



August 2, 2022

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex B)  
Washington, DC 20580

Re: Digital Advertising, P114506

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit the following in conjunction with the Federal Trade Commission’s (“Commission,” “Agency” or “FTC”) June 3, 2022 request for comments regarding its consideration of updating its .com Disclosures guidance (the “Guidance”) concerning digital advertising disclosures. Given the ubiquity of digital media and the prevalence of online advertising, it is prudent for the Commission to update its Guidance so that it can be as effective as possible. Utilizing current research and its increased knowledge concerning digital advertising, the Commission has that opportunity now.

While the Guidance broadly covers digital advertising disclosures, TINA.org has focused its comments on select areas of concern that were nonexistent or not as prevalent at the time that the Guidance was last updated. After a brief summary of TINA.org’s expertise and interest in the matter at hand, this Comment explores how consumer engagement with the digital landscape, and digital marketing in particular, has changed in the past nine years. The Comment then highlights three marketing trends occurring on metaverse and gaming platforms that the updated Guidance should specifically address: advergames; sponsored content within organic virtual worlds and games; and avatar brand influencers—both human-controlled and AI-generated. Next, the Comment highlights various dark patterns that the Guidance should address, including confirmshaming, clickbait, forced continuity offers and limited supply/time pressures. The Comment then discusses issues relating to short-lived digital content before turning to disclosure issues that occur when narrative captions in social media platforms are not conspicuous. TINA.org then discusses the need for disclosure substantiation by marketers. TINA.org next tackles the issue of marketing to young children on digital platforms, arguing that disclosures simply do not work for this young cohort. Finally, TINA.org references select disclosure research and recommends that the FTC pursue further research on disclosures in the ever-expanding digital landscape.

## INTEREST OF PETITIONER

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.

At the center of TINA.org's efforts is its website, [www.tina.org](http://www.tina.org), which aims to reboot the consumer movement for the 21<sup>st</sup> century. The site provides information about common deceptive advertising techniques, consumer protection laws and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad;<sup>1</sup> pillows and essential oils falsely marketed as able to treat chronic diseases;<sup>2</sup> and a delivery meal kit service that falsely advertises free meals.<sup>3</sup> The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates and, when appropriate, takes up with businesses and regulatory authorities. The website is also a repository of information relating to consumer protection lawsuits and regulatory actions.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud, and has testified before Congress on issues related to consumer protection, deceptive marketing and economic justice.<sup>4</sup> TINA.org regularly draws on its expertise to advocate for consumer interests before the FTC and other governmental bodies and appears as *amicus curiae* in cases raising important questions of consumer protection law.<sup>5</sup>

Since its inception, TINA.org has filed legal actions against more than 300 companies and entities, published more than 1,200 ad alerts, written over 900 news articles, and tracked more than 4,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

For years, TINA.org has taken an active role in working to hold companies, brands, influencers and tech platforms accountable for marketing campaigns on the internet that lack effective disclosures. The nonprofit has documented and made publicly available on its website thousands of examples of companies, brands and influencers using stealth advertising tactics on digital platforms to deceive consumers.<sup>6</sup> TINA.org has issued warning letters to more than 35 brands and influencers concerning social media marketing that fails to properly disclose the advertising content, including multiple alcohol companies deceptively promoted on Snapchat and Instagram by celebrity music producer DJ Khaled.<sup>7</sup> The nonprofit has also filed nine complaints with federal and state regulators regarding more than 125 companies and influencers, providing ample documentation of deceptive and undisclosed digital marketing campaigns.<sup>8</sup> It has also advocated for the FTC and state attorneys general to take a more active role in protecting

minors from stealth and undisclosed marketing practices on tech platforms in multiple forums.<sup>9</sup> Most recently, TINA.org filed a complaint with the FTC against Roblox, documenting numerous examples of undisclosed advergames, endorsements and sponsored content in the company’s metaverse, and urging the Commission to take appropriate enforcement action.<sup>10</sup>

TINA.org has also exposed numerous other types of deceptive online marketing that lacks effective disclosures, including, multilevel marketing companies using exceptional earnings claims to recruit distributors without properly disclosing typical earnings;<sup>11</sup> cancer centers deceptively using testimonials from patients who experienced atypical success without adequately disclosing what patients with similar diagnoses should expect;<sup>12</sup> retailers advertising their products as Made in the USA without conspicuously disclosing the origin of foreign product parts;<sup>13</sup> publishing companies selling health and financial products without disclosing risks and usual outcomes, among other things;<sup>14</sup> penny auction websites advertising successful online bidding without properly disclosing expenses and costs associated with the bidding, as well as the likelihood of achieving the advertised successes;<sup>15</sup> and online subscription companies advertising products and services without lawfully disclosing the terms of the subscriptions.<sup>16</sup> To help rein in deceptive marketing in these areas, TINA.org has sent warning letters to 190 companies,<sup>17</sup> filed complaints with state, federal and/or self-regulatory agencies regarding more than 25 companies,<sup>18</sup> and published numerous articles and press releases on its website to help educate consumers about deceptive marketing that lacks effective disclosures.

In short, TINA.org’s data leaves no doubt that online marketing lacking effective disclosures is a widespread problem that significantly impacts consumers’ perception of what they are purchasing, as well as what is and is not marketing material, among other things.

## **THE RISE OF DIGITAL ADVERTISING**

When the Commission last updated the Guidance in 2013,<sup>19</sup> digital marketing was in a relatively nascent stage. E-commerce accounted for little more than five percent of retail sales<sup>20</sup> and only half of Americans owned a smartphone.<sup>21</sup> Instagram, Twitter, Twitch, Pinterest and WhatsApp were all less than five years old; Facebook had just gone public 10 months prior; and TikTok, one of today’s fastest growing social media platforms, did not even exist.

Much has changed in the intervening years. Whether it is for shopping, news, social networking, streaming video or online gaming, the vast majority of American consumers now use the internet daily, and 30 percent are online “constantly.”<sup>22</sup>

Accelerated by the COVID-19 pandemic, e-commerce has experienced explosive growth in the interim period, with newer mobile payment apps making shopping online easier than ever. The market has also been inundated with new platforms and metaverses – now there’s Decentraland, Sandbox, Horizon Worlds, Second Life, Upland and Bloktopia, to

name a few. And many of these new digital platforms appear to be experiencing exponential growth driven in large part by children and young adults who spend an increasing amount of time online.<sup>23</sup>

Not surprisingly, given consumers predilection for these digital platforms, advertising dollars have followed, with advertisers spending nearly \$200 billion on digital marketing in 2021.<sup>24</sup> In fact, compared to a decade ago when digital marketing made up only 18 percent of the total ad spending,<sup>25</sup> it now forms the bulk at 64 percent<sup>26</sup> and is expected to continue to grow with the rise of e-commerce, ad-supported streaming and newer gaming platforms.

Unfortunately, as digital marketing has expanded, so too has the number of advertisements and endorsements that violate FTC law. The digital landscape is littered with examples of stealth marketing, including the use of dark patterns, undisclosed advergames and AI-generated influencer bots, and marketing that is undisguisable from organic content. There is also the plethora of influencers engaged in deceptive, unfair and/or misleading marketing, and the constant and continual promotion of goods and services using atypical results. These deceptive, misleading and unfair ads are doing more than simply affecting consumers' pocketbooks – they are also encouraging consumers, many of whom are minors, to engage in risky, unhealthy and, at times, even dangerous behavior.<sup>27</sup>

## **CONTEMPORARY DIGITAL ADVERTISING DISCLOSURE ISSUES**

### **A. The Guidance Should Address Advertising Content in Video Games and Metaverse Platforms**

Advertising is being surreptitiously pushed in front of millions of U.S. consumers, including children and adolescents, by a multitude of tech platforms and companies in online games and closed metaverses.<sup>28</sup> Such digital deception is widespread, in part, because meaningful guardrails to ensure compliance with truth in advertising laws have not been established in this digital landscape, effectively allowing marketers to manipulate millions of consumers in captivating games and virtual platforms on a daily basis.

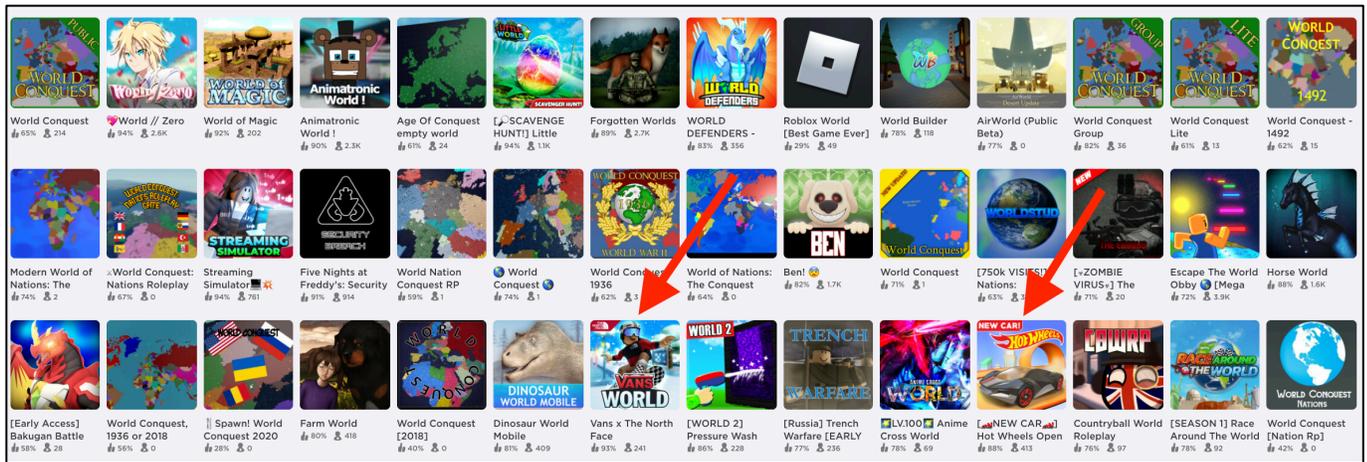
Companies, brands and influencers have jumped into these games and closed platform metaverses with reckless abandon – exploiting children's inability to distinguish organic content from marketing, and manipulating users with undisclosed promotions that are nearly identical to organic virtual items and experiences. Such deception is augmented by marketers' covert use of digital avatar influencers and AI-controlled promotional bots aimed at increasing the popularity and desirability of brands. And as these brands exploit unsuspecting consumers, tricking them into taking part in immersive advertising experiences and unwittingly interacting with walking, talking endorsers that are indistinguishable from other avatars on platforms, the companies and brands are taking users' time, attention and money while extracting their personal data.

As TINA.org’s 2022 investigation of Roblox<sup>29</sup> illustrated, undisclosed advertising content is not only embedded in video games, but is also surreptitiously interlaced within metaverse experiences in numerous ways. Each of the scenarios described below highlight the need for clear FTC guidance regarding how to properly disclose material information in such contexts.

### 1. Advergames

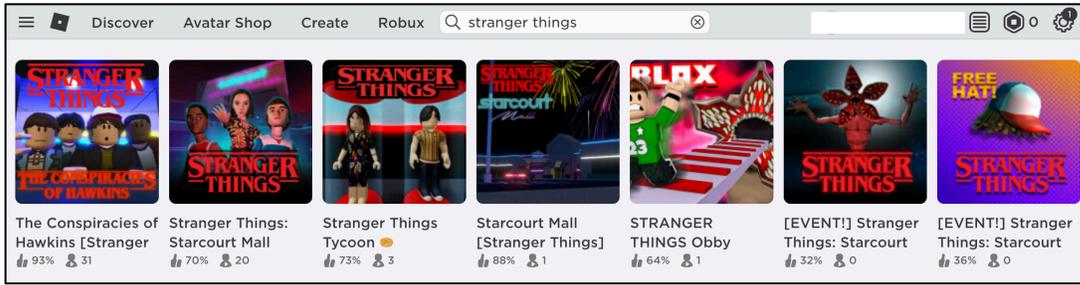
Advergames combine advertisements and video gaming in such a way that consumers are no longer passively engaging with marketing material but rather actively participating in an immersive experience with the brand and its products. Using Roblox as an example, there are many points during the gaming experience where appropriate disclosures are lacking.<sup>30</sup>

The first is the game browsing and selection process. Users browsing the Roblox platform for games to play are presented with a series of tile images representing different games. Simply viewing these images and the accompanying short title of the games does not reveal to consumers which content is organic and which is promotional. By way of example, generically searching the Roblox platform for “world” results in numerous hits with no way of knowing which of these worlds are unsponsored authentic content and which are corporate-controlled advertisements, as the screenshot below illustrates.<sup>31</sup>

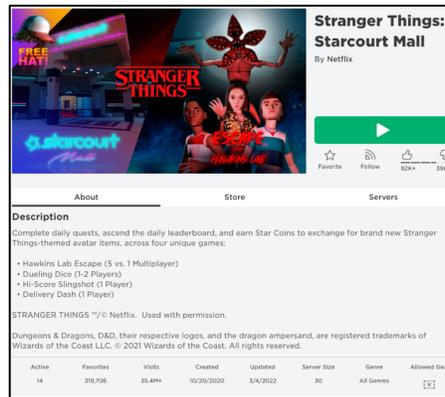


[Red arrows pointing to two sponsored brand worlds]

Similarly, a consumer searching for a Stranger Things experience<sup>32</sup> on Roblox is presented with several choices.<sup>33</sup> But as the screenshot of search results below shows, identifying which of these games are sponsored is impossible.

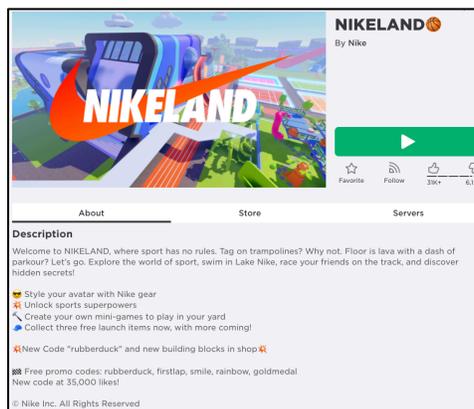


Clicking on the individual thumbnail images provides little clarity.



The only indication that the second Stranger Things search result is sponsored is the small print beneath the game name that ambiguously says “By Netflix” – an indicator that most Roblox users are unlikely to see, and even if they do see it, many Roblox users may not understand that this means the virtual world is an advertisement disguised as a game.

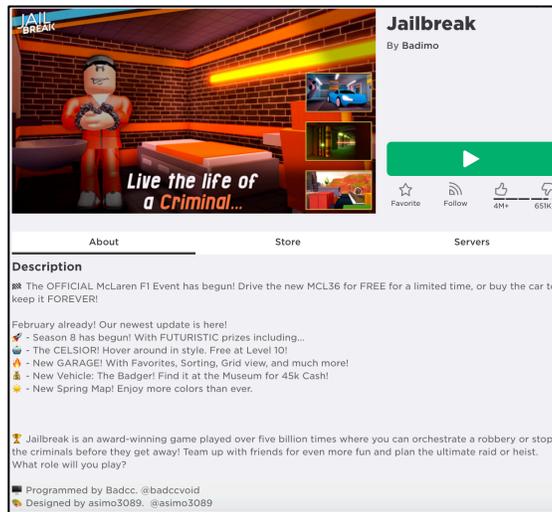
After a user selects and enters a sponsored experience, they are immediately immersed in a never-ending advertisement. Take, for example, Nikeland, created by Nike last fall and which has been visited more than 18 million times since it launched.<sup>34</sup> It is an advergaming where kids can “[e]xplore the world of sport, swim in Lake Nike, race your friends on the track, [] discover hidden secrets,” play children’s games like The Floor is Lava and “[s]tyle your avatar with Nike gear.”<sup>35</sup>



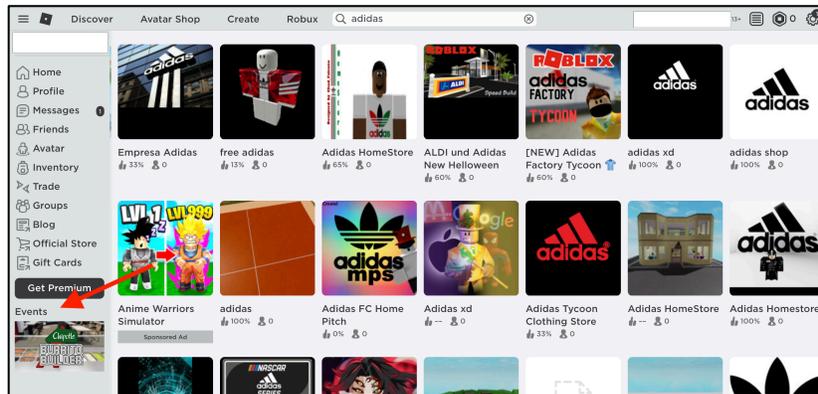
During this entire gaming experience, consumers are never presented with any disclosures clearly and conspicuously informing them that they are playing an advergame. FTC disclosure guidance should be updated to address how to properly disclose advergames on digital platforms.

## 2. Sponsored content within organic virtual worlds and games

Another way advertising content is interlaced with video games and metaverse experiences is via sponsored promotions within organic, non-sponsored games and experiences. The popular game Jailbreak, which was developed on Roblox in 2017, provides an example. In February, Jailbreak hosted a limited-time sponsored event called the “OFFICIAL McLaren F1 Event,” which was timed to coincide with the real-world reveal of the new McLaren MCL36.<sup>36</sup>

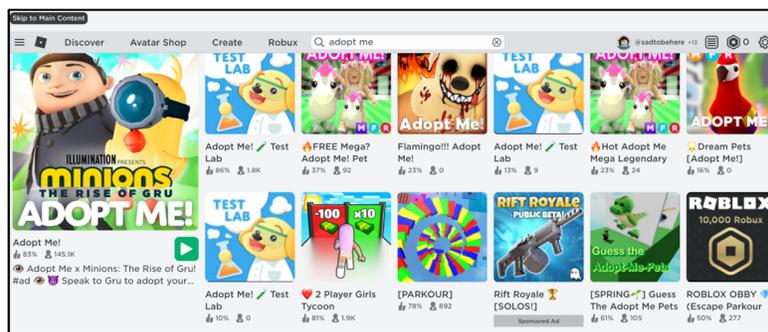


Just like the advergames examined above, there was no disclosure informing Roblox users of the promotional nature of this marketing event. Moreover, Roblox highlights such promotional “events” on its platform but does not disclose when these events are sponsored.



Similarly, in June 2022, the month leading up to the release of the Minions movie, “The Rise of Gru,” Illumination’s Minions brand made a limited promotional appearance in the popular Roblox children’s game Adopt Me! where players could obtain a Zodiac Minion Egg from Gru and were told that the egg would either hatch by itself over time and with care, or could be hatched right away with Robux, Roblox’s virtual currency.<sup>37</sup>

The Minions promotion was inconspicuously disclosed as an #ad in search results for Adopt Me! and also at the end of a long paragraph of text in a promo that appeared before players entered this virtual experience. However, neither of these disclosures clearly or conspicuously communicated to Adopt Me! players, even those who are not young children,<sup>38</sup> that they would be engaging with marketing content within the Adopt Me! virtual world, and there were no disclosures within the game.



Search results



Images taken during Minions promotion in the Adopt Me! experience

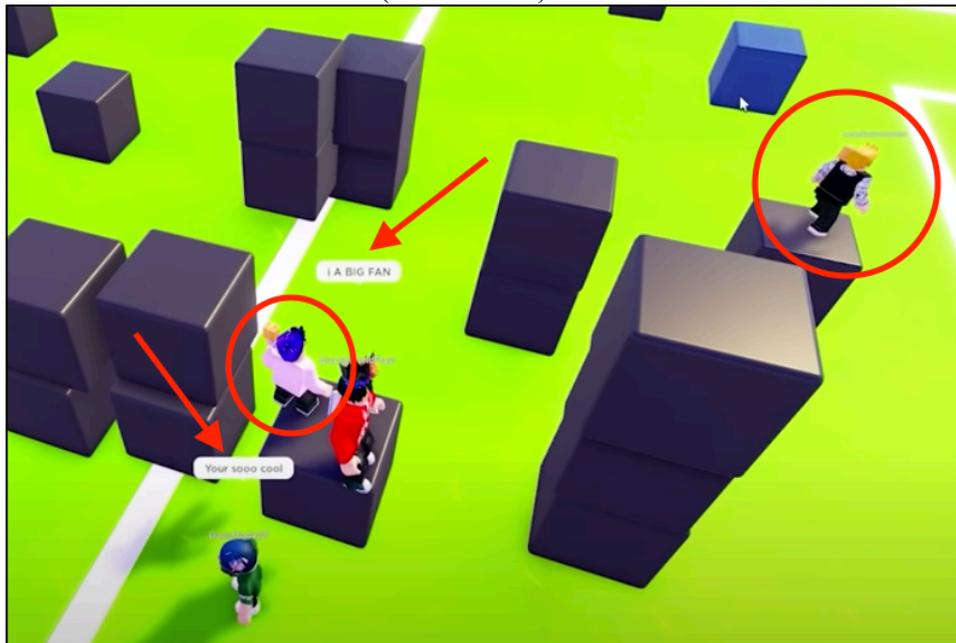
To help rein in this type of deceptive marketing, FTC guidance regarding how to properly communicate such promotions within virtual games and experiences is critical.

### 3. Avatar Influencers

Another way advertising content is presented to consumers in video games and on metaverse platforms is by way of brand avatar influencers – both human-created and AI-generated – who are playing, communicating and socializing with unwitting consumers. Specifically, with respect to human-created avatar influencers, numerous companies enlist social media influencers to promote their brands not only on social media platforms but also within video games and metaverse experiences.<sup>39</sup>

For example, Nike enlisted a fleet of influencers who not only promoted Roblox’s Nikeland on social media platforms, but also promoted Nikeland in the Roblox metaverse through their avatars. These avatar influencers, sporting Nike gear, spent time in Nikeland and interacted with other avatars – playing games, building mini-games, “buying” Nike gear and communicating with fans<sup>40</sup> – yet none of them appeared to have disclosed their material connection to Nike in the advergame.

Nikeland (and Roblox) influencers<sup>41</sup>



Avatar influencers @LankyBoxGamesJustin and @LankyBoxGamesAdam (circled in red above) playing with and interacting with other avatar players in Nikeland (user to influencer, “*I A BIG FAN*,” “*Your sooo cool*”)

### Nikeland (and Roblox) influencer<sup>42</sup>



Avatar influencer @TW\_Dessi (circled in yellow above) communicating with other players in the chat bar in Nikeland (users to influencer, “how doyou get the gear,” “that nike hat is drippy,” “TW dessi???” “omgomg”)

### Nikeland (and Roblox) influencer<sup>43</sup>



Avatar influencer @notiamsanna playing The Floor is Lava with other players in game she created in Nikeland

In addition to undisclosed brand avatar influencers, there are also undisclosed AI-controlled avatars that have been programmed by brands to engage with users in promotional interactions in advergames.<sup>44</sup> In Nikeland, these agenda-driven artificial influencers, which look just like other avatars, give away promotional items such as backpacks and caps, while others act as barkers that try to attract users to the Nikeland stores.

Nike store clerk bot giving away Nike backpack and cap<sup>45</sup>



Nike store clerk bot "waving" users over to the Nike Shop<sup>46</sup>



In addition to the generic staff bots found in Nikeland, there are also avatar bots for real-life NBA stars Giannis Antetokounmpo and LeBron James. Antetokounmpo tweeted to more than 2 million followers and posted to more than 12 million Instagram fans late last year that they should "[c]ome find me" in Nikeland because he was giving away "free gifts." However, it appears that neither Antetokounmpo nor James ever controlled their avatars in Nikeland – rather the look-a-like avatars interacting with other users were simply AI-controlled agents of Nike.

NBA player Giannis Antetokounmpo's avatar bot giving away Nike earmuffs<sup>47</sup>



NBA player LeBron James' avatar bot giving away NBA All-Star Rewards after users complete certain challenges<sup>48</sup>



Regardless of where marketing occurs, advertisers and influencers must fulfill their duty to ensure that all material information is appropriately disclosed to the intended audience. Clear FTC guidance on how to disclose that information in these new, inventive formats

will help advertisers and influencers comply with the law, as well as protect consumers from widespread insidious marketing. Further, users participating in games and metaverses, and viewing other digital platforms have a right to know when they are interacting with or viewing AI-controlled brand avatars. As such, brands should be required to disclose the use of endorsement bots.

## B. The Guidance Should Address Dark Patterns

As several TINA.org investigations have demonstrated,<sup>49</sup> many dark patterns are used by advertisers in a multitude of ways in an attempt to manipulate consumers' purchasing behavior. Certain dark pattern techniques may be addressed by requiring proper disclosures, while others are per se deceptive and cannot be cured with disclosures. Below is a limited sampling of some problematic dark patterns that the FTC should address in its Guidance.

### 1. Confirmshaming

When advertisers use confirmshaming, i.e., attempting to guilt users into opting into something,<sup>50</sup> they frequently present the favorable option for the marketer clearly and conspicuously, and bury the unfavorable option in inconspicuous, guilt-inducing fine print.

The following examples from TINA.org's investigation into Agora are illustrative.<sup>51</sup>

Just click the button below to add your 1-year subscription of Dr. Fred Pescatore's Logical Health Alternatives to your order now!

And with our "one click" ordering below, you don't need to fill in your credit card or address information again—just click below and we'll add Dr. Fred Pescatore's **Logical Health Alternatives** to your order today and send you all the details right to your email inbox.

**Logical Health Alternatives**  
1 Year (12 Issues) for just \$37.00

[No thanks. I'm not interested in this vital information.](#)

“No thanks. I’m not interested in this vital information.”

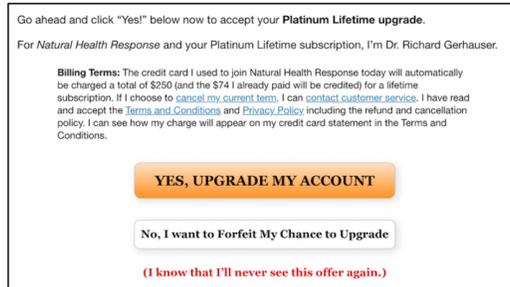
**Congratulations on your acceptance as a new Member in good standing of HSI.**

**Upgrade to Lifetime Membership!**

**Billing Terms:** The credit card I used to join HSI today will automatically be charged a total of \$149 (and the \$74 I already paid will be credited) for a lifetime membership. If I choose to cancel my current term, I can contact customer service. I have read and accept the [Terms and Conditions](#) and [Privacy Policy](#) including the refund and cancellation policy. I can see how my charge will appear on my credit card statement in the Terms and Conditions.

[No thanks. I don't want to upgrade my Membership and receive any additional free gifts. \(I understand this offer may not be repeated.\)](#)

“No thanks. I don’t want to upgrade my Membership and receive any additional gifts. (I understand this offer may not be repeated.)”



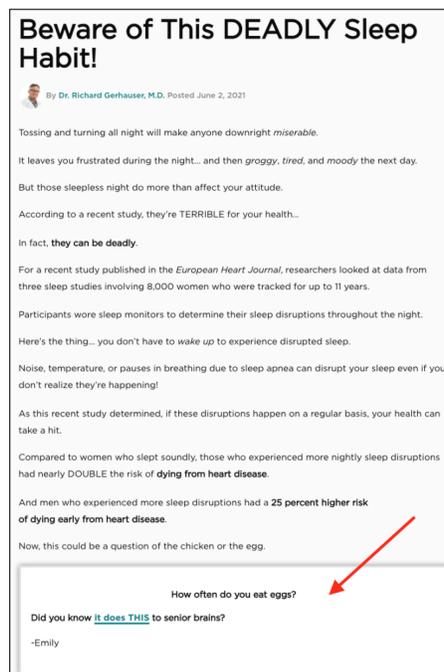
“No, I want to Forfeit My Chance to Upgrade (I know that I’ll never see this offer again.)”

FTC guidance regarding how to disclose the opt-out option in such scenarios (i.e., how to properly and fairly juxtapose consumers’ choices) would help ensure that consumers are not unwittingly tricked into signing up for products or services they do not want.

## 2. Disguised ads/clickbait

TINA.org’s Agora investigation also revealed that the publication giant used undisclosed ads in the margins and/or amid the text of articles on its various websites with a prompt to click. When curious consumers clicked on the disguised teaser ad, they were led to another ad.

By way of example, one of Agora’s websites, called the Natural Health Response, listed hundreds of free articles about a variety of health topics, such as one published on June 2, 2021 entitled “Beware of This DEADLY Sleep Habit!” The article included a disguised ad that asked readers how often they eat eggs and suggested an unknown impact on the human brain.



Consumers intrigued by the teaser clicked on the box and were led to a Health Sense Media video presentation about “millennial medicine,” which deceptively promoted the Natural Health Response subscription using numerous unsubstantiated disease-treatment claims.<sup>52</sup>

Clear and conspicuous disclosure that consumers were viewing marketing material in this type of scenario is imperative. As such, the Guidance should address this specific type of undisclosed marketing.

### 3. Forced Continuity

Forced continuity is another type of dark pattern whereby after a consumer’s free trial ends their credit card continues to be charged without proper warning.<sup>53</sup> This is an issue frequently associated with negative-option offers, which the FTC has addressed in other guidance documents, publications and rules.<sup>54</sup> However, because this marketing tactic frequently involves issues with proper disclosures on digital platforms, the Guidance should expressly echo the disclosure requirements set forth in other Agency publications that address such marketing so there is no confusion with regard to how to properly disclose material information in such scenarios, and to help eliminate these oft-used deceptive marketing ploys.

### 4. Limited Supply

Some unscrupulous marketers use the “limited supply” ruse – that is, telling consumers that a product is in limited supply when it is not – to induce speedy purchases.

The following marketing excerpts from TINA.org’s Agora investigation are illustrative.<sup>55</sup>

But because **AdiGold** has such a unique blend of premium ingredients—it takes us a very long time to make it.

And in these uncertain times, shortages are becoming commonplace.

So unfortunately—and I really can’t stress this enough—supplies of **AdiGold** are extremely limited...

We try our best, but my exclusive formulas can go fast... And with a special solution like **AdiGold**, at such a shockingly reasonable price—we expect it to go even faster.

That’s why it’s wise to order the largest supply now while you still can.

“...supplies of **AdiGold** are extremely limited...”

If you wait to try **Memotex**, however, *we might be completely sold out.*

And because of the ingredient combination and special production process, it can take *months* for us to get more in stock.

So, please, **for the sake of your memory and your loved ones**, do not delay.

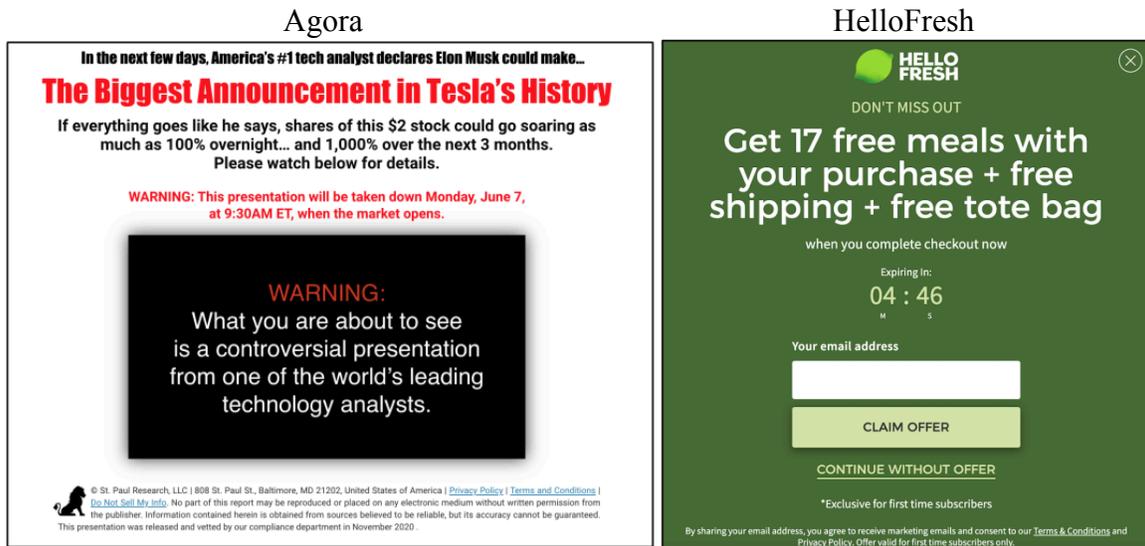
“If you wait to try **Memotex**, however, *we might be completely sold out.*”

Adding a disclosure that says in sum and substance “just kidding” does not render this deceptive marketing tactic any less problematic. The FTC’s Guidance should highlight its position that disclosures cannot cure a false claim, and make clear that marketers may not make scarcity claims if they are not true.

### 5. Limited Time

A similar tactic employed by dishonest marketers is the use of language and/or images that lead consumers to believe that the advertised product or service is only available for a limited time in order to induce consumers to make a rushed purchase.

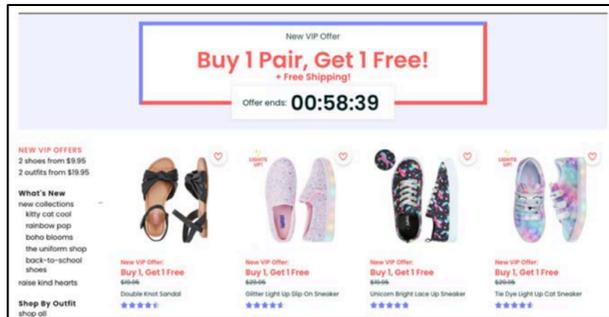
The following screenshots obtained during TINA.org’s investigations of Agora, HelloFresh and FabKids are illustrative.<sup>56</sup>



*“WARNING: This presentation will be taken down Monday, June 7, at 9:30AM ET, when the market opens.”*

*“Expiring in: ....”*

### FabKids



*“Offer ends: ....”*

In each of the above cases, nothing changed when the stated time elapsed; the dates and times were simply repeatedly extended. In other words, the representation that the offers

were time-sensitive was false and thus incurable by disclosures. The FTC’s Guidance should explicitly prohibit the use of such false time-pressure tactics.

### C. The Guidance Should Address Short-Lived Content

As TINA.org previously noted in its Comment to the FTC regarding the Agency’s Endorsement Guides,<sup>57</sup> some of today’s most popular social media platforms, especially among teens and young adults, are ephemeral in nature. That is, the content on these platforms is short-lived – existing, in some cases, for as little as a few seconds before permanently disappearing. Prominent examples for such digital content include Instagram Stories and Snapchat.

Regulatory oversight of such here-today-gone-tomorrow content is incredibly difficult.<sup>58</sup> Indeed, TINA.org’s own investigation into DJ Khaled – the “King of Snapchat”<sup>59</sup> – was fraught with issues concerning the capture and collection of deceptive Snapchat endorsements.<sup>60</sup> Between June 2017 and April 2018, TINA.org staff had to monitor Khaled’s Snapchat stories seven days a week in order to identify and record instances of deceptive advertising.<sup>61</sup>



Screenshot of DJ Khaled July 17, 2017 Snapchat story<sup>62</sup>

These difficulties in monitoring such advertising means that sponsored posts with improper – or nonexistent – disclosures can run rampant with little fear of being identified or exposed. Regardless of the difficulties associated with monitoring advertising on platforms with transitory content, companies and brands are not permitted to ignore their legal obligations on such sites. Wherever marketing takes place, advertisers must ensure that the form, content and disclosures used, at a minimum, comply with the law. To that end, the Commission should carefully consider this growing issue, and address advertisers’ ever-present obligation to ensure proper disclosures are instituted regardless of where the advertisements take place.

Additionally, the Commission should address violations from marketers using vanishing content more seriously. Deceptive advertisements on platforms like Snapchat are difficult

to deter: the miniscule chance of being caught means the likelihood of punishment is low.<sup>63</sup> If the FTC is lenient on violators who are caught, then the likelihood of punishment will effectively be zero. As a former FTC Commissioner noted, deterrence will be limited where “the narrow subset of wrongdoers who are caught and attract law enforcement scrutiny will face minimal sanctions.”<sup>64</sup>

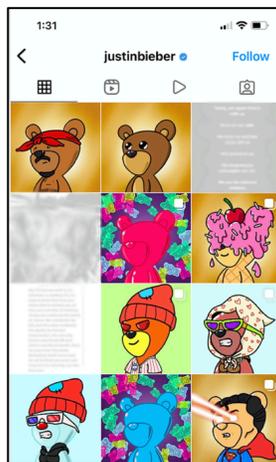
#### **D. The Guidance Should Address How to Disclose Material Information in Social Media Posts When Captions are Not Conspicuous**

The Agency has counseled brands that advertise on social media platforms to disclose material information above the “fold,” meaning that disclosures should be visible to consumers without them having to click “more” in social media captions.<sup>65</sup> While the Guidance is appropriate for consumers viewing posts in certain formats, it is also important to note that there are other ways of viewing marketing material on social media platforms that do not include the narrative format.<sup>66</sup> The Guidance should advise marketers to consider all possible viewing formats when addressing how to properly disclose material information.

TINA.org offers two such scenarios for the Agency’s consideration, though undoubtedly there are other situations that present similar issues that may need to be addressed as well.

##### **1. Tile View on Certain Social Media Platforms**

A TINA.org investigation into Justin Bieber’s Instagram promotions of certain nonfungible tokens (NFTs) revealed that he was promoting an NFT company with which he has a material connection without disclosing this fact, among other things, in his promotional posts.<sup>67</sup> In response to a letter from TINA.org alerting Bieber to the deceptive promotions,<sup>68</sup> his legal team denied any wrongdoing but stated that Bieber would nonetheless update his posts to disclose his connection with the company.<sup>69</sup> However, even if these additions are made, they will not be visible to any Bieber fans who simply scroll through his images from the Instagram main page.



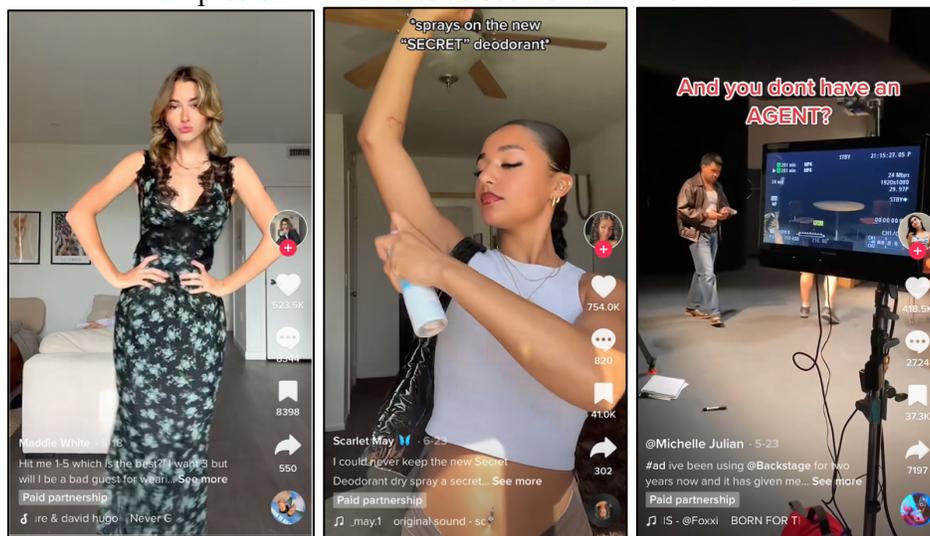
View of Justin Bieber’s Instagram account from an iPhone 12 Pro showing many of his undisclosed NFT promotions<sup>70</sup>

This view allows consumers to view Bieber’s NFT promotions without ever seeing any accompanying captions.<sup>71</sup> This issue frequently occurs when influencers promote products and/or services that are visible in the image, and thus in the tile view.<sup>72</sup>

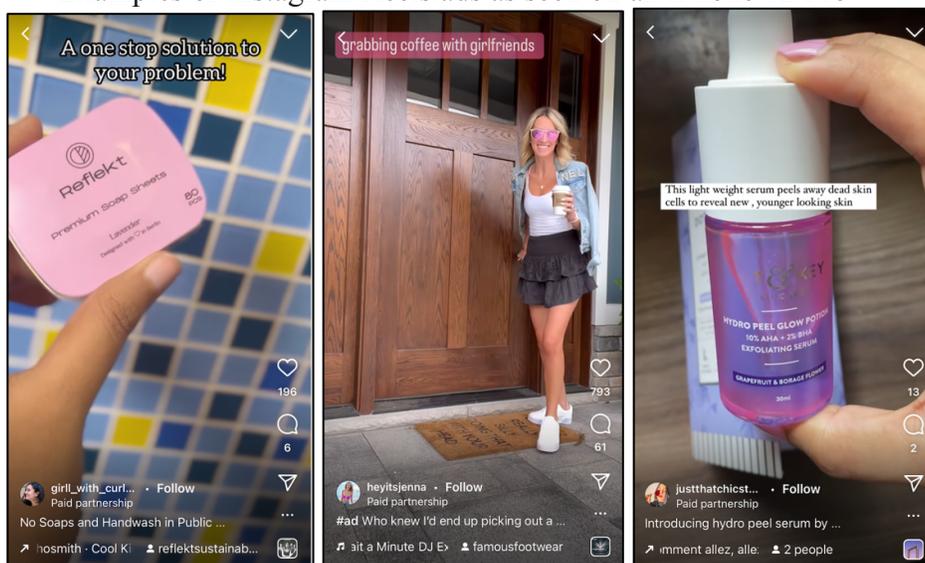
## 2. TikTok Videos and Instagram Reels

A similar issue is present on TikTok, the popular social media and video-sharing platform, as well as on Instagram’s “Reels” feature. In each of these formats, videos take up the entire screen, meaning that accompanying captions can be so inconspicuous that any disclosures within them – even those “above the fold” – may be easily overlooked.

Examples of TikTok ads as seen on an iPhone 12 Pro<sup>73</sup>



Examples of Instagram Reels ads as seen on an iPhone 12 Pro<sup>74</sup>



Note that in both of these formats, text can be superimposed on the videos themselves, as shown in some of the screenshots above, and can be (depending on the size and color of the font used) more conspicuous than the text in the captions, which always appear at the bottom of the videos in small white print.

The FTC should carefully consider this issue and address how advertisers effectively convey their disclosure information to consumers when their marketing is presented in these video formats.

## THE NEED FOR DISCLOSURE SUBSTANTIATION

Despite FTC Guidance regarding how to legally comply with disclosure requirements, TINA.org's experience makes clear that many advertisers either choose to ignore the disclosures suggested by the FTC or take creative license with their disclosure obligations. For example, and as highlighted in TINA.org's 2020 Comment to the FTC regarding its Endorsement Guide,<sup>75</sup> in 2016, cosmetics company Estée Lauder – in response to TINA.org's investigation of the Kardashian/Jenner family's deceptive promotional Instagram posts<sup>76</sup> – took the position that #KJ4EL was a legally sufficient disclosure to inform consumers that Kendall Jenner was paid to endorse the company despite having no readily available data to support such a contention.<sup>77</sup>



Similarly, TINA.org has investigated numerous MLM companies that have taken the position that hyperlinking to an income disclosure statement or including a statement about variable financial results at the end of lengthy promotional videos or posts touting atypical earnings satisfies their disclosure obligations.<sup>78</sup>

In order to effectively rein in advertisers' use of inadequate disclosures, the Guidance should not only incorporate suggestions for how to properly disclose material information, but also emphasize that advertisers are responsible for ensuring that claims conveyed to consumers in an ad are truthful and substantiated, and that they also are responsible for ensuring that consumers know that what they are viewing is an ad. Highlighting in the Guidance that advertisers who use disclosures must be able to

substantiate with reliable data that the net impression of their advertisements is non-deceptive would help to eradicate deceptive and misleading marketing.<sup>79</sup>

### **DISCLOSURES DO NOT WORK FOR YOUNG CHILDREN ON DIGITAL PLATFORMS**

The FTC currently states in its .com Disclosures publication that disclosures must be “understandable to the intended audience.”<sup>80</sup> However, there are certain audiences for whom disclosures simply do not work.<sup>81</sup>

To illustrate this point, TINA.org draws the Commission’s attention to its 2019 complaint regarding Ryan ToysReview, one of the most viewed YouTube channels of all time.<sup>82</sup> TINA.org’s investigation revealed that the YouTube channel, which is now called Ryan’s World and has more than 32 million subscribers, thousands of posted videos and more than 40 billion views,<sup>83</sup> deceptively promoted a multitude of products to millions of preschool-aged children by misleadingly blurring the distinction between advertising and organic content for its intended audience: preschoolers aged five and under.

Children under the age of five are a particularly susceptible consumer group requiring special protections because they are unable to identify marketing content or distinguish it from other forms of content.<sup>84</sup> At age five, the distinction between commercials and other content is only possible when there are perceptual cues, such as verbal separators (“We’ll be right back after this message”) or because commercials are shorter and independent of the other content.<sup>85</sup> Further, even at age five – when children begin to be able to at least identify traditional ads – the selling intent behind the ads is not understood.<sup>86</sup> The perceptual cues present in television programming that allow five-year-olds to identify ads are completely lacking on digital platforms such as YouTube, where videos natively embed sponsored content within the program, as does Ryan ToysReview.<sup>87</sup> Thus, it is not surprising that preschoolers do not realize that they are being marketed to in these online settings.<sup>88</sup>

Because [an] audience of ages five and under lacks the capacity to distinguish advertising from content in traditional television programming, it is inconceivable that they would be able to distinguish between sponsored and unsponsored videos on [YouTubeKids]. Even if sponsored videos in [YouTubeKids] were identified as advertising, its audience is too young to comprehend what that means.<sup>89</sup>

In other words, when a post, video or virtual world directed to children five and under mixes advertising with program content, the preschool audience is unable to understand or even identify the difference between marketing material and organic content, even when there is a verbal indicator that attempts to identify the marketing content.<sup>90</sup>

Thus, the typical remedy for such blending of advertising and organic content – *e.g.*, disclosures of material connections between the endorser and the seller of the advertised product – does not work in such circumstances as the intended audience is unable to understand them. In fact, it is for precisely this reason that the Federal Communications

Commission has a longstanding policy that prohibits product placements in television programs produced and broadcast to children 12 years old and under.<sup>91</sup>

There is simply no support for the proposition that preschool content on digital platforms, such as Ryan ToysReview, can present its target audience with native advertising videos and expect that any disclosure will clearly and conspicuously inform this young and vulnerable cohort that they are being lobbed a sales pitch.

## **DISCLOSURE RESEARCH**

More focused research on the effectiveness of disclosures in various forms of digital advertising would be helpful in guiding policy decisions and regulations. Nevertheless, there already exists some research that may help guide the advertising industry and regulators, among others, to establish some bright-line rules with respect to how and when disclosures should be used to ensure marketing is truthful and not deceptive. Below is some pertinent information that has been gleaned from some of the existing literature relating to the use of disclosures in certain industries and in certain types of marketing.

- “[T]he wide variety of online advertising forms and associated disclosures almost certainly makes it more difficult for consumers to identify ads and disclosures.”<sup>92</sup>
- With respect to native ads that mimic the style of online news articles, traditional text disclosures are not generally effective in communicating to consumers that they are viewing an advertisement; companion banner advertising may increase ad recognition.<sup>93</sup>
- With respect to MLM marketing that promotes the business opportunity, income disclosure statements that are hyperlinked in ads can be so complicated that consumers are discouraged from reading them at all,<sup>94</sup> and frequently contain a multitude of flaws that they do not properly inform consumers of the benefits and drawbacks of the advertised opportunity.<sup>95</sup>
- In the health care industry, disclosures of drug risks do not alter consumer behavior or understanding.<sup>96</sup>
- With respect to Walmart’s Made in USA labels on its website at the time of TINA.org’s 2015 investigation into the retail giant, information disclosing the origin of parts was not effectively communicated to consumers for a number of reasons, including, but not limited to, poor discriminability between different labels, as well as inconsistency in how relevant information was relayed.<sup>97</sup>

This information makes clear that marketers must do a better job communicating all relevant and material information to consumers, and that disclosures, as currently used, are frequently ineffective. The Agency should publicly acknowledge these shortcomings and engage in further research to help improve its .com Disclosures Guidance.

## CONCLUSION

When consumers are presented with truthful advertising that adequately discloses all material information, they can make reasoned decisions about where and how they spend their time and money. But as numerous TINA.org investigations have shown, too many marketers fail to clearly and conspicuously disclose material information in their advertising content – including, among other things, that the content is marketing, the typical experience to be expected with the advertised service or product, what the associated risks are, where a product’s parts are from, and what the true costs and terms associated with an offer are – thereby depriving consumers of the ability to make informed choices and causing real consumer harm.<sup>98</sup> Updated FTC guidance with regard to what and how legally required disclosures are to be made throughout the digital landscape will assist responsible companies, brands, influencers and platforms to do the right thing.

Very truly yours,



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<sup>1</sup> TINA.org’s Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>.

<sup>2</sup> TINA.org’s MyPillow Investigation, <https://truthinadvertising.org/brands/mypillow/>;

TINA.org’s doTerra Investigation, <https://truthinadvertising.org/brands/doterra/>;

TINA.org’s Young Living Investigation, <https://truthinadvertising.org/brands/young-living/>.

<sup>3</sup> TINA.org’s HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.

<sup>4</sup> *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic Before the Subcomm. on Consumer Prot. and Com. of the Comm. on Energy and Com.*, 117<sup>th</sup> Congress (Feb. 4, 2021) (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/house-testimony-2021-summary-action/>; *Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. of the Comm. on Com., Sci., & Transp.*, 117<sup>th</sup> Congress (Apr. 27, 2021), (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/senate-testimony-2021-summary-action/>.

<sup>5</sup> For example, TINA.org participated as *amicus curiae* in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm’n*, No. 19-508 (U.S. Dec. 7, 2020), [https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389\\_19-508%20brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf). TINA.org also filed an *amici curiae* brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc. et al. in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm’n v. Quincy Bioscience Holding Co.*,

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*Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), [https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen\\_Amici-Curiae-brief.pdf](https://www.truthinadvertising.org/wp-content/uploads/2018/03/Prevagen_Amici-Curiae-brief.pdf).

<sup>6</sup> See e.g., TINA.org's Social Media Influencers Investigation,

<https://truthinadvertising.org/industries/social-media-influencers/>;

TINA.org's Kardashian Investigation, <https://truthinadvertising.org/brands/kardashians/>;

TINA.org's DJ Khaled Investigation, <https://truthinadvertising.org/brands/dj-khaled/>;

TINA.org's Ciroc Investigation, <https://truthinadvertising.org/brands/ciroc/>;

TINA.org's Ryan ToysReview Investigation, <https://truthinadvertising.org/brands/ryan-toysreview/>;

TINA.org's Roblox Investigation, <https://truthinadvertising.org/brands/roblox/>;

TINA.org's Justin Bieber NFT Database, <https://truthinadvertising.org/evidence/justin-bieber-nft-database/>;

TINA.org's Warner Brothers Investigation, <https://truthinadvertising.org/brands/warner-brothers/>.

<sup>7</sup> See e.g., June 10, 2022 letter from TINA.org to Justin Bieber and copying Gianpiero D'Alessandro,

InBetweeners, [https://truthinadvertising.org/wp-content/uploads/2022/08/6\\_10\\_22-TINA.org-Letter-re-J-](https://truthinadvertising.org/wp-content/uploads/2022/08/6_10_22-TINA.org-Letter-re-J-Bieber-NFT-Promotions.pdf)

[Bieber-NFT-Promotions.pdf](https://truthinadvertising.org/wp-content/uploads/2018/03/3_29_18-Ltr-re-Khaled-Deceptive-Advertising_Redacted.pdf); March 29, 2018 letter from TINA.org to DJ Khaled and copying Diageo,

Bacardi, and Sovereign Brands, [https://truthinadvertising.org/wp-content/uploads/2018/03/3\\_29\\_18-Ltr-re-](https://truthinadvertising.org/wp-content/uploads/2018/03/3_29_18-Ltr-re-Khaled-Deceptive-Advertising_Redacted.pdf)

[Khaled-Deceptive-Advertising\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/08/8_17_16-ltr-from-TINA-to-K_Jenner-and-M_Kump_Redacted.pdf); August 17, 2016 letter from TINA.org to Kardashian/Jenner

family and copying 27 involved brands and companies, [https://truthinadvertising.org/wp-](https://truthinadvertising.org/wp-content/uploads/2016/08/8_17_16-ltr-from-TINA-to-K_Jenner-and-M_Kump_Redacted.pdf)

[content/uploads/2016/08/8\\_17\\_16-ltr-from-TINA-to-K\\_Jenner-and-M\\_Kump\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2022/06/6_22_22-TINA-complaint-to-FTC-re-HelloFresh.pdf).

<sup>8</sup> June 22, 2022 Complaint to FTC regarding HelloFresh's Deceptive Advertising and Illegal Business

Practices, [https://truthinadvertising.org/wp-content/uploads/2022/06/6\\_22\\_22-TINA-complaint-to-FTC-re-](https://truthinadvertising.org/wp-content/uploads/2022/06/6_22_22-TINA-complaint-to-FTC-re-HelloFresh.pdf)

[HelloFresh.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf); April 19, 2022 Complaint to FTC regarding Deceptive Marketing on Roblox,

[https://truthinadvertising.org/wp-content/uploads/2022/04/4\\_19\\_22-Complaint-to-FTC-re-Roblox.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf);

August 30, 2021 Complaint to FTC regarding FabKids' Deceptive Advertising and Illegal Business

Practices, [https://truthinadvertising.org/wp-content/uploads/2021/08/8\\_30\\_21-FabKids-complaint-to-](https://truthinadvertising.org/wp-content/uploads/2021/08/8_30_21-FabKids-complaint-to-FTC_Redacted.pdf)

[FTC\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf); February 10, 2020 Complaint to FTC regarding Savage X Fenty's Deceptive

Advertising and Illegal Business Practices, [https://truthinadvertising.org/wp-](https://truthinadvertising.org/wp-content/uploads/2020/02/2_10_20-TINA-ltr-to-FTC-re-Savage-X-Fenty_Redacted.pdf)

[content/uploads/2020/02/2\\_10\\_20-TINA-ltr-to-FTC-re-Savage-X-Fenty\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf); August 28, 2019

Complaint to FTC regarding Ryan ToysReview's deceptive native advertising,

[https://truthinadvertising.org/wp-content/uploads/2019/08/8\\_28\\_19-ltr-to-FTC-re-Ryan-](https://truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf)

[ToysReview\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2019/03/TINA-letter-to-FTC-Influencers_Redacted.pdf); March 4, 2019 Complaint to FTC regarding Social Media Influencers Ignoring

FTC Direction, [https://truthinadvertising.org/wp-content/uploads/2019/03/TINA-letter-to-FTC-Influencers-](https://truthinadvertising.org/wp-content/uploads/2019/03/TINA-letter-to-FTC-Influencers_Redacted.pdf)

[Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2018/12/12_10_18-letter-from-TINA-to-FTC-re-Diageo-Ciroc_Redacted.pdf); December 10, 2018 Complaint to FTC regarding Deceptive Advertising by Diageo,

[https://truthinadvertising.org/wp-content/uploads/2018/12/12\\_10\\_18-letter-from-TINA-to-FTC-re-Diageo-](https://truthinadvertising.org/wp-content/uploads/2018/12/12_10_18-letter-from-TINA-to-FTC-re-Diageo-Ciroc_Redacted.pdf)

[Ciroc\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2017/10/10_30_2017-ltr-from-TINA-to-FTC-re-Warner-Bros_Redacted.pdf); October 30, 2017 Complaint to FTC regarding Warner Bros. Home Entertainment

Inc.'s Violation of 2016 FTC Order, [https://truthinadvertising.org/wp-](https://truthinadvertising.org/wp-content/uploads/2017/10/10_30_2017-ltr-from-TINA-to-FTC-re-Warner-Bros_Redacted.pdf)

[content/uploads/2017/10/10\\_30\\_2017-ltr-from-TINA-to-FTC-re-Warner-Bros\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2016/08/8_25_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf); August 25,

2016 Complaint to FTC regarding Deceptive Native Advertising by the Kardashian/Jenner family,

[https://truthinadvertising.org/wp-content/uploads/2016/08/8\\_25\\_16-ltr-from-TINA-to-FTC-re-Kardashian-](https://truthinadvertising.org/wp-content/uploads/2016/08/8_25_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf)

[Jenner-Instagram-posts.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf).

<sup>9</sup> TINA.org's Comment to the FTC Regarding Protecting Kids from Stealth Advertising in Digital Media

(July 18, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment\\_Protecting-](https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf)

[Kids-from-Stealth-Advertising-in-Digital-Media.pdf](https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf); TINA.org's Comment to the FTC Regarding the

Endorsement Guides (June 22, 2020), [https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-](https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf)

[Endorsement-Guides-Comment.pdf](https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf); Bonnie Patten, Exec. Dir., Truth In Advertising, Presentation at the

Int'l Council for Advert. Self-Regul. (ICAS): Deceptive Advertising in the Roblox Metaverse (July 2022);

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Marketing & Consumer Harm: Alcohol, E-Cigs, & Cryptocurrency (May 2018); Bonnie Patten, Exec. Dir.,

Truth In Advertising, Presentation at the U.S. Alcohol Pol'y All. Ann. Conf.: Influencer Marketing of

Alcohol to Minors: DJ Khaled + Diageo, Bacardi, Sovereign Brands (May 2018); Bonnie Patten, Exec.

Dir., Truth In Advertising, Presentation at Middle Atl. Ass'n of Coll. of Bus. Admin. (MAACBA) Ann.

Conf.: Not Keeping Up with the Kardashians: Advertising Challenges in the Digital Age (Oct. 2017);

Bonnie Patten, Exec. Dir., Truth In Advertising, Panelist at the Nat'l Ass'n of Attorneys General (NAAG)

Consumer Prot. Conf.: Deceptive Social Media Marketing (May 2017); Hartford Healthcare, *Sen.*

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Blumenthal Discusses What the FDA Should Do to Protect Consumers, YouTube (Sept. 4, 2019), <https://www.youtube.com/watch?v=E1-gwVYwPsM>.

<sup>10</sup> April 19, 2022 Complaint to FTC regarding Deceptive Marketing on Roblox, [https://truthinadvertising.org/wp-content/uploads/2022/04/4\\_19\\_22-Complaint-to-FTC-re-Roblox.pdf](https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf).

<sup>11</sup> See e.g., TINA.org's Comment to the FTC Regarding Earnings Claims (May 10, 2020), <https://truthinadvertising.org/wp-content/uploads/2022/05/TINA.org-Comment-re-Earnings-Claims-ANPR-R111003.pdf>; TINA.org's DSA Companies' Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>; TINA.org's Beautycounter Investigation, <https://truthinadvertising.org/brands/beautycounter/>; TINA.org's IM Mastery Academy Investigation, <https://truthinadvertising.org/brands/im-mastery-academy-imarkets-live/>; TINA.org's Jusuru Investigation, <https://truthinadvertising.org/brands/jusuru/>; TINA.org's Le-Vel (Thrive) Investigation, <https://truthinadvertising.org/brands/level-thrive/>; TINA.org's Market America Investigation, <https://truthinadvertising.org/brands/market-america/>; <https://truthinadvertising.org/brands/level-thrive/>; TINA.org's New U Life Investigation, <https://truthinadvertising.org/brands/new-u-life/>; TINA.org's Plexus Investigation, <https://truthinadvertising.org/brands/plexus-worldwide/>.

<sup>12</sup> See TINA.org's U.S. Cancer Centers Investigation, <https://truthinadvertising.org/industries/cancer-care-centers/>.

<sup>13</sup> See TINA.org's New Balance Investigation, <https://truthinadvertising.org/brands/new-balance/>; TINA.org's Williams-Sonoma Investigation, <https://truthinadvertising.org/brands/williams-sonoma/>; TINA.org's Gillette Investigation, <https://truthinadvertising.org/brands/gillette/>; TINA.org's Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>; TINA.org's Target Investigation, <https://truthinadvertising.org/brands/target/>; TINA.org's Step2 Investigation, <https://truthinadvertising.org/brands/step2/>; TINA.org's GSA Advantage Investigation, <https://truthinadvertising.org/brands/gsa-advantage/>; TINA.org's Walmart Investigation, <https://truthinadvertising.org/brands/walmart/>; TINA.org's WillaGirl Investigation, <https://truthinadvertising.org/brands/willagirl/>; TINA.org's Almay Investigation, <https://truthinadvertising.org/brands/almay/>.

<sup>14</sup> TINA.org's Agora Investigation, <https://truthinadvertising.org/brands/agora/>;

TINA.org's Stansberry Investigation, <https://truthinadvertising.org/brands/stansberry/>.

<sup>15</sup> TINA.org's DealDash Investigation, <https://truthinadvertising.org/brands/dealdash/>.

<sup>16</sup> TINA.org's HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>;

TINA.org's FabKids Investigation, <https://truthinadvertising.org/brands/fabkids/>;

TINA.org's Savage X Fenty Investigation, <https://truthinadvertising.org/brands/savage-x-fenty/>;

TINA.org's AdoreMe Investigation, <https://truthinadvertising.org/brands/adore-me/>;

TINA.org's O2Pur Investigation, <https://truthinadvertising.org/brands/o2pur/>.

<sup>17</sup> See TINA.org's DSA Companies' Income Claims Investigation,

<https://truthinadvertising.org/industries/mlm-income/>;

TINA.org's Jusuru Investigation, <https://truthinadvertising.org/brands/jusuru/>;

TINA.org's Market America Investigation, <https://truthinadvertising.org/brands/market-america/>;

TINA.org's Le-Vel (Thrive) Investigation, <https://truthinadvertising.org/brands/level-thrive/>;

TINA.org's Plexus Investigation, <https://truthinadvertising.org/brands/plexus-worldwide/>;

TINA.org's U.S. Cancer Center Investigation, <https://truthinadvertising.org/industries/cancer-care-centers/>;

TINA.org's Gillette Investigation, <https://truthinadvertising.org/brands/gillette/>;

TINA.org's Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz/>;

TINA.org's Step2 Investigation, <https://truthinadvertising.org/brands/step2/>;

TINA.org's GSA Advantage Investigation, <https://truthinadvertising.org/brands/gsa-advantage/>;

TINA.org's Walmart Investigation, <https://truthinadvertising.org/brands/walmart/>;

TINA.org's WillaGirl Investigation, <https://truthinadvertising.org/brands/willagirl/>;

TINA.org's Almay Investigation, <https://truthinadvertising.org/brands/almay/>;

TINA.org's AdoreMe Investigation, <https://truthinadvertising.org/brands/adore-me/>;

TINA.org's DealDash Investigation, <https://truthinadvertising.org/brands/dealdash/>;

TINA.org's Stansberry Investigation, <https://truthinadvertising.org/brands/stansberry/>.

<sup>18</sup> See TINA.org's Beautycounter Investigation and Complaint,

<https://truthinadvertising.org/brands/beautycounter/>; TINA.org's iMarketsLive Investigation and Complaint, <https://truthinadvertising.org/brands/im-mastery-academy-imarkets-live/>;

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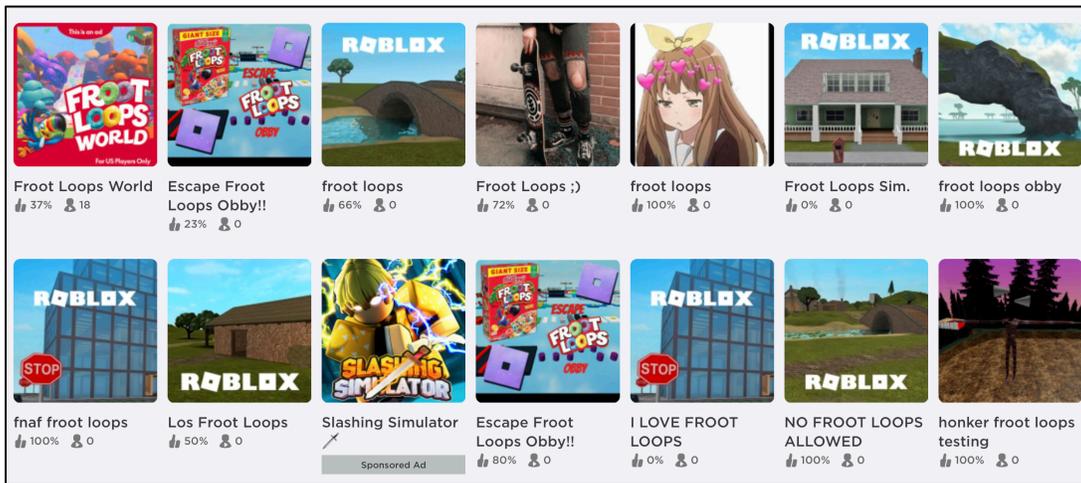
TINA.org’s Jeunesse Investigation and Complaints, <https://truthinadvertising.org/brands/jeunesse/>;  
TINA.org’s Kyani Investigation and Complaints, <https://truthinadvertising.org/brands/kyani/>;  
TINA.org’s Le-Vel (Thrive) Investigation and Complaint, <https://truthinadvertising.org/brands/level-thrive/>; TINA.org’s LuLaRoe Investigation and Complaints, <https://truthinadvertising.org/brands/lularoe/>;  
TINA.org’s Mary Kay Investigation and Complaint, <https://truthinadvertising.org/brands/mary-kay/>;  
TINA.org’s Nerium/Neora Investigation and Complaints, <https://truthinadvertising.org/brands/neora-nerium/>; TINA.org’s New U Life Investigation and Complaint, <https://truthinadvertising.org/brands/new-u-life/>; TINA.org’s Primerica Investigation and Complaint, <https://truthinadvertising.org/brands/primerica/>;  
TINA.org’s Stream Energy Investigation and Complaints, <https://truthinadvertising.org/brands/stream-energy/>; TINA.org’s Team National Investigation and Complaints, <https://truthinadvertising.org/brands/team-national/>;  
TINA.org’s Cancer Treatment Centers of America Investigation and Complaint, <https://truthinadvertising.org/brands/cancer-treatment-centers-of-america-ctca/>;  
TINA.org’s Almay Investigation and Complaints; <https://truthinadvertising.org/brands/almay/>;  
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TINA.org’s Walmart Investigation and Complaints, <https://truthinadvertising.org/brands/walmart/>;  
TINA.org’s Williams-Sonoma Investigation and Complaint; <https://truthinadvertising.org/brands/williams-sonoma/>;  
TINA.org’s Agora Investigation and Complaint, <https://truthinadvertising.org/brands/agora/>;  
TINA.org’s DealDash Investigation and Complaint, <https://truthinadvertising.org/brands/dealdash/>;  
TINA.org’s AdoreMe Investigation and Complaints, <https://truthinadvertising.org/brands/adore-me/>;  
TINA.org’s FabKids Investigation and Complaints, <https://truthinadvertising.org/brands/fabkids/>;  
TINA.org’s HelloFresh Investigation and Complaint, <https://truthinadvertising.org/brands/hellofresh/>;  
TINA.org’s O2Pur Investigation and Complaint, <https://truthinadvertising.org/brands/o2pur/>; TINA.org’s Savage X Fenty Investigation and Complaints, <https://truthinadvertising.org/brands/savage-x-fenty/>.  
<sup>19</sup> FTC’s .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.  
<sup>20</sup> U.S. Census Bureau News, U.S. Department of Commerce, Quarterly Retail E-Commerce Sales, May 19, 2022, [https://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf).  
<sup>21</sup> Pew Research Center Mobile Fact Sheet, April 7, 2021, <https://www.pewresearch.org/internet/fact-sheet/mobile/>.  
<sup>22</sup> Pew Research Center, About three-in-ten U.S. adults say they are ‘almost constantly’ online, Mar. 26, 2021, <https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/>; Dan Avery, Americans spent a third of waking hours on mobile devices in 2021, report finds, Jan. 12, 2022, <https://www.cnet.com/tech/services-and-software/americans-spent-a-third-of-waking-hours-on-mobile-devices-in-2021-report-finds/>; Fast Company, Here’s how Americans spend their time online, Apr. 1, 2016 <https://www.fastcompany.com/4001983/heres-how-americans-spend-their-time-online-2>.  
<sup>23</sup> U.S. children aged 10 to 18 now spend an average of five to eight hours per day in front of a screen. The Common Sense Census: Media Use By Tweens and Teens, Common Sense Media, 2021, <https://www.commonsensemedia.org/research/the-common-sense-census-media-use-by-tweens-and-teens-2021>; Megan Marples, Kids Nearly Doubled Screen Time During the Pandemic, But There Is Something You Can Do About It, CNN, Nov. 1, 2021, <https://www.cnn.com/2021/11/01/health/children-screen-time-increase-pandemic-studywellness/index.html>.  
<sup>24</sup> Megan Graham, Digital Ad Revenue Jumped 35% in the U.S. Last Year, Biggest Gain Since 2006, Apr. 12, 2022, <https://www.wsj.com/articles/digital-ad-revenue-jumped-35-in-the-u-s-last-year-biggest-gain-since-2006-11649759401>.  
<sup>25</sup> Jennifer Saba, Digital ad hogs leave room at the trough, Jan. 11, 2022, <https://www.reuters.com/breakingviews/digital-ad-hogs-leave-room-trough-2022-01-11/>.  
<sup>26</sup> Megan Graham, Advertising Market Keeps Growing Much Faster Than Expected, Forecasters Say, Dec. 6, 2021, <https://www.wsj.com/articles/advertising-market-keeps-growing-much-faster-than-expected-forecasters-say-11638784800>.

<sup>27</sup> TINA.org’s Comment to the FTC Regarding Protecting Kids from Stealth Advertising in Digital Media (July 18, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment\\_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf).

<sup>28</sup> Roblox, which is just one metaverse platform among several, is used daily by 55 million consumers. Roblox Corporation Form 8-K (Feb. 15, 2022), <https://d18m0p25nwr6d.cloudfront.net/CIK-0001315098/86017b0c-bf73-4b2b-bd0a-5373b1609b1b.pdf>.

<sup>29</sup> TINA.org’s Roblox Investigation, <https://truthinadvertising.org/brands/roblox/>.

<sup>30</sup> While there are a couple sponsored worlds on Roblox that disclose they are advertisements, such as Froot Loops World, the disclosures used are unlikely to be effective given that the advergames target young children. *See id*; TINA.org’s Comment to the FTC Regarding Protecting Kids from Stealth Advertising in Digital Media (July 18, 2022); Soontae An & Susannah Stern, *Mitigating the Effects of Advergaming on Children*, 40 J. OF ADVERT. 43 (2011) (an experiment designed to test the effect of “ad breaks,” i.e., disclosing that an advergame is a commercial, on children aged eight to eleven, found that the inclusion of an ad break did not increase children’s understanding that the purpose of the advergame was to sell a product). *See also* Cereal Food Advertising to Children and Teens Score, [https://www.cerealfacts.org/cereal\\_nutrition\\_scores.aspx?id=114](https://www.cerealfacts.org/cereal_nutrition_scores.aspx?id=114) (“Kellogg, (Regular) Froot Loops, Target Market: Child”); Chavie Lieber, How L.O.L. Dolls Became the Dopamine Hit of a Generation, THE NEW YORK TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/parenting/lol-surprise-doll-isaac-larian.html> (“The dolls ... target the 4 to 14 age range.”).





**Froot Loops World**  
By Kellogg's NA Co.

Favorite Follow 1,550 2,590

**About** Store Servers

**Description**

This game is for US audiences only. We're so sorry that our friends around the world can't play, but rules in other countries prevent us from making it available elsewhere. You'll be the first to know if and when this changes. [This is an Ad.]

! New updates added! - start exploring today!

Froot Loops\* have gone missing from the breakfast table, and Toucan Sam\* needs your help to bring them back!

How? Just follow your nose\* to Froot Loops™ World!

On this epic breakfast adventure, you'll explore the Colorful Forest with Toucan Sam, discover hidden secrets, and journey through 10 exciting obbys.

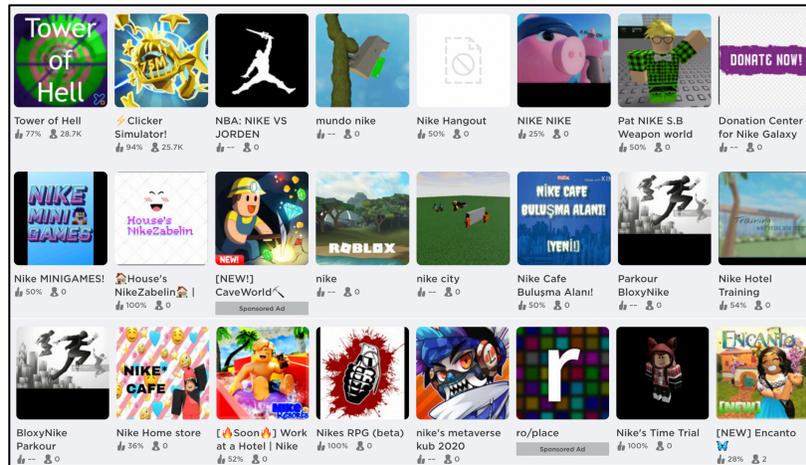
**Features:**

- 🌳 The Colorful Forest - a colorful area to explore
- 👁️ 10 nerve-shredding obbys - can you beat them all?
- 🛒 The Colors and Curiosities Shop - buy exclusive Froot Loops merch!
- 🚀 The Toucan Trail - zipline through the trees!

Froot Loops is part of a complete breakfast.  
TM, ®, © Kellogg's Company. All Rights Reserved

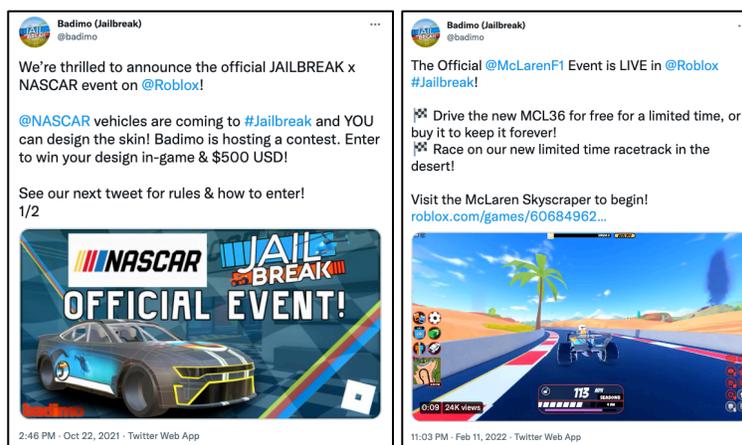


- <sup>31</sup> Roblox search for “world,” <https://www.roblox.com/discover/?Keyword=world>.
- <sup>32</sup> *Stranger Things Branded World Launches in the Roblox Metaverse*, ROBLOX (June 22, 2021), <https://corp.roblox.com/2021/06/stranger-things-branded-world-launches-roblox-metaverse/>.
- <sup>33</sup> Roblox search for “stranger things,” <https://web.roblox.com/discover/?Keyword=stranger%20things>.
- <sup>34</sup> A search for “Nike” on Roblox brings up multiple games that reference Nike:

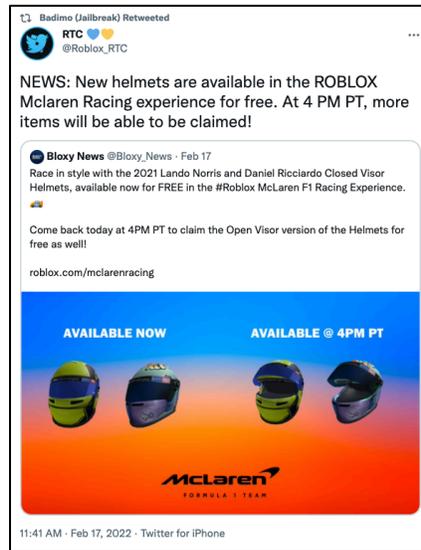


<sup>35</sup> Roblox: Nikeland, <https://www.roblox.com/games/7462526249/NIKELAND>. See also *Nike Creates NIKELAND on Roblox*, NIKE NEWS (Nov. 18, 2021), <https://news.nike.com/news/five-things-to-know-roblox>.

<sup>36</sup> *McLaren Racing Unveils MCL36 Formula 1 Race Car on Roblox*, ROBLOX (Feb. 11, 2022), <https://corp.roblox.com/2022/02/mclaren-racing-unveils-mcl36-formula-1-race-car-roblox/>. During this particular in-game promotion, users could “[d]rive the new MCL36 for FREE for a limited time, or buy the car to keep it FOREVER!” Roblox: Jailbreak, <https://web.roblox.com/games/606849621/Jailbreak>. See also Badimo (@badimo), TWITTER (Oct. 21, 2021), <https://twitter.com/badimo/status/1451621021316833280?lang=en>; Badimo (@badimo), TWITTER (Feb 11, 2022), <https://twitter.com/badimo/status/1492348708272238593?cxt=HHwWgsCj2cnP8bUpAAAA>.



Virtual McLaren racing helmets were also promoted through the Roblox game. See RTC (@Roblox\_RTC), TWITTER (Feb 17, 2022), [https://twitter.com/Roblox\\_RTC/status/1494351205828599813?cxt=HHwWioC5kaOggL0pAAAA](https://twitter.com/Roblox_RTC/status/1494351205828599813?cxt=HHwWioC5kaOggL0pAAAA).



<sup>37</sup> Ad or Not? Minions Invade Adopt Me! on Roblox, July 19, 2022,

<https://truthinadvertising.org/articles/ad-or-not-minions-invade-adopt-me-on-roblox/>.

<sup>38</sup> See “Disclosures Do Not Work for Young Children on Digital Platforms” discussion, pp. 21-22. See also TINA.org’s Comment to the FTC Regarding Protecting Kids from Stealth Advertising in Digital Media (July 18, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment\\_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf).

<sup>39</sup> Duncan MacRae, *More Than Half of Social Media Influencers Participate in the Metaverse*, MARKETINGTECH (Jan. 17, 2022), <https://marketingtechnews.net/news/2022/jan/17/more-than-half-of-social-media-influencers-participate-in-the-metaverse/>.

<sup>40</sup> Typically, avatar influencers (i.e., those with a material connection to Roblox and/or a brand advertising on Roblox) are Roblox users who have large followings on YouTube and/or other social media platforms. Therefore, their avatars are frequently recognizable by their fans.

<sup>41</sup> LankyBox, YOUTUBE (Dec. 11, 2021), <https://www.youtube.com/watch?v=p0bRiqaWiAA>;

LankyBoxGamesAdam Roblox Profile, <https://web.roblox.com/users/1214936771/profile>.

<sup>42</sup> TW Dessi Gaming, YOUTUBE (Nov. 20, 2021), <https://www.youtube.com/watch?v=68g7Ge8Z5FQ>;

@TW\_Dessi Roblox Profile, <https://web.roblox.com/users/298668030/profile>.

<sup>43</sup> iamSanna, YOUTUBE (Dec. 3, 2021), <https://www.youtube.com/watch?v=1VZyrImVGzU>;

@notiamsanna Roblox Profile, <https://web.roblox.com/users/270896527/profile>.

<sup>44</sup> Louis Rosenberg, *The metaverse will be filled with ‘elves,’* TECHCRUNCH (Jan. 12, 2022),

<https://techcrunch.com/2022/01/12/the-metaverse-will-be-filled-with-elves/>.

<sup>45</sup> Screenshot captured by TINA.org.

<sup>46</sup> Screenshot captured by TINA.org.

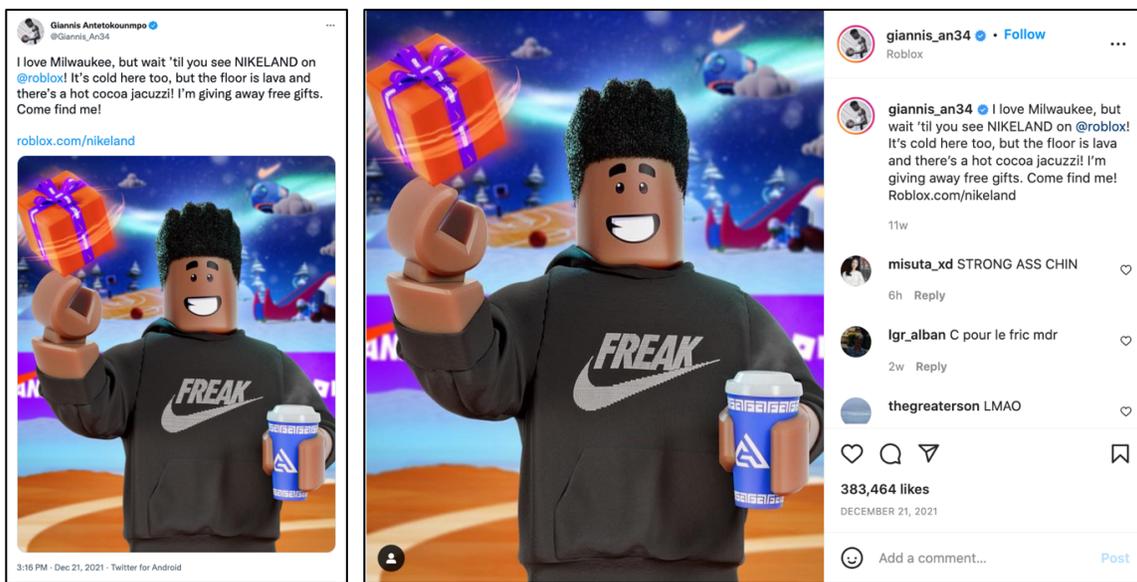
<sup>47</sup> Screenshot from SharkBlox, YOUTUBE (Dec. 20, 2021),

<https://www.youtube.com/watch?v=sFmHLrYoej0>. See also Giannis Antetokounmpo (@Giannis\_An34),

TWITTER (Dec. 21, 2021), [https://twitter.com/giannis\\_an34/status/1473386882226606091](https://twitter.com/giannis_an34/status/1473386882226606091); Giannis

Antetokounmpo (@giannis\_an34), INSTAGRAM (Dec. 21, 2021),

and <https://www.instagram.com/p/CXwhDijFCzv/?hl=en>.



- <sup>48</sup> Screenshot from Conor3D, YOUTUBE (Feb. 18, 2022), <https://www.youtube.com/watch?v=e7-smwmAlc0>. See also Elliot Santiago, *Nike Taps LeBron James for Its Latest NIKELAND Roblox Initiative*, HYPEBEAST (Feb. 17, 2022), <https://hypebeast.com/2022/2/lebron-james-nike-nikeland-roblox-lebron-19-chosen-1-info>; Grace Doyle, *How to Get the Nike LeBron James Crown in Roblox NIKELAND*, PRO GAMES GUIDE (Feb. 16, 2022), <https://progameguides.com/roblox/how-to-get-the-nike-lebron-james-crown-in-roblox-nikeland/>.
- <sup>49</sup> See e.g., TINA.org's HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>; TINA.org's Agora Investigation, <https://truthinadvertising.org/brands/agora/>.
- <sup>50</sup> Deceptive Design, Confirmshaming, <https://www.deceptive.design/types/confirmshaming>.
- <sup>51</sup> TINA.org's Agora Investigation, <https://truthinadvertising.org/brands/agora/>.
- <sup>52</sup> *Id.*
- <sup>53</sup> Deceptive Design, Forced continuity, <https://www.deceptive.design/types/forced-continuity>.
- <sup>54</sup> See e.g., FTC Enforcement Policy Statement Regarding Negative Option Marketing, [https://www.ftc.gov/system/files/documents/public\\_statements/1598063/negative\\_option\\_policy\\_statement-10-22-2021-tobureau.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf); Press Release, FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions, Oct. 28, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions>; Negative Options: A Report by the staff of the FTC's Division of Enforcement, Jan. 2009, <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>. See also the Restore Online Shoppers Confidence Act, 2 15 U.S.C. §§ 8401-8405.
- <sup>55</sup> TINA.org's Agora Investigation, <https://truthinadvertising.org/brands/agora/>.
- <sup>56</sup> *Id.*; TINA.org's FabKids Investigation, <https://truthinadvertising.org/brands/fabkids/>; TINA.org's HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.
- <sup>57</sup> TINA.org's Comment to the FTC Regarding the Endorsement Guides (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf>.
- <sup>58</sup> Baker, Dillon, "DJ Khaled and the FTC's Snapchat Problem," Fast Company (Aug. 30, 2016), <https://www.fastcompany.com/3063239/dj-khaled-and-the-ftcs-snapchat-problem>.
- <sup>59</sup> *Id.*
- <sup>60</sup> See TINA.org's DJ Khaled Investigation, <https://truthinadvertising.org/brands/dj-khaled/>.
- <sup>61</sup> See TINA.org's DJ Khaled Snapchat Database, <https://truthinadvertising.org/evidence/dj-khaled-snapchat-database/>.
- <sup>62</sup> See e.g., DJ Khaled Snapchat Story (July 17, 2017), <https://www.truthinadvertising.org/wp-content/uploads/2018/02/DJK-07-17-2017-Clip-2.mp4>.
- <sup>63</sup> See Wright, Valerie, "Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment," The Sentencing Project (Nov. 2010), <https://www.sentencingproject.org/wp->

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[content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf](#) (noting that “by increasing the certainty of punishment, potential offenders may be deterred by the risk of apprehension”).

<sup>64</sup> Statement of Commissioner Rohit Chopra, *In the Matter of Sunday Riley*, Comm. File No. 1923008 (Oct. 21, 2019), at 3, [https://www.ftc.gov/system/files/documents/public\\_statements/1550127/192\\_3008\\_final\\_rc\\_statement\\_on\\_sunday\\_riley.pdf](https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf).

<sup>65</sup> See e.g., FTC: Disclosures 101 for Social Media Influencers, Nov. 2019, [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf); Disclosures 101 for Social Media Influencers, FTC Business Guidance, Nov. 2019, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>; Press Release, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, Apr. 19, 2017, <https://www.ftc.gov/news-events/news/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose-relationship>.

<sup>66</sup> While the FTC advises that marketers disclose material information “above the fold,” the Agency should also address how this recommendation is impacted by consumers’ ability to enlarge the font size on their mobile devices, thereby impacting where the “fold” is located on any given screen, as well as consumers’ ability to access online material from companion devices, such as Apple watches. See e.g., Devika Girish, *How Apple Watch is Fast Emerging as the New face of Mobile Commerce*, Oct. 11, 2021, <https://blog.beaconstac.com/2015/02/how-apple-watch-is-fast-emerging-as-the-new-face-of-mobile-commerce/>.

<sup>67</sup> TINA.org’s Justin Bieber NFT Database, <https://truthinadvertising.org/evidence/justin-bieber-nft-database/>.

<sup>68</sup> June 10, 2022 letter from TINA.org to Justin Bieber, [https://truthinadvertising.org/wp-content/uploads/2022/08/6\\_10\\_22-TINA.org-Letter-re-J-Bieber-NFT-Promotions.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/6_10_22-TINA.org-Letter-re-J-Bieber-NFT-Promotions.pdf).

<sup>69</sup> July 1, 2022 letter from M. Rhodes to TINA.org, [https://truthinadvertising.org/wp-content/uploads/2022/08/7\\_1\\_22-Bieber-response.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/7_1_22-Bieber-response.pdf). Note: As of August 1, 2022, no noticeable changes had been made to Bieber’s posts at issue.

<sup>70</sup> Justin Bieber’s Instagram page, <https://www.instagram.com/justinbieber/>.

<sup>71</sup> For consumers interested in NFTs, the animated bears, like those shown on Bieber’s Instagram page, are well-known and generally recognizable as inBetweeners NFTs. See e.g., Taman Bachani, *Inbetweeners NFT > Price & Everything In Between!*, Dec. 30, 2021, <https://www.appcraver.com/inbetweeners-nft-price-know-everything/>.

<sup>72</sup> Note a similar tile view is available on Facebook, where users can click on an influencer’s photos and view them all without their accompanying captions.

<sup>73</sup> Maddie White, May 18, 2022 TikTok post, <https://www.tiktok.com/t/ZTRDfYuc2/?k=1>; Scarlet May, June 23, 2022 TikTok post, <https://www.tiktok.com/t/ZTRDfM7Nj/?k=1>; Michelle Julian, May 23, 2022 TikTok post, <https://www.tiktok.com/t/ZTRDyvfup/?k=1>.

<sup>74</sup> Dr. Ashlesha Mahagaonkar, July 27, 2022 Instagram post, <https://www.instagram.com/reel/Cgg1u50Ju4D/?igshid=YmMyMTA2M2Y%3D>; Jenna (heyitsjenna), July 27, 2022 Instagram post, <https://www.instagram.com/reel/CghGIC2jDRY/?igshid=YmMyMTA2M2Y%3D>; Ishita (justthatchicstuff), July 27, 2022 Instagram post, [https://www.instagram.com/reel/CghC\\_oAAXdF/?igshid=YmMyMTA2M2Y%3D](https://www.instagram.com/reel/CghC_oAAXdF/?igshid=YmMyMTA2M2Y%3D).

<sup>75</sup> TINA.org’s Comment to the FTC Regarding the Endorsement Guides (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf>.

<sup>76</sup> August 25, 2019 Complaint to FTC regarding Deceptive Native Advertising by the Kardashian/Jenner family, [https://www.truthinadvertising.org/wp-content/uploads/2016/08/8\\_25\\_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf](https://www.truthinadvertising.org/wp-content/uploads/2016/08/8_25_16-ltr-from-TINA-to-FTC-re-Kardashian-Jenner-Instagram-posts.pdf).

<sup>77</sup> Sometime later, Kendall Jenner edited her May 5, 2016 Instagram post promoting Estée Lauder to add #EsteeModel to the caption (as shown below).



The post has since been removed.

<sup>78</sup> See e.g., TINA.org’s DSA Companies’ Income Claims Investigation, <https://truthinadvertising.org/industries/mlm-income/>; TINA.org’s Team National Investigation, <https://truthinadvertising.org/brands/team-national/>; Decision of The Direct Selling Self-Regulatory Council re Team National, Case No. 3-2019 (Aug. 21, 2019), at 7, <https://www.truthinadvertising.org/wp-content/uploads/2019/09/DSSRC-Team-National-decision.pdf> (“In response to this TINA challenge of its advertising and marketing claims, the Company informed DSSRC that it clearly and conspicuously posts an income earnings disclaimer at the bottom of its website with a hyperlink to the income earnings disclosure.”).

<sup>79</sup> Such a requirement would be consistent with 16 C.F.R. §255.2 n.105, wherein the Commission states that this level of substantiation will “avoid the risk of the initiation of [a law enforcement] action,” but would go one step further in that it would make it clear that all advertisers using disclosures not specifically recommended by the FTC must possess proper substantiation *prior* to using the disclosure and publishing the advertisement, not simply to avoid litigation.

<sup>80</sup> FTC’s .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

<sup>81</sup> See TINA.org’s Comment to the FTC Regarding Protecting Kids from Stealth Advertising in Digital Media (July 18, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment\\_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf).

<sup>82</sup> August 28, 2019 Complaint to FTC Regarding Ryan ToysReview’s deceptive native advertising, [https://www.truthinadvertising.org/wp-content/uploads/2019/08/8\\_28\\_19-ltr-to-FTC-re-Ryan-ToysReview\\_Redacted.pdf](https://www.truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf).

<sup>83</sup> Ryan’s World YouTube Channel, [https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO\\_w](https://www.youtube.com/channel/UChGJGhZ9SOOHvBB0Y4DOO_w).

<sup>84</sup> Matthew Lapierre et al., *The Effect of Advertising on Children and Adolescents*, 140 *Pediatrics* S152, S153 (2017), <https://doi.org/10.1542/peds.2016-1758V> (“For decades, researchers have recognized children as a vulnerable consumer group because of their budding developmental abilities.”); Angela Campbell, *Rethinking Children’s Advertising Policies for the Digital Age*, 29 *Loy. Consumer L. Rev.* 1, 36 (2017), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2969&context=facpub> (“Before children can comprehend advertising, they must be able to discriminate commercial content from non-commercial content at a perception level. Most children develop this ability by around age five for television. But in today’s digital media environment, it is much more difficult for children to identify what is advertising”). See also Deborah Roedder John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research*, 26 *J. of Consumer Rsch.* 183 (1999), <https://doi.org/10.1086/209559>; Rita-Marie Cain Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 *Am. Bus. L. J.* 721, 727 (2014), <https://doi.org/10.1111/ablj.12038>.

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<sup>85</sup> See Rita-Marie Cain Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 Am. Bus. L. J. 721, 727 (2014), <https://doi.org/10.1111/ablj.12038>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 729-30 (“By blurring the boundaries between advertising and entertainment, advertisers may simply overwhelm the defenses children are still in the process of building.”).

<sup>88</sup> Matthew Lapierre et al., *The Effect of Advertising on Children and Adolescents*, 140 Pediatrics S152, S153-S154 (2017), <https://doi.org/10.1542/peds.2016-1758V>.

<sup>89</sup> Angela Campbell, *Rethinking Children’s Advertising Policies for the Digital Age*, 29 Loy. Consumer L. Rev. 1, 36-37 (2017),

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2969&context=facpub>

(note that this publication reports the age of children who cannot distinguish traditional ads from other forms of content as five and under, whereas other sources report the age as under five); see also Soontae An & Susannah Stern, *Mitigating the Effects of Advergaming on Children*, 40 J. of Advert. 43, 50 (2011) (an experiment designed to test the effect of “ad breaks,” *i.e.*, disclosing that an advergame is a commercial, on children aged eight to eleven, found that the inclusion of an ad break did not increase children’s understanding that the purpose of the advergame was to sell a product).

<sup>90</sup> *Id.*

<sup>91</sup> The FCC Order states, among other things: “Any material which constitutes advertising should be confined to identifiable commercial segments which are set off in some clear manner from the entertainment portion of the program.” Rita-Marie Cain Reid, *Embedded Advertising to Children: A Tactic That Requires a New Regulatory Approach*, 51 Am. Bus. L. J. 721, 742 (2014),

<https://doi.org/10.1111/ablj.12038>. See also Sandra Calvert, *Children as Consumers: Advertising and Marketing*, 18 The Future of Children 205, 223 (2008),

[https://www.researchgate.net/publication/49852129\\_Children\\_as\\_Consumers\\_Advertising\\_and\\_Marketing?enrichId=rgreq-26510d809a229033cb793ba9c923d769-XXX&enrichSource=Y292ZXJQYWdlOzQ5ODUyMTI5O0FTOjk3NjM2NDAxMDI1MDMzQDE0MDAyODk3NDA0Njk%3D&el=1\\_x\\_3&\\_esc=publicationCoverPdf](https://www.researchgate.net/publication/49852129_Children_as_Consumers_Advertising_and_Marketing?enrichId=rgreq-26510d809a229033cb793ba9c923d769-XXX&enrichSource=Y292ZXJQYWdlOzQ5ODUyMTI5O0FTOjk3NjM2NDAxMDI1MDMzQDE0MDAyODk3NDA0Njk%3D&el=1_x_3&_esc=publicationCoverPdf).

<sup>92</sup> Colin Campbell and Pamela E. Grimm, *The Challenges Native Advertising Poses: Exploring Potential Federal Trade Commission Responses and Identifying Research Needs*, J. of Pub. Pol’y & Mktg, 1-14 (2018).

<sup>93</sup> Colin Campbell and Nathaniel J. Evans, *The Role of a Companion Banner and Sponsorship Transparency in Recognizing and Evaluating Article-style Native Advertising*, 43 J. of Interactive Mktg. 17 (2018).

<sup>94</sup> Stacie A. Bosley et al., *Voluntary Disclosure and Earnings Expectations in Multi-Level Marketing*, 58 Econ. Inquiry 1643 (2019), <https://onlinelibrary.wiley.com/doi/10.1111/ecin.12840>.

<sup>95</sup> *Id.* See also Stacie Bosley et al., *Income Disclosure and Consumer Judgment in a Multi-level Marketing Experiment*, J. Consumer Aff. (under review) (“Across all subjects, interest in the MLM business opportunity appears to be unaffected by disclosure, on average...”); Motivation in Direct Sales – Part 1, MLM.com The Direct Sales Resource, Dec. 10, 2014, <https://www.mlm.com/the-power-of-drive-motivation-indirect-sales-part-1/> (quoting a former MLM distributor as saying, “I saw that the top leaders were making anywhere from \$20,000 to \$100,000+ per month, and that’s all I needed to see. I didn’t go around asking those leaders how likely I’d be to make that much. Or what my chances were. That’s nuts—my chances were whatever I wanted them to be...and I decided on 100%.”)

<sup>96</sup> See Tony Antoniou et al., *Impact of acetaminophen product labelling changes in Canada on hospital admissions for accidental acetaminophen overdose: a population-based study*, Canadian Med. Ass’n J. (April 2022), <https://www.cmaj.ca/content/194/15/E542> (finding that acetaminophen label disclosures regarding the risk of overdose and safe use did not reduce the rate of acetaminophen overdose hospital admissions); Lisa M. Schwartz et al., *Communicating Uncertainties About Prescription Drugs to the Public: A National Randomized Trial*, 171 Arch. Intern. Med. 1463 (2011),

<https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1105910> (finding that label disclosures regarding the meaning of FDA-approval had a limited impact on consumer drug choice).

<sup>97</sup> Evaluation Report: Effectiveness of Walmart’s “Made in the U.S.A.” Product Labels, Jeff Johnson, June 16, 2015, <https://www.truthinadvertising.org/wp-content/uploads/2015/06/Walmart-Made-in-USA-expert-report.pdf>; July 14, 2015 Complaint to FTC regarding Walmart’s False and Deceptive USA Representations, [https://truthinadvertising.org/wp-content/uploads/2015/07/Walmart-FTC-letter\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2015/07/Walmart-FTC-letter_Redacted.pdf). Dr. Jeff Johnson is President and Principal Consultant at UI Wizards, Inc., a

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consulting firm that specializes in evaluating and designing graphical and Web user interfaces from the perspective of users. In 2014, Dr. Johnson presented at an FTC workshop devoted to native advertising. His presentation discussed how human visual perception impacts the ability to distinguish online content from advertising. TINA.org retained Dr. Johnson to provide a report that sets forth his expert opinion with respect to how visible, noticeable, discriminable, legible, intelligible, and reliable Walmart's USA labeling was in 2015.

<sup>98</sup> See e.g., TINA.org's Comment to the FTC Regarding the Endorsement Guides (June 22, 2020), <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA.org-Endorsement-Guides-Comment.pdf> (discussing the harms associated with undisclosed marketing); TINA.org's Comment to the FTC Regarding Earnings Claims (May 10, 2020), <https://truthinadvertising.org/wp-content/uploads/2022/05/TINA.org-Comment-re-Earnings-Claims-ANPR-R111003.pdf> (discussing the harms associated with MLM companies using earnings claims in marketing without proper disclosures); TINA.org's Comment to the FTC Regarding Protecting Kids from Stealth Advertising in Digital Media (July 18, 2022), [https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment\\_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf](https://truthinadvertising.org/wp-content/uploads/2022/08/TINA-Comment_Protecting-Kids-from-Stealth-Advertising-in-Digital-Media.pdf) (discussing the harms of stealth marketing directed at children); TINA.org's Petition for Rulemaking to Promulgate Regulations for Made in the USA Claims (August 22, 2019), [https://truthinadvertising.org/wp-content/uploads/2019/08/TINA\\_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf](https://truthinadvertising.org/wp-content/uploads/2019/08/TINA_org-Petition-for-Rulemaking-to-Promulgate-Regulations-for-Made-in-the-USA-Claims.pdf) (discussing the harms associated with deceptive Made in USA marketing); Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements, Better Business Bureau, Dec. 2018, <https://www.bbb.org/content/dam/0734-st-louis/free-trial-offer-scam/bbb-study-free-trial-offers-and-subscription-traps.pdf> (reporting that victims of deceptive "free" trial offers lost more than \$1.3 billion over a ten-year period).