

Hot Topics, Hot Takes: How Brands Can Approach Three Hot Button Issues in Advertising Law

Tiffany Ferris

From billboards to television screens, social media feeds and everything in between, advertising is everywhere. While this form of regulated speech is always subject to the requirements of being truthful, not misleading, and substantiated, ebbs and flows in enforcement actions from the many bodies involved in policing advertising reveal clear trends about hot button issues that are likely to draw scrutiny. As 2024 winds down, advertisers should pay special attention to issues around green marketing, fake reviews and endorsements, and dark patterns, and should take steps to shore up communications and practices in those areas now.

It's Not Easy Being Green.

Green marketing—the practice of promoting a brand or product’s positive environmental impact or sustainability—continues to have its time in the spotlight. With more consumers expressing preference for brands and products that contribute to sustainability, marketers want to tout the efforts of their brands and benefits of their products. However, the challenges of making claims relating to environmental benefits and sustainability seem to continue to grow.

In the United States, the enforcement against false and misleading green claims can come from a veritable who’s-who of challengers. Among the many players in the game are the Federal Trade Commission (“FTC”), Securities and Exchange Commission, state attorneys general, competitors, and even consumers. As of this writing, we continue to await long-expected updates from the FTC for its Guides for the Use of Environmental Marketing Claims, which could provide advertisers with valuable guidance on how to make properly substantiated and nondeceptive environmental and sustainability claims. For now, though, advertisers are left to sift through often inconsistent guidance from federal agencies, courts, and the National Advertising Division.

Outside of the United States, the situation may be a bit clearer, and perhaps more restrictive. In 2024, Canada amended The Competition Act to take on green claims. There, advertisers making green claims about a product must substantiate with an “adequate and proper test,”¹ while claims about the benefits of a business or business activity must be substantiated “in accordance with internationally recognized methodology.”² In Europe, the EmpCo Directive prohibits “generic environmental claims” unless supported by “recognized excellent environmental performance.”

Advertisers who want to make green claims should do so carefully. Claims should be tailored and specific, benefits should not be overstated, and all claims should be adequately substantiated. For global or multi-jurisdictional campaigns, advertisers should be aware of how standards may differ across the board and decide if campaigns should be tailored to each jurisdiction or designed with a “lowest common denominator” approach in mind.

Faking It Hurts More Than It Helps

Earlier this year, the FTC issued a final Rule³ that broadly prohibits the false reviews and testimonials. Fake reviews have long been an enforcement priority for the FTC, as they have the potential to damage both consumers and competitors, and the finalization of a formal Rule enables the

¹ R.S.C., 1985, c. C-34 74.01(1)(b.1).

² *Id.* at (b.2).

³ 16 C.F.R. § 465.

Commission to seek monetary penalties from violators to the tune of \$51,744 *per violation*. While the Rule prohibits what might be obvious—creating, buying, selling, or disseminating obviously fake reviews and testimonials, like those generated by artificial intelligence or buying positive reviews—it also prohibits some behaviors that might not seem so obvious.

As one example, the Rule prohibits “review suppression.” This includes using threats and intimidation to prevent or remove negative consumer reviews, but also prohibits businesses from misrepresenting that certain reviews constitute most or all reviews. For example, a business touting and displaying “thousands of 5-star reviews!” while also suppressing negative reviews would likely be guilty of review suppression.

Another prohibition that advertisers may not expect out of this rule is that against the “misuse of fake indicators of social media influence.” Buying fake followers on social media, using artificial intelligence tools to inflate engagement, and knowingly partnering with influencers who engage in these behaviors can also raise issues.

Advertisers should take the time to review and supplement their internal policies now. What policies are in place for review collection and display? Consider prohibiting incentives for positive reviews and ensure display policies are in place that allow consumers access to all reviews—even those that are negative. Influencer marketing program policies should also be reviewed. Consider what your brand requires of influencers and consider implementing guardrails around indicators of influence that are susceptible to being faked. For example, if your brand requires a certain follower count of an influencer, consider whether it makes sense to include audits as part of the influencer selection process to ensure followers are real, or whether contracts should prohibit purchased followers and/or indemnify against such behaviors.

Dark Patterns Cast Long Shadows

Enforcement is on the rise against so-called “dark patterns,” deceptive trade practices marketers use to convince consumers to act in ways that they otherwise would not. Examples of dark patterns include complicated subscription cancellation processes, design elements that subvert choice (like confusingly worded questions that ask consumers to “Continue” or “Confirm”) and similar tactics. In 2023, FTC obtained an \$18.5 million settlement with Publishers Clearing House over its use of dark patterns that misled consumers into believing that a purchase was necessary to enter one of its sweepstakes. Earlier this year, FTC took enforcement action against Adobe alleging it failed to clearly and conspicuously disclose terms of its subscription plans and made cancelling those plans unfairly difficult.

Advertisers should pay special attention to their user interfaces and ensure that design choices prioritize clarity and conspicuous delivery of material information to consumers. For example, pricing information should be clear. Unavoidable and mandatory fees should be disclosed upfront. Ensure that design choices are aimed at consumer clarity. If asking a consumer “Are you sure you want to cancel?” the button marked “YES” should probably not be displayed in a small red box while “NO” is displayed in a green one. If a product or service is offered on a subscription basis, a good rule of thumb is that cancelling the subscription should be as simple as starting it.

About the Author



Tiffany Ferris

Partner and Chair, Trademark and Advertising Practice Group

Dallas

+1 214.651.5152

tiffany.ferris@haynesboone.com

Tiffany Ferris is the chair of Haynes Boone’s Trademark and Advertising Practice Group. Tiffany’s practice focuses on advising clients in all aspects of brand management and promotion. From analyzing potential risks associated with advertising claims to evaluating the availability of a potential trademark, Tiffany works to help her clients build, maintain, and promote their brands. Clients rely on her through all stages of their brand’s lifecycle, including the selection and protection of brands, as well as the creation and defense of advertising and promotional programs. Tiffany has been recognized by *Chambers USA* as well as *World Trademark Review’s WTR 1000*, Globe Publishing, Ltd. (2023) and noted that she “brings her mastery of advertising law to bear when advising on commercial trademark issues.”