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Accountability and Transparency

Understanding Advertising Disclosure Obligations Within Virtual Reality



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As the technological landscape evolves and businesses continue to use new technologies to reach consumers in innovative and previously unthought-of ways, the speed with which lawmaking and regulatory bodies try to fit new technologies within the bounds of existing laws and regulations has also intensified. Software development kits have been rolled out within the last year that allow virtual reality creators to drag and drop advertisements into the worlds they are creating. Examples include video billboards placed in fixed locations, or food and drinks placed in a virtual refrigerator for the player's consumption.

The Federal Trade Commission has attempted to keep pace with recent technologies by providing practical guidance regarding what exactly must be disclosed to consumers when compensation is paid, be it mon-

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etary or otherwise, to another party to advertise products or services. The ever-increasing prevalence of “influencers” on social media sites — namely Instagram, Twitter, and Facebook — has garnered much of the attention in this field, and the FTC has released specific guidance about what is required of social media users who post sponsored content. With the emergence of virtual and augmented reality technologies, it was inevitable that advertisers and brands would attempt to capitalize on these novel technologies as yet another means of reaching consumers. Although virtual reality represents a convergence of existing video game and social media technologies, and the FTC has already addressed disclosures and advertising in both video games and social media, virtual reality provides a new way to interact with technology. The FTC has not yet issued specific or detailed virtual reality advertising guidelines. This article examines which steps virtual reality content creators can take to comply with existing FTC regulations.

In recent years, the FTC has updated its FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising and has provided commentary addressing the use of paid endorsements on social media. Specifically, the Endorsement Guidelines dictate that any material connection between an endorser and an advertiser must be clearly and conspicuously disclosed, unless the connection is already reasonably expected by consumers. This requirement is intended to arm consumers with the knowledge that a particular endorser is receiving a benefit in exchange for the endorsement, thereby swaying the degree to which a consumer perceives the endorsement and possibly even affecting the

consumer's decision whether to make a purchase. The FTC has specified that in social media posts, influencers should include a specific disclosure, such as "#sponsored" toward the beginning of a post to indicate that they are receiving compensation. Imprecise disclosures such as "#partner" or "thank you" are insufficient.

It follows that if the FTC requires specific disclosures on Instagram and Facebook, the same companies and advertisers that use virtual reality to advertise products and services will be held to similar disclosure standards. That is, any material connection between an advertiser and an endorser should be disclosed to the consumer. The difference, however, may be in the way such disclosures can be displayed. For instance, the requirement of a specific hashtag or physical placement in an Instagram post might not be able to be transferred in the context of virtual reality. Thus, the existing regulations may have some inherent shortcomings when applied to virtual reality.

As for video games, the FTC, to some extent, has already addressed the requirement to disclose such material connections in multiple contexts, most notably in its *Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising* guidelines. In these guidelines, the FTC highlights that general advertising principles and regulations apply equally to online advertising, while conceding it must provide additional guidance as to how established advertising principles are to be applied to ever-changing and developing online technologies. The guidelines address the broader notions of advertising law and required disclosures, stating that such disclosures must be "clear and conspicuous." The guidelines also provide limited insight into what may be expected of advertisers using virtual reality as a vehicle to reach the consuming public.

Specifically, the guidelines discuss the use of advertising in "augmented reality experiences," noting that, like radio and television advertising, required disclosures must accompany the claim, and the form of disclosure should match the form of the claim. In other words, audio claims must be accompanied by audio disclosures and written claims must be accompanied by written disclosures. Also, visual disclosures should be displayed for a "duration sufficient for consumers to notice, read, and understand them." Although these general principles are helpful as a starting point for virtual and augmented reality creators to consider, they fall short in setting forth clear guidance for advertising and promotion in this rapidly developing technological field.

The FTC also addressed disclosures in virtual reality in the context of native advertising in a document titled *Native Advertising: A Guide for Business*, which inter-

preted the FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements. Again, the FTC's focus is on arming consumers with the knowledge that certain content is, in fact, advertising, so that consumers may appropriately apportion credibility to that content. The FTC reiterates, however, that disclosure remains necessary only where it is unlikely that consumers would otherwise know from using the content that the advertiser has paid for the content to be included. This requirement is comparable to what is placed on a social media influencer to disclose material connections only where consumers would likely otherwise be unaware of the existent material connection between the influencer and the brand being promoted.

In the context of native advertising disclosures, the FTC uses the example of a video game based on a virtual world where, as part of the virtual world, a player (or consumer) is exposed to billboards advertising actual products. In this case, the FTC opines that consumers are "likely to attribute the ads to the sponsoring advertisers" and therefore "no disclosure is necessary." The FTC goes on to opine that even where an advertiser has paid for branded products to be included in other ways and the consumer is unaware of such sponsorship, for example "game characters wear a specific brand of sunglasses, drink a particular brand of beverage, and patronize a particular donut shop," disclosure is unnecessary as the product's inclusion in the game is "not likely to be material to consumers." Virtual and augmented reality technology, however, is much more sophisticated than video game advertising, and as such, a content creator should not be able to reasonably rely on consumers to be aware of a connection between the presence of a product and the existence of consideration paid by the sponsor for such presence.

The FTC has not yet released any specific guidelines for marketers to comply with in the context of virtual and augmented reality advertisements. As this technology continues to expand and marketers inevitably take advantage of the novel marketing opportunities it provides, the FTC, at some future point, may release guidelines outlining how such advertising fits into the existing regulatory framework. Alternatively, the FTC may release entirely new regulations, whether or not they are consistent with existing guidelines that apply more seamlessly to emerging technologies. Until then, however, creators should be cognizant of existing FTC regulations and their obligation to clearly and conspicuously disclose material connections to product placement. There are no one-size-fits-all rules than can be gleaned from other sources, so virtual reality creators must be aware of both the similarities and differences in the way in which the FTC has treated social media and video game advertising.