

# TEXAS LAWYER

An ALM Publication

## EDITOR-IN-CHIEF

Heather D. Nevitt, HNEVITT@ALM.COM

## ASSOCIATE EDITOR

Mark Bauer, MBAUER@ALM.COM

## SENIOR REPORTERS

John Council, JCOUNCIL@ALM.COM

Brenda Sapino Jeffreys, BIEFFREYS@ALM.COM

## REPORTERS

Angela Morris, AMORRIS@ALM.COM

Angela Neville, ANEVILLE@ALM.COM

Miriam Rozen, MROZEN@ALM.COM

## ART DIRECTOR

Thomas Phillips, TPHILLIPS@ALM.COM

## PRODUCTION ARTIST/PHOTO EDITOR

Frank Goodenough, FGOODENOUGH@ALM.COM

## DISPLAY ADVERTISING MANAGERS

Deni Ackerman, DACKERMAN@ALM.COM

Tina M. DeRobertis, TDEROBERTIS@ALM.COM

## LAW FIRM ADVERTISING MANAGER

Annette L. Planey, APLANNEY@ALM.COM

## ADVERTISING COORDINATOR

Angela Brindle, ABRINDLE@ALM.COM

## PROJECTS MANAGER

Anna Liza Butciaga, ABUCIAGA@ALM.COM

## REGIONAL SENIOR MANAGEMENT

### REGIONAL PUBLISHER, TX/FL/GA

Chris Mobley, CMOBLEY@ALM.COM

### REGIONAL EDITOR-IN-CHIEF, TX/FL/GA

George Haj, GHAI@ALM.COM

### REGIONAL DIRECTOR OF CLIENT DEVELOPMENT, TX/FL/GA

Carlos Curbelo, CCURBELO@ALM.COM

### REGIONAL CHIEF FINANCIAL OFFICER, TX/FL/GA

Jeff Fried, JFRIED@ALM.COM

## DALLAS MAIN OFFICE

1999 Bryan St., Suite 825, Dallas, TX 75201

(214) 744-9300 • (800) 456-5484

Fax: (214) 741-2325

Advertising email:

abrindle@alm.com

Subscription/Delivery Issues:

(877) ALM-CIRC

## AUSTIN BUREAU

(512) 990-5773

(512) 524-0368

## HOUSTON BUREAU

(713) 222-2559



## ALM SENIOR MANAGEMENT

**PRESIDENT & CEO** Bill Carter

**PRESIDENT/LEGAL MEDIA** Lenny Izzo

**PRESIDENT/INTELLIGENCE, CHIEF DIGITAL OFFICER**

Jeffrey S. Litvack

**CHIEF PRODUCT & CONTENT OFFICER** Molly Miller

**SENIOR VICE PRESIDENT/GENERAL COUNSEL**

Dana Rosen

**SENIOR VICE PRESIDENT/HUMAN RESOURCES**

Colleen Zelina

**VICE PRESIDENT/EDITOR IN CHIEF** David L. Brown

## CORRECTIONS POLICY

We always publish corrections at least as prominently as the original mistake was published. If we make a mistake on page one, we will correct it there.

We are eager to make corrections quickly and candidly. Although we welcome letters to the editor that are critical of our work, an aggrieved party need not have a letter to the editor published for us to correct a mistake. We will publish corrections on our own and in our own voice as soon as we are told about them by anyone - our staff, an uninvolved reader, or an aggrieved reader - and can confirm them.

Our corrections policy should not be mistaken for a policy of accommodating readers who are simply unhappy about a story that has been published.

Any information about corrections or complaints should be directed to Editor in Chief Heather D. Nevitt. Phone (214) 744-7721 or email hnevitt@alm.com.

Reproduction of this publication in whole or in part is prohibited without express written permission of the publisher.

©2015. ALM Media Properties, LLC. All rights reserved.

# For Vloggers, Old Marketing Rules Still Apply

by STEVE THOMAS

YouTube viewers never see the face of the woman who films herself opening Disney toys. Fingernails adorned with tiny gemstone designs flip box tops and tear open cellophane wrapping, while her accented voice thrills at discovering candy hearts in tin boxes, or little ponies deep inside nesting plastic eggs. She is DisneyCollectorBR, and she was the online-video platform's top-earning star in 2014, taking home almost \$5 million from her share of ad revenues, according to a January 20 Yahoo Finance article.

## TECHNOLOGY

DisneyCollectorBR is an "unboxer"—part of a years-long phenomenon of people who record themselves opening product packaging and describing the contents, then post the videos in hopes of earning ad revenue. To gauge the extremes, search "underwater unboxing" to find a Carphone Warehouse video with three cameramen and the unboxer submerged in diving gear to unbox the Sony Xperia Z3—and note the 1.1 million views. DisneyCollectorBR's "Play Doh Sparkle Princess," video has been watched almost 178 million times, and her channel has a total of 3,481,507 subscribers and a whopping 4.7 billion views.

But ad revenues for YouTube and the unboxer are just one facet. At least a million people have seen the Sony Xperia Z3—soaking wet. Disney's brand got reinforced 4.7 billion times. Companies are taking note of the powerful influence these new online content producers have garnered, and making deals to get their products featured.

Close cousins to unboxers are "haulers"—people (usually young women) gushing before the camera about their "haul" from a recent shopping spree. A March 2013 NPR story featured Caitlin Ellsworth, known as Glamourista16, whose hauler videos have landed her deals with 15 companies, including *Seventeen Magazine* and several YouTube beauty channels. She told NPR that some haulers review products from retailers that pay them, while others receive commissions on sales generated by the videos that feature a company's product.

**But whether vlogger, blogger, podcaster, or mere social-media butterfly, if they receive compensation of any kind for touting a product, endorsers they are.**

Haulers and unboxers arguably represent a subset of the broader category called "Vloggers," or "video bloggers," who record their thoughts and observations for their followers to enjoy online. A September 2014 article in *The Guardian* said vloggers are seen as key to reaching younger audiences, and some are paid thousands for mentioning a specific product on one of their entries.

Vloggers are part of the remarkable shift toward online marketing. According to the 2015 Marketing Fact Pack published by *Advertising Age*, the average amount of time U.S. adults spent per day using digital media overtook time spent watching TV in 2013. Also, the Internet's share of ad spending in 2014 surpassed print media's share—newspapers plus magazines—in the U.S. and the world.

"Endorsement" might seem like a strong word to describe a video of someone too young to drink—or in some cases, to vote—squealing with glee as she rocks a new ten-dollar shirt or fist pumping after he kills the aliens with a new game accessory. But whether vlogger, blogger, podcaster, or mere social-media butterfly, if they receive compensation of any kind for touting a product, endorsers they are.



Generally speaking, the same rules that govern advertising in other media apply to online content. Recently, the Federal Trade Commission even updated its Guides Concerning Use of Endorsements and Testimonials in Advertising (16 CFR Part 255) "because truth in advertising is important in all media—including blogs and social networking sites." Although "[t]here is no fine for not complying with an FTC Guide," they are based on the FTC's interpretation of §5 of the FTC Act (15 U.S.C. 45) and the FTC's website states that "[i]f law enforcement becomes necessary, our focus will be advertisers, not endorsers—just as it's always been."

Other countries are updating their focus as well. In November, the UK's Advertising Standards Authority banned an Oreo ad campaign that featured a host of YouTube stars because it did not clearly label the videos as having been paid for.

Here in Texas, the Attorney General's consumer protection division includes an Internet and Privacy team that investigates and pursues claims against online advertisers and marketers. Section 17.47 of the Texas Deceptive Trade Practices Act specifically empowers the consumer protection division to obtain injunctions and recover civil penalties against violators. DTPA §17.46(b) provides a non-exclusive "laundry list" of acts considered "false, misleading, or deceptive," and subsection (b) (2)—"causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services"—has been ruled by, at least one court, the Texas Court of Civil Appeals in Amarillo, to be "primarily concerned with deception in the origin or endorsement of a good or service."

The consumer protection division's recent efforts include actions against an online pet shop that allegedly sold diseased puppies, an alleged online scheme that advertised "free" credit score information when it actually charged a recurring fee, and an online "diploma mill" allegedly selling fraudulent high school diplomas.

Maybe a good way to market that new fashion accessory is to pay Instagram star Eugénie Grey, @feralcreature, to pick one up while she wanders through town taking selfies on her quest to find the perfect #ootd (outfit of the day). Just be sure the contract requires her to disclose the compensation. **TTT**



Steve Thomas is a shareholder with McGuire, Craddock & Strother in Dallas. He serves on the firm's technology committee. His practice includes commercial litigation in state and federal courts and administrative agencies on behalf of telecommunications and technology companies.

Contact Steve at sthomas@mcslaw.com.