

Mixed Reality: Navigating Influencer and Native Advertising in a Virtual World

7th Edition: Trends in Marketing Communications Law

In a marketing landscape dominated by social and digital platforms, the lines between advertising and content — and reality and virtual reality — are becoming more and more blurred. When influencers (formerly known as “bloggers”) and online advertorials were new on the scene, the Federal Trade Commission (FTC) issued guidance to help marketers in this emerging space comply with their disclosure obligations. Now, much of that early wisdom has become sorely outdated. While digitally fluent consumers are savvy to integrated marketing techniques — even coming to expect an influx of sponsored content from influencers — the ongoing development of new media formats and the sustained desire of marketers to continue pushing boundaries means that new and novel questions about disclosure obligations are constantly arising.

In today’s digital landscape, the worlds of native advertising and influencer marketing are merging. For example, publishers are increasingly working with influencers to both appear in and help promote custom native advertising content to their followers, as well as the publisher’s existing viewers. But for a campaign to be legally compliant, publishers must disclose when native content has been paid for (and accurately convey the degree of the brand’s involvement), and influencers need to disclose their own material connections with an advertiser. In 2019, the FTC finally settled its enforcement action against Creaxion Corporation and Inside Publications LLC with respect to hybrid influencer and native campaign.

Beginning with its series of letters to influencers in 2017, the FTC has made it clear that, along with marketers and agencies, it does and will continue to hold influencers individually accountable for compliance. As recently as November 2019, the FTC launched a new microsite directed to influencers, with updated and easy to understand guidance about why disclosures are important and how to make them in an appropriate and compliant manner. The microsite specifies that influencers — or those responsible for managing influencer accounts — no longer have an excuse to feign ignorance. In addition, the FTC announced a review of its Endorsement Guides at the beginning of the year, and sought public comments through June 22nd, 2020 on whether changes need to be made to them, indicating the possibility of new developments for the future of branded content.

To add yet another layer, the use of real people as influencers may find itself at an inflection point. Agencies and marketers have begun experimenting with virtual influencers — avatars like Lil Miquela, who have huge social media followings even though they are not real people. So far, the FTC’s party line is that the usual rules will apply.

The regulators have also demonstrated a sensitivity toward the increased risk of deception that can result from fake online profiles and fraudulent online metrics. For example, in 2019, the FTC followed New York and Florida attorneys general in bringing enforcement actions against Devumi, LLC, a company that traded in the sale of social media bots and fake followers. The FTC also brought an action against Sunday Riley Modern Skincare and its CEO over charges that company employees posted fake reviews of the company’s products on the Sephora website at the CEO’s direction.

Key Takeaways

- Entering the new decade, we will continue to increasingly interact with and confront complex new digital technologies that make it difficult to differentiate the real from the unreal.
 - Along with the use of new technologies, such as dynamic advertising, artificial intelligence and machine learning, marketers will be faced with new challenges when handling and monitoring native advertising and influencer marketing campaigns.
 - Regulators will continue to keep an eye on the new media landscape, ready to issue ongoing guidance and recommendations, and to pursue enforcement action when marketers, publishers or influencers cross the line.
 - The FTC's decision to revisit the Endorsement Guides may well herald substantial changes to address recent developments in technology and how consumers perceive new media.
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