

FEVER OVER VIRAL
MARKETING AND
OTHER TECHNIQUES
SPREADS: Rx FOR
COMPLIANCE

By

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WHAT IS "VIRAL MARKETING"?

"Viral marketing" has generally been used as a catch-all term to refer to, among other things, word of mouth marketing, buzz marketing, stealth and guerilla marketing, grassroots marketing, and influencer marketing. It refers to marketing techniques that seek to exploit pre-existing social networks to produce exponential increases in brand awareness, through viral processes similar to the spread of an epidemic. It is word-of-mouth delivered and enhanced online; it harnesses the network effect of the Internet and can be very useful in reaching a large number of people rapidly.

LAWS APPLICABLE TO VIRAL MARKETING

Federal Law: Section 5 of the FTC Act

Section 5 of the Federal Trade Commission Act applies to viral marketing:

- (1) Section 5 prohibits unfair or deceptive acts or practices affecting interstate commerce
- (2) "Deception" includes any misrepresentations or omissions likely to mislead consumers acting reasonably under the circumstances. "Omissions" occur when material information necessary to prevent a claim from being misleading is not disclosed.
- (3) "Unfairness" refers to advertisements that cause or are likely to cause substantial consumer injury, not reasonably avoided by the consumer, and not outweighed by countervailing benefits to consumers or competition.

To comply with the law, viral marketing campaigns must be neither unfair nor deceptive. However, given the nature of some viral campaigns (especially stealth and guerilla marketing, and some forms of word of mouth), an omission of a material fact is the most likely violation.

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Federal Law: FTC Endorsement Guides

According to FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising ("FTC Endorsement Guides"),

"an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."

Viral marketing is impacted by the Endorsement Guides in any situation where a person has been used to promote the advertiser's message in a manner that suggests that such person endorses or otherwise uses the advertiser's products. Any connections between the endorser and the advertiser that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) must be fully disclosed. When the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose any payment or promise of compensation.

COMMERCIAL ALERT REQUESTED INVESTIGATION

In 2005, the consumer group, Commercial Alert asked the FTC to investigate what it called buzz marketing, stating that "companies are perpetrating large-scale deception upon consumers by deploying buzz marketers who fail to disclose that they have been enlisted to promote products." Consumer Alert argued that the failure to disclose is fraudulent and misleading.

The FTC responded to Commercial Alert's request by indicating that a failure to disclose a relationship between a marketer and a consumer that was paid to discuss a particular product would be deceptive unless the relationship was otherwise clear from the context. In addition, the FTC emphasized that children may be a particularly vulnerable class of consumer and that the question of whether viral marketing to children is deceptive would be analyzed from the point of view of the ordinary child. The FTC concluded that it would determine whether law enforcement action against viral marketing was necessary on a case-by-case basis.

CAN-SPAM ACT

Another federal law, the CAN-SPAM Act requires, among other things, that any commercial message distributed via e-mail generally contain the following:

- (1) a notice that the e-mail is an advertisement or solicitation;
- (2) a valid physical postal address;
- (3) a functioning opt-out method; and
- (4) an accurate e-mail header.

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The Act applies to "commercial electronic mail messages" whose primary purpose is commercial advertising or promotion of a commercial product or service, including content on a website.

Viral marketing that uses "forward to a friend" e-mails as a component could raise compliance issues if the e-mail is "commercial" in nature so that CAN-SPAM is applicable. If a person is provided consideration or is otherwise induced to forward the e-mail to a friend, the e-mail must comply with the CAN-SPAM Act. Consideration includes rewards, coupons, discounts, payments or extra sweepstakes entries.

While inducing a person to forward the e-mail will also require compliance, a web page with a "Click here to forward" feature that allows someone to forward a message or link to someone else (and that does not provide any encouragement to do so) would not be considered an inducement.

STATE LAW

Certain state laws may also come into play with respect to specific types of viral marketing campaigns.

California Online Privacy Protection Act of 2003

If personally identifiable information is being collected online from California consumers, the California Online Privacy Protection Act requires any commercial website operator doing so provide individuals with notice of its privacy policies. A website's privacy policy must be posted in a "conspicuous" manner. Thus, for example, a fictitious website used in connection with a viral marketing campaign that collects such information would be required to comply with this California law.

Contractual Rights

Use of third party sites (such as chat rooms or message boards) or tools (such as e-mail accounts or voice over Internet protocol telephone service) are typically subject to specific terms and conditions that may prevent commercial uses. Be sure to check the applicable site's terms and conditions before proceeding.

Other State Laws

There may also be other state laws that can have an impact on a viral marketing campaign, such as laws relating to rights of privacy and publicity, which may arise if the campaign uses images or likenesses of individuals. The right of publicity is the right of every person to control the commercial exploitation of their identity. A person's right to publicity is violated by the commercial exploitation of that person's identity without written permission. The specific nature of a particular viral marketing campaign will dictate what specific state laws may come into play.

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SOCIAL NETWORKING AND MYSPACE.COM*What Are Social Networking Sites?*

A social networking site is one that provides a virtual community for people interested in a subject. Specifically, it provides a way for members to communicate by voice, chat, instant message, videoconference and blogs and may also serve as a vehicle for meeting in person. Either by invitation only or open to the general public, the term "social networking site" is in other words a "virtual community," a group of people who use the Internet to communicate with each other about anything and everything.

What is "MySpace.com"?

MySpace is best known as a young people's social network and an innovative way to market new music, movies or just about anything else. Even before Rupert Murdoch's News Corp. bought the parent company of the site for \$580 million, MySpace has been exploding in numbers. It is now at 85 million users and counting—the site grew 14% in April, adding 1 million new users every four days—and pushing forcefully into the lucrative realm of movie marketing.

While the results are impressive, the impact of advertising on attendance is always hard to measure. While Fox was among the first studios to take full advantage of what MySpace could do, now many studios and independent film distributors are exploiting the site's extraordinary reach, especially for teens. There is a wide range of spending possible—from simply setting up your own MySpace page, as "Stick It" writer-director Jessica Bendinger and actress Vanessa Lengies did in the spring, to Fox Searchlight's one-day ad buy on every single MySpace page for its March horror remake "The Hills Have Eyes," which cost about \$500,000.

Potential Legal Issues?

While marketers and advertisers are exploiting Social Networking sites such as Myspace by posting pages dedicated to their products and services, the terms and conditions of Myspace actually prohibit this practice. Specifically, the terms of use provide that—

"commercial use by members, other than that explicitly endorsed or approved by Myspace, will be removed from the site and may result in termination of membership as well as potential legal action for illegal or unauthorized use."

BRANDED ENTERTAINMENT*What is "Branded Entertainment"?*

Branded entertainment in television, sometimes referred to as product placement, product integration or strategic entertainment, can take many forms. At its most basic, branded entertainment can take the form of passive product placement, such as the prominent depiction of the Coca Cola name and marks in the program American Idol, or the American Eagle apparel that

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each cast member on the patriarch of reality programs, *The Real World*, wears. In other cases, the product is integrated into the "storyline" for the program, such as the use of the American Express card by the proprietor of *The Restaurant*. Sometimes, branded entertainment appears as a form of sponsorship, with marketers such as Pepsi attaching their names to programs such as *Pepsi Smash* in much the same way *Texaco* did over fifty years ago. Meanwhile, other marketers are attempting to combine various of these elements, as *Ford Motor Company* attempted through its participation in the "No Boundaries" television program, which shared its title with the tagline for *Ford's* truck and SUV lines, and prominently featured *Ford* vehicles in this outdoor-themed reality program.

*Opposition to Branded Entertainment
Commercial Alert*

In 2003, *Commercial Alert* petitioned the *FTC* and the *Federal Communications Commission (FCC)* to initiate rulemaking to regulate product placement practices in television programming. *Commercial Alert's* proposal would require real-time "pop-up" notifications of any product placement arrangement in television programming. But this proposal would have *First Amendment* implications which extend far beyond the issue of notifications. It would fundamentally alter a form of communication which has traditionally been accorded the deference of core *First Amendment* speech.

In 2005, the *FTC* rejected *Commercial Alert's* petition, stating that the principal reason for identifying an advertisement as such is that consumers may "give more credence to objective representations about a product's performance or other attributes if made by an independent third party than if made by the advertiser itself". Despite the variety and frequency of product placement in programming, the *FTC* acknowledged that few objective claims appear to be made about the product's performance or attributes, noting that though the product appears onscreen, its attributes are rarely discussed. The *FTC* further concluded that a "one-size-fits-all rule or guide would not be the most effective approach to addressing any potential for deception in some forms of product placement" and, as such, its current policy of evaluating product placements on a case-by-case basis is sufficient to protect consumers from misleading representations. The *FCC* has not responded to the petition.

Freedom to Advertise Coalition

The *Freedom to Advertise Coalition (FAC)*, which represents advertisers and media, and the *Washington Legal Foundation*, a public interest law and policy center, are two organizations, who sharply oppose the central argument in *Commercial Alert's* petition.

FAC asserts that "product placement can be an essential ingredient in the story being told through a program." Products often become an important part

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of the story by communicating traits of a character or era that simply could not be demonstrated so effectively via dialogue. Advocates of this position claim Seinfeld would not have been the same without the Yoo Hoo, Bosco, Snapple, Drake's coffee cakes, and the ubiquitous boxes of brand-name cereals that occupied a permanent position on his kitchen shelf.

INTERRELATIONSHIP BETWEEN BRANDED ENTERTAINMENT AND ENDORSEMENTS/TESTIMONIALS

Generally

Because of the popularity of utilizing celebrity endorsers and spokespeople to sell products and services, there has been increased regulatory scrutiny of the product and service claims being made. Spokespersons are being used in a variety of contexts, including in situations where it may not be obvious that they are acting as paid spokespersons. For example, a product "expert" may be hired on behalf of one or more advertisers to participate in a media tour in which the spokesperson talks about the benefits of the products of the advertisers.

Endorsement Guides

Under the FTC Endorsement Guides, FTC requires that endorsements and testimonials reflect the honest opinions, findings, beliefs or experience of the endorser. Additionally, endorsements must not be presented out of context or continued if the advertiser can no longer in good faith believe that the endorser still subscribes to the views presented in the advertisement. In addition, when the endorser is neither represented as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement. Therefore, if it is not clear to consumers that a celebrity endorser has been paid for such endorsement, such fact would need to be disclosed.

LAWYER'S REFERENCE SERVICE

Federal Law

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)2).

FTC's Guides Concerning Use of Endorsements and Testimonials in Advertising.

The CAN-SPAM Act of 2003 (Controlling the Assault of Non-Solicited Pornography and Marketing Act).

State Law

California Online Privacy Protection Act of 2003

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