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Blogging without Logging FTC Lawsuits: A Panel Discussion

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The line is increasingly blurred between what content is or is not endorsed by a particular entity online. Social marketing outlets like [Facebook](#) and [Twitter](#) allow bloggers, celebrities and companies to communicate with their audience more intimately and in turn, content is shared and disseminated seamlessly among Internet users. Cardozo School of Law's Intellectual Property Law and Cyberlaw Societies brought a panel together last month to discuss the ways in which businesses that interact with the vast array of these social networking outlets can effectively comply with Federal Trade Commission (FTC) disclosure regulations in light of the increase in sponsored content online. [Robert DeBrauwere](#), co-chair of the [Digital Media Group](#) at [Pryor Cashman LLP](#), and former [Cardozo Arts & Entertainment Law Journal](#) editor, moderated the discussion.

The FTC views the reasonable consumer as having a "healthy skepticism" toward conventional advertisements, said [Leonard Gordon](#), partner at [Venable LLP](#) and former Regional Director of the [FTC's Northeast Regional Office](#). On the other hand, with the Internet facilitating the emergence of "consumer to consumer" marketing, it is harder and harder to determine the relationship between the author of the blog, tweet or product review and the underlying "product," said Gordon. As a result, the 2009 [revision of the FTC Guide](#) states that, where it is not apparent that there is a "material connection" between the endorsee and product, an endorsee who is compensated in some way by the product must "conspicuously disclose" such information.

Promulgated as a way to combat the flooding of [fake testimonials](#) and [misleading endorsements](#), mandating disclosure also invites the thought in consumers' minds that there might be a questionable level of objectivity in the reporting of that particular product. [Susan Getgood](#), Vice President of Influencer Marketing at [BlogHer](#), maintained that loyal consumers' trust is not shaken, and is often enhanced, when bloggers candidly disclose an endorsement. What is important, she added, is that the disclosure be presented in an "organic" way that laypeople can decipher. In addition, Getgood argues that bloggers, for example, have their own "brand" to uphold and would not traditionally want to stand behind something they didn't believe in or know about. Thus, a balance of what constitutes adequate disclosure must be struck, and perhaps uniquely tailored to each respective audience, Getgood suggests.

Another panelist, [Michael Ogince](#), Director of Platform and Product Strategy at [Big Fuel](#), commented on the importance of educating those in the business of marketing brands on the

need for disclosure, as many marketing departments today are not even aware of their compliance obligations. In the realm of "[influencer marketing](#)," brands need to acutely understand the qualities of the select "influencers," who, in turn, influence the greater demographic of potential buyers. "A brand needs to leverage tools to identify . . . manage . . . communicate with . . . and activate influencers, and finally, measure the return on investment," said Ogince. In addition, despite the fact that regular readers may understand the mechanics of their favorite blogs' product-submission guidelines, the FTC's guidelines are in place to protect the new or infrequent reader who cannot readily make that distinction.

As a way to streamline FTC compliance, [Tom Chernaik](#) founded [CMP.LY](#), an online service designed to facilitate the efficient display of such disclosures. CMP.LY advocates the importance of "open and transparent marketing," and offers a solution to allay risk and promote education to the end-user through its company's "3 C's" of disclosure and transparency—compliance, credibility and clarity. Chernaik presented some of the problems that recent ad hoc solutions have created, which CMP.LY seeks to remedy. For example, the use of general hashtags in Twitter posts to connote sponsorship can imply a wide spectrum of relationships between endorsee and product. Despite [FTC approval of hashtags like "#spon,"](#) said Chernaik, this approach—albeit easily streamlined due to the ease with which individuals can display the hashtag on their tweet—is insufficient because there is no place to click for more information. In addition, third parties have an opportunity to cannibalize a brand's campaign, since the emergence of too many "#spon" hashtags, each with different meanings according to each brand, makes it impossible for a consumer to easily keep track of the brand's message, and the hashtag, in turn, loses meaning.

Incompatibility issues create additional problems, where links to PDFs of the sponsorship statement can't be opened on mobile devices, which are quickly [replacing dependency on PCs and laptops](#). As a result, the message fails to reach a substantial audience. In addition, pursuant to FTC rules, brands that place advertisements on blogs are responsible for how their advertised content is disclosed and if compliance becomes an issue between an advertiser and a blogger, revenue opportunities diminish. Monitoring such compliance, in turn, is impossible when there is no conspicuous display of disclosure and no current "industry standard" with which to compare, as companies engage in ad hoc solutions and the [FTC guidelines remain vague](#).

Chernaik concluded the discussion by stressing the importance of standardizing and centralizing disclosure statements, which would: 1) mitigate social media risk, 2) optimize marketing, 3) reduce social media overhead, 4) standardize practices across all platforms, and 5) develop and maintain consumer trust. Through the use of plain language URLs like "rul.es," "leg.al," or "ter.ms," [CMP.LY presents one possible solution](#) to ensure these factors are satisfied. On the whole, it is imperative to understand that nondisclosure is no longer an option in an increasingly interactive global network and online participants should be

conscious of their growing responsibility as credible influencers in an evolving Internet marketplace.

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