FEDERAL TRADE COMMISSION UPDATES ONLINE ADVERTISING DISCLOSURE GUIDELINES; ADDRESSES MOBILE DEVICES AND SOCIAL MEDIA

To Our Clients and Friends:

On March 12, 2013, the Federal Trade Commission ("FTC") updated[1] its advertising disclosure guidelines for mobile and other online advertisers. The new guidance, *Disclosures: How to Make Effective Disclosures in Digital Advertising*, explains how advertisers can make disclosures "clear and conspicuous" to avoid deceiving consumers. In particular, the guidance addresses the expanding use of mobile devices with small screens and the rise of social media marketing. In this regard, the guidance includes a helpful appendix of twenty-two illustrative mock advertisements.

The guidance emphasizes that the consumer protection laws embodied in the FTC Act apply equally to advertisements across *all media*, whether those advertisements appear via desktop computer, mobile device, or more traditional media such as print, television, telephone, or radio.

Disclosures that are required to prevent an advertisement from being deceptive, unfair, or otherwise violative of an FTC rule must be presented "clearly and conspicuously." Thus, under the new guidance, advertisers must ensure that disclosures are clear and conspicuous across *all* devices and platforms that consumers may use to view a given advertisement. If a particular platform does not provide an opportunity to make clear and conspicuous disclosures, advertisers should avoid that platform when disseminating advertisements that require disclosures.

Whether a disclosure meets the clear and conspicuous standard is measured by the disclosure's "performance--that is, how consumers actually perceive and understand the disclosure within the context of the entire ad." The guidance points to a number of factors in this regard. For example, advertisers should consider:

- the placement of the disclosure in the advertisement and its proximity[2] to the claim it qualifies;
- the prominence of the disclosure;
- whether the disclosure is unavoidable;
- the extent to which items in other parts of the advertisement might distract attention from the disclosure;
- whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure;
whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and

whether the language of the disclosure is understandable to the intended audience.

The new guidance provides a number of warnings and recommendations for advertisers using space-constrained advertisements, such as those appearing on mobile devices with smaller screens and those appearing on social media platforms. For example, where consumers must scroll in order to view a disclosure, the guidance suggests that advertisers "use text or visual cues to encourage consumers to scroll" to the disclosures. In addition, the guidance provides a number of considerations for evaluating the effectiveness of using hyperlinks to provide consumers additional information where disclosures are too complex to describe adjacent to the "triggering" claim. The guidance also suggests that advertisers avoid disclosing necessary information using pop-ups or Adobe Flash because consumer web browsers and mobile devices may be configured to block or otherwise cannot display such content.

Importantly, the guidance points out that "[d]isclosures must be effectively communicated to consumers before they make a purchase or incur a financial obligation." Thus, "[w]hen a product advertised online can be purchased from brick-and-mortar stores or from online retailers other than the advertiser itself, necessary disclosures should be made in the ad." Advertisers may not rely on disclosures made by a third-party retailer that is promoted in the ad -- even if the ad links directly to those disclosures on the third-party retailer's website -- because consumers may choose to purchase the product from a brick-and-mortar store or other unaffiliated online retailer. In that case, consumers may not see the disclosures prior to making their purchases. The same advice applies to "space-constrained ads," including sponsored "tweets." The guidance further provides that "[i]f the disclosure needs to be in the ad itself but it does not fit, the ad should be modified so it does not require such a disclosure or, if that is not possible, the space-constrained ad should not be used."

Gibson Dunn recommends that companies advertising online carefully review their policies and practices to ensure compliance with the updated FTC guidance.


[2] Although the 2000 guidance defined proximity as "near, and when possible, on the same screen," and stated that advertisers should "draw attention to" disclosures, the new guidance states that disclosures should be "as close as possible" to the claim it qualifies.
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FTC UPDATES ONLINE ADVERTISING DISCLOSURE GUIDELINES

The Federal Trade Commission (FTC) updated its online advertising disclosure guidelines to advise advertisers on how to make clear and conspicuous disclosures on mobile and social media platforms.

The new FTC guidance updates the original guidelines known as the Dot Com Disclosures and responds to the technological changes that have taken place since the guidelines were first introduced in 2000, including the rise of smartphones, tablets and social media marketing.

GENERAL PRINCIPLES

The updated guidelines set forth the following general principles for online and mobile:

- The consumer protection laws that apply to traditional media (e.g., television, radio, and print) apply equally to online and mobile media. For example, the FTC’s prohibition on “unfair and deceptive acts or practices” broadly covers marketing and promotional activities in all mediums, including online and mobile.

- If a disclosure is required, the disclosure must be clear and conspicuous.

- When evaluating whether a disclosure is clear and conspicuous, an advertiser should consider its placement in the ad and its proximity to the relevant claim. In the prior version of the Dot Com Disclosures, the FTC defined “proximity” as “near, and, when possible, on the same screen.” The FTC now advises that the disclosure should be “as close as possible” to the relevant claim.

- There is no set formula for a clear and conspicuous disclosure. Advertisers have flexibility to be creative in designing their advertisements provided that the necessary information is communicated effectively. In evaluating whether a disclosure is clear and conspicuous, advertisers should consider the prominence of the disclosure, whether it is unavoidable and whether other parts of the advertisement distract from the disclosure.

- Disclosures that are integral to a claim should not be communicated through a hyperlink. Instead they should be placed on the same page or immediately next to the triggering claim and should be sufficiently prominent so that the claim and disclosure are read at the same time. According to the FTC, this is particularly true of cost information and health and safety disclosures. Similarly, the FTC noted that disclosures that are required under the FTC Endorsement Guides (e.g., disclosure of material connection) should be included on the same page as the endorsement itself, even in the case of space-constrained ads such as tweets (e.g., #AD).

THE BOTTOM LINE

The FTC updated its online advertising disclosure guidelines to address the rise of smartphones, tablets and social media. While the general principles of traditional advertising law apply equally to online and mobile media, the updated guidelines provide specific guidance for making clear and conspicuous disclosures on mobile and social media platforms. Advertisers should carefully review this new guidance and keep these principles in mind when developing online, mobile and social media advertisements.
Hyperlinks should be obvious (e.g., different colors, underscored) and labeled to convey the importance, nature, and relevance of the information to which they link. Hyperlinks that simply say “disclaim,” “more information,” and “terms and conditions” may be inadequate to convey the importance of their corresponding disclosure.

If a disclosure is necessary to prevent an advertisement from being deceptive or unfair and, if it is not possible to make the disclosure clearly and conspicuously, then the advertisements should not be disseminated. This also means that if a platform does not provide the opportunity to make clear and conspicuous disclosures, that platform should not be used for advertisements.

CLEAR AND CONSPICUOUS DISCLOSURES

The updated guidelines also provide the following recommendations for making clear and conspicuous disclosures:

- Design advertisements so that “scrolling” is not necessary to find a disclosure; when scrolling is necessary, use text or visual cues to encourage consumers to scroll to view the disclosure.
- Keep abreast of empirical research about where consumers do and do not look on a screen.
- Recognize and respond to any technological limitations or unique characteristics of a communication method when making disclosures.
- Display disclosures before consumers make a decision to buy (e.g., before they “add to shopping cart.”)
- Repeat disclosures, as needed, on lengthy websites, in connection with repeated claims and if consumers have multiple routes through a website.
- If a product or service promoted online is intended to be (or can be) purchased from “brick and mortar” stores or from online retailers other than the advertiser itself, then any disclosure necessary to prevent deception or unfair injury should be presented in the ad itself — that is, before consumers head to a store or some other online retailer.
- Necessary disclosures should not be relegated to “terms of use” and similar contractual agreements.
- Prominently display disclosures so they are noticeable to consumers, and evaluate the size, color, and graphic treatment of the disclosure in relation to other parts of the webpage.
- Review the entire ad to assess whether the disclosure is effective in light of other elements — text, graphics, links, or sound — that might distract consumers’ attention from the disclosure.
- Use audio disclosures when making audio claims, and presenting them in a volume and cadence so that consumers can hear and understand them.
- Display visual disclosures for a duration sufficient for consumers to notice, read, and understand them.
- Use plain language and syntax so that consumers understand the disclosures.

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The U.S. Federal Trade Commission (FTC) released updated guidance on how to make online advertising and marketing disclosures “clear and conspicuous” to avoid consumer deception. The guidelines affect the structure and format of digital advertisements and marketing initiatives such as the use of endorsements and testimonials.

On March 12, 2013, the U.S. Federal Trade Commission (FTC) released updated guidance on how to make online advertising and marketing disclosures “clear and conspicuous” to avoid consumer deception. The FTC’s new .com Disclosures update the agency’s original Dot Com Disclosures issued in May 2000, to account for the emergence of new technologies and the extensive changes in the online marketplace since the 2000 guidelines were released.

As background, the FTC aims to protect consumers from deception in the marketplace through Section 5 of the FTC Act (15 U.S.C. 45), which prohibits “unfair or deceptive acts or practices in or affecting commerce.” Deceptive acts or practices may include false representations about goods or services, misleading price claims, sales without adequate disclosure, and bait-and-switch techniques. In an attempt to reduce consumer injury as a result of such practices, the FTC requires that companies make certain disclosures in advertising, marketing and sales efforts, regardless of the medium, and such disclosure must be “clear and conspicuous.” The FTC takes the position that if a required disclosure cannot be made effectively through a particular online format, then that format should not be used for advertising, marketing or sales.

Acknowledging that there is no set formula to create a “clear and conspicuous” disclosure, the .com Disclosures set forth criteria to evaluate whether a disclosure is made effectively in digital advertising. The criteria apply to endorsement messages and testimonials as well as traditional advertising conducted on online platforms.

Location, Location, Location. A disclosure should be placed “as close as possible” to the claim it qualifies. The FTC encourages placing a disclosure within the text of the claim itself if the disclaimer can be adequately conveyed by doing so. Advertisers should also be mindful of how digital advertising may be formatted differently on various devices. A disclosure should be viewable within the “same screen” as the claim it qualifies, without excessive scrolling or linking to other locations (except in limited instances). Advertisers should assume that consumers do not read an entire website or screen, and should place a disclosure in a way that increases the likelihood that consumers will notice it and relate it to the relevant claim.

Be Mindful When Separating Disclosures from Qualifying Claims. The FTC recognizes that in limited cases it may not be easy to incorporate disclosures into, or in close proximity to, a claim (e.g., particularly lengthy disclosures or disclosures that need to be repeated due to multiple triggering claims).

If scrolling is necessary to view a disclosure, the disclosure should be “unavoidable.” One example is to have consumers “click-accept” a disclosure before allowing a purchase, or before proceeding to the next webpage. Advertisers should also be familiar with the formatting capabilities of the technology they are using to provide the disclosures. Disclosures should not be contained in blockable pop-ups or formatted using technology that may display correctly on some devices but not others.

It is acceptable to hyperlink to a disclosure if the hyperlink appears proximate to the claim that triggers the disclosure and is formatted in a manner that makes obvious to consumers that the link can be clicked. The wording of the hyperlink should not state “Disclosure,” “Details Below,” “Terms and Conditions,” “Fine Print” or other such generic language that does not convey the importance, nature or relevance of the information. The best practice is to give consumers an indication of what the disclosure is about (e.g., “See below for important information on additional fees” or “Click here for limitations on product warranty”). Furthermore, a hyperlink should take consumers directly to the disclosure without additional searching or scrolling. If data shows that the hyperlinks are not being clicked, that may provide an indication that the disclosures are not being clearly and conspicuously conveyed to consumers. In those circumstances, advertisers should provide the disclosures to consumers in a different way.

In certain cases, the FTC strongly discourages use of hyperlinks—even if formatted properly. Advertisers should make every effort to include required health and safety disclosures on the same page as the qualifying claim(s), immediately adjacent to the claims made, with appropriate prominence. In addition, the FTC disfavors use of hyperlinking to disclosures that provide cost information, unless details about significant additional fees associated with a purchase are too complex to describe adjacent to the price claim.

Carefully Craft Space-Constrained Advertisements. Space-constrained ads are not immune from FTC disclosure requirements. Disclosures made in a space-constrained ad (e.g., a Tweet or SMS) should be placed in each message, in the beginning of the message, so the disclosure stays with the message if it is republished. Abbreviations that adequately inform consumers of the essence of a required disclosure may be used, however, the
meaning of the abbreviation must be generally understood by consumers. For example, “ad” and “sponsored” are likely to be generally understood by consumers whereas “spon” or “fs” may not immediately be recognized by consumers to mean “sponsored” or “free sample,” respectively.

Display Disclosures Prominently. Advertisers are responsible for drawing consumer attention to the required disclosures. The FTC suggests using size, font and color to distinguish a disclosure so it is not lost in the surrounding text. In addition, an advertisement should not distract consumers from the disclosure, for example, placing moving visuals behind a text disclosure. Advertisers should repeat disclosures if necessary, especially on lengthy websites. Essentially, disclosures should be prominent, unavoidable and in plain view so consumers can easily locate them, regardless of the technology platform.

Match the Medium. The concept of disclosures accompanying the triggering claim also translates to media selection. Audio claims should use audio disclosures; written claims should use written disclosures; and visual disclosures presented in video clips or moving visuals should appear for a sufficient duration to be noticed, read and understood by consumers.

What the Disclosures Mean in the Context of Endorsements and Testimonials

In light of the .com Disclosures, advertisers may wish to reexamine their internal guidelines and external instructions regarding endorsements and testimonials. In these guidelines, advertisers should:

● Emphasize that endorsers place the requisite relationship disclosure statement at the beginning of each endorsement message (i.e., the beginning of a blog, Tweet, text or post)
● Instruct Tweeting or texting endorsers to use clearly understood disclosure abbreviations such as #ad and #sponsored, and not #spon
● Tailor disclosure guidelines for endorsers to the form of media the endorser will use, e.g., bloggers should not need to use hyperlinks or abbreviated hashtags to make the necessary relationship disclosure statement, so guidelines should instruct bloggers to avoid these disclosure formats

Companies may be held liable for misleading statements made by third-party endorsers, so the best practice is to employ quality control processes to ensure the guidelines in the .com Disclosures are followed.

In light of this guidance, companies should review and update their internal guidelines, policies and practices regarding disclosures in the digital environment. If you have any questions regarding the FTC’s new .com Disclosures or this On the Subject, please contact the authors or your regular McDermott Will & Emery lawyer.

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GoldieBlox vs. Beastie Boys

GoldieBlox is brilliant. The company, which makes construction toys specifically for little girls in an aim to excite them about engineering, recently released a delightful, exuberant ad which has gone massively viral and might get them into the Super Bowl. The ad depicts three fierce, intrepid little girls setting off an elaborate Rube Goldberg machine made out of their girly-girl fare against a defiant rewrite of “Girls” by the Beastie Boys. The Beasties and their various labels and publishers, including Island Def Jam and divisions of Universal & Sony, sent GoldieBlox a letter which, according to GoldieBlox, threatened action for copyright infringement—so GoldieBlox sued first.

Boom! The internet exploded again. GoldieBlox, as it turns out, is not only brilliant at making and marketing toys. It’s also pretty brilliant at offensive PR.

Boom! The Beastie Boys fought back today with an open letter to GoldieBlox, stating that, while they were all for empowering women, “long ago, we made a conscious decision not to permit our music and/or name to be used in product ads.” They topped off their response with deft twist of the knife, noting that all they’d done was send a letter — “YOU sued US.” The Beastie Boys know from brilliant PR themselves, thanks.

What is at issue here, however, is which one is brilliant at fundamental legal reasoning. The Beasties claim the song is theirs to license as they see fit, for good or, er, ill. (Sorry.) Goldiblox argues that they have a right to use “Girls” under the doctrine of Fair Use. Who’s right?

No one knows! “Fair Use” is not what’s known as black-letter law, i.e., well-established, settled and clear-cut, with criteria that establishes whether you did or you didn’t, are or you aren’t. Think of violating a curfew. Were you out past
12 am or not? You may have had a good reason for violating the curfew—I swear, Mom, we lost track of time!—but the trigger is clear and precise.

Fair Use is more like murky, blurry, I'll-make-my-best-guess law. It is governed by four factors, each evaluated in conjunction with each other, and is decided on a case-by-case basis. That decision is made by a court at the behest of one of the parties. This is why we don’t know whether GoldiBlox’s use of “Girls” is fair use—it hasn’t been decided yet.

But we can make a Fair Use argument—and that is what I have laid out below.

**Fair Use: The Four Factors**

Briefly, in determining whether use of a work is fair, U.S. Code § 107 states that it needs to be done for purposes of “criticism, comment, news reporting, teaching, scholarship or research” and in accordance with the reasonable balancing of these four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

That’s it. This is an evaluation meant to specifically balance the individual right of the copyright holder against our collective interest in progress as a society. Notice that nowhere does the statute invoke the will of the original creator—like the honey badger, the statute don’t care. The rights accorded by copyright are not absolute.

Which is why the will of the Beastie Boys in their letter above is irrelevant here—even Adam Yauch. Yauch, who died in 2012, put a clause in his will prohibiting the use of his music for any “advertising purposes” after his death. That, however, only affects how his estate is authorized to license his work, which is a function of granting permission. In the case of a Fair Use claim, it is the Court which grants permission.

Okay. Let’s break it down.

1. **Purpose/character of the use**—Goldieblox has argued that the use was criticism and social commentary, both on the original sexist lyrics and on the state of girls toys today. True on both counts! This is a strong argument for them thanks to their strong social good mission. They will also argue that their use was transformative—i.e. that their own creative contribution to the work turned it into something distinct and singular. On page 6 of its complaint, GoldieBlox compares the original, sexist lyrics to “Girls” with the empowering, feminist version in their work (“Girls—to do the dishes, Girls—to clean up my room” vs. “Girls—to build a spaceship, Girls—to code the new app”). The point of parody is to transform—to use the meta-understanding of the source to deepen the meaning of the new work through contrast. In this way parody is almost always fair use, from Weird Al to 2 Live Crew (a case which held that their commercial parody was fair use despite being commercial). This is the strongest argument that GoldieBlox has.

But—the use is commercial. This is the strongest argument that the Beastie Boys have. Sure, GoldieBlox is pushing back on sexism, but the Beasties will argue that it’s just an excuse to use an unlicensed version of their song to sell their wares. That is usually expensive. If everyone could get around licensing fees by changing the words then Pringles could do a whole ad campaign for all the Pringle Ladies without paying Beyonce. All the Pringle ladies! All the Pringle ladies! Put your chips up! Actually, that would be a great ad. But it would be one that Pringles should have to pay for.

This is will be the most decisive point here. Is GoldieBlox’s song a transformative piece of social commentary or a cheap toy ploy? I come down for GoldieBlox here, as the Court did for 2 Live Crew in ’94. That said, fair use is decided on a case-by-case basis on all four factors so, onward.
(2) **Nature of the copyrighted work**—Here the court asks, is the expression factual or creative, i.e. is it a news report or an entire song used bar for bar? This one is harder for GoldieBlox to argue since they are using the work as the work, i.e. the song. ([As Corynne McSherry at the EEF notes](https://www.eff.org/deeplinks/2017/01/copyright-parody-girls), the fact that the song is almost 30 years old—it was released in ’86—might mitigate in favor of GoldieBlox, but arguing that Beasties have had ample time to collect on their work might be more of an argument for #4 below.)

The Beasties will say “They ripped off our song!” and this is where that argument is the strongest. Point, Beasties.

(3) **The amount of the copyrighted work used**—Goldieblox is weak here, since they used the whole thing (including the characteristic pause in the middle and the double-time “Girls” riff at the end—over which the eponymous Goldieblox character appears.) I disagree with the EEF’s McSherry here, who thinks that since the GoldieBlox song was shorter it counts as only using a part of the song. If you listen to the two side by side it’s clear that GoldieBlox’s tune is mapped out against the full arc of the original “Girls”—which actually is a point in favor of establishing parody, since good parody is a function of the details. This point is far more compelling in cases of artists who use only a part of a song and then build on it. Like, say, the Beastie Boys.

The Beasties will say, “You used the whole song!” And they will have a point.

(4) **Effect on the market**—Here’s where GoldieBlox catches a break. Because, seriously, the Beastie Boys really think this is going to cut in on the massive demand for “Girls”? C’mon. If anything, this just reminded millions of people of the song “Girls” and probably a bunch went to download it. I bet if someone checked out iTunes there would be a spike.

The Beastie Boys could say that having another unauthorized version out there will dilute the market, and maybe a generation of girls who would otherwise have liked “Girls” will now like another version of “Girls.” Maybe they could argue that if HBO’s “Girls” wanted to use “Girls” on “Girls” they might lose out on the licensing of “Girls” to the other “Girls.” Could happen.

Upshot: GoldieBlox has the edge here, based on its strong parody of “Girls” and the strong case law supporting that expressive right.

**Permission, Licensing & Good PR**

All of this is only relevant when there is a challenge. In the case of authorized use, the authorization comes from permission. The Beastie Boys should just grant theirs here. It’s not just about protecting their song from use in an ad—like it or not, their song has already been used in an ad. At this point, it’s about the PR. (Sorry, purists. Just being practical.) Yes, GoldieBlox used their song with neither permission nor payment for their own commercial ends. Yes, GoldieBlox pre-emptively filed to enjoing the Beastie Boys from pursuing a copyright claim. Yes, GoldieBlox asked the Court not only to find for them, but to have the Beasties & co. pay their attorney’s fees. (There is definitely some GoldieBlox backlash brewing—Felix Salmon thinks they’re behaving like entitled Silicon Valley bullies, and Amanda Clayman thinks the toys themselves need work.)

Even so, GoldieBlox has the decided PR edge—righteously proclaiming themselves on the side of progress, equality, and a nation of adorable little girls. This leaves the Beastie Boys as, sure, the artists who created the song—but also the artists who said that girls were for making their beds, doing their laundry, and satisfying their urges.

Besides, there’s a good chance that GoldieBlox will win. If they do, they won’t need the Beasties’ permission. So it’s in their interest to grant it and come out of this looking like the good guys. As GoldieBlox says in their now-famous song: “Don’t underestimate girls.”

*Rachel Sklar is a former lawyer, and also a former little girl. She is the cofounder of TheLi.st and writes frequently on tech, media and culture. *This is her favorite open letter from the Beastie Boys.*