



What You Need to Know About Endorsements

by Steve Gillen



Endorsements are good for business. We know this intuitively. And a 2012 article in the *Journal of Advertising Research* confirms it empirically, reporting that in a study of more than 300 endorsement deals over nearly two decades, endorsements resulted in an average 4 percent increase in weekly sales of the endorsed products.

Sophisticated advertisers know this—Nike reportedly spends more than a quarter of its \$1.7 billion annual advertising budget on endorsements—but so do unscrupulous advertisers. So the Federal Trade Commission has made it a practice to monitor and police the use of endorsements and testimonials and has, since 1980, published and periodically updated guidelines for their use.

The basic principles are constant and straightforward:

- Endorsements must reflect the honest opinion or experience of the endorser.
- An endorsement may not convey to customers an express or implied claim that would be deceptive if made directly by the advertiser.
- Any connection between the endorser and the seller of the product that might affect the weight or credibility of the endorsement must be fully disclosed.

But the application of these principles has evolved and become more complex with changing methods and media of advertising. Let's take a look at how they are applied in several contemporary contexts.

Reader Endorsements

An ad on your website or copy on the back cover of your book that features readers touting what they accomplished with the aid of your book needs to be true, substantiated, and typical. The reader must have read and acted on the advice in your book. Any claims made by the reader will be evaluated as if you had made them directly, and so you will

in fact have those credentials and their claims must be based on an actual, professionally competent evaluation or test.

In the case of an expert, because this person is a professional in the business of providing expertise and advice for compensation, the FTC assumes that your readers presume the expert was paid by you. This represents a material connection that, were it

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need adequate substantiation to support the claim (including competent and reliable scientific evidence; reader testimonials themselves are anecdotal and do not constitute such evidence). The claims made by the reader must be typical of what other readers will achieve, you must have substantiation for this, and, if you don't, you must clearly and conspicuously disclose the generally expected result in the circumstances depicted. There was a time when the disclaimer “results not typical” was considered adequate for this purpose, but no more. The FTC now believes such disclaimers to be ineffective and so has amended its guidelines to require an express, affirmative disclosure of what is typical.

As an example, if the back cover copy of your new diet book featured before and after pictures of a reader with the claim he lost 100 pounds in 100 days following the regimen prescribed in the book, unless this is typical of what other readers have experienced, your back cover copy would have to conspicuously disclose what the average reader does actually accomplish.

Expert Endorsements

If your website or back cover copy includes endorsement by someone who would be perceived to be an expert (in the example above, this might be a medical doctor or nutritionist), then the endorser must

not obvious, would have to be affirmatively disclosed since it would likely influence the credibility your readers assign to the endorsement. Such connections are not always obvious, however, as is sometimes the case with bloggers.

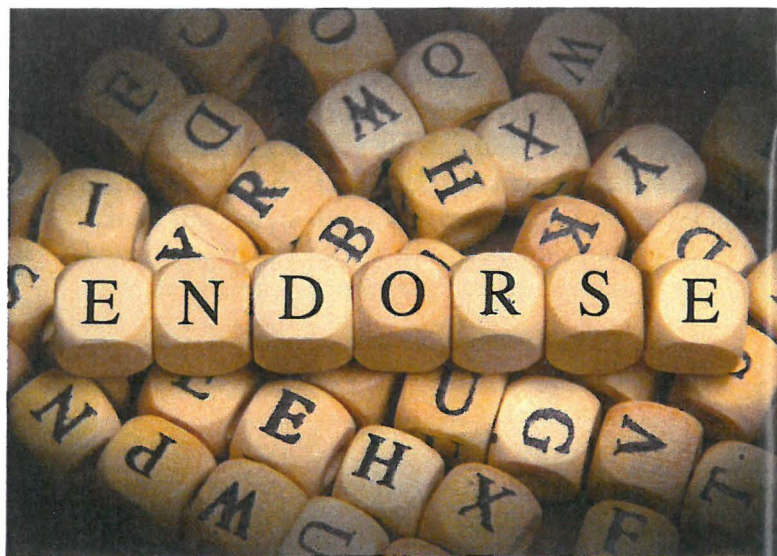
Bloggers

If a blogger buys your book and reviews it online, you are not responsible for what they say. But if you pay a blogger to review or plug your book, or if you provide the blogger with free copies or with other perks with the understanding they will promote your book, then there is, under these circumstances, a material connection between you and the blogger. This will affect the credibility of the review in the eyes of consumers, and this relationship must be clearly and conspicuously disclosed. There is no special language required as long as the consumer gets the information she needs to decide how much weight to give the review. It might be as simple as “Publisher A gave me a free copy of this book to preview and ...”

And, in the case of a compensated blogger, anything the blogger says will be attributed to you, so the blogger cannot say anything about the book that you couldn't say yourself. This means the blogger cannot make claims for which you do not already have in hand competent substantiation.

If there is a failure to make a necessary disclosure, both you and the blogger will be responsible even if you did not exercise any control over what the blogger said. But the FTC has advised that when enforcement actions are necessary, it will be the advertiser, not the blogger, who is the focus of those enforcement actions.

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Reviewers

The ubiquitous back cover blurbs have long been viewed with a skeptical eye. They are generally understood to have been culled, pared, and isolated from context to leave just a few glowing superlatives. Consumers understand them for what they are and are not misled by them.

More problematic are the longer reviews left by reviewers presumed, but not always justifiably, to be independent. Amazon has purged thousands of suspect reviews from its website based on suspected connections or financial interests the reviewer might have in the book reviewed, with the author, with the publisher, or in a competing book.

Disclosures and Disclaimers

When you are required to make a disclosure or disclaimer, it must be clear and conspicuous. This has always meant avoiding legalese and mouse type, but it takes on some additional complexity in the often pithy world of social media.

Proximity and prominence of the disclosure are critical. The disclosure should be located proximate to the claim to which it relates and should be of equal prominence (comparable type size, weight, and color—if the claim is a flashing animation, then the disclaimer better flash, too). Readers should

not have to scroll to find your disclosure, but if they do because the disclosure is lengthy or otherwise difficult to place next to the claim, then you must use proximate text or visual cues to encourage readers to scroll to the disclosure. A vague “see details below” will not suffice, but a more specific “see below for conditions on your right to return your purchase for refund” would likely pass muster. Where scrolling is necessary, then the disclosure should be unavoidable (i.e., the reader should not be able to proceed with a transaction without scrolling through the disclosure).

Hyperlinking to a disclosure is generally discouraged, especially when it comes to health and safety information.

Hyperlinking to a disclosure is generally discouraged, especially when it comes to health and safety information. Do not simply hyperlink a single word, a short phrase in text, or a subtle icon. Instead, make your hyperlink obvious, label it to ensure the reader

understands both its relevance and importance, place it as close to the relevant claim as possible, and take readers directly to the disclosure.

Make sure you account for viewing your promotional messages across all platforms (including small screen and mobile devices). A disclosure needs to be conspicuous regardless of the device on which it is displayed. Twitter, with its 280-character limitation, has its own special challenges. If your endorser is paid to tweet about your book, the endorser's tweets must disclose the connection. A hashtag like "#paid ad" uses only eight characters and would probably be effective for this purpose. That the mode of social media will not reasonably accommodate a disclosure is no excuse. The FTC has taken the position that if any given method of reaching your audience cannot deliver the entire, non-deceptive message, then it shouldn't be used at all.

Different Rules for the Inside and the Outside

Until 2009, the FTC reviewed book advertisements under what it termed the "Mirror Image Doctrine." Ads that quoted or mirrored the contents of the book or that merely expressed the opinion of the author were thought to be shielded from government regulation by the First Amendment. But, in 2009, after a series of court decisions tightening controls over commercial speech, the FTC abandoned its Mirror Image Doctrine. Now, while what is in your books is insulated from government editors

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by the free speech and press provisions of the First Amendment, the messages that appear on the back cover (or on your website or even on a blog influenced but not operated by you) to promote or sell your book constitute commercial speech, which enjoys only very narrow protection. Furthermore, commercial speech deemed unfair or deceptive enjoys no protection at all. Just be sure you understand where the line is drawn between editorial and advertising and the different rules that apply to each. ●

Steve Gillen is a lawyer and partner in the intellectual property firm of Wood, Herron & Evans and has focused his practice on publishing and media matters for 35 years. He is a member of IBPA and a frequent contributor to the Independent. This article was excerpted from Guide to Rights Clearance & Permissions: in Scholarly, Educational, and Trade Publishing (Textbook & Academic Authors Association, 2018). He can be reached at sgillen@whe-law.com or 513-707-0470.

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