

Paradigm



INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2017

**President's Podium:
A Bright Future**

**Primerus Looks Ahead:
Trends in the Legal Industry**



Current Legal Topics:

Asia Pacific

Europe, Middle East & Africa

Latin America & Caribbean

North America



Social Media Endorsements in the Age of Fyre

On April 27, 2017, thousands of affluent millennials descended on the Bahamian Island of Great Exuma to attend a three-day concert event known as the Fyre Festival. Paying upwards of \$12,000 a ticket, concertgoers were promised an ultra-glamorous, highly-exclusive Coachella alternative that was to include “first-class culinary experiences and a luxury atmosphere,” along with performances by G.O.O.D. Music, Major Lazer, Migos and more. What they got

instead were Styrofoam box lunches, disaster relief tents and feral dogs.

Not surprisingly, a flurry of lawsuits against the festival’s promoters promptly followed—six at last count—each seeking millions of dollars in damages. Interestingly, in addition to the promoters, one of these lawsuits also takes aim at a number of unnamed Doe defendants for allegedly engaging in unfair trade practices by endorsing the event on social media without disclosing their financial interest.

This allegation springs from the almost exclusive reliance by the festival’s promoters on social media influencers to market the event. The promoters paid these celebrity influencers, or “Fyre Starters,” as they were called in the festival’s leaked pitch deck, including models Kendell Jenner, Emily Ratajowski and Hailey Baldwin, hefty sums for their Instagram stamp of approval. (Jenner, in particular, reportedly received \$250,000 in exchange for a single promotional Instagram post.) In virtually no case, however, did these influencers disclose that they had been paid.

As the above lawsuit indicates, by failing to disclose their financial interest, these influencers likely ran directly afoul of the Federal Trade Commission (FTC). According to the FTC’s Endorsement Guides, anytime there is a “material connection” between a person endorsing a product and the advertiser, “that connection should be clearly and conspicuously disclosed, unless it is already clear from the context

of the communication.” A “material connection,” in turn, is defined by the FTC to include “a business or family relationship, monetary payment or the gift of a free product.”

Rampant non-compliance with the FTC’s Endorsement Guides is nothing new. Indeed, just one month prior to the ill-fated Fyre Festival, the FTC sent letters to 90 celebrities and social media influencers concerning this very issue. While the specifics of each letter varied, the FTC’s basic message was the same: Anyone using their fame to promote products must disclose a “material connection” between the endorser and the product’s marketer.



James R. Molen

James R. Molen is a litigator with Greenberg Glusker. His practice focuses primarily on entertainment and intellectual property related matters, and includes the representation of such clients as Warren Beatty, Uma Thurman and E! Entertainment. He also represented Shelly Sterling as the lead associate in the \$2 billion sale of the Los Angeles Clippers to Steve Ballmer, which stands to date as the largest sale of a sports franchise in history.

Greenberg Glusker
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067

310.734.1965 Phone

jmolen@greenbergglusker.com
greenbergglusker.com

It pays to be alert here, lest one be misled into a false sense of complacency and conclude that these actions by the FTC amount to little more than yet another bureaucratic exercise—all bark and no bite. Despite the seemingly innocuous choice of title, the FTC’s misnomered “guides” are actually codified regulations located in the Code of Federal Regulations (16 CFR § 255 et seq., for those keeping track at home). These regulations, in turn, are promulgated by the FTC pursuant to 15 USC § 45, which empowers the Commission to prevent the use of “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”

In other words, rather than merely serving as a friendly reminder of best practices, the FTC’s Endorsement Guides carry the full force of law. The penalty for their infraction? Up to \$16,000 per violation.

Unfortunately, given the increasingly scattered nature of online influencers, it becomes very difficult to determine what violates the FTC rules. In the case of the

Fyre Festival, only Emily Ratajkowski included “#ad” in her post to indicate that it was sponsored content. Is this enough?

According to the FTC, maybe.

Then again, maybe not.

To help answer this question, consider a recently-issued public statement by the FTC, wherein the Commission observes that “when multiple tags, hashtags or links are used, readers may just skip over them, especially when they appear at the end of a long post—meaning that a disclosure placed in such a string is not likely to be conspicuous.” In addition, the Commission points out that “consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post unless they click ‘more,’ which many do not.” Thus, says the FTC, endorsers “should disclose any material connection above the ‘more’ button.”

In the case of Ratajkowski’s “#ad” hashtag then, the question of compliance likely turns on whether it stood alone, or whether it was part of a longer string, and/or whether it appeared above or

below the “more” button. If alone and above, it likely complied. If it failed to satisfy either of these conditions, it probably didn’t. Then again, depending on the circumstances, maybe it did.

So much for guidance.

Fortunately, thanks to Instagram, brands and influencers looking to avoid the FTC’s wrath are not left completely in the dark. In the wake of the Fyre Festival, the social media juggernaut announced a new feature intended to make those hidden hashtags easier to spot: a “Paid Partnership With” tag that easily alerts users that a post has been paid for. Best practices dictate taking advantage of this feature, as it could well become the gold standard of compliance once users become accustomed to seeing it.

Of course, whether or not the new Instagram feature will ultimately satisfy the FTC is something only the Commission itself can decide. Hopefully, the public will get some clear guidance on this question soon. Just don’t expect it to come from the FTC. **P**

