

# MARKETING AND ADVERTISING THROUGH SOCIAL MEDIA

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# Topics

- Overview
- Endorsements
- Promotions
- Liability for Claims in User-Generated Content
- IP and Related Issues with User-Generated Content
- Policies and Best Practices



# Overview





# Social Media Defined

*Internet or mobile-based applications that allow end-user interaction.*

While traditional media provide for one-way communication from advertiser to consumer, social media invites two-way communication between the advertiser and consumer.

## Business Reasons for Using Social Media

- **Personalized interaction.** Enhance customer feedback and engagement by interacting directly with customers.
- **Boost brand awareness.** Create a presence on the same platforms that customers use in their daily lives.
- **Protect reputation.** Quickly respond to rumors or other negative publicity.
- **Inexpensive.** Saves time and money.
- **Problem solving (crowdsourcing).** Users can pool their collective knowledge to create new ideas or solve problems.
- **Easily customizable.** Quickly and inexpensively target different groups of customers.

# Common Forms of Social Media in Advertising and Marketing

- **Endorsements.** Messaging that consumers are likely to believe is a reflection of the opinions and beliefs of the endorser rather than the sponsoring advertiser.
- **Branded pages.** Branded social media pages on a third-party service, such as Facebook, LinkedIn or Google+.
- **Promotions.** Many companies run sweepstakes and contests on social media networks.
- **User-generated content (UGC).** Companies frequently rely on customers to submit content in connection with a marketing promotion on a social media network.



# Endorsements



# FTC Guides

## **FTC Publishes Final Guides Governing Endorsements, Testimonials**

### **Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements**

The Federal Trade Commission today announced that it has approved final revisions to the guidance it gives to advertisers on how to keep their endorsement and testimonial ads in line with the FTC Act.

The notice incorporates several changes to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, which address endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of important connections between advertisers and endorsers. The Guides were last updated in 1980.



# When is Something an Endorsement?

- Is the speaker acting independently or on behalf of the advertiser?
  - Whether the speaker is **compensated** by the advertiser;
  - Whether the **product** was **provided for free** by the advertiser;
  - The **terms** of any agreement;
  - The **length** of the relationship;
  - The **previous receipt** of products, or the likelihood of future receipt of products; and
  - The **value** of the products received.

# Why Does It Matter?

- Advertisers may be liable for an endorser's actions.
  - Failure to disclose connections.
  - False claims.
- Advertisers may be liable *even if they did not authorize, approve, or use the claims.*



# WARNING

**Fake Reviews,  
Fake Blogs,  
General Fakery**

## **Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online "Consumer" and "Independent" Reviews**

A company selling a popular series of guitar-lesson DVDs will pay \$250,000 to settle Federal Trade Commission charges that it deceptively advertised its products through online affiliate marketers who falsely posed as ordinary consumers or independent reviewers.

The FTC complaint against Nashville, Tennessee-based Legacy Learning Systems Inc. and its owner, Lester Gabriel Smith, is part of FTC efforts to make sure that advertising to American consumers is truthful and not deceptive, whether the advertisements appear in traditional or newer forms of media.

## **Public Relations Firm to Settle FTC Charges that It Advertised Clients' Gaming Apps Through Misleading Online Endorsements**

A public relations agency hired by video game developers will settle Federal Trade Commission charges that it engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store, and not disclosing that the reviews came from paid employees working on behalf of the developers.

"Companies, including public relations firms involved in online marketing need to abide by long-held principles of truth in advertising," said Mary Engle, Director of the FTC's Division of Advertising Practices. "Advertisers should not pass themselves off as ordinary consumers touting a product, and endorsers should make it clear when they have financial connections to sellers."

## FTC Charges Promissory Note Pitchman With Deceiving Consumers

Infomercial Falsely Claims It's Easy to "Find 'Em," "List 'Em," and "Make Money" Agency Also Settles Charges Against Consumer Who Gave Allegedly Misleading Testimonial



AS SEEN ON TV

*Barbara G.  
from Ohio  
has made  
\$722,158.73  
so far!*

Try it **RISK FREE**  
for 30 days  
& see how much  
YOU will make!

**CLICK HERE!**

## Retailer Dodges FTC Freebie Blogger Bullet

Wendy Davis, Apr 22, 2010 05:30 PM

Retailer Ann Taylor Loft seems to have dodged a Federal Trade Commission action for allegedly providing bloggers with gifts at a January preview of the store's summer line. But other companies might not be as lucky.

In a [letter](#) sent to Ann Taylor's lawyers this week, FTC associate director Mary Engle reiterates the agency's stance that bloggers must disclose all material connections to companies they write about. "Depending on the circumstances, an advertiser's provision of a gift to a blogger for posting blog content about an event could constitute a material connection that is not reasonably expected by readers of the blog," states the letter.

Upon careful review of this matter, we have determined not to recommend enforcement action at this time. We considered a number of factors in reaching this decision. First, according to LOFT, the January 26, 2010 preview was the first (and, to date, only) such preview event. Second, only a very small number of bloggers posted content about the preview, and several of those bloggers disclosed that LOFT had provided them gifts at the preview. **Third, LOFT adopted a written policy in February 2010 stating that LOFT will not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog. The FTC staff expects that LOFT will both honor that written policy and take reasonable steps to monitor bloggers' compliance with the obligation to disclose gifts they receive from LOFT.**




EVERYDAY SASSYPANTS

5.20.2009

## sun and skin

Warmer temperatures are coming... is your skin ready?



When Cara worked at [BlueMercury](#), my roommates and I were all spoiled with the best beauty brands. One of my favorite product introductions? This Bliss body scrub - [Vanilla+Bergamot Body Buff](#). It will have you ready to bare your skin in no time, plus it cures eczema. I recommend it to all my friends with that condition.

MY TWEETS

[@AvettNation](#) dreaming of hearing "Head Full of Doubt/Road of Promise" live and hoping for some oldies but goodies! 1 day ago

[@CRL26](#) u my friend are a champion! I KNOW they all came out gorgeous 1 day ago

[@susannareid](#) perfectly said!! 1 day ago

"I can't stand the sight of kids getting emotional unless it's from physical exhaustion." - Sue Sylvester, great night [@gleeonfox](#) 1 day ago



# Best Practices

- Social Media Policy.
  - There is no one-size-fits-all solution.
  - Consider your goals, strategies, risks, etc.
- Provide guidelines as to what endorsers can and can't say.
  - Consider providing approved claims; or
  - Specifying types of claims that must be avoided.
- Endorsers must clearly disclose connections and incentives.
- Monitor and enforce.



# Promotions





# Doritos Crash the Super Bowl

“Changing the Game”



Super Bowl



5 Prostate



Viral Websites



## Challenge

Needed to build awareness and regain relevance with young adult males. Doritos needed to re-ignite passion in their fans.

## Ideas

We changed the game by creating Crash the Super Bowl

Viral sites delivered the casting-call for entries

Employed the perfect touch-points for our target; viral websites, user-generated content and the Super Bowl

## Results

The new game

Press generated over 1 billion impressions (more than \$20MM value)  
125,000 unique visitors viewed 1,070 video submissions Sales increased 12%  
The winning video ranked 44 on USA Today's Super Bowl  
Adwatch and won YouTube's Bowl Challenge

Published: February 08, 2007

**IAG TOP 10 BEST-LIKED SUPER BOWL ADS**



**TOP MOST-LIKED SPOT**

Viewers said the Super Bowl commercial that they most liked was "Live the Flavor," the winning spot in Frito-Lay's "Crash the Super Bowl Challenge" contest for consumer-created advertising.

Rank	Brand	Description	Index
1	Doritos	Man driving car opens bag of chips; sees woman walking; Spicy; he smiles at her; Cheesy; then crashes his car; Crunchy; woman runs into his car.	159

**SPECIAL REPORT: SUPER BOWL**

**As 2011 Super Bowl Faded, Doritos and Snickers Proved Lasting Winners**

But Some Brands' Buzz Got Worse After the Game, Study Finds



# THE APPRENTICE<sup>®</sup>

CHEVY ONLINE

## ARE YOU UP TO THE CHALLENGE?

The all new 2007 Chevy Tahoe is more capable, more responsible, and more refined. Now, you're the director and it's your job to communicate this message by creating the best Tahoe online commercial for your chance to win.

Click on the hotspots for a preview of Tahoe's new highlights.



**CHEVY**  **TAHOE** Get more details on the all new Tahoe at [chevy.com](http://chevy.com) 

Starts at \$33,990\*. Price as shown \$44,060\*.

### ENTER CONTEST

### YOUR PRIZES

As the Grand Prize Winner, you'll earn your choice of ONE incredible prize package made up of EACH of these categories — including airfare and hotel accommodations:

### MORE LEISURE

Jackson Hole Getaway: Summer Excursion or Winter Retreat

+

### MORE SPORTS

Chevy Rock & Roll 400 at Richmond International Speedway or Major League Baseball All-Star Game Getaway





## GM slow to react to nasty ads

By [Greg Sandoval](#)

Staff Writer, CNET News

Last modified: April 3, 2006 3:17 PM PDT

**General Motors did little in the way of damage control on Monday after a do-it-yourself ad campaign for a GM SUV was hijacked by critics of the company and thousands of negative ads flooded the Web.**

As part of a partnership with the TV show "The Apprentice," GM launched a contest last month to promote the Chevy Tahoe SUV. The contest challenges viewers to create their own digital commercial about the SUV at [Chevyapprentice.com](#). Entrants must choose from a range of video clips and sound tracks and write their own text to create their ad.

Over the weekend, hundreds of people used the Internet to circulate thousands of videos that [charged GM with contributing](#) to global warming, protested the war in Iraq or just demeaned the Tahoe's quality. Some videos also contained profanity or sexually explicit messages.


# Public Voting



**Pr. I Love ATJ**  
Random video


Added: 2 weeks ago  
From: [LubooCash](#)  
Views: 338


01:01 



**#Gumbies2008**


Added: 2 weeks ago  
From: [seniorrito](#)  
Views: 246


01:00 



**Pr. I Love ATJ**  
Random video


Added: 2 weeks ago  
From: [bunco](#)  
Views: 516


00:59 



**Pr. I Love ATJ**  
Random video


Added: 1 month ago  
From: [gibsonmagnum](#)  
Views: 425

01:01 



**I Love ATJ**  
Content -

Added: 2 weeks ago  
From: [gumbies](#)  
Views: 188,826

01:00 

# Promotions Laws Still Apply

- 50+ sets of promotions laws still apply.
- Purchase Requirements
  - You can't require people to make a purchase in a sweepstakes.
  - In some states, you can require a purchase for a contest.
- Disclosures.
- Registration and bonding.
- Privacy, IP, taxes, etc.



# Platform Requirements

- Facebook
  - Facebook prohibits the use of Facebook features as an entry mechanism or winner notification mechanism.
  - Facebook requires various disclosures.
- Google+ prohibits promotions on its platform.
- Twitter has several requirement designed to prevent spam.

# Best Practices

- Ensure you comply with promotions laws and platform requirements.
- Ensure rules are tailored to your promotion.
- Provide guidelines about what content can and can't be submitted.
  - Don't just rely on the rules.
- Limit public control over outcome.





# Liability for Claims in User-Generated Content





## Can a Sandwich Be Slandered?



Matt Barton for The New York Times

Bill Blackburn, of Lexington, Ky., made a Quiznos contest video that showed a Subway sandwich requiring "medical attention."

By [LOUISE STORY](#)

Published: January 29, 2008



# Communications Decency Act §230

- Content providers may be held liable for content they create.
- Interactive computer service providers may not be held liable for content provided by another information content provider.
  - ICS providers may lose immunity if they are responsible, *in whole or in part*, for *creating or developing* the content.
  - At what point is the line crossed?

# Quiznos

- Was Quiznos responsible for the creation and development of the content?
  - Quiznos invited contestants to submit videos demonstrating “why you think Quiznos is better.”
  - The meatnomeat.com domain could be literally false because it implies that Subway subs have no meat.
  - Four sample videos may contain false representations in how the subs are depicted.
- Whether Quiznos crossed the line is an issue for the jury.
- The case has settled.

**Testimonials**

*I just wanted to thank you for providing an excellent service. Roommates.com was by far the best roommate matching system I found on the net. I did find a place with another member of your site and it looks like things are going to work out great. - Mike*

*Hello, I have successfully found a roommate through your service and want to thank you. Prior to signing up I put an ad in the local paper which covers 15 communities for two weeks and never even got a single response. Within 2-3 weeks with you I wrote to several people I thought may be a good match - I also received interested responses to my ad as well. Thank you!*

**JJB: Has a place to share** 06-19-08 09:54 AM MST

**My Roommate Preferences**

Select the criteria by which we should match your potential roommate.

Age range:  - to -  Adjust if you prefer a specific age group.

Female:

Male:

Smoking:

Cleanliness:  Clean  Average  Messy Deselect if uncomfortable with

Pets:  Dog(s) ok  Cat(s) d

Children:

||| [back](#)

**Additional Comments (optional)**

We strongly recommend taking a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate.

||| [finish](#)

||| [back](#)

# Ninth Circuit Decision

- By requiring subscribers to select from a menu of pre-populated answers, Roommates.com becomes, at least in part, a *developer*.
  - “Unlawful questions solicit (a.k.a. “develop”) unlawful answers.”
  - Therefore, there was no CDA immunity for the drop down boxes.
- Because Roommates.com did not require subscribers to provide additional content, it was not a developer of that content.

# Best Practices

- Don't require people to provide unlawful content.
- Website Terms or Official Rules
  - Specify what people can and can't post.
  - Consider prohibiting references to third parties.
  - Disclaim affiliation with content posted by others.
- Consider a reporting function.
- Don't use content with claims you can't substantiate.



# IP and Related Issues with User-Generated Content





# Disney's "Create Your Own Enchanted Princess Video!"

The image shows a promotional banner for Disney's "Create Your Own Enchanted Princess Video" contest. At the top, there is a navigation bar with several buttons: "YOUR Princess MOMENT", "HOME", "MAKE A VIDEO", "WATCH VIDEOS", "PRIZES", "TELL A FRIEND" (with a red bird icon), and the "Disney Princess" logo with the tagline "So Sexy. So Royal. So Disney!".

The main content area is split into two sections. The left section features a video player with a pink and purple background. A yellow ribbon at the top of the video reads "GRAND PRIZE". Below the ribbon, it says "upload by September 12 5 PM PT". The video frame shows a castle on the left and a photo of London with Big Ben on the right. The word "LONDON" is written in blue over the photo. At the bottom of the video player, there is a progress bar showing "0:35 / 3:48" and standard video controls.

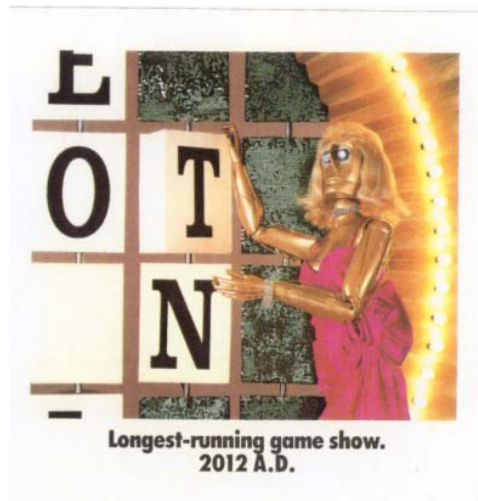
The right section is a pink box with white text that reads: "Dress Up, Sing a Song, Do a Dance or Make a Scene. Create Your Own Enchanted Princess Video!". Below this text is a purple button that says "GET STARTED". Underneath the button is an illustration of several Disney princesses. At the bottom of this section, it says "I've made my video and I'm ready to" followed by a purple button that says "UPLOAD NOW".



# IP Issues



- UGC May Contain Content That:
  - Infringes Third Party IP Rights.
  - Violates a Third Party's Right of Publicity/Privacy.
  - Is Defamatory, Obscene or Otherwise Tortious.
  - Makes a False or Misleading Advertising Claim.



How does a company limit its exposure when it hosts UGC on its site or through a social media platform?

# Managing Legal Exposure

- DMCA Safe Harbor.
- CDA Immunity.
- Monitoring/Moderating UGC.
- Terms of Service/Contest Rules.



# DMCA Safe Harbor

Digital Millennium Copyright Act (“DMCA”) Safe Harbor: Section 512(c) of the Copyright Act provides immunity from liability for copyright infringement for Online Service Providers (“OSP”) that “store information on systems or networks at the direction or users” so long as:

▪ **No actual knowledge of infringement, or circumstances making infringement apparent.**

- General knowledge of rampant infringement is NOT knowledge of facts and circumstances. *Viacom Int'l Inc. v. YouTube, Inc.*, 2010 WL 2532404 (SDNY June 23, 2010)

▪ **“right and ability” to control infringing activity.**

- More than ability to control access to site is required;
- Right and ability to control infringement; not right and ability to control the network. *Io v. Veoh*, N.D. Cal. August 27, 2008



# DMCA Safe Harbor

- **No “financial benefit directly attributable to the infringing activity.”**
  - “There may be arguments whether revenues from advertising applied equally to space regardless of whether its contents are or are not infringing, are ‘directly attributable to infringements...’” *Viacom v. YouTube*, SDNY June 23, 2010.
- **Implementation of Notice and Takedown policy.**
- **Implementation of repeat infringer termination policy.**

Recent DMCA Case: *Capitol Records, Inc. et al. v. MP3Tunes, LLC et al.*, Case No. 1:07-cv-09931 (S.D.N.Y. August 22, 2011)

Open question as to whether self-monitoring, removing, editing content that an OSP believes is likely to infringe a third-party’s copyright destroys DMCA immunity. Common practice is to do some monitoring/moderating and companies generally believe this does not destroy DMCA Immunity.

# CDA §230 Immunities

- CDA provides immunity from claims of defamation, obscenity, and certain other torts:  
“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”
- CDA immunity excludes IP claims or criminal charges
- CDA may provide immunity for Lanham Act false advertising claims
  - However, immunity likely would not apply to false advertising claim if company induces/encourages users to include unsubstantiated or false and misleading advertising claims in UGC. *Subway v. Quiznos*

Open question as to whether monitoring/moderating content converts web site owner into “publisher,” destroying immunity. General consensus is that some monitoring/moderating is probably ok, but too extensive could destroy immunity.

# Monitor/Moderate UGC

- Even though there may be some risk of destroying DMCA/CDA immunity if, since DMCA and CDA do not cover all types of claims (such as trademark infringement, right of publicity/privacy, *possibly* false advertising), website owners may opt to do some monitoring and might remove content that they believe exposes them legally or is inconsistent with company policies and practices.
- Some companies also choose to apply a notice and takedown policy more broadly than just for copyright infringement claims.
  - In fact, some cases suggest that a web host that uses the same notice and takedown policy for trademark claims may enjoy similar immunities as under the DMCA. *See e.g. Louis Vuitton Malletier v. Akanoc*, No. 10-15909 (9th Cir. Sept. 12, 2011).

# Monitor/Moderate UGC

## Example:

### Intellectual Property Policy

Zazzle respects the intellectual property rights of others. We ask our users to do the same. Zazzle may terminate the accounts of users who appear to infringe the copyright or other intellectual property rights of others.

If you believe that your Content has been copied in a way that constitutes copyright and/or trademark infringement, please notify Zazzle's Copyright Agent, and provide the following information ("Notice"):



- a. an electronic or physical signature of the person authorized to act on behalf of the owner of the copyright/trademark interest;
- b. a description of the copyrighted work and/or trademark claimed to have been infringed;
- c. a description of where the claimed infringing Content is located on our Site;
- d. your address, telephone number, and email address
- e. a statement by you that you have a good faith belief that the disputed use is not authorized by the copyright/trademark owner, its agent, or the law;
- f. a statement by you, made under penalty of perjury, that the above information in your Notice is accurate and that you are authorized to act on behalf of the owner of the copyright/trademark interest involved.

Zazzle's Copyright Agent can be reached at: [content\\_agent@zazzle.com](mailto:content_agent@zazzle.com) or by telephone at: 800-980-9890.



# Website Terms of Service/ UGC Contest Rules

TOS/Contest Rules should have users represent that:

- User is author of UGC and the UGC is the author's original work;
- User is sole and exclusive owner of submission and all trademarks, copyrights, and images appearing in submission;
- UGC does not (i) infringe the copyright, trademark or other IP rights of a third party; (ii) violate the privacy or publicity rights of any third party; or (iii) contain any libelous, slanderous material or defame a third party; and
- UGC does not contain (i) porn/explicit content; (ii) criminal or illegal acts; or (iii) violent/dangerous acts.

TOS/Contest Rules should also:

- expressly permit web site owner to remove/disqualify UGC that violates these terms.
- Contemplate how company may want to use submissions, and obtain ownership and/or license to UGC submissions.



# Policies and Best Practices



# Best Practices

Although social media is a new medium, all of the same offline rules apply. Yet, the nature of social media does create some new challenges:

- It's real-time, giving lawyers less time to review and approve content.
- It's casual, giving marketers the false sense that the traditional rules (like TM usage and claim substantiation) are also more casual.

At the same time, unlike traditional media, social media content does not have the permanency of other media, making it easier to remove or pull content after the fact.

**Best Practice: Implement policies that allow company to take advantage of social media with clear guardrails to limit legal exposure.**



# Social Media Policies

Social Media Policies Typically Fall Into Two Main Buckets:

- Employee Usage of Social Media (Both Personal and On Behalf of Company).
- Brand/Marketing Social Media Interaction.



# Employee Use of Social Media

- Clearly define which employees are authorized to act on behalf of company in social media.
- Ensure employees do not disclose confidential company information.
- Ensure employees properly disclose relationship to company in personal social messaging.
- Ensure employees use brand assets/trademarks correctly.
- Ensure employees do not make false/misleading claims about company products/services.



Some caution should be taken when implementing these policies, as there has been at least one NLRB case where an employee claimed unfair labor practice due to firing over disparaging remarks made on Facebook about employer. *American Medical Response*.

# Brand/Marketing Social Media Interaction

The screenshot displays the Facebook page for Oreo, categorized as 'Food/Beverages'. The page features a navigation bar with 'facebook', a search bar, and links for 'Home', 'Profile', and 'Account'. A 'Create a Page' button is visible in the top right.

**Left Sidebar:**

- OREO World's Favorite Cookie:** World's Fan of the Week - Rhône-Alpes, France. Winner: Clement C. Instructions: Post or tag Oreo in your photo to give us permission to make you Fan of the Week, or use it in our photo bar.
- Wall**
- Info**
- Moments Gallery**
- Recipes**
- Oreo Malaysia**
- Oreo Middle East**
- Commercials**
- Create a Team**
- MORE**
- About:** As the world's favorite cookie, Oreo has been a part of memorable family mo... **More**
- 22,995,931** like this
- Files** **See All**

**Main Content:**

- Oreo Wall:** Oreo · Everyone (Top Posts)
- Share:** Post, Photo, Link, Video
- Write something...**
- Oreo Post 1:** Click below and stack the perfect Triple Double Oreo for a chance to meet Eli Manning, Shaq, Venus Williams or Apolo Anton Ohno. Are you game? **Triple Double Oreo Stacker - Are you Game?** kraft.promotions.com. Click for a chance to meet a Team DSRL member. 497 people like this. View all 48 comments. Write a comment...
- Oreo Poll:** Oreo asked: How long is the perfect Oreo dunk?
  - 3 Seconds
  - Till the cookie almost breaks off in the milk
  - 5 Seconds
  - 97 More...
 181 · Follow · Ask Friends · Yesterday at 2:16pm
- Oreo Post 2:** Like' this post if you wish you could lick an Oreo cookie right now. 51,216 people like this.

**Right Sidebar:**

- You and Oreo:** 16 friends like this.
- People You May Know:** See All
  - Sylvia Kramer Angert:** 2 mutual friends. Add Friend
  - Michael Angert:** 2 mutual friends. Add Friend
  - Josh Pierce:** 9 mutual friends. Add Friend
  - Linda Letofsky Drachman:** 1 mutual friend. Add Friend
  - Ethan Lev:** 2 mutual friends. Add Friend
- Chat**



# Brand/Marketing Social Media Interaction Guidelines

## Some Considerations

- Proper use of company brand assets/trademarks.
- Use of third-party IP.
- False & misleading claims.
- Use of celebrity likeness/personas.
- Interaction with celebrities/well-known third parties.
- Proper disclosures in accordance with FTC Guides.
- Avoidance of obscenity, vulgarity, defamation, and other tortious communications.
- Linking to third-party sites/content.

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