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WITH THE FTC WATCHING FOR DISCLOSURE VIOLATIONS, MARKETERS CAN LESSEN THEIR LIABILITY RISKS

by Richard S. Eisert

If a brand hands off advertising and marketing tasks to an online network, can it also hand off legal liability? The recent actions of the Federal Trade Commission (FTC) provide an answer: Not so fast.

The FTC actions serve as a reminder that advertisers and their agencies remain potentially responsible for the actions of their networks, including affiliates and influencers. The underlying message from the FTC is clear: Advertisers cannot wash their hands of responsibility by delegating certain marketing responsibilities to networks.

Agencies and brands must be proactive in minimizing the risk associated with using such networks. The good news is that greater scrutiny and monitoring by advertisers now will ultimately benefit the entire ecosystem.

GREATER SCRUTINY

Over the past 18 months, three high-profile actions show the FTC's heightened focus on the use of networks by advertisers.

In September 2015, the FTC targeted Machinima, a multichannel network on YouTube, for allegedly failing to disclose that its influencers were being paid to produce and upload endorsements of the Xbox One. Ultimately, the FTC only recommended enforcement against the network, and not the advertiser, Microsoft, or its agency.

The FTC emphasized that the failure of Machinima's influencer network to make adequate disclosures was "in spite of, and not in the absence of, policies and procedures designed to prevent such lapses." Specifically, Microsoft had implemented a robust compliance program and trained and monitored network personnel.

The Machinima case illustrates that there are certain actions advertisers can take to avoid liability for their networks' actions. Unfortunately, too many advertisers fail to take proactive steps and the FTC has been aggressive in bringing enforcement actions against them.

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For example, in March, retailer Lord & Taylor settled with the FTC over charges that it deceived consumers by paying 50 online fashion influencers to post Instagram pictures of themselves wearing the same dress without disclosing it had given each influencer the dress and money in exchange for their endorsement. The FTC alleged that Lord & Taylor failed to adequately monitor or train the influencers hired on their behalf.

The FTC's scrutiny doesn't apply just to influencer networks.

In October, LeadClick Media, the operator of an affiliate marketing network, was held accountable for deceptive practices by the third-party publishers in its network. Specifically, a circuit court ruled that LeadClick remained liable when network members created fake news sites to advertise its products. Although LeadClick did not create the offending material, the court held that LeadClick was aware of and approved of the use of the fake sites and, on occasion, provided affiliates with content to use on their fake news pages. LeadClick had the authority to control the deceptive content of the fake news sites but still allowed the deceptive content to be used.

The Machinima, Lord & Taylor and LeadClick cases make clear that all members of the network ecosystem potentially remain liable. But these cases also point to steps that agencies and advertisers can take that not only limit their liability but also benefit the broader network community by increasing the odds that best practices will be followed.

TRAIN AND MONITOR NETWORK MEMBERS

Adequate monitoring and training is essential. At a minimum, advertisers should push networks to agree that their members will comply with legal and marketing guidelines developed by the network or the advertiser. If the network has its own guidelines, they should be reviewed and revised as necessary by the advertiser to ensure they are thorough.

The degree to which a network should be monitored will vary, but the FTC requires that advertisers make at least a "reasonable effort to know what [network] participants are saying."

TERMINATE NONCOMPLIANT RELATIONSHIPS

Advertisers should negotiate for broad termination rights. If illegal or noncompliant activities are detected and can't be corrected, the advertiser should immediately terminate the agreement.

Of course, a termination right can only be exercised if the advertise is aware of wrongdoing. Therefore, in addition to actively monitoring their networks, advertisers should ensure that the networks have an express obligation to report any violations they are aware of.

IMPLEMENT APPROPRIATE LEGAL AGREEMENTS

Advertisers must negotiate agreements with networks heavily to ensure that risk is adequately allocated. Applicable legal obligations should apply not just to the network but also the network participants.

For example, an agreement between an agency and an influencer network provider should ensure that the influencers have express obligations to comply with FTC disclosure rules. Similarly, the advertiser should have remedies in case any network participant violates its obligations. At the very least, this will incentivize the network to monitor and train its members.

Advertisers should know that the FTC continues to scrutinize the actions of networks and that all members of the network chain, from advertisers all the way down to individual network members, can be liable for wrongdoing. The goal is to ensure that everyone in the ecosystem is playing by the rules.

However, by proactively negotiating for adequate protections, training and monitoring network members and promptly terminating any noncompliant relationships, advertisers and agencies can insulate themselves from liability even when the networks and network members cross the line.

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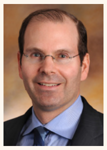

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