

**Workshop Session 1**  
October 27, 2016

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# Native Advertising and Social Media Influencers

- Two very hot marketing techniques and regulatory enforcement priorities
- FTC has issued Native Advertising Enforcement Policy and Business Guide
- Agency has also updated Testimonial Guides to include influencers
- Machinima, Lord & Taylor and Warner Bros. cases
- Blogger cases
- TIA letter to the Kardashians



# Native Advertising

- Native advertising is advertising that is intended to mimic non-advertising content in style and form.
- December 22, 2015 the Commission issued an enforcement policy statement addressing the issue of native advertising.  
[https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf)
- Native Advertising: A Guide for Businesses  
<https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>

# FTC Issues Enforcement Policy “Native” Advertising and Deceptive Advertisements

## FTC Staff Also Releases Business Guidance

FOR RELEASE

December 22, 2015

TAGS: Bureau of Consumer Protection | Consumer Protection

Online Advertising and Marketing

The Federal Trade Commission  
Consumer Protection & Advice » Business Center » Guidance » Native Advertising: A Guide for Businesses

### Native Advertising: A Guide for Businesses

TAGS: Advertising and Marketing | Advertising and Marketing Basics | Endorsements | Online Advertising and Marketing

Marketers and publishers are using innovative methods to create, format, and deliver digital advertising. One form is “native advertising,” content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online. But as native advertising evolves, are consumers able to differentiate advertising from other content?

Marketers and publishers are using innovative methods to create, format, and deliver digital advertising. One form is “native advertising,” content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online. But as native advertising evolves, are consumers able to differentiate advertising from other content?

The Federal Trade Commission Act prohibits deceptive or unfair practices. It’s the FTC’s job to ensure that long-standing consumer protection principles apply in the digital marketplace, including to native advertising. The FTC has issued an Enforcement Policy Statement on Deceptively Formatted Advertising, which explains how the agency applies established truth-in-advertising standards in this context. This Guide for Businesses summarizes the Policy Statement by offering informal guidance from FTC staff to help companies apply the Policy Statement in day-to-day operations.



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

#### Enforcement Policy Statement on Deceptively Formatted Advertisements

The Federal Trade Commission issues this enforcement policy statement regarding advertising and promotional messages integrated into and presented as non-commercial content. The statement summarizes the principles underlying the Commission’s enforcement actions, advisory opinions, and other guidance over many decades addressing various forms of deceptively formatted advertising.

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” As the Commission set forth in its 1983 Policy Statement on Deception, a

AR

Policy

ing or  
workshop on

Native Advertising

#### For Businesses

Native Advertising: A Guide for  
Businesses

Blog: FTC issues Enforcement  
Policy Statement and business  
guidance on native advertising



## FTC Issues Enforcement Policy Statement Addressing “Native” Advertising and Deceptively Formatted Advertisements

### FTC Staff Also Releases Business Guidance on Native Advertising

FOR RELEASE

December 22, 2015

**TAGS:** [Bureau of Consumer Protection](#) | [Consumer Protection](#) | [Advertising and Marketing](#) | [Online Advertising and Marketing](#)

The Federal Trade Commission today issued an enforcement policy statement explaining how established consumer protection principles apply to different advertising formats, including “native” ads that look like surrounding non-advertising content.

In the [Enforcement Policy Statement on Deceptively Formatted Advertisements](#), the Commission lays out the general principles the Commission considers in determining whether any particular ad format is deceptive and violates the FTC Act. The policy statement affirms the long-standing consumer protection principle that advertisements and promotional messages that promote the benefits and attributes of goods and services should be identifiable as advertising to consumers.

“The FTC’s policy applies time-tested truth-in-advertising principles to modern media,” said Jessica Rich, Director of the Bureau of Consumer Protection. “People browsing the Web, using social media, or watching videos have a right



#### Related Actions

[Commission Enforcement Policy Statement on Deceptively Formatted Advertisements](#)

[Blurred Lines: Advertising or Content? – An FTC Workshop on Native Advertising](#)

#### For Businesses

[Native Advertising: A Guide for Businesses](#)

[Blog: FTC issues Enforcement Policy Statement and business guidance on native advertising](#)

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# Endorsement & Testimonial Guides

The Commission's Endorsement & Testimonial Guides, as revised on December 1, 2009, apply to endorsements made in social media.

[www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/guides-concerning-use-endorsements](http://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/guides-concerning-use-endorsements)

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# Native Advertising and Influencers

- Although they can be distinct methods of marketing, regulatory issues surrounding them are very similar.
- Goal today is to walk you through the issues you need to consider with each form of marketing:
  - Is what you're doing "advertising?"
  - Do consumers know it's an advertisement?
  - If not, how do you disclose that fact?
  - Supporting your claims
  - Is there a material connection you need to disclose?



# Is What You're Doing Advertising?

While almost everything you do is presumably intended to be promotional . . . .

Not everything falls within the regulatory definition of "advertising"

- Product placement
- General interest articles
- Celebrity use of products

Common theme in all these areas is that there needs to be a claim or selling message.





UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Mary K. Engle  
Associate Director for Advertising Practices

February 10, 2005

Gary Ruskin, Executive Director  
Commercial Alert  
4110 S.E. Hawthorne Boulevard #123  
Portland, OR 97214-5246

Dear Mr. Ruskin:

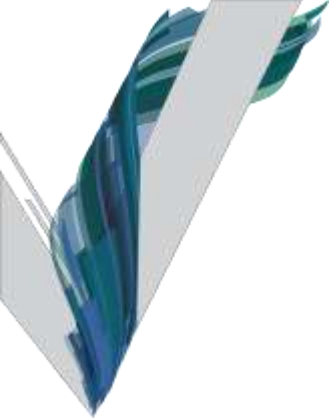
On September 30, 2003, Commercial Alert filed with the Federal Trade Commission a Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement. Commercial Alert asked the Commission to require advertisers to disclose product placements in a clear and conspicuous fashion and specifically to require advertisers to identify product placements when they appear on screen with the prominent superscript "ADVERTISEMENT."

I. Background

Product placement is a form of promotion in which advertisers insert branded products into programming in exchange for fees or other consideration. Commercial Alert raises concerns that product placements may deceive consumers by blurring the line between advertising and programming, and that the appearance of product placement is implicated in diseases such as obesity and Type 2 diabetes in children. In addition, Commercial Alert raises concerns about advertisers' use of paid celebrity spokespersons to appear on programs without disclosing the celebrities' financial ties to the company in question. Commercial Alert contends that the failure to disclose that advertisers have paid for their products' appearances in programming constitutes an unfair or deceptive practice in violation of Section 5 of the Federal Trade Commission Act.

As you know, an act or practice is deceptive under Section 5 of the FTC Act: 1) if there is

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# Product Placement

Native Advertising Guides take this one step further

- Product placement in video games with no claims
- But if product placement is a door opener, does rationale behind door openers really apply here?





# General Interest Articles

- Article does not mention or promote the advertiser's product
- Running shoe sponsors article on 20 Most Beautiful Places to Vacation
- Advertiser may still want to disclose they provided content
  - Generate consumer goodwill
  - Sesame Street brought to you by...





# General Interest Articles

- Where do you draw the line?
  - Article by an airline that promotes travel?
  - Article by a mattress company that talks about the benefits of replacing your mattress?
    - What if the article only talks about the benefits of a good night's rest?

# Influencer's Use of Free Product





# Influencer's Use of Free Product

- If claim associated with use, it's clearly advertising
  - Just finished off an energy drink for the long night ahead
- What if there is no express claim?
- Is product linked to influencer's performance?
  - Golfer tweets, loving my new [ ] clubs
  - Guides: Expert builder uses stain on home improvement show



# Influencer's Use of Free Product

- What if it's simply style?
  - Looking rad in my new [ ] shoes
- Wearing a loaned dress or jewelry to an awards show



# Influencer's Use of Free Product



See <https://www.youtube.com/watch?v=g-wdRroa4ms> and <https://www.youtube.com/watch?v=9JqJDRkKlt8>



# Do Consumers Know It's an Ad?

So you know what you're doing is clearly intended to be an advertisement.

Now ask yourself ...

Will Consumers know it too?



## General Principle

“The Commission will find an advertisement deceptive if the ad misleads consumers as to its nature or source, including that a party other than the sponsoring advertiser is its source. Misleading representations of this kind are likely to affect consumers’ decisions or conduct regarding the advertised product or the advertisement, including causing consumers to give greater credence to advertising claims or to interact with advertising content with which they otherwise would not have interacted.”

# Do Consumers Know It's an Ad?

- For Native Advertising, context is king
- Article about running shoes on financial news site
- Article about a cholesterol lowering supplement in a cooking magazine?
- Billboards in video games
- “more content for you” widgets

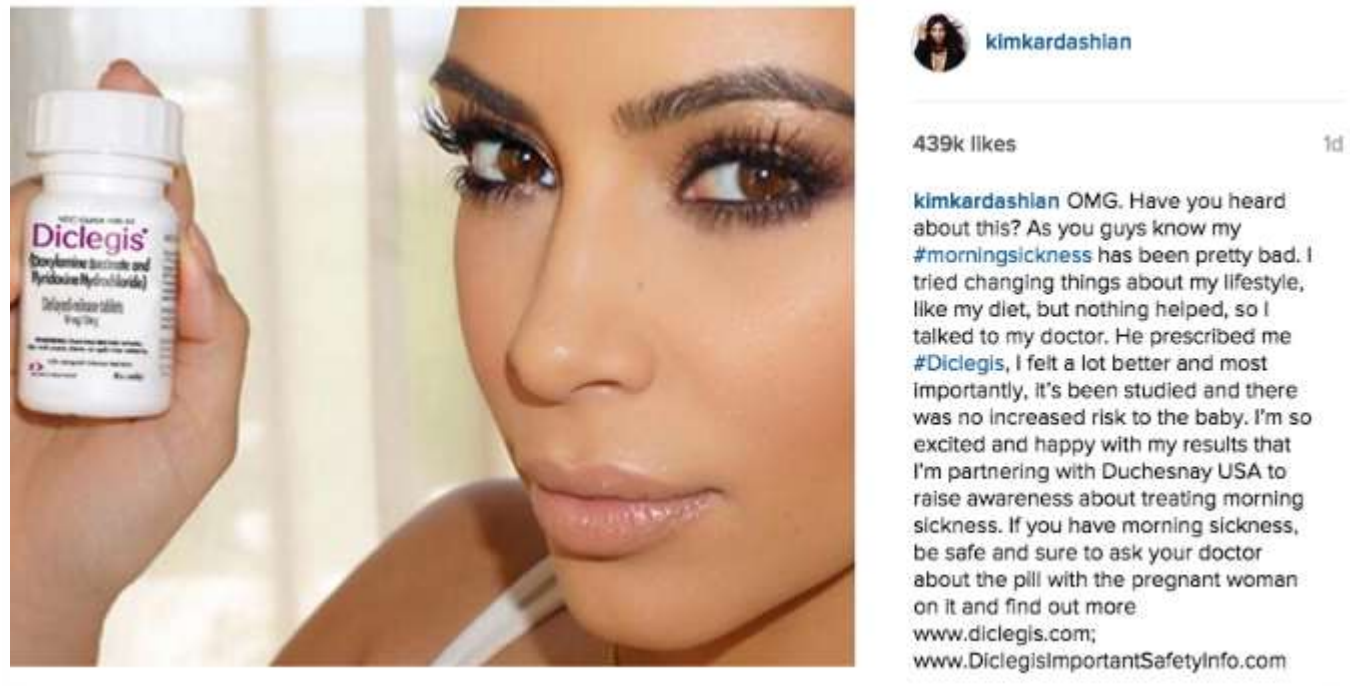




# Do Consumers Know It's an Ad?

- For Influencers, answer is almost always “No” unless you tell them
- Is an influencer tweeting or posting about how great a product is because they simply like it or because they are being paid?
  - What if they aren't being paid now but hope to be paid?
  - Peyton Manning Budweiser example
- Perhaps an influencer's connection to a product is so well-known that no need to disclose (Michael Jordan and Air Jordan's)
  - Probably not worth the risk

# Celebrity or Influencer? Where is the line?





# If Consumers Don't Know, How Do You Tell Them?

## Native:

- Include a disclosure with the native ad itself that is clearly visible before the viewer engages.
- Include a disclosure in any links or other teasers driving viewers to the content.

*Note: Disclosure may be required even if the content was independently created, but a brand is promoting the content in paid media (e.g., via content recommendation widget)*



# If Consumers Don't Know, How Do You Tell Them?

## Native:

- In multimedia native pieces where the commercial content appears briefly in a larger piece, the disclosure might instead be appropriate near the advertising message.
- Disclosures must travel with the content when shared using social media plug-ins.



# Should you disclose not only that it's sponsored but also who is sponsoring?

## AROUND THE WEB

Sponsored Links by Taboola



**Take a Mad Men Inspired Getaway in Connecticut**  
CT Visit



**WHAT Is Happening to Cameron Diaz's Face? (PHOTO)**  
bloomberg



**Want to Dump Cable? You'll Probably Be Happy You Did**  
fox sports

[Taboola, Inc. \(Online Advertising\), NAD Case Report #5708](#)

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# FTC on Native: Disclosures

## Where to Disclose?

- In front of or above the headline of a native ad, ideally top left (plus on the main page of a publisher site if there is a content teaser)
- If a video, image, or graphic is the focal point of a native ad, include disclosure on the focal point
- In the post or content itself naturally



# FTC on Native: Form of Disclosure



“Ad,” “Advertisement,” “Paid,” “Sponsored Advertising Content”  
all “likely to be understood”

Use visual cues such as shading or framing to differentiate  
native from editorial content.

# FTC on Native: Form of Disclosure



Best to avoid

“Promoted” or “Promoted Stories”

Shorthands like #spon

Technical or industry jargon or unfamiliar icons

Company logos alone

Terms that are used to mean different things on a single platform

**One Key Difference:**

For Testimonials/Endorsements it is ok to say #sponsored



# FTC on Native: Form of Disclosure



“Presented by X,” “Sponsored by X,” “Brought to you by X” may be understood to mean a sponsor paid for the placement but did not “influence” the content

One Key Difference Between Native and Endorsements:



For Testimonials/Endorsements it is OK to say #sponsored

# Disclosure: Who Should care

## More on this in our next session:

- “Everyone who participates directly or indirectly in creating or presenting native ads”
  - Marketers
  - Ad agencies
  - Affiliate marketers
  - Publishers/Media companies
- FTC brought recent action involving YouTube content



<https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>  
<https://www.ftc.gov/enforcement/cases-proceedings/142-3090/machinima-inc-matter>

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# What Claims Can I Make?

- Any product claims in native advertising or by influencers must be true
- Ask yourself, if the Company made this claim directly could we adequately support it?
- Furthermore, claims made by influencers who use the product must reflect a typical user experience
  - If not, then you must disclose what is typical
  - No more “results may vary”

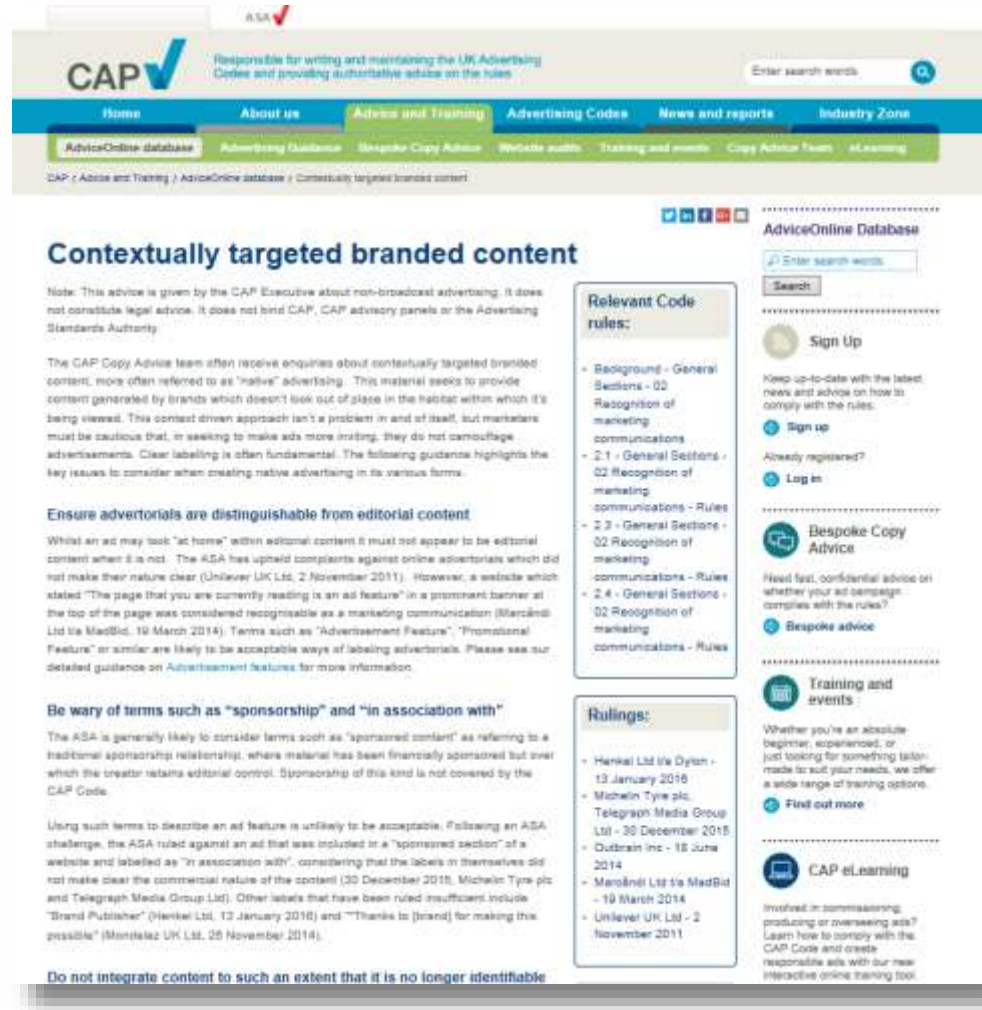


# Must I Disclose a Material Connection?

- For native, issue is whether it is “advertising” and would consumers, absent disclosure, not know it is advertising
- For influencers, issue is whether they could be perceived as biased in their opinions
  - Free or discounted product
    - Low threshold; but old media vs new media
    - Doesn’t matter if advertiser doesn’t dictate positive or negative review
  - Employee or relative



# Issue Is Overseas As Well



The screenshot shows the CAP website interface. At the top, the CAP logo is accompanied by the text: "Responsible for writing and maintaining the UK Advertising Codes and providing authoritative advice on the rules." Below this is a navigation menu with tabs for Home, About us, Advice and Training, Advertising Codes, News and reports, and Industry Zone. A secondary menu includes links to AdviceOnline database, Advertising Database, Bespoke Copy Advice, Website audits, Training and events, Copy Advice Team, and eLearning. A search bar is located in the top right corner.

## Contextually targeted branded content

Note: This advice is given by the CAP Executive about non-broadcast advertising. It does not constitute legal advice. It does not bind CAP, CAP advisory panels or the Advertising Standards Authority.

The CAP Copy Advice team often receive enquiries about contextually targeted branded content, more often referred to as "native" advertising. This material seeks to provide content generated by brands which doesn't look out of place in the habitat within which it's being viewed. This content driven approach isn't a problem in and of itself, but marketers must be cautious that, in seeking to make ads more inviting, they do not camouflage advertisements. Clear labelling is often fundamental. The following guidance highlights the key issues to consider when creating native advertising in its various forms.

### Ensure advertorials are distinguishable from editorial content

Whilst an ad may look "at home" within editorial content it must not appear to be editorial content when it is not. The ASA has upheld complaints against online advertorials which did not make their nature clear (Unilever UK Ltd, 2 November 2011). However, a seaside which stated "The page that you are currently reading is an ad feature" in a prominent banner at the top of the page was considered recognisable as a marketing communication (Maroñón Ltd t/a MadBid, 19 March 2014). Terms such as "Advertisement Feature", "Promotional Feature" or similar are likely to be acceptable ways of labelling advertorials. Please see our detailed guidance on [Advertisement features](#) for more information.

### Be wary of terms such as "sponsorship" and "in association with"

The ASA is generally likely to consider terms such as "sponsored content" as referring to a traditional sponsorship relationship, where material has been financially sponsored but over which the creator retains editorial control. Sponsorship of this kind is not covered by the CAP Code.

Using such terms to describe an ad feature is unlikely to be acceptable. Following an ASA challenge, the ASA ruled against an ad that was included in a "sponsored section" of a website and labelled as "in association with", considering that the labels in themselves did not make clear the commercial nature of the content (30 December 2015, Michelin Tyre plc and Telegraph Media Group Ltd). Other labels that have been ruled insufficient include "Brand Publisher" (Hewlett Ltd, 12 January 2016) and "Thanks to [brand] for making this possible" (Montelez UK Ltd, 26 November 2014).

### Do not integrate content to such an extent that it is no longer identifiable

#### Relevant Code rules:

- Background - General Sections - 02 Recognition of marketing communications
- 2.1 - General Sections - 02 Recognition of marketing communications - Rules
- 2.3 - General Sections - 02 Recognition of marketing communications - Rules
- 2.4 - General Sections - 02 Recognition of marketing communications - Rules

#### Rulings:

- Hewlett Ltd t/a Dymk - 12 January 2016
- Michelin Tyre plc, Telegraph Media Group Ltd - 30 December 2015
- Outbrain Inc - 18 June 2014
- Maroñón Ltd t/a MadBid - 19 March 2014
- Unilever UK Ltd - 2 November 2011

#### AdviceOnline Database

Enter search words

Search

#### Sign Up

Keep up-to-date with the latest news and advice on how to comply with the rules.

Sign up

Already registered?

Log in

#### Bespoke Copy Advice

Need fast, confidential advice on whether your ad campaign complies with the rules?

Bespoke advice

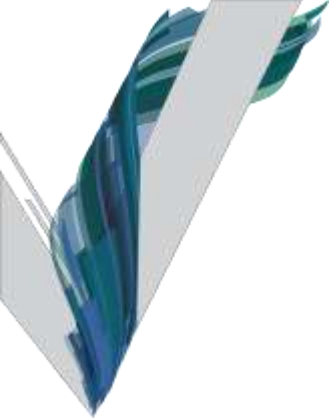
#### Training and events

Whether you're an absolute beginner, experienced, or just looking for something tailor-made to suit your needs, we offer a wide range of training options.

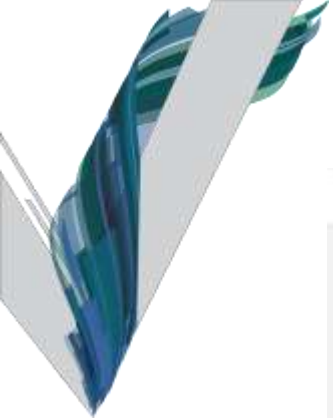
Find out more

#### CAP eLearning

Involved in commissioning, producing or overseeing ads? Learn how to comply with the CAP Code and create responsible ads with our new interactive online training tool.



# Regulators Are Watching!



YouTube

Shadow of Mordor - Gameplay - Part 1 (Gamescom Demo) ULTIMATE ORC SLAYING!

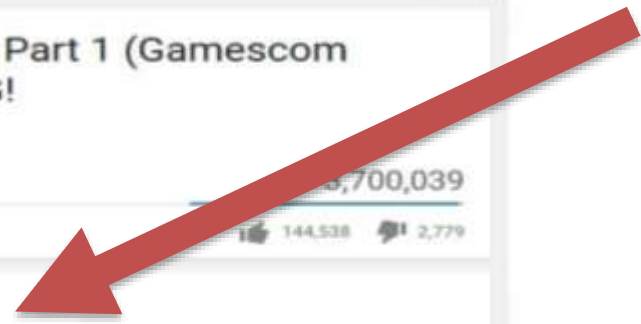
PewDiePie

Subscribe 39,204,799

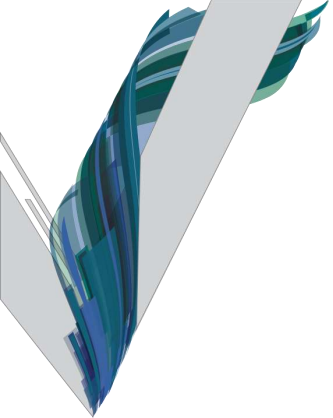
144,538 2,779

Published on Sep 4, 2014  
Get Shadow of Mordor: <http://bit.ly/SoMinfl>  
SoM YT: <http://youtube.com/shadowofmordor>  
Comment: #OrcPoods

SHOW MORE



Sponsorship disclosure not visible in YouTube description box before "show more" link clicked



Published on Oct 3, 2014

Thanks for watching! LIKE the video if you enjoyed and always leave comments, I read them all! :D Thanks for your support!

Click here for more info on Shadow of Mordor! <http://bit.ly/1vivrEL>

Click here for the trailer of the game! <http://youtu.be/9-ZXC-08gd8>

This game is Rated M for Mature.

Follow me on twitter: [http://bit.ly/I\\_AM\\_WILDCAT](http://bit.ly/I_AM_WILDCAT)

My Instagram: [http://instagram.com/wildcat\\_official](http://instagram.com/wildcat_official)

Want I AM WILDCAT Shirts and Merchandise?

US Shop: <http://wildcat-shop.spreadshirt.com/>

UK Shop: <http://wildcat-shop.spreadshirt.co.uk/>

EU Shop: <http://wildcat-shop-eu.spreadshirt.net/>

Follow Me on Twitch: <http://www.twitch.tv/LAMWILDCAT>

Subscribe to my let's play channel: <http://bit.ly/WILDCATLetsPlays>

Apply for a Partnership: <http://apply.fullscreen.net/?ref=w1ld...>

For Business Inquiries Contact: [IAMWILDCATBusiness@yahoo.com](mailto:IAMWILDCATBusiness@yahoo.com)

Use the code "WILDCAT" to get 8% off all products from my computer sponsor!

<http://www.customcontrollerzz.com/?Cl...>

Outro Song: The Wreckage – Breaking Through <http://www.youtube.com/watch?v=LekDT7...>

Please flag hateful comments or spam...we need that here :D

This video is sponsored by Warner Bros.

No one reads this far into the description...what are you doing snooping around...

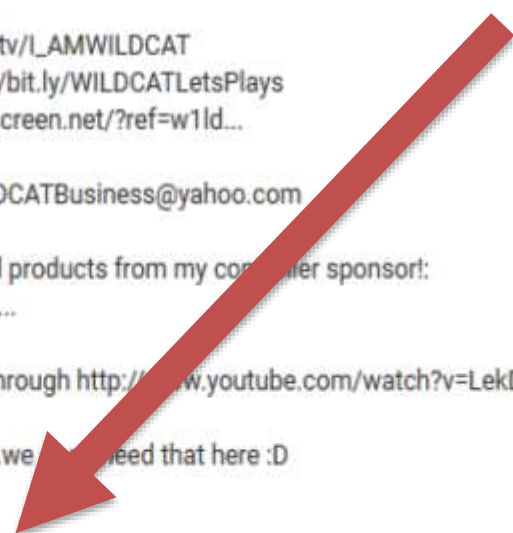
Category

Gaming

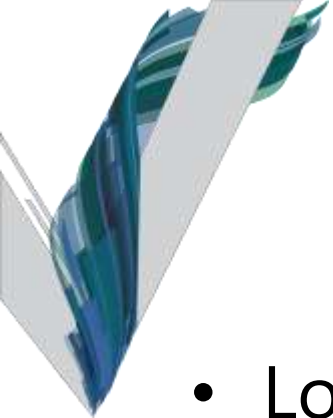
License

Standard YouTube License

Sponsorship disclosure visible after clicking "show more" link in YouTube description box



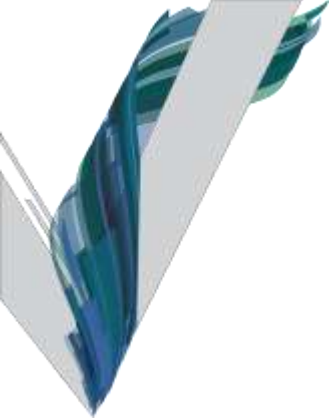
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# Lord & Taylor

- Lord & Taylor's campaign promoted their Design Lab collection (March 2015)
- Native advertising & Influencer campaign on Instagram
- Paisley asymmetrical dress

Read FTC press release at: [www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through](http://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through)



#NYLON shop

FROM OUR FASHION CLOSET TO YOURS

SHOP NOW >>



## this season's must-have line

lord & taylor's design lab

by: nylon — march 31 2015

#NYLON shop



### more nylon

prev **rihanna** finally speaks out about dating **leonardo dicaprio**



next stop what you're doing and watch the new 'mad max' trailer



### from our friends



Bobbi Kristina Brown



9 Must-Know Tips For



view gallery

photo via @alwaystudjng instagram



Every season, there's one collection that you see everywhere—and yet, instead of getting sick of it, you just after it until one day, you finally cave in and get it for yourself. This time around, we're taking out the guess work and introducing you to spring's must-have line: **Lord & Taylor's Design Lab**. You've probably already seen the new contemporary line's asymmetric bandana dress everywhere—from Instagram to your favorite blogs to the streets. But **Design Lab** is filled with many more amazing statement pieces, like festival-ready lazer cut tanks and fringed kimonos.

Click through the gallery to see how your favorite bloggers style their **Design Lab** pieces.

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# Lord & Taylor

- Lord & Taylor also recruited a team of 50 fashion influencers
- Paid them between \$1,000 and \$4,000 to post photos of themselves in the dress on Instagram on one specified weekend in March 2015
- Coordinated with Nylon postings
- No disclosures



## Lord & Taylor Charges

- Lord & Taylor falsely represented that the 50 Instagram images and captions reflected the independent statements of impartial fashion influencers, when they really were part of a Lord & Taylor ad campaign to promote sales of its new line;
- Lord & Taylor failed to disclose that the influencers were the company's paid endorsers – a connection that would have been material to consumers; and
- Lord & Taylor falsely represented that the Nylon article and Instagram post reflected Nylon's independent opinion about the Design Lab line, when they were really paid ads.

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# Lord & Taylor Remedy

- Lord & Taylor is prohibited from falsely claiming that an endorser is an independent user or ordinary consumer;
- Lord & Taylor is prohibited from falsely claiming that a statement or opinion from an independent or objective publisher or source;
- Material connections must be disclosed; and
- Lord & Taylor must monitor its influencers.



# Public Interest Groups Are Watching

Before the  
Federal Trade Commission  
Washington, DC 20580

In the Matter of

Complaint, Request for Investigation,  
and Request for Policy Guidance on  
the Deceptive Practice of Influencer  
Marketing Directed to Children

COMPLAINT, REQUEST FOR INVESTIGATION,  
AND REQUEST FOR POLICY GUIDANCE

Submitted by

Campaign for a Commercial-Free Childhood,

Center for Digital Democracy,

and Public Citizen

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# Influencers Are Policing

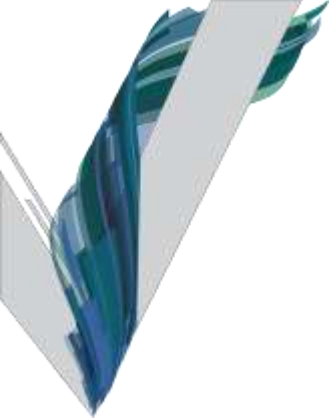
## Did Lord & Taylor's Instagram Influencer Campaign Cross The Line?

Fashion bloggers paid to post pictures of themselves on Instagram wearing an identical Lord & Taylor dress didn't follow FTC guidelines that require disclosure of material relationships.

Martin Beck on April 3, 2015 at 12:09 pm



It was a powerful illustration of the effectiveness of influencer marketing, but did it cross the line into undue influence?



## Microsoft Xbox One prompts outrage after YouTube stealth-marketing stunt

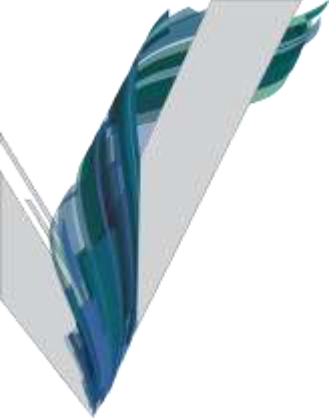
Undisclosed money paid to YouTubers featuring Xbox One in gaming videos prompts backlash



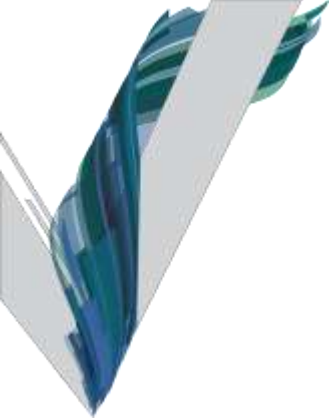
Microsoft paid extra for videos that showed the Xbox One in a positive light on a popular YouTube video game TV channel. Photograph: Lucas Jackson/Reuters

Games video creators on YouTube have reacted angrily to a stealth marketing campaign for Microsoft's [Xbox One](#) which paid bloggers for posting favourable videos.

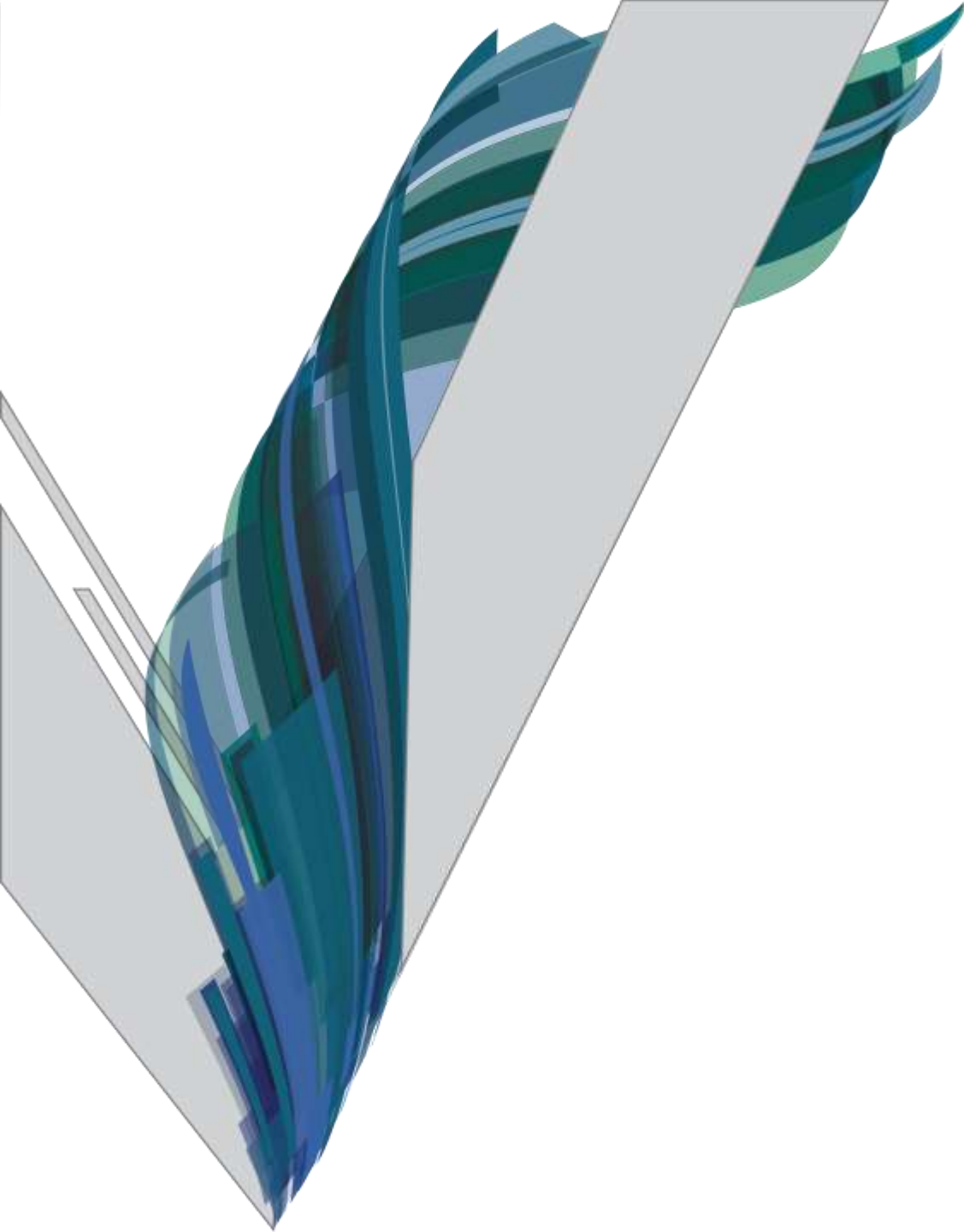
The revelation that Microsoft paid extra for positive videos featuring at least 30 seconds of Xbox One game footage and for the tag "XB1M12" on the popular



# Question and Answer Period



15 Minute Break



**Workshop Session 2**  
October 27, 2016

Amy Ralph Mudge  
Melissa Steinman  
Po Yi

[AllAboutAdvertisingLaw.com](http://AllAboutAdvertisingLaw.com)



# Takeaways from Session 1

- If there is a material connection between your company and an endorser, disclose it.
- Disclosures of material connection must be clear and conspicuous.
- Don't use footnotes, hyperlinks, in a general ABOUT ME or INFORMATION pages.
- Train your affiliates and monitor what they're doing on your behalf.
- Because advertisers are responsible for substantiating objective product claims, explain to your network the claims you can support.
- Instruct them about their responsibilities for disclosing their connection to you.
- Periodically search to make sure they're following your instructions.
- Follow up right away if you find questionable practices.

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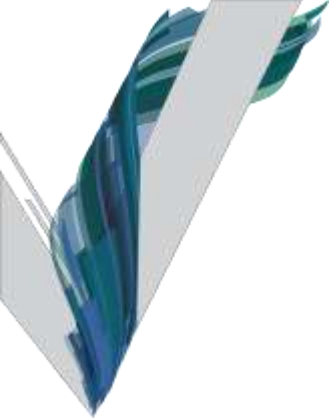
# Compliance Programs Done Right

How to End Up Like This?



Not Like This?





Training

Monitoring

Enforcement



# Training

- Early and often
- Document attendance
- Your people and your people's people – the whole Village
- E-training with participation quiz
- Simple leave behinds
- Ideal to combine legal messages with marketing or other business guidance

# Picture is Worth 1000 Words

**2016 FTC ENDORSEMENT GUIDELINES FOR SPONSORSHIPS ON SOCIAL MEDIA AND WITH INFLUENCERS**

**DISCLOSURE GUIDELINES BY PLATFORM**

This infographic is provided for general informational purposes only. It was not created by lawyers and does not constitute legal advice. Refer to FTC website for full guidelines. If you have questions about your legal obligations, contact a lawyer.

DISCLOSURE DOs	DISCLOSURE DON'Ts
<b>YOUTUBE</b>	
<ul style="list-style-type: none"> <li>✓ Disclosure must be verbal, can include written.</li> <li>✓ Use words or phrases that are clear and unambiguous, such as "Sponsored by...," "Paid Advertisement," or "Sponsored Advertising Content."</li> <li>✓ Include sponsorship information above the "show more" button in the description box.</li> <li>✓ For both verbal and written disclosures, disclosure should be close to the beginning video.</li> <li>✓ For written disclosures, must remain on screen long enough to be read and understood.</li> </ul>	<ul style="list-style-type: none"> <li>✗ Use ambiguous phrases like "Thanks to..." Disclosure should be clear and straightforward.</li> <li>✗ Attempt to hide written disclosure at the bottom of the video description.</li> <li>✗ Make written disclosures too brief to be read or make them the same color as the background.</li> <li>✗ Fail to include written and/or verbal disclosure within the video itself.</li> </ul>
<b>INSTAGRAM</b>	
<ul style="list-style-type: none"> <li>✓ Place disclosure at the beginning of the description and before the "more" button.</li> <li>✓ Use the hashtag #sponsored, #ad, or #paid to disclose partnership.</li> <li>✓ Use the phrase "Sponsored by..." and tag the sponsoring brand in the post description.</li> </ul>	<ul style="list-style-type: none"> <li>✗ Bury disclosure among many other hashtags.</li> <li>✗ Put disclosure at the very end of the post description.</li> <li>✗ Use #sp, #spon, or other hashtags that don't clearly convey sponsorship.</li> <li>✗ Use the phrase "Partnering with..." or "Collaborating with..."</li> <li>✗ Include disclosure in a comment instead of in post description.</li> </ul>

When a brand gives you something and you write about it,

## SHOULD YOU INCLUDE A DISCLOSURE?

**YES!**

*but what if....*

It's just a coupon	I didn't like it
I have to give it back	I work for this brand
I run a product review website	They said there's "a chance" my review could appear in an ad

**STILL YES!**

...but I paid for it and the brand never gave me anything

**NO**

BUT if the brand has ever given you something or WILL in the future...

Learn how to disclose at [bit.ly/DontGetFined](http://bit.ly/DontGetFined)  
Follow Kerry O'Shea Gorgone @kerrygorgone

# Make It Simple



Search YouTube Help

YouTube Help

Ad policies

Is there a feature that can help me inform viewers about Paid Promotion in my videos? [^](#)

Yes. We now offer an additional feature that enables creators to opt-in to a visible disclosure for viewers, which appears as a text overlay for the first few seconds when a viewer watches the video.

You can choose to add the paid promotion disclosure to any new or existing videos without having to upload a new video. If you add the paid promotion disclosure to an existing video, the video will keep its view count and other video metrics.

Use the paid promotion disclosure feature by following these instructions:

1. For any new or existing video that contains Paid Promotion, [follow the steps above](#) to check the "video contains paid promotion" box.
2. You'll see a second checkbox that says **Help me inform viewers of paid promotion by adding a disclosure to this video.**
3. Check this box to add a 10-second text disclosure on your video that says "Includes paid promotion."
4. Viewers will see this when they start watching the video on a computer or the latest version of the YouTube mobile app.



**Note:** Even if you use the paid promotion disclosure feature, keep in mind that different jurisdictions have various requirements for creators and brands involved in Paid Promotion that may require you to do more, so be sure to check and follow applicable laws.

## Paid product placements and endorsements

**Note:** This article was updated on October 4, 2016, for clarity purposes and to announce an additional [paid promotion disclosure feature](#). There are no changes to our long-standing Paid Promotion policies.



# Monitoring – How Much is Enough?

- FTC not giving guidance here
- If you are caught with no disclosure, it was by default not enough!
- Deputize the brand teams who are viewing the content for authenticity, ROI and other business stuff
- Smart monitoring: focus more efforts on influencers where you do not have a history and on campaigns where the content is clearly advertising and spend is higher



# Enforcement – How Much is Enough

- Clock begins to tick when you are aware of no disclosure
- Contact the influencer with clear direction on how to disclose – what to say and where to say it
- Understand their reason for failure to disclose or failure to disclose adequately
- If you continue to work with this influencer, monitoring must be stepped up
- Follow the handlers – investigate to understand who dropped the ball and how to correct

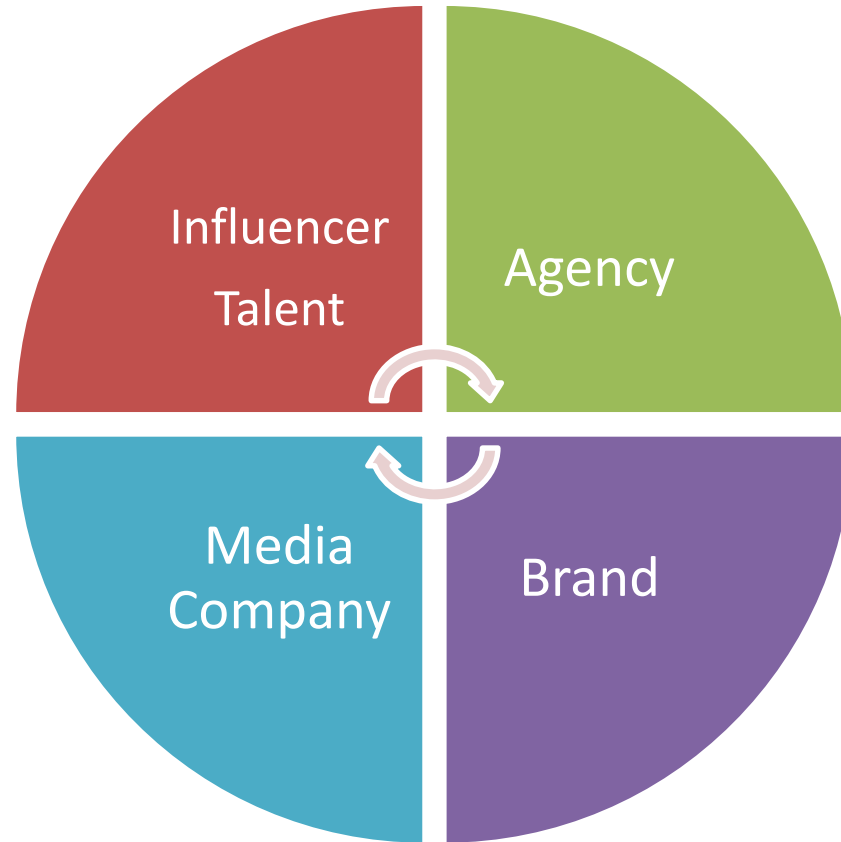


# Where Might There Be Some Give from Fencing In?

- Clear and conspicuous in Orders required to be both visual and audio means of the communication is in both video and audio
- Signed and dated acknowledgements from influencers
- Immediate termination of noncompliant influencers
- Confirmation of material connection disclosure prior to compensating influencer



# Campaign Participants





# Agency Contract

- **PARTIES: Brand and Agency**
- **KEY CONSIDERATIONS**
  - ✓ Due diligence – make sure Agency has a good track record of legal compliance on native advertising/influencer marketing issues
  - ✓ Establish minimum requirements and standard terms and conditions for Media Company Contracts, to the extent Media Company (and not Agency) is executing influencer or native advertising campaigns
  - ✓ If Agency is executing influencer or native advertising campaigns, then add relevant terms in Agency Contract



# Media Company Contract

- **Parties: Media Company and Brand, or Media Company and Agency**
- IAB Standard Terms and Conditions for Media Buys do not address native advertising or influencer campaign issues
- Supplement IAB Terms and Conditions with specific terms related to native advertising and/or influencer campaigns



# Key Terms – Native Advertising

- General reference to compliance with the FTC's *Native Advertising: A Guide for Businesses* and other applicable laws
- Identification of key requirements
  - Required disclosure (consider specifying triggers, placement and copy)
  - Provide Native Advertising Policy/Guidelines, if available, and require compliance
- Violation is a breach
- Remedy
  - Must cure breach promptly (e.g., 24-48 hours)
  - Immediate termination if uncured



# Key Terms – Influencer Marketing

- General reference to compliance with the *FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising* and related guidance and other applicable laws
- Provide Brand's influencer guidelines (if available), or if Brand does not have influencer guidelines, ask for Agency's or Media Company's influencer guidelines
- Provide/review monitoring and enforcement protocol
- Require implementation of influencer guidelines, monitoring and enforcement
- Reserve right to independently review influencer activities, require removal/modification of objectionable posts, and require immediate termination of influencer's participation in the campaign



# Influencer/Talent Contracts - Requirements

- Identify Talent's obligations
  - Compliance with applicable laws, including the *FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising*
  - Compliance with Company's influencer guidelines (should be attached as an exhibit)
  - Submit all social media posts for pre-approval and/or require Talent to comply with approved "message points" and guidelines
  - Immediately remove (or take steps to remove) or modify social media posts upon receipt of Company's written request if Company reasonably determines that such posts could expose Company to potential liability or are otherwise reasonably objectionable



# Influencer/Talent Contracts - Remedy

- State Company's remedy if Talent does not comply with contractual requirements
  - Violation is a material breach
  - Right to terminate contract immediately
  - Beware of providing cure period for repeated breach (FTC Consent Order in *Lord & Taylor*)



# Sample Provision in Talent Contract

Talent shall at all times adhere to all applicable federal, state, and local laws, rules and regulations relating to testimonial advertisements and endorsements, including, but not limited to, the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising and related guidance ("FTC Guides") and with industry best **practices**. Without limiting the generality of the foregoing, Talent will ensure that any social media posts and other public statements made by Talent comply with the Influencer Guidelines in Schedule A, and include a clear and conspicuous disclosure of the relationship between Talent and Company, in language that is easy to understand and in a noticeable manner. Talent agrees that anything Talent says or presents related to Company or Company's products will reflect Talent's honest opinion and experience. Additionally, Talent agrees to modify or delete all social media posts or other public statements immediately upon Company providing notice to Talent that any such public statement does not comply with this Section. A breach of this section will be deemed to be a material breach of this Agreement.

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# Sample Provision in Talent Contract

Talent shall at all times adhere to all applicable federal, state, and local laws, rules and regulations relating to testimonial advertisements and endorsements, including, but not limited to, the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising and related guidance ("FTC Guides") and with industry best practices. **Without limiting the generality of the foregoing, Talent will ensure that any social media posts and other public statements made by Talent comply with the Influencer Guidelines in Schedule A, and include a clear and conspicuous disclosure of the relationship between Talent and Company, in language that is easy to understand and in a noticeable manner.** Talent agrees that anything Talent says or presents related to Company or Company's products will reflect Talent's honest opinion and experience. Additionally, Talent agrees to modify or delete all social media posts or other public statements immediately upon Company providing notice to Talent that any such public statement does not comply with this Section. A breach of this section will be deemed to be a material breach of this Agreement.



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Talent shall at all times adhere to all applicable federal, state, and local laws, rules and regulations relating to testimonial advertisements and endorsements, including, but not limited to, the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising and related guidance ("FTC Guides") and with industry best practices. Without limiting the generality of the foregoing, Talent will ensure that any social media posts and other public statements made by Talent comply with the Influencer Guidelines in Schedule A, and include a clear and conspicuous disclosure of the relationship between Talent and Company, in language that is easy to understand and in a noticeable manner. Talent agrees that anything Talent says or presents related to Company or Company's products will reflect Talent's honest opinion and experience. Additionally, Talent agrees to modify or delete all social media posts or other public statements immediately upon Company providing notice to Talent that any such public statement does not comply with this Section. **A breach of this section will be deemed to be a material breach of this Agreement subject to immediate termination by Company.**

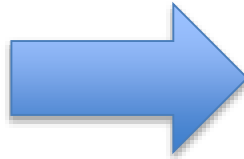


# Influencer Guidelines

- Reference to applicable laws and Talent's obligation to comply with such laws
- Material connection disclosure
  - Specific examples of approved disclosures
  - Guidance on placement
- Do's and Don'ts on making claims and referencing Company's or competitors' products
- Do's and Don'ts on referencing or using third-party name, trademarks, content, etc.
- Brand safety/standards – standard of conduct

# Testing

## Putting Disclosures to the Test



The screenshot shows the FTC website page for the 'Putting Disclosures to the Test' workshop. The page features a blue header with the FTC logo and navigation links. The main content area includes a breadcrumb trail, a title, a line graph with the title 'Putting Disclosures to the Test', event details (date, time, location), tags, an event description, and a list of bullet points. On the right side, there are sections for 'Related Releases' and 'Related Blog Posts'.

**FEDERAL TRADE COMMISSION**  
PROTECTING AMERICA'S CONSUMERS

Contact | Stay Connected | Privacy Policy | FTC en español

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ABOUT THE FTC | NEWS & EVENTS | ENFORCEMENT | POLICY | TIPS & ADVICE | I WOULD LIKE TO...

Home » News & Events » Events Calendar » Putting Disclosures to the Test

### Putting Disclosures to the Test

an FTC Workshop September 15, 2016

SEP 15, 2016  
9:15AM  
CONSTITUTION CENTER  
400 7th St SW, Washington, DC 20024 | Directions & Nearby

TAGS: Bureau of Consumer Protection | Technology | Mobile | Consumer Protection | Advertising and Marketing | Online Advertising and Marketing | Privacy and Security | Consumer Privacy

#### EVENT DESCRIPTION

The Federal Trade Commission hosted a public workshop in Washington, DC on September 15, 2016 to examine the testing and evaluation of disclosures that companies make to consumers about advertising claims, privacy practices, and other information.

Effective disclosures are critical in helping consumers make informed decisions in the marketplace.

- Many advertisers have used disclosures in an attempt to prevent their advertisements from being deceptive. Disclosures must be crafted with care both with respect to their language and presentation. Disclosures used in the marketplace are sometimes ineffective. Commission staff has recommended that disclosures be tested for effectiveness.
- Disclosures are also challenging in the privacy arena, whether disclosing to consumers that their physical location or online interactions are being tracked, or explaining privacy practices when consumers sign up for a service. Privacy policies are often long and difficult to comprehend and privacy-related icons may fail to communicate information meaningfully to consumers. Furthermore, the accompanying mechanisms for consumers to provide informed consent or exercise choices about the use of their data may also be confusing. The Commission has long encouraged the development and testing of shorter, clearer, easier-to-use privacy disclosures and consent mechanisms.
- The FTC has issued guides to help businesses avoid deceptive claims, such as guidance related to endorsements, environmental claims, fuel economy advertising, and the jewelry industry. Often the guidance presents options for qualifying claims to avoid deception. In developing guides, the Commission has sometimes relied on consumer research to gauge whether specific disclosures can be used to qualify otherwise misleading claims.

#### Related Releases

September 14, 2016  
[How To Participate in the FTC's "Putting Disclosures to the Test" Workshop](#)

August 22, 2016  
[FTC Announces Agenda for "Putting Disclosures to the Test"](#)

May 24, 2016  
[FTC To Host September Workshop On Testing Effectiveness of Consumer Disclosures](#)

#### Related Blog Posts

September 12, 2016  
[FTC disclosure evaluation research from the archives](#)

August 29, 2016  
[Workshop preview: Putting Disclosures to the Test](#)

# Nathaniel Evans, U. Georgia

## No Disclosure



## Single Modality Disclosure



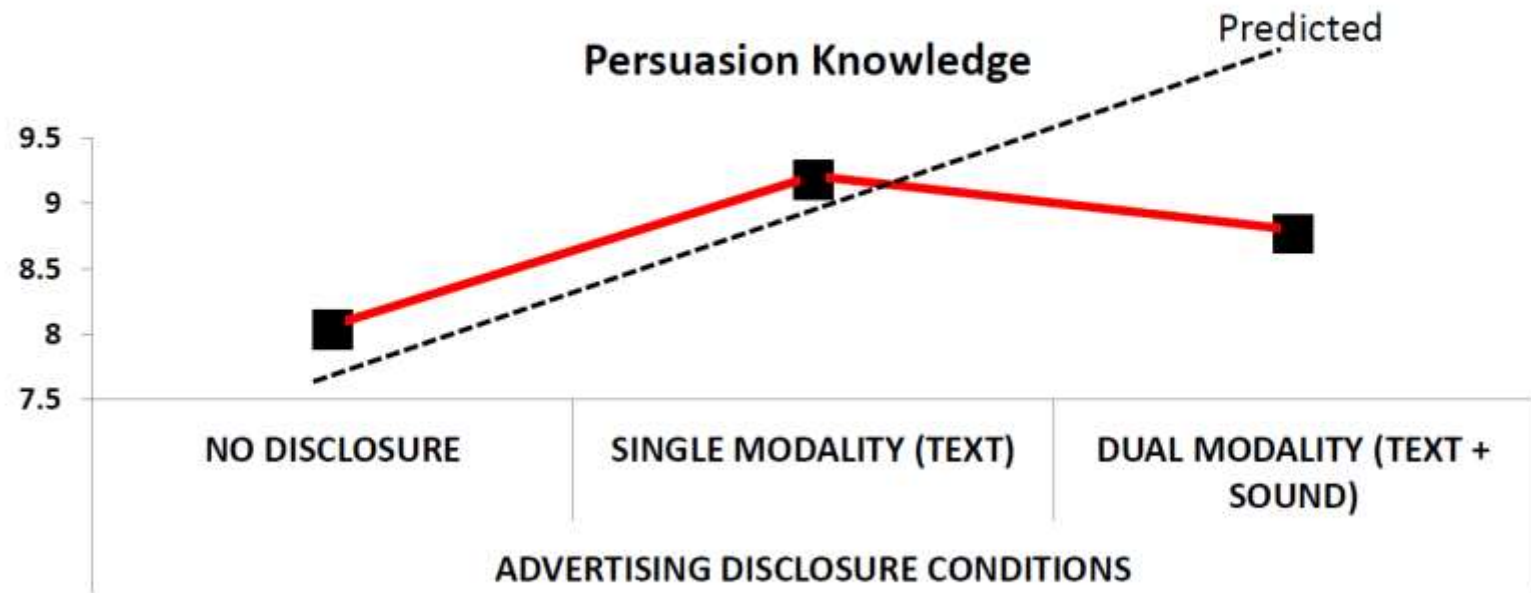
## Dual Modality Disclosure



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Nathaniel Evans, U. Georgia

## What Did We Find?



adpr@UGA

VENABLE

# David Hyman, U Illinois

## *What do Labels Signify to Consumers?*

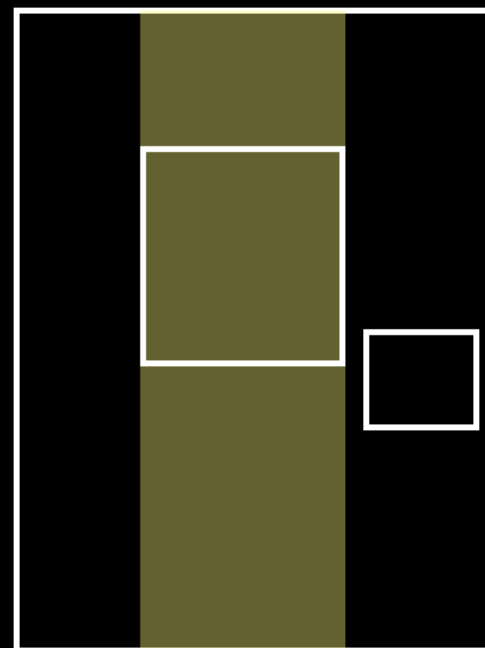
Label	Ad/paid content	Unpaid content	Don't know
Paid Ad	89%	4%	6%
Paid Content	87%	5%	8%
This content was paid for by	86%	6%	8%
Paid Post	83%	7%	10%
Ad	81%	7%	12%
Sponsored	79%	11%	10%
Sponsored Content	76%	12%	12%
Sponsored Post	76%	13%	11%
Brand Voice	64%	16%	20%
Brand Publisher	61%	19%	20%
Presented By	60%	20%	20%
Partnered Content	57%	19%	24%
Partner	57%	17%	26%
Written By	23%	52%	25%



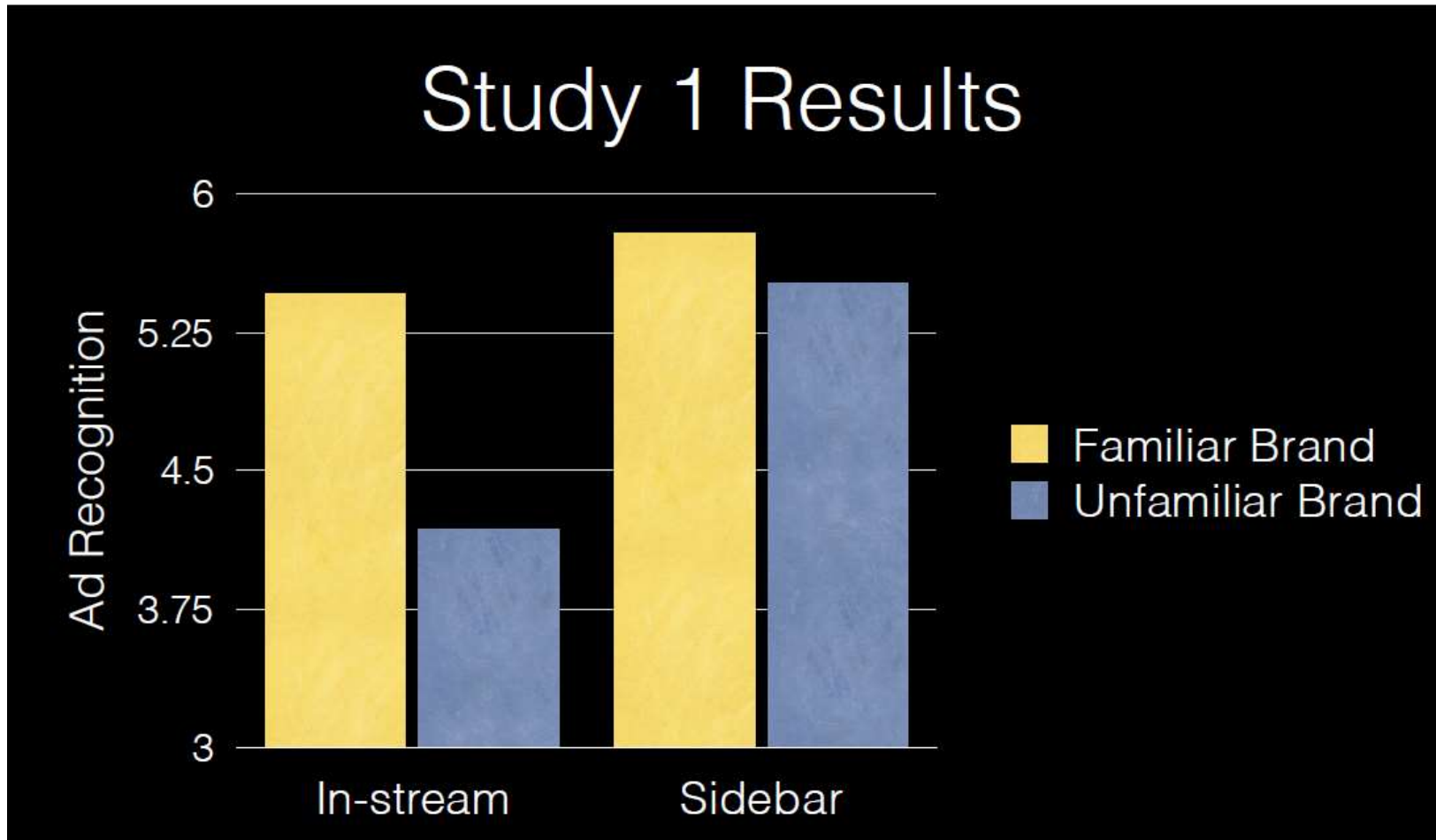
# Colin Campbell, Kent State University

## Multiple Recognition Cues

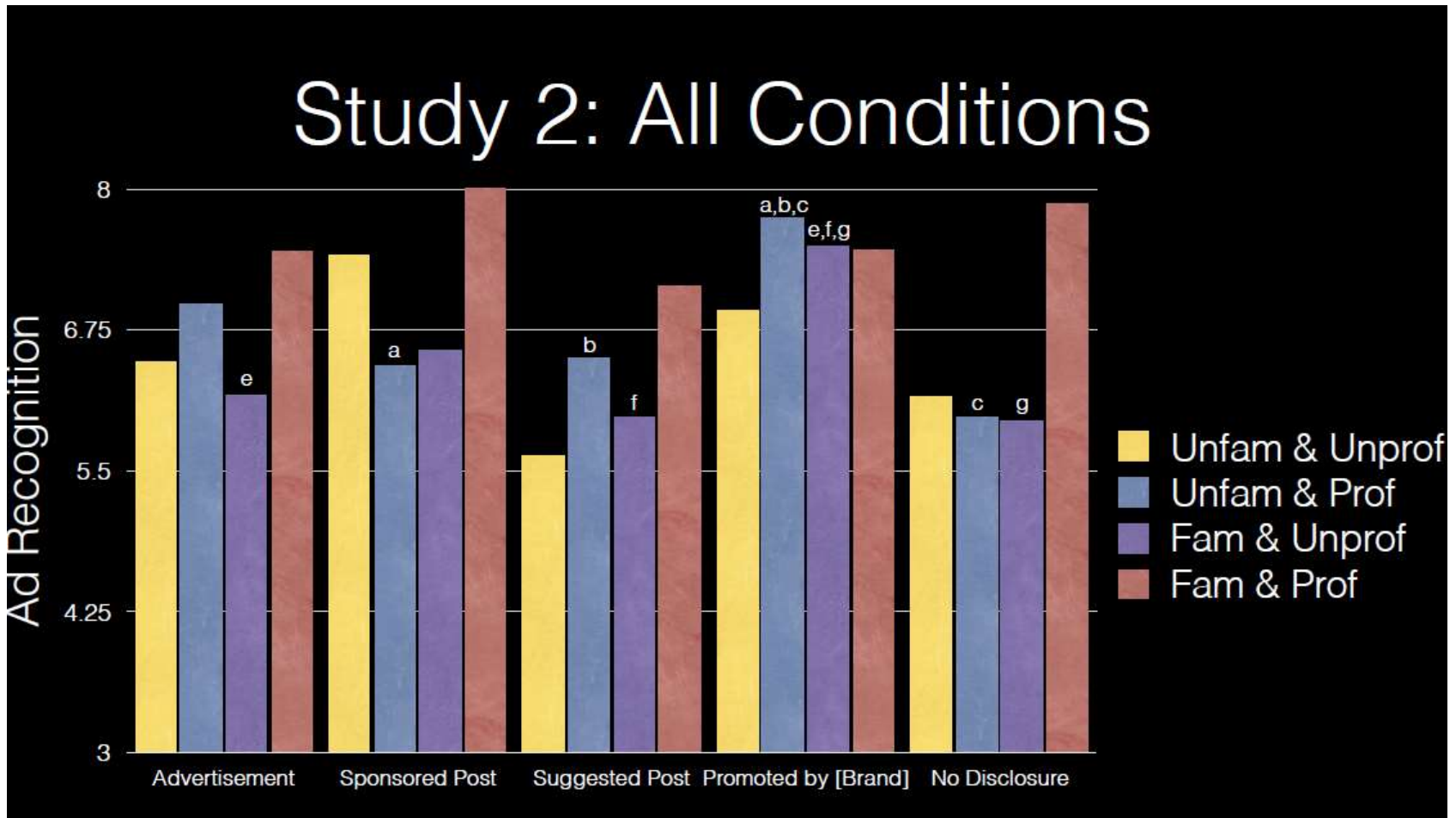
- **Ad position** (van Reijmersdal, Neijens, and Smit, 2009)
- **Central region gets more attention** (Leonhardt, Catlin, and Pirouz 2015; Tatler 2007)
- **Brand familiarity** (Keller 1993; Kent and Allen 1994)



# Colin Campbell, Kent State University



# Colin Campbell, Kent State University





Colin Campbell, Kent State University

## Threshold Effects

- Disclosure *will not* have an effect when:
  - no other ad recognition cues are present, or
  - multiple ad recognition cues are present
- Disclosure *will* have an effect when a single ad recognition cue is present



# Colin Campbell, Kent State University

## Results

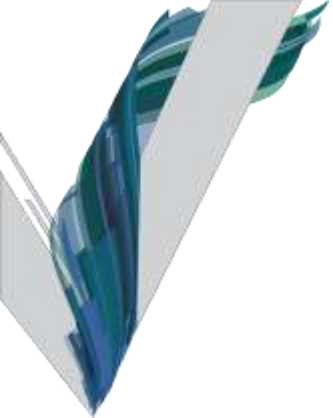
- Multiple ad recognition cues are needed to affect ad recognition
  - Only “Promoted by [Brand]” was effective
- Consumers *can* identify native advertising in a social media setting



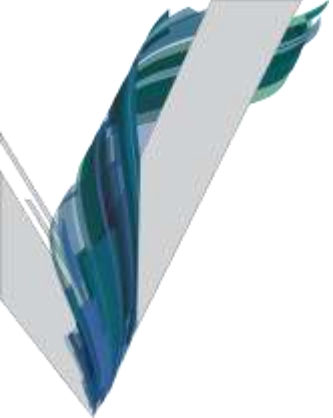
Colin Campbell, Kent State University

## Discussion

- Consumers do not seem to be processing social media content deeply
- Current disclosures may need strengthening
- Supports FTC perspective that disclosure isn't the only ad recognition factor
- Disclosure finding contradicts enforcement guide language recommendations

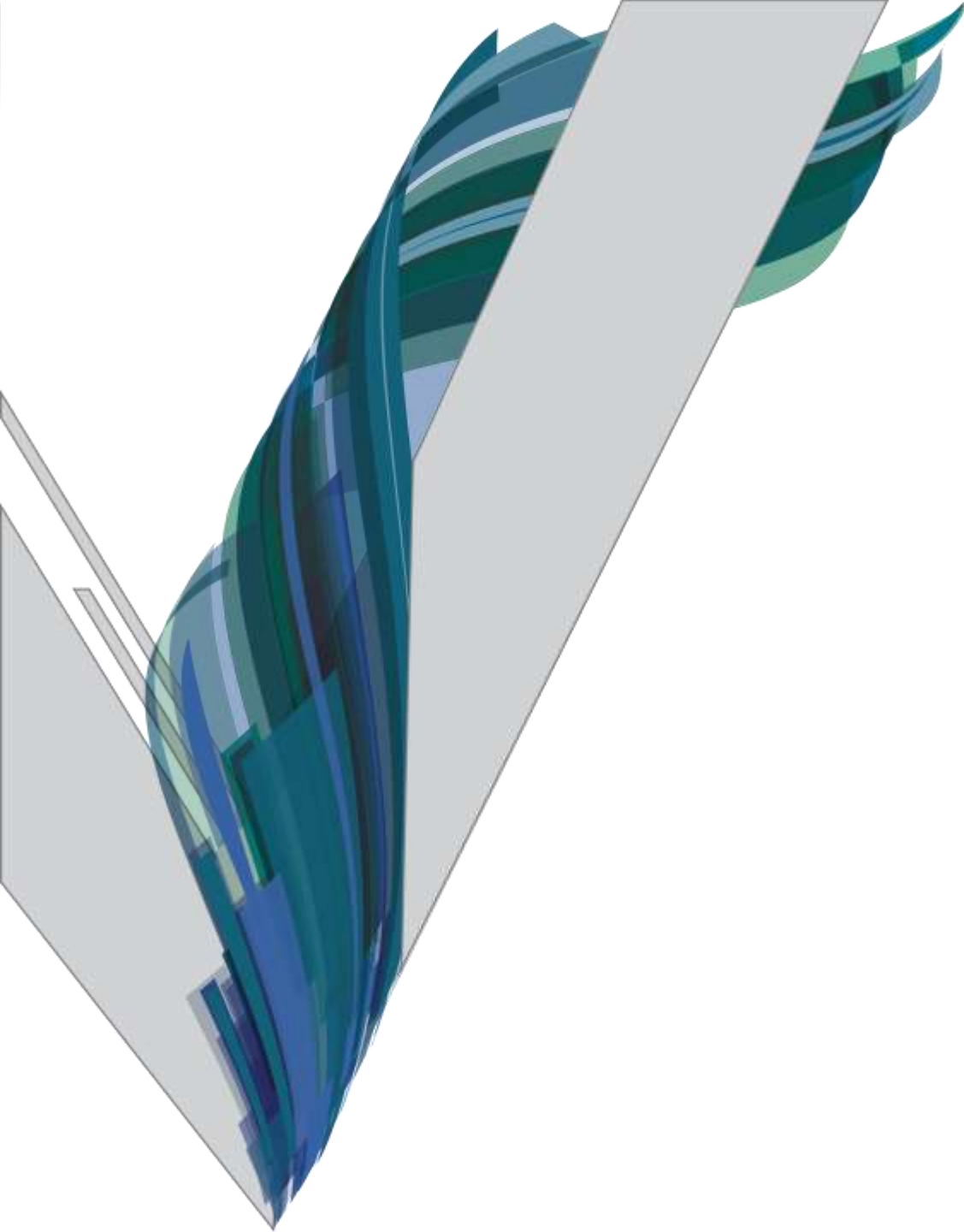


# Question and Answer Period



15 Minute Break





**Workshop Session 3**  
October 27, 2016

Melissa Steinman  
Po Yi

[AllAboutAdvertisingLaw.com](http://AllAboutAdvertisingLaw.com)



# WHAT'S UP NEXT?

## SOCIAL MEDIA AND PROMOTIONS

How to:

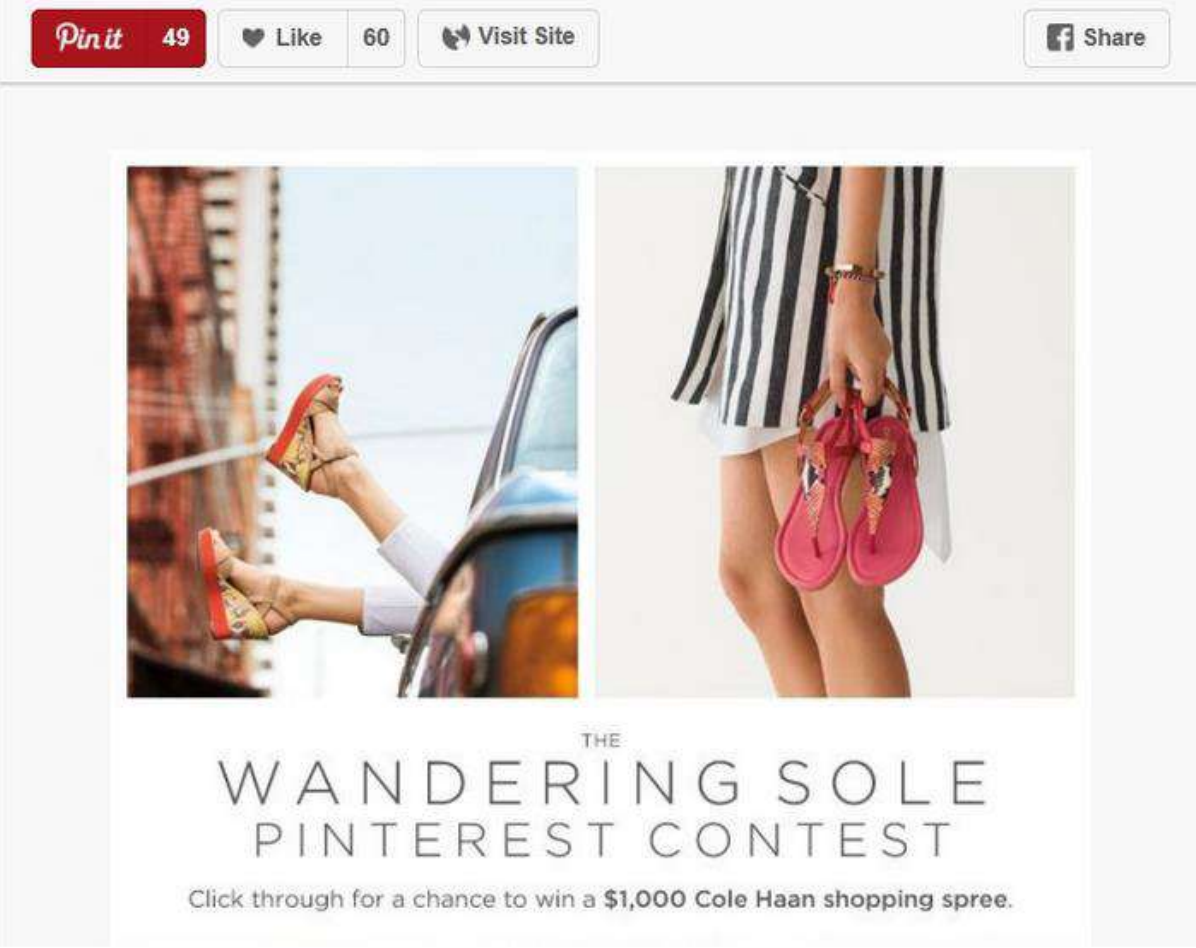
- (1) generate "buzz" on social media, and
  - (2) take advantage of the buzz that's already out there
- ...without violating the law.



# Topics

- Sweepstakes and contests and social media disclosures
- User reviews
- User generated content best practices
  - Social media platform rules
  - IP issues
    - Copyright/Trademark and securing consent for use in social media
    - Right of Publicity and the use of celebrity endorsements
- Buzz activations, surprise and delights and experiential marketing

# FTC v. Cole-Haan: Application of the Endorsements and Testimonials Rules to Social Media Promotions



A screenshot of a Pinterest pin. At the top, there are interaction buttons: a red 'Pin it' button with the number '49', a 'Like' button with a heart icon and the number '60', a 'Visit Site' button with a cursor icon, and a 'Share' button with the Facebook logo. The main image consists of two side-by-side photographs. The left photo shows a person's legs sticking out of a car window, wearing red high-heeled sandals. The right photo shows a person's legs from the knees down, wearing a black and white striped skirt and holding a pair of red high-heeled sandals. Below the images, the text reads 'THE WANDERING SOLE PINTEREST CONTEST' in a large, sans-serif font. Underneath that, in a smaller font, it says 'Click through for a chance to win a \$1,000 Cole Haan shopping spree.'



# Social Media Promotions and Disclosures: FTC v. Cole Haan

- **Basic rule:** Under FTC's Endorsements and Testimonials Rules, if an influencer has received material consideration in return for talking about a product on social media, it must be disclosed
- **Sweepstakes/Contests corollary:** In 2014, FTC closed its investigation into Cole Haan's Wandering Sole Pinterest Contest, which asked entrants to pin images that included product and hashtag #WanderingSole
  - FTC announced for the first time that ***pins and hashtags could be endorsements***
  - The fact that the pins/hashtags were incentivized by offering an entry to win a prize was a ***material connection*** that would not reasonably be expected by consumers.
  - ***This material connection must be disclosed in all hashtags/pins/posts that are requested as entries.***



# Key Reasons FTC Closed Cole-Haan Matter

- New issue for FTC
- Relatively small promotion
- Cole Haan committed to improve its policies

FTC Closing Letter:

[https://www.ftc.gov/system/files/documents/closing\\_letters/cole-haan-inc./140320colehaanclosingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf)



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# Compliance Takeaways: Cole Haan

Sweepstakes rules must require entrants (in rules/abbreviated rules) to include **disclosures/hashtags** in their entries such as:

#[company]Sweepstakes;

#contestentry;

NOT #sweeps or other abbreviations

May be two hashtags (e.g., #[Company name] #[sweepstakes], which can help ensure unique “constellation” of hashtags for purpose of ensuring that any “sweep” of social media platform for entries does not pick up “false positives.” [*To be discussed.*]

Sponsors must **monitor** and **enforce** requirements with:

Policy

Contractual requirements

Enforcement



# FTC Endorsement Guides FAQs: May 2015

- Even small incentives with little financial value can be a material connection that must be disclosed.
  - E.g., Entry into sweepstakes (per [Closing Letter to Cole Haan](#)), rewards points
- Use of the word #contest or #sweepstakes may sufficiently disclose material connections, but abbreviated disclosures are not necessarily sufficient
  - Recommends “sweepstakes” and “contest,” not “sweeps,” “sponsored” and “promotion” versus “spon” or “promo”





# FTC Endorsement Guides FAQs: May 2015

- Placement of disclosure is important:
  - Material connections disclosure should be made in each individual post containing an endorsement
  - Disclosure on a profile page or in description section insufficient because may not be seen
- FTC still determining the weight given to Facebook “likes,” etc., but recognizes they may be deceptive in certain circumstances



# Social Media Language for Official Rules

Social media entry instructions should include requirement that entrants include disclosure hashtags

**3. How to Enter:** During each Entry Period, go to your account on [www.instagram.com](http://www.instagram.com) and (1) follow @sponsorHandle, (ii) take a still photograph that shows your look and (iii) post photograph to your Instagram feed with #specialContestHashtag and #sponsorContest in the caption. You must be a member of Instagram and your account must be set to the “public” setting in order to participate; joining Instagram is free. Upon uploading a photo and commenting with #specialContestHashtag and #sponsorContest you will automatically be entered with one (1) entry into the Contest

By participating in this Contest, entrant acknowledges and agrees that he or she will clearly and conspicuously disclose that he or she is participating in this Contest in the entry and any online social sharing interaction that references the Contest or that is used to obtain entries in connection with this Contest. At a minimum, the hashtag #sponsorContest should be included in all social media communications sent pursuant to the Contest. Sponsor and Administrator reserve the right in their sole discretion to disqualify any entrant who does not adequately disclose his or her participation in this Contest while engaging in any online social sharing interaction during the Contest Period.

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# Sweepstakes and Product Reviews:

## The Scotts Company, LLC (Ortho Home Defense), #5889 (10/5/15)

- Scotts awarded \$25 gift cards to some individuals who posted online reviews of Scotts products. While the official rules for the promotion required entrants to include a disclosure in submitted reviews that the review was part of a sweepstakes entry, this requirement was not clearly identified in the email sent to consumers regarding the promotion and did not appear in the sample or template review.
- Competitor United Industries filed complaint that Scotts used sweepstakes to inflate social media presence.
- United also alleged that certain Scotts television commercials portrayed United's Spectracide product in a false light.



Write a review for any Roundup®, Ortho® or Tomcat® product and be entered for a chance to win a \$25 Visa gift card!

Write a review for your favorite product below, or click the Roundup®, Ortho®, or Tomcat® logos to access the product catalog and follow these easy steps to submit your review.

1. Navigate to the product you wish to review
2. Click on "Write a review" on the product detail page
3. Rate the product, write a review (include the words "Sweepstakes Entry"), and click "submit" (one entry per day)



Ortho® Dial N Spray®  
Hose End Sprayer

WRITE A REVIEW



Ortho® Weed B Gon  
MAX® Plus Crabgrass  
Control Ready-to-Use

WRITE A REVIEW



Ortho® Weed B Gon®  
Weed Killer For Lawns  
Concentrate 2

WRITE A REVIEW



Ortho® Bug B Gon®  
Insect Killer for Lawns &  
Gardens Concentrate

WRITE A REVIEW

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## The Scotts Company, LLC (cont.)

In responding to the NAD complaint, Scotts noted that once it became aware that consumers were not including the disclosure in submitted reviews, it

- Tagged each of the reviews as a “sweepstakes entry;”
- Ensured tag “Sweepstakes Entry” traveled with the reviews to other sites when reposted;
- Enhanced the discussion of the necessary disclosures in subsequent emails about the promotion; and
- Added a disclosure of the requirement on the review portion of the promotion website.



## The Scotts Company, LLC (cont.)


NAD concluded Scotts' remedial actions were sufficient; took no further action.

**However,** NAD expressed general concern about these sorts of programs, because they call into question the reliability of consumer reviews.

**Caution:** Promotion sponsor must not only require disclosures, but ***must monitor and enforce compliance***— and consider potential for a competitive response in the case of a potentially controversial promotion.



# Issues with Use of Incentivized Consumer Reviews and Similar Techniques



**Use of incentivized consumer reviews continues to be controversial**

- **Euro-Pro** case at NAD/NARB: Euro-Pro could not support “most recommended” claim based on consumer reviews
- **Amazon’s** recent ban on use of incentivized consumer reviews on platform
- **Facebook** now prohibits “likegated” promotions, which require that one must “like” a page to win, thus providing an inflated number of “likes” for a brand page.



# Using Social Media to Source UGC

- **Examples:** UGC Contest or open submission program; closed “advisory” community; crowdsourcing; requests to use content.
- **Challenges:**
  - Need clear grant of IP rights and ongoing participation
  - Who owns the submission, derivative works, etc.? License or assignment?
  - Third-party clearance — do not rely solely on reps and warranties from participants
  - Participants should “accept” the terms—but what does that mean?
  - How to make required disclosures?
  - Prizes or gifts given are subject to all applicable laws (lottery, FTC Endorsement Guides, etc.)
  - May need moderation or screening

# When can you reuse/retweet a post/tweet/picture...

Without consent

Relying on sweepstakes, contest, or other program terms and conditions, with or without "I accept"

Relying on a request in a tweet or post

*When is a full release/agreement required?*



# Social Media Promotions: Understanding the Social Landscape



Each social network has its own set of advertising rules and usage guidelines—strictest for sweepstakes and contests.



IP rights grant does not necessarily give you the right to use for commercial purposes.



You don't always get the right to contact users.



Consequences of violation? Your page/promotion may be pulled down!



# Requesting Use of UGC on Social Media

## Instead of:

americangirlbrand Love your photo! We'd like to use your photo and username in American Girl social media and emails, and on our site. To confirm the photo belongs to you, you are the parent or guardian of the child in it, you consent & have read & accept our Terms(<http://bit.ly/MattelTC>) and Privacy(<http://bit.ly/MattelPriv>), reply #loveag.

OR



## Try this:

"We'd like to share your post and username on [Company's] Facebook Page. If you approve, please read and accept our Terms (link here) and Privacy Policy (link here) and reply with #CompanycanUseMyPost."

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# Third Party Rights

- Copyright
  - Videos and images, such as photographs and drawings, are protected by copyright law, and, in general, can only be used with the consent of the author
- Trademark
  - Many company names and most company logos and slogans are protected by trademark law, and, in general, can only be used with the consent of the trademark owner
- Right of Publicity
  - A person's name, voice, likeness and image are generally protected by that person's right of publicity, and, in general, can only be used for commercial purposes with the consent of the featured person

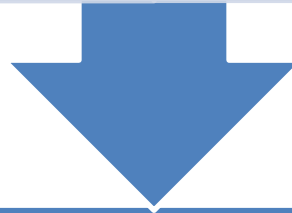


# Copyright

Copyright is a legal protection for the authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works

Applies *automatically*, even if the author/creator hasn’t registered the “work”

Applies equally to content offline and content that exists online (i.e., posted on websites or social media)



Determine who owns or controls copyrighted content and obtain consent/license from such party (NOTE: submitter of content is not always the copyright owner)



# Copyright

## Copyrightable content includes:

- **Photos**
- **Videos**
- **Music** - recording and composition have separate copyrights
- **Literary works** – paragraphs, articles, chapters
- Other “works” such as drawings, paintings, sculptures, movies
- Works from pre-existing works, such as compilations and derivative works



# Trademark

A **word, logo, symbol, slogan, product packaging** or **product design** that identifies the source of the specific product

- Need to obtain permission/license from the trademark owner when using third party trademark
- Avoid false association

## Note:

Hashtags can be  
trademarked

# Trademark

## Beware: Dangerous Trademark Owners and Trademarks



"Elite Eight"



Olympics



"Go for the Gold"



"Super Bowl"

MLB



"Stanley Cup"



NHL



VENABLE



# Right of Publicity

Right of publicity applies to a person's name, voice, likeness or image, and legal protection applies when content includes any of the above features in a recognizable manner

- Applies to individual celebrities, athletes, employees and even members of the general public
- Some states apply protection posthumously
- Some states require written consent
- Does not apply to corporations (*but remember*, some business names are protected by trademark law)

***Obtain written release from the person if using that person's name, voice, likeness or image in any recognizable manner in the content***



# Right of Publicity: A Tale of 2 Celebrities



**Arby's** @Arbys  
Hey @Pharrell, can we have our hat back? #GRAMMYS

RETWEETS 77,958 FAVORITES 46,541

5:26 PM - 26 Jan 2014

**Pharrell Williams** @Pharrell  
Y'all tryna start a roast beef? 😊😏  
"@Arbys: Hey @Pharrell, can we have our hat back? #GRAMMYS"

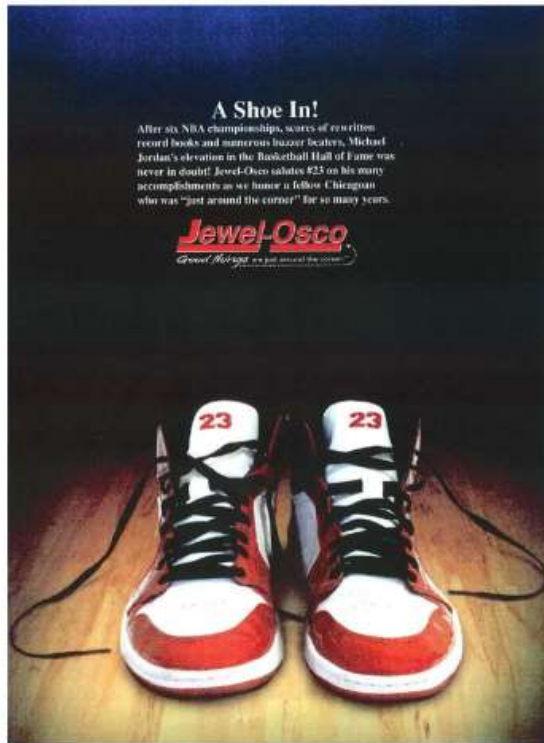
RETWEETS 16,098 FAVORITES 13,920

1:23 AM - 27 Jan 2014



# Right of Publicity: Congratulatory Ads

Cautionary tale about congratulating athletes



## A Shoe In!

*"After six NBA Championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was 'just around the corner' for so many years."*

VENABLE

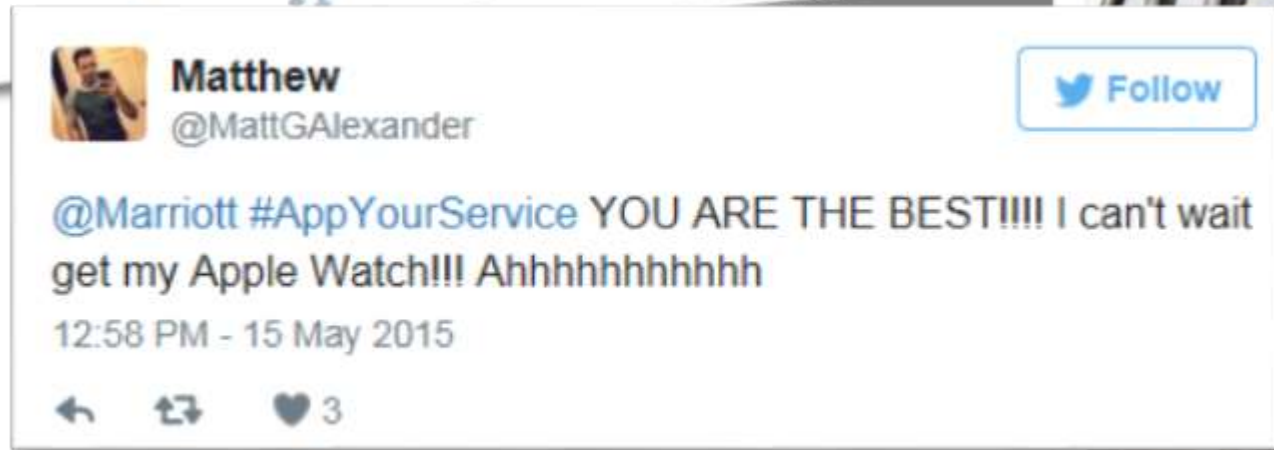
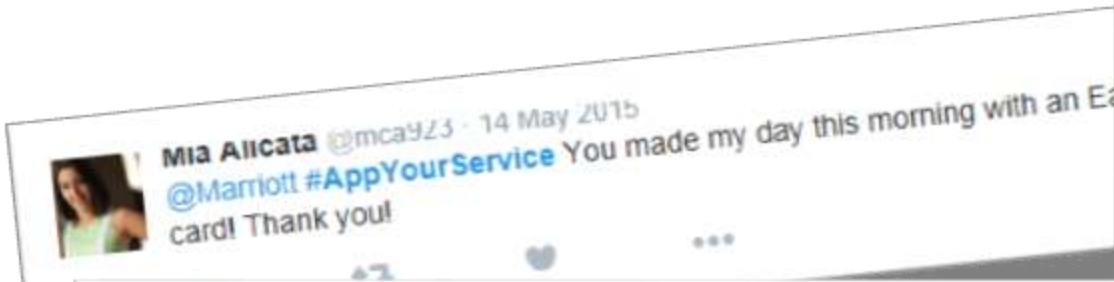


## Case Study: Movies, UGC and Kids

- Studio considered soliciting UGC from superfans to promote an upcoming movie featuring characters very popular with children, as well as adults.
- Fans would create their own art depicting a scene they hope to see in the movie for a chance to win movie prizes.
- Factors to consider included underlying IP ownership, intended use of submissions, age of entrants.

# "Buzz Activations" and Experiential Marketing

## Marriott #AppYourService



# Buzz Activations and Experiential Marketing

## Marriott #AppYourService

### Issues:

- Is it a sweepstakes or a “Surprise and Delight”?
- What kind of terms and conditions are necessary?
- Is preannouncement/PR allowed (or a good idea)?
- Releases—winners, third parties, filming sites
- Third party IP issues
- What disclosures are necessary under the FTC Guidelines?
- Potential liability triggered by gifts
- Training and/or guidelines for blogger/concierges/employees re disclosures
- Concept of a “war room” to address issues for these types of promotions.





## Practice Tips

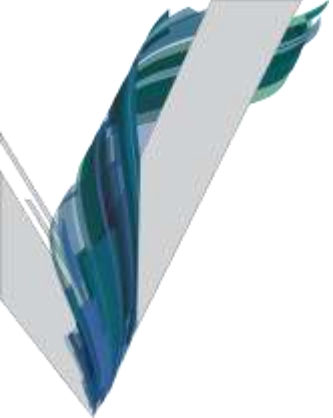
- Have policies in place, e.g., social media influencer policies/agreements
  - Do different types of influencers merit different policies or agreements?
  - E.g., celebrities, product testing
- Forms can be valuable
  - Rules: Sweepstakes, contest/UGC, other types of promotions
  - Releases: Winners, guests, third party publicity releases, premises releases



# Practice Tips (Cont.)

- “Guides” for sweepstakes, buzz activations, etc.
  - Comply with the rules imposed by each social network for contacting users.
    - Ex. Facebook limits on direct messaging without prior consent.
- It may also be desirable to get signed releases from prize/gift recipients depending on size of “surprise” and how you interact with recipient.
- Understand and keep up to date with government guidance and social media platform
- For joint promotions:
  - Obtain indemnification, representations and warranties clause
  - Clarify roles





# Question and Answer Period



# Contact Us



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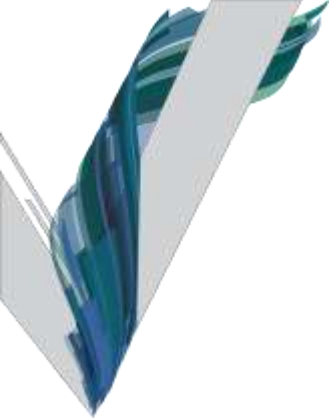
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Thank You for Joining Us  
This Concludes our Presentation