

# Agents talk the talk, but must walk the line



By Bart  
A. Lazar

I really love *Marketing News*. You should try reading it. It contains the kind of information every marketer needs as well as handy tips that are useful in your business. Oh, and by the way, did I tell you that I get paid by *Marketing News*, and that part of my pay involves promoting *Marketing News* to

consumers like you? That really doesn't make a difference to you, does it? I mean, you believe me, don't you, and the fact that I am getting paid just to tell you what I believe to be true shouldn't affect your view of my opinions.

Or would it?

Commercial conflicts seem to be increasing every day. In the media we are seeing more and more product placements to show an association between a particular actor, show or lifestyle and a product. In addition, as an alternative to traditional advertising, marketers are taking their messages directly to consumers on a person-to-person level through viral, buzz, stealth, guerrilla and other forms of word-of-mouth marketing. A growing number of advertisers are finding that they can promote products by using "marketing agents" or undercover marketing methods. The concern about using marketing agents to endorse products within their peer group is that consumers are not being properly informed when a marketing agent is being compensated for promoting a product.

In October, Portland, Ore.-based Commercial Alert suggested that the Federal Trade Commission investigate companies engaged in what it identified as buzz marketing. Commercial Alert identifies four

## MARKETING AND THE LAW

major problems with the practice, and at least one of them relates directly to the potential deception of consumers. Specifically, "People think they're talking to an ordinary person when they're really talking to a corporate shill." The real concern is whether a marketing agent is an undisclosed salesperson, an undisclosed paid endorser of a product or something else entirely, which is in violation of FTC guidelines on deception and use of endorsements in advertising. We are all familiar with how these guidelines play out in traditional commercial advertising, however, applying these principles to word-of-mouth marketing efforts, like many new media, blurs the issues.

According to the FTC, an endorsement means any advertising message (including a verbal statement) that a consumer is likely to believe reflects the opinion or experience of a party other than the sponsoring advertiser. So when a marketing agent talks to consumers about a product, the consumer may not recognize that the sponsoring advertiser is speaking through a party who is somehow being compensated to promote the product. I mentioned a similar issue in one of last year's columns as it relates to blogs (see "Marketing blogs present new legal issues," April 15, 2005, page 6) where the issue was whether the blogger should disclose whether she is being paid to operate the blog.

Marketing agents may be viewed as consumer endorsers under the FTC guide. If so, the endorsement message that the agent uses may be required to meet particular criteria. For example, when an agent makes statements about experiences with a particular product, that experience must be representative of what consumers will generally achieve with the advertised product, and the advertiser needs to possess adequate substantiation for the consumer experience claimed by the agent. Also, the agent may need to be an actual consumer of the product, or disclose the fact that she does not actually use the product.

The FTC's guides on endorsement are similar to the views that courts have taken regarding deceptive advertising. The law is fairly clear that advertising as a whole must not create a misleading impression to the consumer, and that it must not obscure or conceal material fact. Toward that end, a marketing agent may be argued to be a walking, talking, undisclosed advertisement.

According to Commercial Alert's letter to the FTC, buzz marketers are also violating the FTC rules on deceptive conduct. When marketing agents in the field fail to identify themselves as an advertiser's compensated representatives, the marketing agents are deceiving the public. This could well be true depending on the particular nature of the promotion and how the marketing agents handle themselves in public. The leaders in the field, such as Boston-based BzzAgent LLC and Procter & Gamble Co.'s Cincinnati-based Tremor, indicate that their policies

are to have agents disclose their affiliation with the agency, but this is policy, not a requirement.

With this type of attention being paid to viral marketing, a few things are clear. First, these types of marketing appear to be successful and growing—hence the increased attention. Second, it is hard to engage in any kind of "stealth" marketing if all of the traditional rules are followed. Guerrilla marketing and clear and conspicuous disclosure do not mix well together. Guerrilla marketing, we assume, will not work if the marketer must announce to the whole world, and each consumer, exactly what is going on. Therefore, marketers may be less than open in their marketing efforts, which could result in a more significant clamp-down.

There already have been rumblings in the industry and among regulators. This year, efforts to define and distinguish between these types of marketing will increase so that word-of-mouth advertising is distinguished from undercover advertising. In addition, some form of regulatory response is likely. The industry will need to show that it is responsible (and some are already making these efforts) in order to avoid laws directed at restricting viral marketing practices.

What will happen is hard to predict, but it will probably revolve around marketers attempting to fend off any type of legislation by banding together to establish proper rules of the game. If and when the regulato-

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### New rules evolve with buzz tools

ry action occurs, I would expect it to first involve some form of viral marketing targeted to or that reaches a protected class, such as children or senior citizens.

There seem to be many great benefits to word-of-mouth and undercover marketing. Word-of-mouth empowers individual taste-makers, which helps people and creativity stand out in today's society. Undercover marketing, if handled well, is extremely innovative. The key this year will be to make sure that consumers, particularly protected classes, are not deceived in the process. ■

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via MobiTV—an Emeryville, Calif.-based company that sends live television signals to cell handsets—the Jeep channel plays four short *Mudd* films on a loop and airs one Jeep commercial an hour. It is the first product-branded channel available on the network, which has about 500,000 subscribers and includes programming from such networks as CNN, Cartoon Network and TLC. MobiTV data is sent over existing mobile networks.

Meanwhile, Royal Phillips Electronics N.V., based in Amsterdam, announced in December that it will introduce mobile television broadband chipsets and a mobile broadcast network to the United States in 2006. The chipsets will receive a direct broadcast signal and already are in use in Europe and Japan.

Finally, Reston, Va.-based Sprint Nextel broadcast rock band Bon Jovi's Dec. 17 concert to those mobile customers who subscribe to its video and data services. According to the company, it was the first time a mobile company has aired a full-length concert to U.S. customers.

#### But on the other hand ...

■ Whatever the science tells us, marketing still is a discipline practiced by people. Regardless of how attractive the demographic statistics are on gay con-

sumers, the decision to advertise to them—or not—still is fraught with controversy.

Consider Ford Motor Co.'s advertising saga of late last year. In December, the Dearborn, Mich.-based company decided to stop advertising luxury auto brands, including Jaguar and Land Rover, in gay-oriented publications such as *The Advocate*. Execs said the decision was part of its plan to cut back on advertising everywhere due to market conditions, nevertheless, it came less than a week after the conservative Christian group American Family Association called off its seven-month-long boycott of the car maker.

The Tupelo, Miss.-based group had been railing against Ford for giving money to gay rights groups, for recruiting gay employees and for providing same-sex benefits to couples. Donald Wildmon, chairman of American Family Association, wrote in a statement on the group's Web site that it was calling off the boycott because "we feel that our concerns are being addressed in good faith."

Ford's decision to withdraw the ads drew loud protest from the other side of the issue, and Ford brass met with national gay and lesbian organization representatives in mid-December. The next day the company said it would run

corporate ads in the targeted publications that would promote all Ford brands, reaffirmed its commitment to nondiscrimination and inclusiveness, and restated that the decision to withdraw the ads had been a business issue and had been misperceived. A memo written by Joe W. Laymon, Ford's group vice president of corporate human resources, states, "It is my hope that this will remove any ambiguity about Ford's desire to advertise to all important audiences and put this particular issue behind us."

#### Too big to wrap

■ Dutch media giant VNU NV may be on the block, *The Wall Street Journal* reports. The company, which counts Nielsen Media Research and AC Nielsen among its many assets and was ranked No. 1 in *Marketing News*' annual Honomichl survey of the world's research companies, is being considered by two separate private-equity consortiums. If the company were acquired by one of the private-equity groups, it would become private; VNU confirmed in mid-December that it has been approached by several suitors. VNU has an estimated market value of \$8 billion. ■

—Allison Enright, Staff Writer

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