

S1:E8 - Censoring Online Influencers: FTC Endorsement Guidelines and the First Amendment

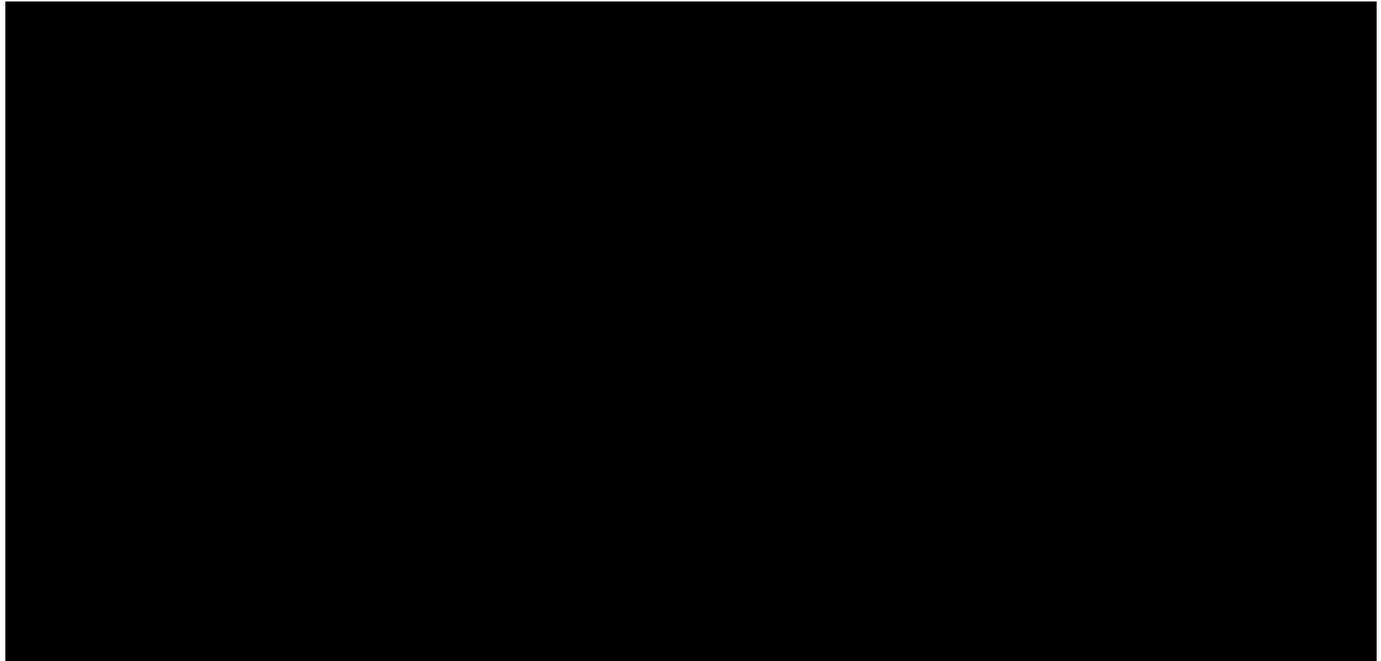
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The FTC regulates endorsements and promotions by online influencers, including those in the gaming space. Join Steve and Nick as they discuss these guidelines as well as best practices for both influencers and companies behind the campaigns. They also interview First Amendment lawyer Justin Wales and discuss the guidelines' impact on online speech.

View the [FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising](#) .

Transcript:

Steve: Hello and welcome to the LAN Party Lawyers Podcast where we discuss issues at the intersection of video games, law and business. I am one of your hosts, Steven Blickensderfer.

Nick: And I am the other host, Nick Brown.

Steve: And today we are going to be discussing FTC endorsement guidelines as they apply to online influencers.

Nick: We promise it's more interesting than that sounds.

Steve: Yeah, that's a really wordy title, I'll work on that for next time. So this is a cool episode, we're going to be interviewing Justin Wales, a senior counsel at Carlton Fields who co-chairs the block chain practice group. He also has a robust First Amendment practice and has lots of opinions about this topic. So we're going to get right into it. He also has had many clients affected by these rules and offers a unique perspective on what we're going to be talking about today. So this is a little different of an episode. We're going to also do a one v. one showdown in addition to the interview. We're going to put Justin in one corner and one of us in the other and, you know, it'll probably be Nick's champion, Justin will be Nick's champion facing off against one of us. And we're going to be debating about these regulations.

Nick: That's a nice way of saying Nick may not argue.

Steve: Yeah, alright, I just kind of gave it away.

Justin: I volunteer as tribute.

Steve: There we go. So, okay, so why don't you start us off, Nick. What are we talking about today when we say these FTC regulations for online influencers?

Nick: Sure, so as we talked about a little bit in our Data Privacy episode of the podcast, everyone who's engaged in trade and commerce is federally regulated by the FTC act, whether they know it or not, specifically section 5. Under that legislation, you can't engage in "deceptive and unfair trade practices"...

Steve: It's about half the stuff you do.

Nick: No comment. All states also have laws that regulate trade. It's not just a federal issue. You can't be unfair and deceptive in your trade wherever you go in the United States. Some violations of state laws might result in state attorney generals, you know, bringing investigations and actions and it may even involve private causes of action by people alleged to have been harmed by the practices. But today, we're going to be focusing on the Federal regulation that comes in through the FTC Act.

Steve: So as you described, Nick, the FTC goes after businesses on that national interstate commerce side of things so, how do they do this? It usually starts with an investigation, it always starts with an investigation but this may be prompted by the consumer as, you know, people may not know that you can lodge complaints to the FTC about businesses and that's often times how they hear about businesses doing nefarious things. So the FTC will then reach out to the business or individual in the form of a letter, usually takes a form of, like a cease and desist, stop what you're doing, we've got our eyes on you...

Nick: We're watching you.

Steve: ...kind of thing. Exactly. And then it may escalate depending on what happens to a complaint against the individual or company for corrective action. Sometimes this is filed within the agency itself, sometimes in federal court and then if it continues from there you may end up with a settlement agreement, often times including a consent order, if the agreement's breached, a judgment's going to be entered. So that's typically what'll happen. What you're going to agree to in a settlement, usually, it's paying a sum of money.

Nick: Is it a fine?

Steve: No, it's typically like a disgorgement of profits, we have to give back what you illicitly gained through your bad conduct.

Nick: So you have to pay us the money but it's not called a fine?

Steve: Yeah, man. That's why, you know, lawyers, it's all about the wording so, but this is a form of...

Nick: As we'll see in a few minutes, it can come down to just a couple letters.

Steve: Couple letters. So in this, it's basically injunctive relief. Stop what you're doing and pay back what you shouldn't have earned from this. So that's the overview of what the FTC will do.

Nick: And so the reason the legal issues arise here with respect to endorsements is because endorsing products is considered a part of trade.

Steve: It's not obvious, but it is.

Nick: Well, the FTC has actually published endorsement guidelines that apply generally to anyone who markets and endorses products. These guidelines have been around since the eighties. They were revised in 2009 and again, most recently, in 2015. And they cover, you know, anything that's an advertisement or an endorsement. So just one example, TV advertisement, you got a prominent golfer hitting a golf ball and says wow this is the best golf ball, it goes farther than anyone else.

Steve: I want to buy that golf ball.

Nick: I would too. I guess, depending on the advertiser, right?

Steve: 'Cause then my game will be better.

Nick: Well, yeah, you could use some help in that regard, I think.

Steve: Uh-huh.

Nick: You spend too much time playing video games. It would also apply to infomercials, it would apply all across the board. And as we're going to see in a few minutes...

Steve: Like Chuck Norris to his latest exercise toy?

Nick: I think it could. As we'll see in a few minutes, it's also been applied to social media influencers.

Steve: I think there's an exception, it's called the Chuck Norris exception, section five doesn't apply to him.

Nick: Yeah, he's above that. So anyways, the guidelines that the FTC has put out, they represent the agencies interpretations of section five of the FTC Act as it applies to endorsements of products. And the whole point, their intent, is to protect consumers from deceitful and unfair practices. So why is this important? Courts are often required under the law to defer to an agency's interpretation of its own rules. So these guidelines should be taken very seriously even though they're not necessarily traditional legislation. And the guidelines, what they say is, that an act or practice is deceptive if it misleads "a significant minority" of consumers. So it doesn't even have to mislead everybody. It doesn't have to mislead most people. It just has to mislead a significant minority.

Steve: Up to 49% maybe, something like that.

Nick: That's above my paygrade, what the number is. I think that's where people argue. But what we do know is that if an endorsement is deceptive, then both the advertiser and the endorser are responsible.

Steve: Okay.

Nick: And so the incentive to comply goes all the way up the chain.

Steve: Alright, so, why is this a big deal for the industry? For those who don't know, gamers, content producers, and other online influencers make money from endorsements, from sponsorships of products, including their own products, if they had side hustles, side businesses. Some gamers have been so popular that they're considered cross-over stars. A recent example of that being Tyler Blevins, who's also known as and more famously known as Ninja, the Fortnite player who plays with celebrities such as Drake and makes a lot of money each year, in the millions.

Nick: I think he just hosted the New Year's special on TV this past year.

Steve: He also hosted Thursday Night Football online, so he's done quite a different, a lot of different things online in different areas, not just Fortnite. And so, these types of gamers can make millions of dollars each year coming from a mix of online sponsorships, ad revenues, and businesses that they own.

Nick: Side hustles.

Steve: Side hustles, exactly. And so stat of the day, Nick, this blew me away, 49% of global consumers use influencer marketing to learn about new brands and products they might be interested in.

Nick: Wow, so half of the world uses these sorts of things? No wonder the FTC is so interested.

Steve: Yeah, pretty much.

Nick: Well as influencers have gained prominence on social media platforms, the FTC, correspondingly, has paid increasing attention to their disclosures of relationships to brands and the FTC has stepped in where they thought they weren't doing a good enough job. Even though these are just individuals, and they're not necessarily companies engaged in trade in the ordinary sense that you and I would kind of expect, and so the FTC has applied their endorsement guidelines that just talked about to online influencers and recently that includes gamers. This represents a very real regulation of an industry that has otherwise been pretty unregulated up until now. There really hasn't been a lot of action, but recently that's begun to change. And so, because this is a developing area, there is a lot of uncertainty, but we have learned a few things already from the few cases we have seen. Steve?

Steve: That's right. The FTC first applied these rules to individual influencers in 2017. So there's a game, Counterstrike Global Offensive, we're going to call it CS:GO from now on, and CS:GO gamers, Trevor Martin, TmarTn, and Tom Cassel, ProSyndicate, are also online influencers with millions of followers on YouTube. And so they endorsed an online gambling website for CS:GO's crate and lootbox items that includes skins that could be traded called, CSLotto.

Nick: got to do a quick plug here, Steve. We talked about loot boxes on the first episode of our podcast, you should really check it out.

Steve: Yeah, it's a good one. So on this site, CSLotto, players could pretty much gamble their skins and other transferable in-game items which, again, they had value and could ultimately be sold for cash. So the way it was set up is that you would challenge others to what worked out to be like a one on one coin flip, a virtual coin flip, or like if you had multiple people, a roulette-stylized random outcome where the thing would just fall somebody and one person in that group would win the entire bundle.

Nick: So let me get this straight, everyone involved, whether it was two people or more would put up something, they would leave the chance to the computer, computer would make a flip, and then all of those items would go to the same person depending on how the randomized generator came out?

Steve: Right.

Nick: Okay.

Steve: The website would then communicate to Steam and would initiate a trade and basically you would be trading away your items or however it worked. It worked something like that. So then you have these influencers who claim to be making thousands of dollars on this site. So let me just give you a couple of samples of the video titles in TmarTn's videos and this is, I'm not going to scream at you but this is in all caps.

Nick: But they are all caps, yeah.

Steve: Yeah. "HOW TO WIN \$13,000 IN FIVE MINUTES (CS:GO BETTING)".

Nick: And, "\$24,000 COIN FLIP, HUGE CS:GO BETTING AND GIVEAWAY".

Steve: Yeah, again, thank you for not yelling at me but so the problem...

Nick: You could tell that was all caps by the way I read it.

Steve: Yeah, it was, yeah. So the problem here is that they failed to mention that they were also part owners of the company. Apparently, they felt it wasn't a secret, that they also founded this company, CSLotto.

Nick: Right. And that's a problem because their videos made it seem like they had no connection whatsoever to this online betting operation. In particular, in one video they said, I think it was TmarTn that said that he, "found" this gambling site when really I think, founded would have been more accurate because they were the ones behind the website itself.

Steve: Alright, 2 letters changed the, it was the difference maker here which is pretty incredible.

Nick: Like we said earlier, it can come down to just a couple of letters and not only did they do that but they also paid other people to promote the site as well, but again, with no disclosures as required under the FTC guidelines. So what did the FTC do? Like we said, it investigated, it sent them letters, and when that didn't get them, the gamers to be in compliance, the FTC filed an agency complaint. Now this is really interesting. This was the first of its kind that was ever filed against individual influencers, so people, not companies, not corporations, and they filed it and said that by failing to disclose their connection to the CS:GO betting website, the FTC alleged that they violated section five of the FTC Act. And they ultimately settled with the individuals and entered into a consent order. Steve, what did the consent order do?

Steve: Right and so this consent order basically required them to do a bunch of different things and still doing into the future. So first, stop what you're doing, stop making misrepresentations. Next, and this is in quotes, "clearly and conspicuously disclose material connections with an endorser or between an endorser and any promoted product or service", the idea being, that consumers should know when influencers are being paid or having a connection, a material connection to the brand that's being endorsed. And to do that the FTC requires in its consent order, use of unambiguous language and to make the disclosure, "stand out." So for example, consumers viewing posts on their Instagram streams on mobile devices, they typically only see the first three lines of a longer post unless they click on the more link. I don't know if you've seen that. And many consumers may not even click on the more and the FTC recognizes that and they say you should disclose any material connection above that more button.

Nick: The FTC is a little more social media savvy than some people might give them credit for, huh?

Steve: Than you, I imagine.

Nick: Way more than me.

Steve: And they also recommend not burying an endorsement in hashtags and links that readers might skip over. So the FTC in addition in this consent order required compliance reports and this a big one, you know, you have to say that you're still in compliance and this is what you're doing and records of this for years and this order, this consent order remains in place for 20 years.

Nick: 20 years?

Steve: 20 years. And that's typical for FTC consent orders for this to be hanging over your head for a number of years. So, you know, that's one thing, right? And these gamers in particular also faced tremendous blowback from the gaming community. I'm not sure if it effected their bottom line, but I imagine it must have.

Nick: You'd think. Well, you know, what's interesting about this is that's just one case, but in 2017 alone the FTC sent 90 educational letters and 21 warning letters to individual social media influencers. It told them to clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media. And so the important thing is, you know, don't expect this trend to die down, it's actually just ramping up. Just because it's only happened in that one big case we know about, you know, it looks like the FTC is making moves to do this more often. And just recently in early 2019, a nonprofit organization called Truth in Advertising actually sued the FTC over what it alleged to be 1,400 undisclosed sponsored social media posts in an attempt to get the FTC to investigate even more of these instances.

Steve: Even then, it's more than that, Nick. This is actually a global trend, the UK and many other countries have similar laws and policies like this, in particular the competition and markets authority, the CMA, is a British government agency that regulates advertising. And it recently sent, in 2019, numerous warning letters to British celebrities and other social media influencers and these warnings mirror those sent in 2017 by the FTC. So what's also notable is that in the UK, violations of this law from what I understand could include jail time.

Nick: Wow.

Steve: Yeah. Which is not something that happens here.

Nick: No thank you.

Steve: So, alright, so we're going to shift gears now and move to the interview portion. We're going to bring Justin Wales into this conversation and get his two cents. So Justin, welcome again to the podcast and let's talk a little bit about this but first I want to start off with like a warm up question.

Justin: Sure.

Steve: So who is your idol?

Justin: John Lennon.

Steve: Okay so let's, how would you feel if John Lennon promoted an amazing music festival...

Justin: Mm-hmm.

Steve: ...in a remote location...

Justin: Mm-hmm.

Steve: ...didn't disclose that he was paid to make that endorsement.

Justin: Mm-hmm.

Steve: Next, imagine that you paid good money for that festival and it turned out to be a bust. Wouldn't you feel slighted by that endorsement?

Justin: I'd just be happy that John Lennon was alive.

Steve: Okay, fair, fair. So that would be enough for you.

Justin: I disagree with the premise.

Nick: You'd be thrilled.

Steve: So that was just a, you know, a for fun question but what is your...

Nick: I had a lot of fun with that question.

Steve: Why don't you tell us some of your experiences with some of these guidelines?

Justin: Sure. So my background is in the First Amendment. I've been a constitutional litigator. I'm also the head of the firm, Carlton Fields' Blockchain and Virtual Currency Practice Group and, you know, really what we do both on the First Amendment side and on the cypto side is deal with the interaction and changes that come from applying existing laws to new forms of communication and new forms of technology. So FTC guidelines on what influencers can and cannot say, whether these are social media guidelines applying to companies, or regular folks, or to professions, such as the legal profession, there' a lot of questions about how do you deal with new forms of interaction. Additionally there's, once you get into the idea of promoting or selling things like securities online, you have a whole other set of guidelines and restrictions. And really, it's a challenge at an agency level because you have agencies who do not create the laws. They are there interpreting laws that are passed by legislatures and they enter into all sorts of consent agreements. They enter into all types of settlements with those who they want to enforce against and that creates a series or precedence that sometimes are not challenged. And then you get into a situation like we have now where, it seems like there's pretty clear-cut guidelines, but then when you go and sort of fiddle around the edges, you see that there's a lot of uncertainty as to the constitutionality of some these guidelines, as to the applicability of some of these guidelines. There's huge gaps in some instances where a type of interaction may be deemed a violation of the FTC if done on one platform or by one type of person, whereas on another it would just be regular day-to-day communication.

Steve: In your experience, Justin...

Justin: Mm-hmm.

Steve: Is the enforcement of these rules consistent across markets, across individuals, across companies, or have there been a lot trouble in finding consistent rules?

Justin: There's been a lot of difficulty and part of that is the way than an agency typically goes after folks, is they find someone who has been egregious or, the CS:GO is a great example. These were people who were promoting an online gambling platform saying that they just found it, it had nothing to do with, you know, it had nothing to do with them. They were promoting it. They were getting the profits off of that promotion. Well, that's pretty easy application of some of the FTC guidelines. The problem becomes is that application, the consent agreement, effectively now dictates what other influencers do even though there might not be this nefarious intent. And this is a result of individuals becoming brands. There's a question, and I think we'll probably get to this in a second, of what is commercial speech.

Nick: Right, I was just going to go there.

Justin: Okay, go. Go there.

Nick: Well...

Justin: I'm there.

Steve: Tell me where this fits in the rubric of a First Amendment analysis. If I'm an individual, so you have a government agency, so you have the government, telling me what I can and cannot say.

Justin: Sure.

Steve: Or what I should say on my tweet or my Instagram post or online, where's the line between that's okay and no, you're violating my First Amendment right?

Justin: Well, it's even difficult to pinpoint the line. Now, you said earlier in one of the introductions that courts have to give deference to agency interpretations. Well, that's true, but an agency interpretation does not supersede the Constitution. It doesn't supersede your inalienable rights.

Steve: Mm-hmm.

Justin: So, if you think of, you know, our laws as a pyramid, the Constitution is on top and the agencies and the regulations have to abide by those principals. Now, there's a lot of difficulty in trying to apply those principals to modern technology. And why is that? It's 'cause modern technologies were not contemplated by the founders. So you have the First Amendment, which is a series of contradictions...

Steve: Pretty sure I saw a line about the internet in the Bill of Rights.

Justin: Well, it's funny. In 2017, the Supreme Court of the United States, have you heard of it? Supreme Court?

Nick: Yes. That one yes.

Justin: The Supreme Court of the United States had a case called *Packingham v. North Carolina* and that case dealt with a North Carolina restriction on felons who had, you know, were sex offenders and they said that, you know, while on parole you couldn't interact with any websites that allow minors to either participate in social media communications or have their own "web space".

Nick: Wow.

Justin: So, what ended up happening was this guy who had, you know, been convicted and was out on parole for sex offences, he was involved in, you know, a traffic dispute. He got a traffic ticket. He went to traffic court. He got the case dismissed and he went on Facebook and he said, praise Jesus the Court found me not guilty; the case was dismissed. And his parole officer saw that, revoked his parole, and put him back in jail.

Nick: Wow.

Justin: So that case went all the way up to the Supreme Court and what the Supreme me Court ended up saying is that you cannot prevent someone from utilizing a form of mass communication, a network that allows expressive content, merely to prevent some harm that could be prevented from, in a different, in a more narrowly tailored way.

Steve: Even as a parolee? Not just as a...

Justin: Even as...

Steve: ...private standard citizen?

Justin: Even as a parolee. Now they didn't say, you know, what the line was, but they said this was clearly too far because under...

Nick: Wow.

Justin: ...this particular statute, thing like, I think like [Recipes.com](#), I think [PaulaDean.com](#) was an example of a type of site that...

Nick: That's a very popular social media...

Justin: It is.

Steve: It's on my favorites.

Justin: Among a certain group. You couldn't even go to things like that. So, it was preventing you from interacting with the world. And here's what's so amazing about that case. They talk about how the nature of, they say the nature of a revolution is such that even its founders, even its innovators, could not predict where it will lead. Now what they're doing is they're talking about the internet. They're talking about these changes in communications.

Steve: Mm-hmm.

Justin: But the quote was from Benjamin Rush.

Steve: Hmm.

Justin: And what was he talking about? Democracy. So, it's this idea that the Supreme Court, and Justice Kennedy says this, the Supreme Court should not regulate technology to such a degree that we are harming future ability, the future population's ability to communicate freely.

Now, you can extrapolate that principal to things like SEC or FTC or all sorts of state regulations on the ability to interact online and that's really what we're talking about. So, where the line is it's unclear because we are still developing the technology by which we communicate. So, how does someone on Instagram properly demonstrate that they are being sponsored by someone?

Steve: Mm-hmm.

Justin: Well, a lot of it depends on the intent of the post, right?

Nick: Right.

Justin: So, the FTC put out guidelines regarding a tennis player. I don't know if you saw this. And they said that if a tennis player had, I think it was, like, ankle surgery, and they went on television, and part of the contract for the ankle surgery was they had to go and talk about that on television, then they have to clearly disclose that. However...

Nick: Really?

Justin: ...if they're sponsored by a, you know, sports apparel brand and they go on that same television show wearing the sports apparel brand...

Steve: That's not it. That's not enough.

Justin: ...then you don't have to.

Steve: Right.

Justin: Now, and why is that?

Nick: Can he, like, point to it and wink?

Justin: Well, it's unclear because one of the things that the FTC said was, and the reason why is cause you're not making any statements about the quality of the brand. Now if I'm Tiger Woods and I'm wearing Nike...

Nick: I'm buying Nike.

Justin: Why? Because I think that it's good enough for Tiger Woods.

Nick: Right.

Steve: Sure sounds like a statement of quality to me. Statement by act, right?

Nick: But where does that end? Cause you could be wearing anything on TV and is it always going to require disclosure?

Justin: We look, the FTC is not a newly created entity, right? These regulations on commercial speech activities stem from a time when commercial speech was difficult to actually express. We are now in a time, and this 15, 10, 15 years old.

Steve: Right.

Justin: Where everyone has a platform,

Steve: Right.

Justin: So your Instagram account, not yours, but Nick's Instagram account...

Steve: Hey.

Nick: It's Myspace. Thank you.

Justin: Nick's Instagram account has a lot of followers, right? So, he is his own brand. He might have more followers than some news entities.

Nick: I do a lot of unboxing.

Justin: Now what is the purpose of someone's individual Instagram account? Well, it's partially expressive. They might get paid through ad revenue. They might have a larger influence because of that expression, but at what point does something go from purely expressive to purely commercial? It's a very difficult question. It's one that the courts have been struggling with for a long time and, in fact, they've said that when you have something that's so intertwined, expressive and non-expressive or commercial activity, you have to apply the higher standard which is a strict scrutiny standard because you can't regulate the...

Nick: A higher standard meaning?

Justin: A higher constitutional standard?

Nick: Right. So it's more protective of the speech.

Justin: It's more protective of the speech because we'd rather let some commercial speech in in order not to stifle the non-commercial speech. And then you can get into a question, there was a case called *Reed v. Town of Gilbert* in 2015 which, in some ways, threw out the question of is commercial speech and regulations specifically on commercial speech subject to a lower standard of constitutional protection? The court said it perhaps may not be because if you need to analyze the face of

a document, if you need to analyze the speech being said, then it is necessarily, in some viewpoints, a content-based restriction.

Nate: Right.

Justin: And you can't have content-based restriction, so the internet has made the first application of the First Amendment very difficult.

Nate: Yeah, I can see that.

Steve: Take that rule book, Justin, and throw it out the window. Or you probably did already throw it out the window. Okay, so...

Justin: I don't even have a window.

Steve: You're in a windowless room. We're going to move, we're going to shift gears here, but only slightly because we're going to take some of these thoughts into our one v. one showdown where, Justin, you're going to be Nick's champion.

Justin: Okay.

Steve: Nick is just throwing you in the ring with me. So, good luck.

Nick: Yeah.

Steve: So, we're going to debate is the FTC getting it right?

Nick: I feel pretty safe here.

Steve: I think the question should be, based on our conversation, is the FTC getting it right with the level at which it's regulating endorsements with online influencers in the gaming space and other spaces but, you know, focusing on this space. Why don't you take it off, you think that they, I don't know, you just tell me how you feel.

Justin: Well, like your John Lennon question, I'm going to disagree with the premise and pose my own.

Nick: This is why we invited you, Justin.

Justin: Because here's the problem, to say they're getting it right or they're getting it not right, they're getting it right sometimes and then sometimes they're not.

Steve: Okay.

Justin: But what they are primarily concerned about, or almost exclusively concerned about is the public being deceived. So what they're doing is they're saying, we are going after clearly egregious violations of the FTC, clearly deceptive marketing practices, and then those are going to be applied to everyone else. And they're going to give some guidelines and the guidelines are just agency guidelines. I mean they're not legislation. So you end up having to read tea leaves. You know, in the newspaper there's a whole line of cases regarding newspaper advertisements and the question is a newspaper needs to run advertisements in order to fund its news gathering activities, so does the fact that the newspaper has advertisements in it mean that it is commercial speech or that it's quasi-commercial speech and the courts have said no.

Steve: The articles or the ads?

Justin: Well the ads themselves would certainly be commercial, but the newspaper, is it a commercial, is it commercial expression or is not commercial? Or is it a mixture of both? The answer is it's pure expression. A newspaper is pure expression even though it needs to sell ads. So if I have a blog, right, and the blog takes in Google ad revenue, or I allow someone to donate money to me through you know, an API plug-in, does that mean that what I'm doing is less expressive? Well what if my blog is a lifestyle brand? And what if my lifestyle brand requires that I have certain, you know, clothing brands, or drive certain cars? Well, at some point, my brand becomes so big, that I'm getting access to a, you know, to more of those types of clothes and those types of materials. And it becomes very hard to determine where that line is. Now, it's easy when you say, okay Scott Disick was being paid to make a smoothie on his Instagram page.

Nick: Right.

Justin: And he needs to say that. But there's a whole world of people who don't have his level of influence, but you know, I listen to a lot of, I watch a lot of YouTube woodworking videos.

Nick: Yeah.

Steve: I would have guessed that.

Justin: Yeah. So, there's a guy named Steve Ramsey. Now, he starts every episode with a commercial for something called Micro Jig. Now, he's been doing so many episodes that the Micro Jig gag has become a core part of the video.

Nick: That's great.

Justin: At what point...

Steve: Is he going to plug it in?

Justin: Well, I mean, I think he's already getting paid for it or maybe he's just getting free Micro Jigs, which are a thing that allow you to safely move through a table saw. But, the point is that we are experimenting with content creation for the first time in a large scale in human history and, necessarily, the traditional commercial advertising rules are not going to apply easily. And that why, friends, if you have these types of questions, you should call Nick and ask for Steve and tell him to connect you to me, and we can help you out. And that why this is a commercial speech, exercise of commercial speech this podcast. Nick, did I win the one on one?

Steve: Well, well...

Nick: I'm pretty sure.

Justin: Thank you.

Steve: We don't call it like that. You know, let the listeners maybe weigh in. They can leave their comments, but I will transition this way.

Justin: Shout out to the listener.

Steve: We're going to be, we're going to be going over some takeaways right now and one of the things you'll see as a common theme is that these guidelines are all fact specific, context specific. 'Cause as Justin just pointed out, this is really difficult to put a bright line on. The FTC has tried to an extent, but it also recognizes, and you can see this throughout the guidelines, that these are fact specific questions and that these are just general guidelines. They are just guidelines. So, Nick, why don't you start off and tell us some takeaways that someone could take from this episode about FTC influence rules?

Nick: Sure. So for most people, these rules are not really going to apply directly because most people, when they share information, it's with family, friends, co-workers, et cetera, and not with the entire world on the internet. But if you are part of a network, or a program that receives free products or other perks with the expectation that you'll then promote or endorse or even discuss the advertiser's products, then the rules might apply. And so, you know, the most important thing is to know the FTC endorsement guidelines or, as Justin pointed out, you could work with a wise attorney that knows something about them. And so we actually pulled, the FTC has some express recommendations for social media influencers. You can find it on their website.

Steve: Dos and don'ts.

Nick: Dos and don'ts. The highlights are, as we said, you have to clearly disclose when you have a financial or a family relationship with a brand. You have to ensure that that disclosure is hard to miss. You need to make sure to treat your sponsored tags like any other tag. You can't bury it within others hoping that it won't get noticed and on image only platforms, like Snapchat, you have to superimpose your disclosures onto the images.

Steve: That also goes for Twitch and other video streams that they've made guidelines as to that as well.

Nick: Right, so they, you know, the FTC of course is going to suggest that you're loud and proud about any sorts of endorsements.

Justin: Now, look, I'm going to jump in cause I don't like too much time between me speaking. But, do you know who Bhad Bhabie is?

Nick: I feel like I'm about to.

Justin: B-H-A-D?

Steve: No.

Justin: B-H-A-B-I-E? So, Bhad Bhabie, otherwise known as the 'cash me outside' girl from Dr. Phil. You remember her?

Steve: Ah, okay I know that one.

Justin: You remember her? Cash me outside, how 'bout dat? So she has become, you guys are old, so you don't know this, she has become a huge star, a rapper. She's a 15-year-old rapper, gangster rapper.

Steve: Really? I can definitely say I did not know that.

Justin: So, she has a video that came out last week called Bestie featuring the rapper Kodak Black, the rapper DMX you might know from middle school makes a...

Nick: I hear dogs barking.

Justin: ...a cameo appearance. In that, half way through the video, the music stops and someone says, Bhad Bhabie, it's time for your product placement, and there's a 45 second commercial in the middle of this video...

Nick: Wow.

Justin: ...that has something like 8.5 million view in, like, the last week where she goes and she promotes a couple products and at the end she goes, okay I'm done with this, let's get back to the song.

Nick: Wow.

Justin: And then she goes back to the song. Now, is that required?

Nick: Is it required?

Justin: Is that required?

Nick: Oh, to be, right in the middle this is my product.

Justin: Right, now, now take another example, "I'm the one" by DJ Khaled. Do you guys know who DJ Khaled is?

Nick: Of course.

Steve: I know.

Justin: DJ Khaled song is "I'm the one" Justin Bieber is in it, Chance The Rapper is in it, Quavo, from the Migos group, is in it.

Nick: Great song.

Justin: There are product placements in all of his videos, including that on. There's...

Steve: But are you confused with what they're doing? I think that's really the point of really need to disclose.

Justin: Well, I don't know, if I'm sitting on, if I have an Instagram post and I'm lying back wearing a Ferrari shirt on a Ferrari, in front a Ferrari showroom, do I need to now put a watermark that says, "Paid Advertisement". No, I'm sure I don't.

Nick: You better consult with someone about the guidelines first.

[INAUDIBLE]

Justin: I do. So, because...

Nick: _____ are called.

Justin: _____, yeah. Well, I actually only have a Lambo.

Steve: That's right.

Justin: I'm a crypto guy. But, the point is, the government cannot tell you what to create in your art.

Nick: Apparently they can.

Justin: So, so...

Steve: But they can tell you not to mislead people right.

Justin: Well sure, but where is that, where is that line? And the problem is, we're talking about agency guidelines. This guideline from the source of federal trade commission, may have drafted by an intern there and then put on the website. This isn't legislation. So, we're not taking this and then we're chilling speech and we're forcing people to change the way they produce art and they communicate online. There're certainly clear cut, there's something, there's clear-cut applications of this where you need to disclose something. But, commercial material products, individual and corporate brands are all moving towards one type of, of expression on the internet.

Nick: Is it art through, is it all art?

Justin: I don't know what art is. I mean, is Campbell's Soup art?

Nick: If Warhol paints it on a canvas _____.

Justin: Now, what if, what if, okay here's something interesting, what if Andy Warhol was working the Campbell's Soup, corporate factory and...

Nick: I would be happy that he is alive.

Justin: Right, me too. But what if he was, him and Basquiat, they were go there and go "Andy, we love you, here's a can of Campbell's Soup, on the house," and he took that, and goes "You know what I'm going to do? I'm going to paint it." And then he painted it, and then that sold at auction for million and millions of dollars.

Nick: And he didn't disclose.

Justin: And he didn't disclose that he got that Campbell's Soup for free. It's very hard to drive and intent, and that's what we're trying to do with these guidelines, and that's why you would call Nick and ask for Steve and have Steve connect you to me. So, at the end of the day though, if you are unsure, I mean, it's as simple as company X gave me this product to try. The FTC says normally that would be good enough and I know we can keep debating over whether or not we should even be doing this, but these are the take ways and the take ways really that plus, really understand that these standards apply across the board. They include online influencers on Twitch and YouTube.

Nick: Whether you think they should or not.

Justin: Yes, and so there are specific things you can do for, that you have to do for Instagram, we talked about it earlier

about putting the, the disclaimer above the more button, not baring the sponsorship in a hashtags. All though Twitter, you can maybe get away with some of that, and also hyperlinks to discloser/league and you know, saying that they can just click on that link. Really, they are not sufficient. So, again this is all, you know content and fax specific so. Nick, why don't you give us some take away for advertisers?

Nick: Sure, so you know think about revising your written influencer plan, especially if it does, you know, if it doesn't include the FTC's most recent guideline recommendations, and lay some ground rules. The FTC recommends not encouraging indorsements that use feature that doesn't clear and conspicuous disclosers like the Facebook like button. The indorsements should reflect honest opinions and experiences, so it's not a good idea to try to encourage positive reviews, by promising discount on items, or something like that. Train your teams on the rules, so that all the way up and down the chain, people aren't violating them. Monitor your influencers, don't just fire it and forget, because remember these penalties can apply all the way up the chain. And most important, if you receive and FTC education or warning letter, do not ignore it. Okay, it is always a good idea to retain counsel to help to respond to one of those.

Steve: So, this was a lot of fun. Justin, thank you so much for your time, and coming on the show, and being here with us.

Justin: I learned a lot, especially about recent rap songs.

Steve: Yeah, thank for that.

Nick: Bhad Bhabie, shout out to Bhad Bhabie.

Steve: So, be on the lookout for other episodes of our LAN Party Lawyers Podcast from season one and Nick, I don't have anything else. Do you?

Nick: That's all I got.

Steve: So until next time.

Nick: Game on.

Steve: Game on.

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