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2 FTC Cases Take A Stand Against Online Endorsement Fraud

By Brad M. Elbein

Two recent cases by the Federal Trade Commission further the commission's effort to rein in the so-called endorsement economy, which so far has been ungovernable. Anyone involved in e-commerce should take careful note of these developments.

The Endorsement Economy

Endorsements have always been a staple of marketing. In the beginning, what we now know as endorsements were mostly testimonials, which featured well-known personalities. As marketing changed from oral to published to broadcast, endorsement technology changed too, though testimonials by public figures hung on.

The FTC and other consumer protection agencies were keeping step, fighting false advertising and false testimonials. But as marketing has shifted to online, testimonials are giving way to different kinds of endorsements. The new electronic endorsement economy features influencers, microinfluencers, followers, likes and reviews.

All of these new tools in the endorsement economy can be faked. But because they are mostly anonymous, the consumer protection agencies have been falling behind. Until now.

The Sunday Riley Case

In the first case, the FTC took on a product producer and distributor who was marketing its own goods. The company, Sunday Riley Modern Skincare LLC,[1] produces an array of skincare products, many sold through the international chain Sephora SA. But, according to the FTC's case, Sunday Riley Skincare also produced something else: a carefully designed and orchestrated program of endorsement fraud.

The FTC alleged that management at the company systematically created a program of producing fake online buyers, fake online accounts, and fake endorsements and reviews, all with the aim of pumping up the reputation of the company's products. The FTC's investigators were even treated to communications from Sunday Riley herself, the company's CEO, who, along with managers, instructed employees and interns to produce aggressive quotas of fake endorsements and reviews.

The FTC's lawsuit charged Sunday Riley Skincare and the CEO with making "false or misleading endorsement claims" through their fake reviews. This case wasn't difficult for the FTC to prosecute: The company and the CEO's alleged conduct was way over a line clearly established decades ago. But the case should serve to remind online sellers

that endorsements must (1) represent the independent experience or opinions of (2) ordinary consumers who (3) are actual users.

That's been the law for just about 50 years. The FTC serves notice with Sunday Riley Skincare that it remains the law today. It is no surprise that a settlement between the parties has been proposed and will likely be confirmed after a public comment period expires.

The Devumi Case

The second case stakes out new ground in the FTC's war against fake endorsements. FTC v. Devumi LLC [2] is another case in which the commission prosecuted false endorsements, but this time with a surprise twist.

The twist is that the FTC claimed that now-defunct Devumi was a company that created false endorsement economy indicators, as the FTC so romantically called them. According to the FTC's complaint, the company provided fake followers, subscribers and likes on a retail basis to sell to e-marketers and others who wanted to pump up their online indicators to enhance the value of their brand.

The fake endorsements were published on LinkedIn and Twitter (through fake followers) and on YouTube (through fake likes). Buyers of the fakery were marketing and sales firms, computer software solutions providers, financial services groups, artists of all genres, motivational speakers, lawyers, and others. A settlement has been reached in the case.

The Devumi case is, in one sense, an easy case. The law is clear, but the case presents an important reminder to service providers, that they are not immune from liability just because they aren't the ones directly deceiving consumers.

Marketing and advertising firms should particularly take this to heart. The take-home message is that if you provide the tools for others to deceive consumers, you're just as responsible as the company that uses those tools to actually deceive consumers.

But in another sense, the Devumi case breaks new ground. The Devumi case is a rare case of the FTC prosecuting a service provider as a sole defendant.

Service providers (ad agencies, fulfillment companies and so forth) have historically been targeted by consumer protection agencies as just one part of a common enterprise scheme: one defendant alongside other defendants. In this case, Devumi was sued alone.

None of the users of the fake endorsements were named in this suit. This somewhat unusual posture amounts to the FTC's highlighting a message to service providers:

Retailing a service that allows others to commit fraud is also fraud and will be prosecuted as fraud.

I would be remiss in not flagging one curious additional element to these cases. In the Sunday Riley Skincare case, two of the five commissioners who make up the FTC very publicly called out their fellow commissioners (and by implication the FTC's Bureau of Consumer Protection).

Democratic Commissioners Rohit Chopra and Rebecca Kelly Slaughter criticized their peers for suing the company and its owner over an outrageous two-year program of fraud — but imposing no actual punishment on the wrongdoers. To be fair, this toothless enforcement conduct is not confined to the FTC and the occasional dissent has challenged other commission majorities.

But this is different. At least two commissioners at the FTC want you to know that, in the future, when the FTC comes after you, at least 40% of the commission will be pushing for significant punishment for violation of the law.

[1] In the Matter of Sunday Riley Modern Skincare, LLC and Sunday Riley; before the Federal Trade Commission, Docket No. C-4689.

[2] FTC v. Devumi, LLC and German Calas, Jr., Case No. 9:19cv81419, S. Dist. Florida.

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