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FTC Gives Dot Com Guidance

By Ari Kaplan

You've managed to design your own Web site, round up the necessary funds and slog through the various agreements you need to sell your wares over the Internet. You are officially a cyber seller, a net-setter, an e-tailer. But before you start promoting your product, don't forget about your friends at the Federal Trade Commission, because they certainly haven't forgotten about you. In fact, the FTC recently published a guide for online advertising called *Dot Com Disclosures*.

Follow some basic points and you'll be fine. First, if your advertisement doesn't pass muster offline, don't bother posting it online. Second, if there's something your customers ought to know — that the purchase price does not reflect hidden fees, for instance — disclose it. And, when you do, make that disclosure clear and conspicuous.

The rules of conduct are, of course, only fresh until the next technological development. But the FTC has tried to make its guide as general and widely-applicable as possible. Its authority for implementing the new guidelines is derived from Section five of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices." This prohibition covers advertising claims, marketing and promotional activities and general sales methods. The act isn't limited by medium, either, so the commission ensures consumer protection online as well as in traditional print, television and other communication modes. In fact, the commission has taken a number of actions over the last six years to prevent online fraud and deception.

The contents of your advertisement must comply with three basic principles:

- **An ad must be truthful and not misleading.** So, if an ad is likely to mislead an average consumer and that misperception influences a customer's decision to buy or use the product, it is considered deceptive.
- **Advertisers must be able to substantiate their claims.** If you're going to run an ad, you must have support for the claims the ad conveys. For example, if your ad claims that tests show xyz.com is a better search engine than cde.com, you should have some test results to back that up. If there is more than one reasonable interpretation a consumer can make, the ad has to substantiate each interpretation.
- **An ad cannot be unfair.** It's unfair if, according to the FTC, it causes (or is likely to cause) serious consumer injury that couldn't have been reasonably avoided, and isn't justified by the potential

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benefit to consumers or competition. For example, you must disclose all hidden fees. It's also considered unfair if you don't admit that you paid individuals for endorsements.

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Make It Clear and Conspicuous

Much of the FTC's Dot Com Disclosures guide is devoted to a discussion of what constitutes a "clear and conspicuous" disclosure. The requirements depend on the nature of the advertisement. To determine if your ad complies, the FTC recommends adopting the perspective of a reasonable consumer and then asking yourself if the disclosure is presented in a way that you would both notice and understand.

There are a number of factors to consider, including:

- whether a single disclosure is sufficient or whether the disclosure needs to be posted at various points throughout the site;
- whether anything on the site distracts attention from the disclosure;
- the location of the disclosure, including where it is in relation to the advertisement (generally, you should avoid requiring customers to click on a link to read the disclaimer);
- and the prominence of the disclosure.

You also need to keep in mind that competing browsers may display Web page formats differently, so the effectiveness of a particular disclosure may vary depending on the browser. The FTC links to a number of helpful examples on its Web site.

Use size, color and graphics to help highlight the disclosure. There is no need for subtleties here; simply indicate that you are making a disclosure or disclaimer and list those details that the consumer needs to know.

Two final notes: first, the FTC emphasizes that its rules and guides using the terms "written" or "writing" apply online as well as offline. Second, the FTC cautions that certain advertisements sent by e-mail may be considered "direct mail advertisements" and thus be subject to certain prohibitions under the direct mail solicitation rules.

Ultimately, if you run an ad on your Web site that a reasonable consumer will understand and that will not deceive that consumer, you should be fine. If, however, you run an ad that is even slightly deceptive or somewhat confusing, and you fail to "clearly and conspicuously" disclose, you may have a problem.

*Ari Kaplan is a corporate associate with [McDermott, Will & Emery](#) in New York City. He concentrates his practice in the area of e-commerce and Internet-related issues and writes a monthly feature for **The Internet Lawyer** magazine. Feel free to e-mail questions to him at alkaps@yahoo.com. This information should not be considered legal advice and is intended for general informational purposes only.*

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