Litigation Alert

The FTC Pursues Online Endorsements by Undisclosed Insiders

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The Federal Trade Commission recently signaled that it may begin cracking down on the increasingly common practice of pumping up a product with online reviews that purport to be from customers but are really posted by friends, family or employees of the vendor. On August 26, 2010, the FTC announced that it had reached a settlement with Reverb Communications, Inc. ("Reverb"), a video game PR agency, and its principal, Tracie Snitker, regarding Reverb's online marketing activities. The settlement prohibits Reverb from misrepresenting its status as an ordinary consumer in connection with advertising and from making representations about an endorser of a product without disclosing any material connection between the endorser and the producer, and requires Reverb to remove any previous endorsements that do not comply with the order.

According to the underlying FTC complaint, Reverb employees posted favorable reviews of clients' games to the iTunes Store without disclosing their connection to the developers of the games reviewed. By failing to disclose that affiliation, the FTC alleged, Reverb falsely represented that its reviews were the independent opinions of ordinary consumers, and acted deceptively by failing to disclose a material connection between the reviewer and the developers of the reviewed games.

The FTC's guidelines for the use of endorsements, issued in 2009 at 16 CFR §255, require that an endorsement, defined as an advertising message that consumers are likely to believe reflects the opinions of someone other than the advertiser, must reflect the honest opinion of the endorser, may not contain any representation that would be deceptive if made by the advertiser, and must disclose any connection between endorser and seller that might materially affect the endorsement's credibility. Notably, the complaint did not allege that the posted reviews did not reflect the poster's honest opinion, but rather that they misrepresented the poster's status as an ordinary consumer and failed to disclose a material connection to the seller.

The Reverb action confirms that the FTC intends to apply the same standards to online advertising that it does to traditional advertising venues, and suggests that it may do so more aggressively in the future. The relatively light sanction imposed on Reverb may be in part intended as a warning to online marketers, putting them on notice that more vigorous oversight lies ahead.

The implications of the Reverb settlement extend beyond the direct posting of online reviews. Although the FTC complaint did not name Reverb's clients, under FTC guidelines, sellers may be liable for misleading endorsements of their products (*see* 16 CFR §255.5, example 7). Online sellers that use third parties to promote their products online should monitor what those proxies are doing. The FTC's move here raises particular concern for companies that rely on word of mouth, especially early in a product's lifecycle, when online buzz often begins with individuals connected to the producer – employees, friends, family, beta testers, etc. It seems unlikely that a company would be held liable for unsolicited comments by connected individuals, but a "spread the word" campaign without proper disclosure could run afoul of FTC guidelines.

The text of the complaint and agreement can be found at http://www.ftc.gov/os/caselist/0923199/index.shtm. The agreement is open for public comment until September 27, 2010 at https://ftcpublic.commentworks.com/ftc/reverb.

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