Flo extols the virtues of Progressive insurance, she is not making an endorsement because she is widely known as the spokesperson for Progressive. Consumers would not likely believe that she’s expressing her own views on comprehensive coverage. Similarly, a dramatization showing two
anonymous urbanites comparing t-shirt stains at a Laundromat is not an endorsement because no one expects either of them to use the advertised detergent at home. They key factor distinguishing and endorsement from any other advertising statement is whether the consumer believes she is hearing the genuine opinion of a real person or simply the words of the advertiser.

The same rules for truthful advertising apply to endorsements. An endorsement must, of course, reflect the honest opinion of the speaker. So be careful if you edit reviews or testimonials for marketing purposes: quoting from a review or testimonial is false advertising if it does not accurately reflect the speaker’s opinion. Also, be careful to keep paid endorsements current. An endorsement from a user of a product is valid only as long as the advertiser reasonably thinks the endorser still uses the product endorsed. If, for example, you obtain a celebrity endorsement, but you then modify or alter the product in a material way (even if you consider the change an improvement), you may be found liable for false advertising if you fail to confirm that the celebrity still recommends the product. The same is true if the endorsement mentions a competitor’s product that is later modified or altered. Be sure the celebrity still prefers your product.

**Material Connections**

The FTC views social media as forums in which consumers expect to find genuine user content, so “material connections” that might influence consumer choice must be disclosed. If a reasonable consumer would not otherwise expect that the endorser received payment or other compensation, the “material connection” between advertiser and endorser must be disclosed. The FTC guidelines give the example of a tennis star stating in a TV ad that her Lasik surgery at a particular clinic has improved her game; consumers would expect this to be a paid ad, and no disclosure is necessary. But what if the tennis star tweets the same comment? If the tennis star was paid by the clinic to do so, that fact must be disclosed. The FTC deems Twitter, Facebook, and LinkedIn to be forums in which consumers expect to hear real people giving real opinions about people, products, and services. As a result, advertisers need to consider whether a disclosure of a material connection with the endorser is necessary.

Your employees may be a willing and reliable source of positive reviews, and there’s nothing to prohibit the practice per se. But if a reviewer is an employee of the advertiser or paid by the advertiser that material connection must be disclosed or the employer/advertiser may be liable for false advertising. Employers should consider including a social media policy in their employee handbooks that provides guidelines for reviews and endorsements of the employer’s products or services.

In contrast to employee reviews, consumer reviews on a personal blogs are generally not considered endorsements. Because consumer reviews earn higher credibility, they may be closely scrutinized for any connection to the product manufacturer or service provider whose goods and services are the subject of the endorsement. Where the consumer speaks positively about a product she bought herself, there is of course no material connection to disclose. Even if our blogger got free trial in the mail, that fact need not necessarily be disclosed. If, however, the blogger joins a network marketing program and gets free stuff in exchange for writing reviews, then a positive review—even if written voluntarily—
would be considered an endorsement. Amazon, for example, invites select reviewers to join its Vine program. Amazon Vine reviewers receive free items in exchange for voluntary reviews. Amazon discloses this material connection by identifying Vine reviews with “Vine Customer Review of Free Product” with a link to its Vine description and policy page.

Don’t neglect to pay attention to what your marketing firm is doing. A marketing firm, for example, may utilize a network marketing program, matching your company with individuals who will review company products and post their opinions on their social media accounts. If the claims made by the consumer reviewers are not substantiated, both your company and the reviewer may be liable. Make sure that your marketing service is providing reviewers with guidelines for their review, and you should monitor reviews for compliance with the policy.

Negative reviews of an advertiser’s own products are a brand issue and do not raise false advertising concerns. But comparative reviews do. Paying for negative reviews of a competitor’s goods or services may well result in a defamation claim, which is a form of false advertising. If you create a forum for consumers to post reviews of competing products or services, monitor the posts. If, for example, you host your own blog, review site, bulletin board, YouTube channel, or other social media site, you need to be aware of user content that provides negative reviews of competitor products. Advertisers can be liable as a result of content they did not create posted to social media sites. If you host a forum for reviewers, you should post guidelines for reviews and monitor user content submitted to ensure that claims are substantiated.

**In Conclusion: Best Practices**

- Keep it real. Puffery—this is ABSOLUTELY THE MOST AMAZING AND WONDERFUL HOTEL IN ALL THE UNIVERSES—is OK, but if you make a statement of fact, make sure you can back it up with real evidence. If you’re using testimonials, they should be real and accurately reflect the consumer experience.

- Don’t set up fake social media accounts to criticize competitors or boost your ratings.

- If you use native content, think about whether consumers will recognize it as paid advertising. When in doubt, use hashtags, such as “#paid ad”

- If you offer an incentive or pay endorsers, advise them of their responsibility to disclose the incentive or payment. In addition, have a blogger policy linked on your website and keep endorsements current.

- Tell your ad agency or outside marketing profession to include policies and disclosures in any network or social media marketing campaign.

- Monitor your brand in social media and police statements that might give consumers false or misleading information about your product or services; especially true for endorsers who’ve received free gifts, payments, or other incentives.

- Document your efforts: keep a record of your efforts to advise and police.

- Periodically review marketing statements for accuracy, especially comparative advertising.
About HSMAI
The Hospitality Sales & Marketing Association International (HSMAI) is committed to growing business for hotels and their partners, and is the industry’s leading advocate for intelligent, sustainable hotel revenue growth. The association provides hotel professionals & their partners with tools, insights, and expertise to fuel sales, inspire marketing, and optimize revenue through programs such as HSMAI’s MEET, Adrian Awards, and Revenue Optimization Conference. HSMAI is an individual membership organization comprising more than 7,000 members worldwide, with 40 chapters in the Americas Region. Connect with HSMAI at www.hsmai.org, www.facebook.com/hsmai, www.twitter.com/hsmai and www.youtube.com/hsmai

About Garvey Schubert Barer
Operating from six strategic locations — Anchorage, Beijing, New York, Portland, Seattle, and Washington, D.C. — Garvey Schubert Barer represents clients locally, nationally and internationally. Members of Garvey Schubert Barer’s Hospitality, Travel and Tourism practice group are well-versed in the lodging, restaurant and tourism industries and are focused on the variety of day-to-day challenges faced by national and international owners and operators long after the “deal closes.” In addition to the traditional real estate acquisitions, dispositions and financings that form the basis of most hospitality practices, members of the Hospitality, Travel and Tourism practice have years of collective experience (in both in-house and outside business and legal roles) with management agreements, franchise agreements, wholesale and distribution agreements, sales and marketing agreements, leases, labor and employment, intellectual property licenses and transactions, and regulatory licenses and permits. Members of the Hospitality, Travel and Tourism practice represent, are members of and frequently speak to many of the lodging, restaurant and tourism industries’ leading associations and trade groups.
About the Author
John Crosetto is a litigator with experience representing clients with disputes over trademarks, trade dress, licensing, trade secrets and non-competition agreements. John has a varied clientele that includes software and hardware companies, equipment manufacturers, video game companies, and creative firms. He can help minimize litigation risk and find alternative solutions to intellectual property disputes.

John was counsel in UtilX Corp. v. Novinium, (W.D. Wash.), which involved patent infringement, false advertising, and unfair competition claims, as well as anti-trust counterclaims, related to methods for underground cable rejuvenation by fluid injection. He also acted as counsel in Rosetta Stone, LTD v. Topics Entertainment, Inc., (E.D. Va.), a trade dress and trademark case in which the parties disputed rights to the color yellow for language learning software packaging. Mr. Crosetto acted as lead counsel in Strategic Marketing Partners, Inc. v. Greenwave LLC and Northwestern Brothers Marketing LLC, (K.C. Sup. Ct., Wash.), a dispute related to gaming software based on the television series The Deadliest Catch.

John has a Ph.D. in Comparative Literature. Before pursuing his career as an attorney he taught language, literature, aesthetics, and critical theory in the Department of Germanics at the University of Washington and the University of Colorado.
The focus in this article is unfairness to consumers. The FTC addresses unfairness to business competitors through antitrust law and policy. FTC Policy Statement on Unfairness, n.4, Dec. 17, 1980.

Social media are one form of native content, which the FTC is currently examining. In December 2013, the FTC held a one day workshop Blurred Lines: Advertising or Content? “to examine the blending of advertisements with news, entertainment, and other editorial content in digital media, referred to as “native advertising” or “sponsored content.”

See Facebook v. MaxBounty (fake Facebook account)
See POM Wonderful v. Coca-Cola/Minute Maid (Minute Maid’s “Pomegranate Blueberry” beverage offered by is actually 99 percent apple and grape juice).
14 CFR 399.84.
See Lanham Act, Section 43(a).
Section 5 of the FTC Act (15 U.S.C. 45).
See, e.g., Doctor’s Associates v. QIP Holder (C. Conn. 2006).