



TIP SHEET

an informational newsletter on intellectual property matters **NOVEMBER 2009**

INTELLECTUAL PROPERTY PRACTICE GROUP

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Expensive Pitfalls of Online Endorsement and Testimonial Advertising

More and more companies are seeking ways to establish an Internet presence to promote their products and services. The industry phrase the “Twitter Effect” refers to the instantaneous consumer-to-consumer feedback that drives customer decisions, such as instantaneous reviews of a movie on its opening night. Forward-looking companies are increasingly searching for ways to make this instant feedback work to their benefit. A popular path is for a company to have its products reviewed by well-known bloggers or social media personalities, i.e. people who have well established followings on social media networks such as Facebook®, Twitter® or MySpace®. While this may be an effective way to generate “buzz,” online endorsement and testimonial advertising is not without its legal hazards.

Revised Federal Trade Commission (FTC) rules may impact company and consumer approaches to Internet advertisements. Under recently revised FTC rules found in 16 C.F.R. § 255, reviewers must disclose if any material connection exists between the reviewer and the products or services being reviewed, or else face stiff penalties. The FTC revisions reflect increased enforcement efforts to prevent false or misleading testimonial advertising or product reviews and the ease of disseminating product reviews on the Internet. For example, in a recent New York investigation, Lifestyle Lift agreed to pay more than \$300,000 in penalties and costs based on the publishing of fake reviews on the Internet. According to reports, Lifestyle Lift paid employees to engage in creating advertising in the form of consumer testimonials and spread these testimonials across the Internet, which is sometimes referred to as “astroturfing.”

To conduct an initial FTC vulnerability assessment, companies and reviewers alike should consider whether they engage in the following:

- Providing customers with products or services for review, free of charge
- Promoting the goods or services of others on the Internet
- Maintaining a blog or social media account featuring products or services
- Releasing customer reviews of your products or services online
- Having employee or corporate websites or social media accounts where products or services are evaluated

If the companies and reviewers engage in any of the above, the FTC disclosure requirements may impact these activities. Under these revised regulations and guidelines, companies can be held responsible for product and service reviews which they have solicited.

In order to avoid potential pitfalls, we recommend companies or reviewers do the following:

1. Establish procedures to clearly notify product reviewers that they must disclose having received some form of compensation for the review, whether in the form of discounts on products or services, free products or services or other compensation, or face FTC liability.
2. Notify employees who review the companies' products or services, whether on their personal blog or on behalf of the company, that they should include an appropriate disclosure of the connection between the company and employee in any reviews.
3. Take steps to monitor and track social media or other online product reviewers to ensure the technical accuracy of their reviews, verify their compliance with your disclosure policy, and evaluate the efficacy of the campaign.
4. Understand that if you review a product or service online, you are required to disclose any compensation you have received for the review.

This should not be seen as a comprehensive task-list to avoid liability, but rather as an advance notice to identify potential problems. You may review these regulations on your own at these websites (PDF downloads):

- <http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>
- <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>

Online advertising through endorsements and testimonials can greatly enhance your business presence on the Internet. Doing it smartly can greatly protect your company's bottom line. If you should need to discuss the particulars of your operations with an attorney, please feel free to contact us.

McAfee & Taft Intellectual Property attorneys Ryan Lobato, Richard Miller and Andy Peterson contributed to this article.

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