

Influencer Marketing Disclosure Rules



somethingnavy • Follow

somethingnavy Thank you @chaserbrand for making the perfect striped sweater for Fall. #somethingCHASER #ad

Load more comments

emily_g.r Love that look thestylishing Beauty holdethim



bryanboycom • Follow

Paid partnership with calvinklein Stockholm, Sweden

bryanboycom There's still time to check out what @CalvinKlein and @AmazonFashion have available for the holidays! I'm so thrilled to be partnering with them this season in #MyCalvins. I love Calvin Klein and Amazon through and through! Check out everything while you still can by visiting amazon.com/mycalvins



songofstyle • Follow

songofstyle Giving my all black work ensemble a holiday lift with @gucci. #GucciGift #ad

Load more comments

annasophiaofficial So beautiful 🥰🥰🥰
melissanavan @mgnnush vaas



chiaraferragni • Follow

Palazzo Parigi Milan Hotel & Grand Spa

chiaraferragni Lunch in my @chiaraferragnicollection x Converse (a few pairs are still available in store) 🥰 #ChiaraFerragniCollection #advertisement

Load more comments

ece.kardas Ay bu ne be minnos kiz gibi pozlar @cacuu

babakebrahimi43yahoo.com09115 بامر nayzi

babakebrahimi43yahoo.com09115 Zavira 99@113

babakebrahimi43yahoo.com09115 @pes etmeyensey @loupetteb @ju.gilio

shailuchauhan87 Nice baby

shailuchauhan87 I like u

shailuchauhan87 And I will be using marriage me

idea space by miriam Beautiful 🥰

397,708 likes

DECEMBER 8, 2017

Add a comment...

Presented by
Danielle N. Garno
Shareholder, Greenberg Traurig
March 14, 2019

Greenberg Traurig's Exclusive Fashion Law Practice



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Presentation Outline

What is the FTC?

Who do the regulations apply to and when?

How can you stay in compliance as a brand?

The Federal Trade Commission

- US Government Agency
- Promotes Consumer Protection
 - Truth-in-Advertising
- Regulates advertising including social media
 - Section 5 of the FTC Act ensures that online advertising is not deceptive
 - An ad is deceptive if it misleads a significant percentage of consumers, which can be as low as 10-15% of consumers



The Federal Trade Commission

- **Jurisdiction**
 - Section 5 is a U.S. specific law
 - Applies to all entities operating in commerce in the U.S.
 - FTC has said “to the extent it is **reasonably foreseeable** that [posts, videos, etc.] will be seen by and affect U.S. consumers, U.S. law would apply and a disclosure would be required.”



To whom do the FTC Regulations apply?

- Any fashion influencer or celebrity who receives free items, and/or is paid to endorse an item.
 - FTC generally does not monitor bloggers or influencers, but if possible violations come to its attention, it will evaluate on a case by case basis.
- The brands/advertisers or their ad agencies and public relations firms.
 - Consumer watchdog groups like www.truthinadvertising.org (TINA) and competitors are often the source of information.
 - National Advertising Division (NAD)
 - Electronic Retailing Self-Regulation (ESRP)

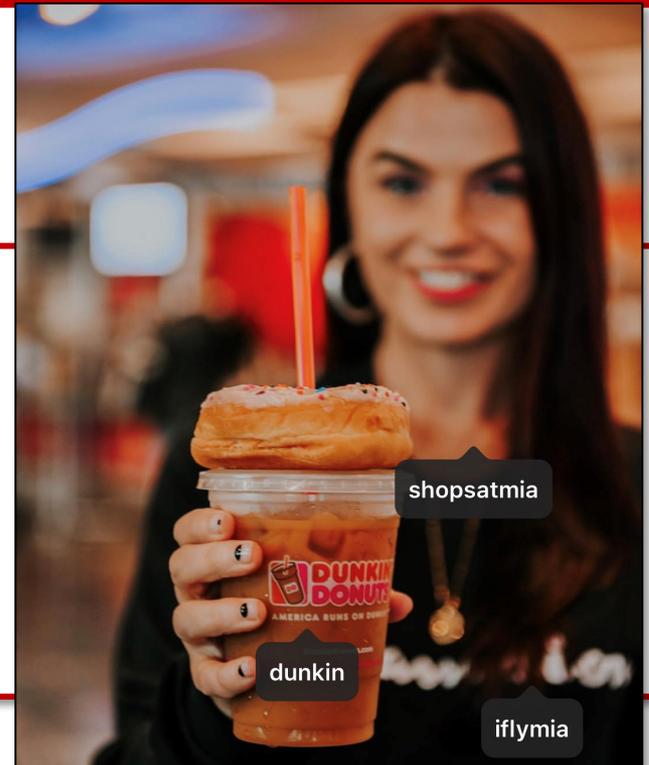


What do the FTC Regulations Require?

- The FTC has said that it is “not common knowledge” that influencers/bloggers are paid to post.
- If there is a *material connection* between the brand and the influencer that consumers *would not expect*, and it would *affect how consumers evaluate the endorsement*, that connection should be **disclosed**.
- Examples:
 - Relatives or employees of the brand or advertiser
 - When the influencer was paid to promote a product
 - When the influencer was given the product for free in exchange for an endorsement
 - Even if no instructions to post an endorsement
 - Ownership interest in the brand

What do the FTC Regulations Require?

- Influencers must be bona fide users of a product or service.
- Their endorsements must reflect their honest opinions.



Liked by tacouture and 1,125 others

thefashionpoet Early a.m. flights mean quick a coffee stop. My drink is the cold brew with a tiny bit of almond milk and no sugar.

@shopsatmia don't know what I would do without your @dunkindonuts. #ishopatmia #partner



So, how to ensure
your disclosure
complies?

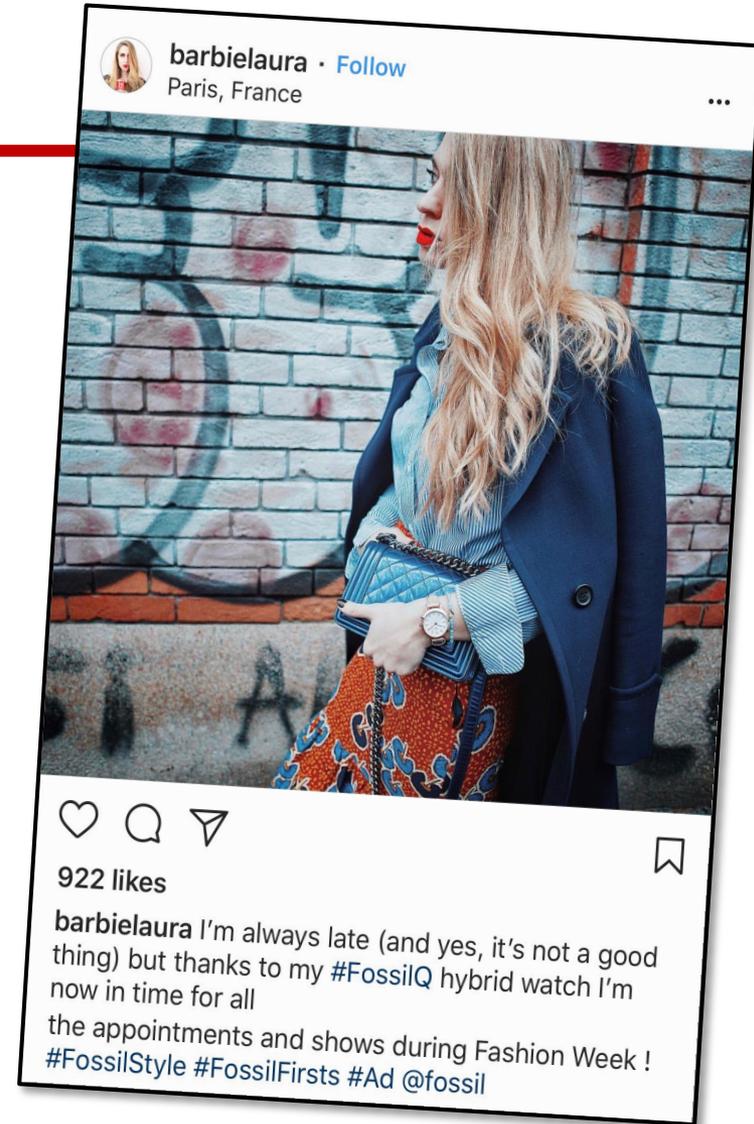
Remember Two Things:

Clear and
Conspicuous



How to Make Sure a Disclosure is Compliant

- FTC uses the “4Ps” to determine if clear and conspicuous
 - **Prominence** – Is it big enough to read? Color matters.
 - **Presentation** – Is it worded in a way that consumers can easily understand?
 - **Placement** – Is the disclosure where consumers are likely to look? For YouTube videos, the disclosure should be in the title of the video and also on the screen during the video.
 - **Proximity** – Is the disclosure next to the claim it modifies? On Instagram, the disclosure should be before the “More” button.





How to Make Sure a Disclosure is Compliant

Use terms like:

- “ad”
- “paid advertisement”
- “sponsored”
- “promoted”

which are clear and easily understood by consumers.

Avoid terms like:

- “ambassador”
- “collab”
- “influencer”
- “partner”
- “thank you [brand]”

which the FTC says are ambiguous.

How to Make Sure a Disclosure is Compliant

- **Social Media Platform Tools**
 - According to the FTC...
 - “Don’t assume that the disclosures built into the platforms are sufficient ... FTC staff doesn’t think that the built-in YouTube and FB tools suffice. The same applies to the built-in Instagram tool.”



What should a disclosure NOT be?



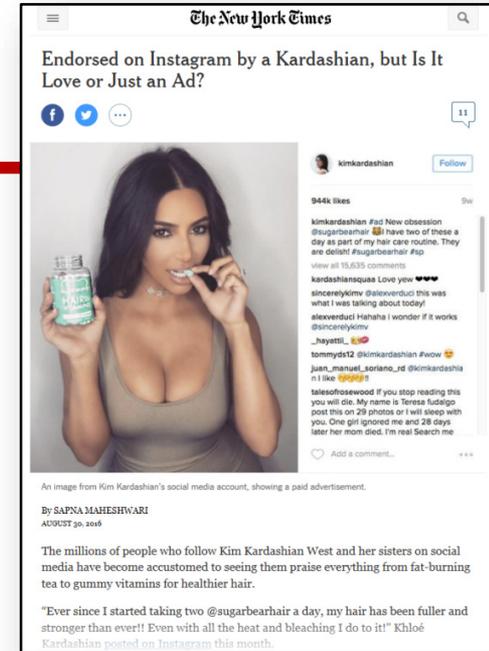
- Avoid making the disclosure a **hyperlink**.
- Avoid placing the disclosure so far down the page that consumers would have to keep **scrolling** to see it.
- Do not place the disclosure on a **profile** page only.
- A single disclosure on a **home page** or in one of many posts about the product is not enough!



Paid Testimonials on Social Media

In August 2016, the New York Times published an article called, “Endorsed on Instagram by a Kardashian, but Is It Love or Just an Ad?”

- The article touched on the trend of paid testimonials on social media, which are in fact paid sponsorships.
- The article pointed out that Kylie Jenner changed a caption on an Instagram picture of a lavish mansion in Turks and Caicos from “Thanks for the birthday home, @airbnb” to “Thanks for the gift of a lovely birthday home, @airbnb.”
- After a lawyer for the sisters received a letter from TruthinAdvertising.org, the Kardashian women also edited the captions on at least a dozen other Instagram photos and deleted others outright.



FTC Enforcement

- The FTC charged **Lord & Taylor** for violating FTC regulations.
 - What was the problem?
 - Lord & Taylor paid for an article to be published in Nylon Magazine and for a paisley dress to appear in Nylon's IG feed but did not require Nylon to identify it as advertising.
 - Lord & Taylor paid 50 fashion bloggers to post IG photos wearing the dress and did not tell the bloggers to disclose that they were being paid and received the dress for free.
 - Lord & Taylor eventually settled with the FTC and 20-year consent order.





Increasing Enforcement by the FTC

- In April 2017, the FTC issued warnings to over 90 celebrities, athletes, and other influencers (as well as the brands who were endorsed), who promoted products on their Instagram accounts without disclosing their relationship with the brand.
- Letters were meant to educate influencers, brands and celebs on the FTC's endorsement guidelines.
- Results? Many of the posts in question were taken down by the influencers at the request of the brands or their agents.
 - Some of the posts were not sponsored.
- In September 2017, the FTC sent follow-up letters to 21 of the influencers who were previously contacted, citing specific non-compliant posts.



Increasing Enforcement by the FTC

- In September 2017, FTC settled its first complaint against influencers
 - The influencers endorsed an online service CSGO Lotto without disclosing that they owned a substantial portion of the operator of CSGO Lotto.
 - In fact, the videos and posts could imply that CSGO Lotto was operated by an unaffiliated party
 - Additionally, the influencer owners also paid other influencers to promote CSGO Lotto and did not instruct them to disclose the material connection.

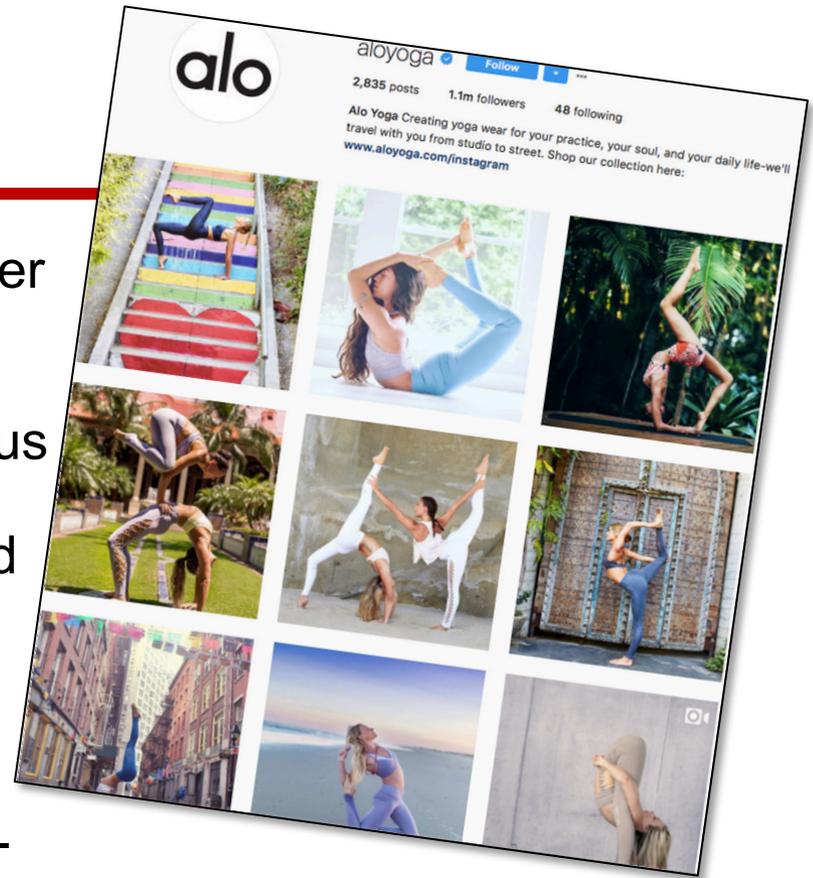
Truthinadvertising.org (TINA.org)

- “TINA.org is an independent, non-profit, advertising watchdog organization whose mission is to empower consumers to protect themselves and one another against false advertising and deceptive marketing.”
- It catalogued over 100 instances in which the Kardashian/Jenner family had endorsed a company on Instagram without clearly and conspicuously disclosing that they had a material connection with the brand.
- TINA.org filed a formal complaint with the FTC in August 2016.
- A year later, TINA.org conducted an audit which showed that 40% of the original posts remained unchanged and they listed over 200 new posts that failed to comply with the FTC regulations.
- In September 2017, TINA.org again alerted the FTC.



ESRP: Alo Yoga

- ESRP’s mission: “[T]o enhance consumer confidence in advertising and marketing by electronic retailing, to offer the electronic retailing industry an expeditious system for review of advertising and marketing, to discourage advertising and marketing in the electronic retailing industry that contain unsubstantiated claims, and to demonstrate the strong commitment of the electronic retailing industry to meaningful and effective self-regulation.”
- In 2018, ESRP (pursuant to its routine monitoring program) identified approx. 60 Instagram accounts that contained posts endorsing Alo Yoga but did not identify the material connection between the “Alo Yoga ambassador” and Alo Yoga or that they received the products for free.



ESRP: Alo Yoga

- Alo Yoga's response to ESRP:
 - It has long required its ambassadors to comply with the FTC Endorsement Guides and it was in the process of implementing a way to monitor and enforce compliance.
- However, months after the ESRP inquiry, Alo Yoga had not modified any of the posts.
- ESRP referred the matter to the FTC.



Floyd Mayweather Jr. & DJ Khaled -- Cryptocurrencies

- Floyd Mayweather and DJ Khaled were fined by the SEC for promoting Initial Coin Offerings for cryptocurrency companies without disclosing they were paid.
 - They are also named defendants in a civil suit by investors in Centra Tech which is alleged to be a fraud.
- Mayweather was paid \$100,000 from Centra Tech and \$200,000 from two other cryptocurrency companies.
- "These cases highlight the importance of full disclosure to investors," said Enforcement Division Co-Director Stephanie Avakian. "With no disclosure about the payments, Mayweather and Khaled's ICO promotions may have appeared to be unbiased, rather than paid endorsements."
- DJ Khaled paid the SEC \$150,000 in disgorgement and penalties and Mayweather paid the SEC \$600,000 in disgorgement and penalties.
 - Both are banned from promoting any type of security for 2 and 3 years, respectively.



Fyre Festival



- Over 100 unnamed influencers are defendants in a lawsuit filed in Los Angeles County.
- Allegations are that the organizers and the influencers acted “with negligent misrepresentation, fraud, breach of contract for failing to ‘provide the festival experience as promised’ and for ‘misrepresentations’ that caused people to purchase tickets.”
 - Example: Kendall Jenner posted on Instagram that some members of the G.O.O.D Music family would be performing, and her followers could buy tickets using a discount code she provided.
 - It is reported that she received \$250,000 for the post, but she did not disclose the material connection.





**Let's see some
examples of
compliant and non-
compliant disclosures**



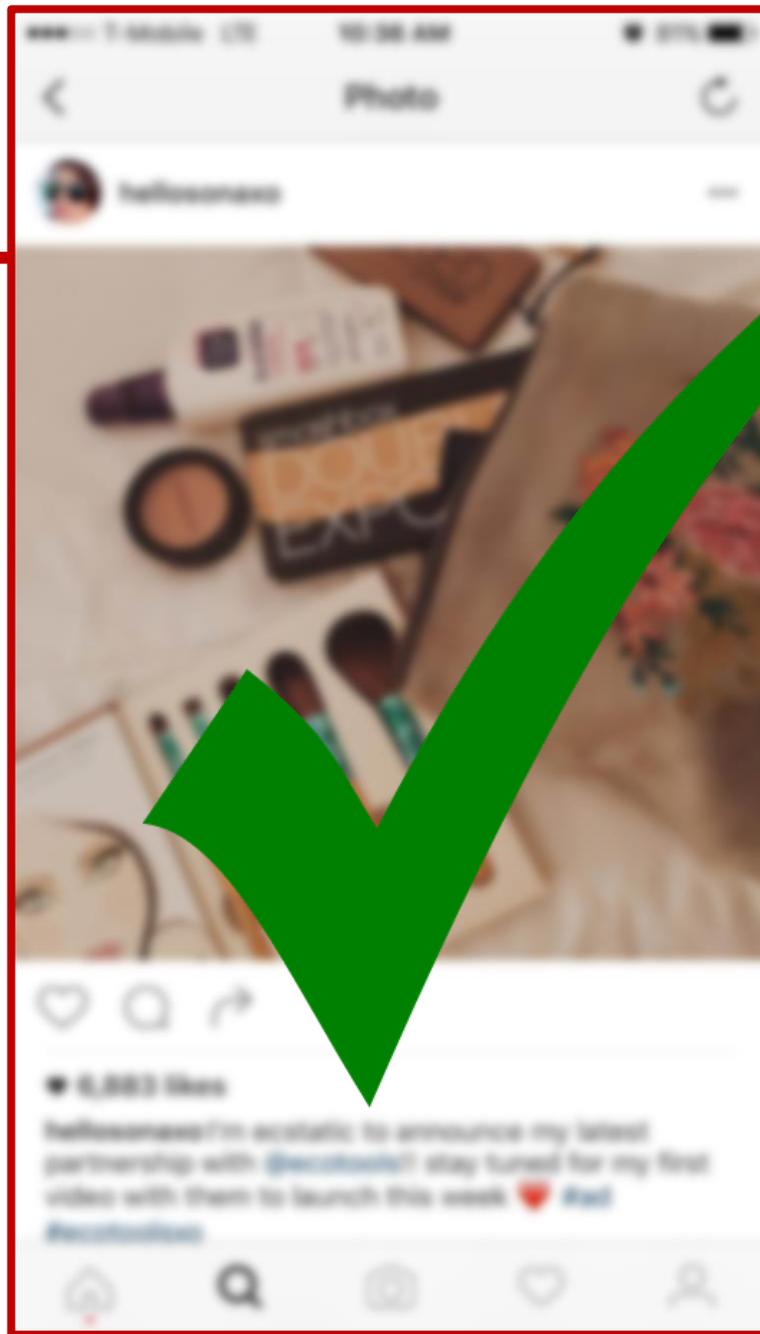
 **hellosonaxo** ⋮



♡ 💬 ↗

♡ 6,883 likes

hellosonaxo I'm ecstatic to announce my latest partnership with @ecotools!! stay tuned for my first video with them to launch this week ♡ #ad #ecotoolsxo





T-Mobile LTE 8:21 AM 87%

< Photo >

 milacoelhoca

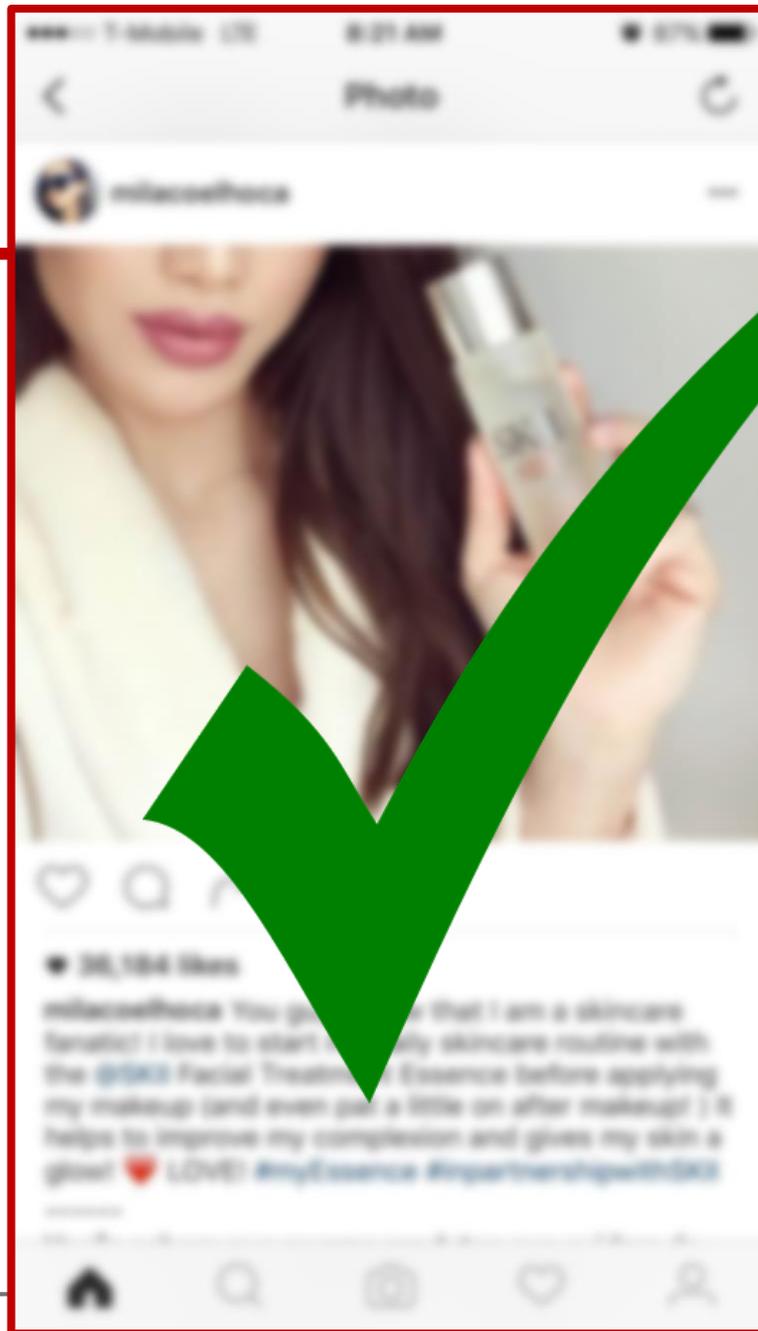


♡ 💬 ↗

♥ 36,184 likes

milacoelhoca You guys know that I am a skincare fanatic! I love to start my daily skincare routine with the @SKII Facial Treatment Essence before applying my makeup (and even pat a little on after makeup!) It helps to improve my complexion and gives my skin a glow! ❤️ LOVE! #myEssence #inpartnershipwithSKII

Home Search Post Like Profile









tashoakley
Acapulco, Guerrero



Liked by portdebras, imnotsorrydarling and 37,839 others

tashoakley Lover of love ❤️ 🍷 @mondayswimwear





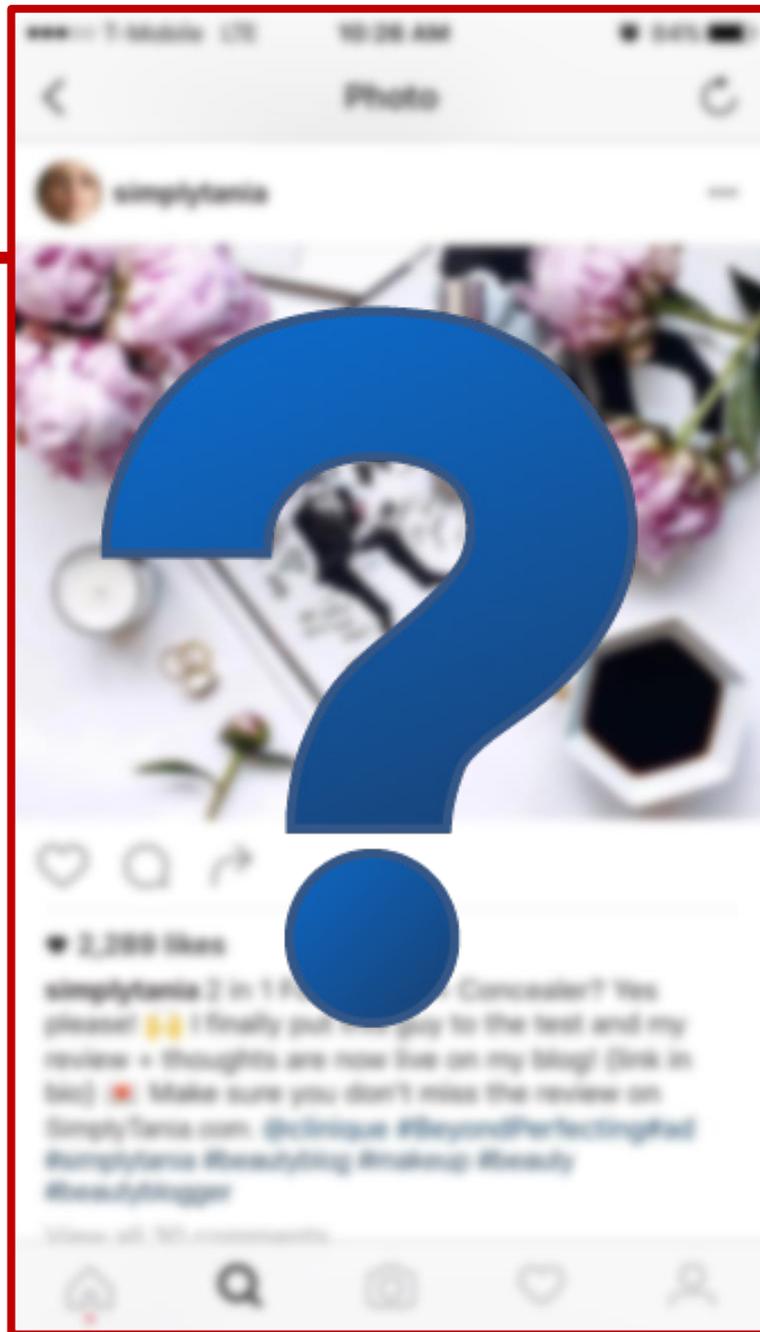
 simplytania ...



♥ 2,289 likes

simplytania 2 in 1 Foundation + Concealer? Yes please! 🙌 I finally put this guy to the test and my review + thoughts are now live on my blog! {link in bio} ❤️ Make sure you don't miss the review on SimplyTania.com. @clinique #BeyondPerfecting#ad #simplytania #beautyblog #makeup #beauty #beautyblogger

View all 30 comments





How can brands comply?

- **Every company should incorporate four things into its influencer marketing program.**
 1. Explain to influencers what they can and cannot say about the product.
 2. Instruct influencers on how to disclose their relationship to the company and why they have to do so.
 3. Monitor the influencers!
 4. If you find that the influencers are posting questionable claims or not including the disclosure, follow up with them.



What's the Downside of Non-Compliance?

- Disgorgement of profits earned from the violations.
- Injunction preventing company from marketing activities.
- Lengthy consent judgment to abide by law – if violated, significant fines.
 - Note: there are no “fines” for violations of the Act.
- Cost of retaining counsel to defend against enforcement action.
- Potential drop in stock price.

COPYRIGHTS, TRADEMARKS & SOCIAL MEDIA



Presented by:
Steven J. Wadyka, Jr.
Shareholder
Greenberg Trazurig,
LLP

Copyright Law and Social Media



- Copyright law protects “original works of authorship,” photographs
- The holder of a copyright – in the case of photos is usually the photographer (unless those rights are assigned) – has the exclusive right to reproduce, distribute, perform, display, license, and to prepare derivative works based on the copyrighted work for his entire life, **plus 70 years after death.**
- Digital Millennium Copyright Act (DMCA) makes it illegal to “violate the integrity of copyright management information,” such as by removing or altering copyright-identifying information (CMI).



Can Celebrities Post Photos of Themselves on Instagram?

Maybe Not – Could be
Copyright Infringement!



Xposure v. Kardashian

- A London-based celebrity photo firm sued Khloe Kardashian for copyright infringement for posting photo of herself without licensing the photo from Xposure, the copyright holder
- Photo was licensed for limited use to The Daily Mail and displayed copyright notice
- Khloe posted photo on her Instagram account and **removed the copyright notice**
- The photo was highly valuable due in part to Khloe's celebrity status



Wu v. Jonathan Simkhai, Inc.

- Well-known designer posted photo of Gigi Hadid wearing clothes from his Fall/Winter 2017 collection on his Twitter and Facebook brand pages
- Photographer sued for copyright infringement
- Designer did not license the photo or get permission to post on social media
- Seeking statutory damages of up to \$150k per work infringed



Gigi Hadid v. The Paparazzi



- Two lawsuits filed against Gigi Hadid by celebrity photographers
- Direct copyright infringement – Hadid posted the photo without a license or permission
- Contributory copyright infringement – Hadid “knowingly made available” to photo to her 43 million Instagram followers
- Photos taken of Hadid in public places and without her permission

Backgrid USA v. Blac Chyna

- Celebrity photo agency sued for copyright infringement
- Photos used for commercial purpose
- Blac Chyna was promoting a fashion brand and profited from unauthorized use of photo
- Mediation was unsuccessful
- Case will head to trial



Backgrid v. Fashion Nova

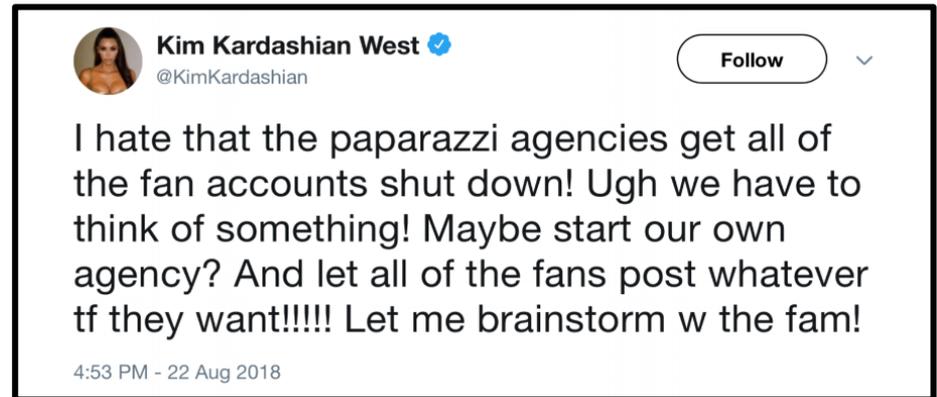
- Photo agency sues fast fashion retailer
- Filed 2/28/19 in C.D. Cal.
- Claims unauthorized uses of photos of Kourtney Kardashian, Blac Chyna, Amber Rose, and 21 Savage
- Direct and contributory contributory copyright infringement
- FN boasts that “Nova Style” means “breaking the rules” – including those against infringement?
- Alleges removal of CMI

FASHION **NOVA**



Unless You Own the Copyright, You Can't Use the Photo Without Permission

- It is not sufficient simply to give credit to the photographer or copyright holder
- Khloe now licenses the photos of herself that she posts on Instagram
- Fan accounts are being disabled by Instagram due to copyright violations
- Can fan accounts claim fair use? Probably not.
 - Applies to criticism, comment, news reporting, teaching, scholarship, and research
 - Non-profit educational and non-commercial uses



What about the Celebrity's Right of Publicity?

- A person (does not need to be a celebrity) owns the right to commercially exploit his or her name and likeness
- Gives individuals the ability to prevent others from exploiting their name and/or likeness without permission



The Best Defense is a Good Offense!



Odell Beckham v. Splash News and Picture Agency

- Beckham sued Splash News and photographer for violating his right of publicity – exploiting his image for financial gain
- Claims they attempted to “extort” him to pay USD 40,000 after he posted photo of himself on his Instagram account
- “The only reason that the photos have any value is because they depict Beckham...Yet, Beckham received no compensation from Diggs or Splash.”
- Suit recently settled

Who Would Have Prevailed?

- Consent is not required to use a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.
- Outcome uncertain due to newsworthiness and public interest, and that Beckham benefits from paparazzi coverage



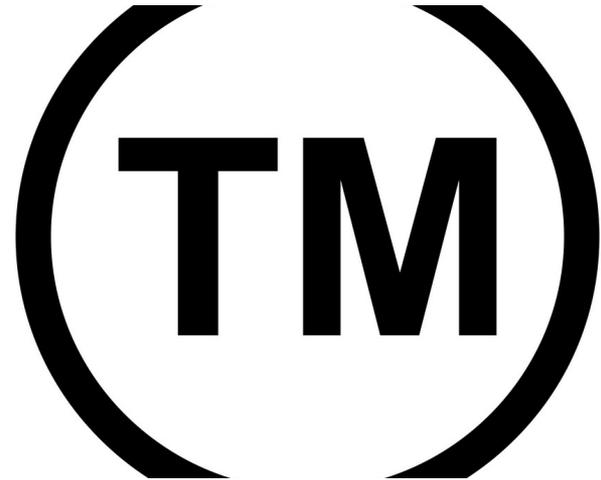
Protecting Hashtags as Trademarks

- What is a Hashtag?
 - “A word or phrase preceded by the hash character or pound sign (#) that is used to categorize the content of the accompanying text”
 - Facilitate a search for a keyword or topic of interest
 - Engage with consumers on social media



What Does the Trademark Office Say?

- “A mark consisting of the hash symbol (#) or the term HASHTAG is registrable as a trademark or service mark only if it functions as an identifier of the source of the applicant’s goods or services.” TMEP § 1202.18.
- “A mark may be registrable with a disclaimer of the hash symbol in cases where it is separable from other registrable matter. Therefore, if a mark consists of the hash symbol combined with wording that is distinctive for the goods or services, the hash symbol should be disclaimed.” TMEP § 1202.18(a).
- BUT: The addition of the hash symbol to an otherwise unregistrable mark typically will not render it registrable.



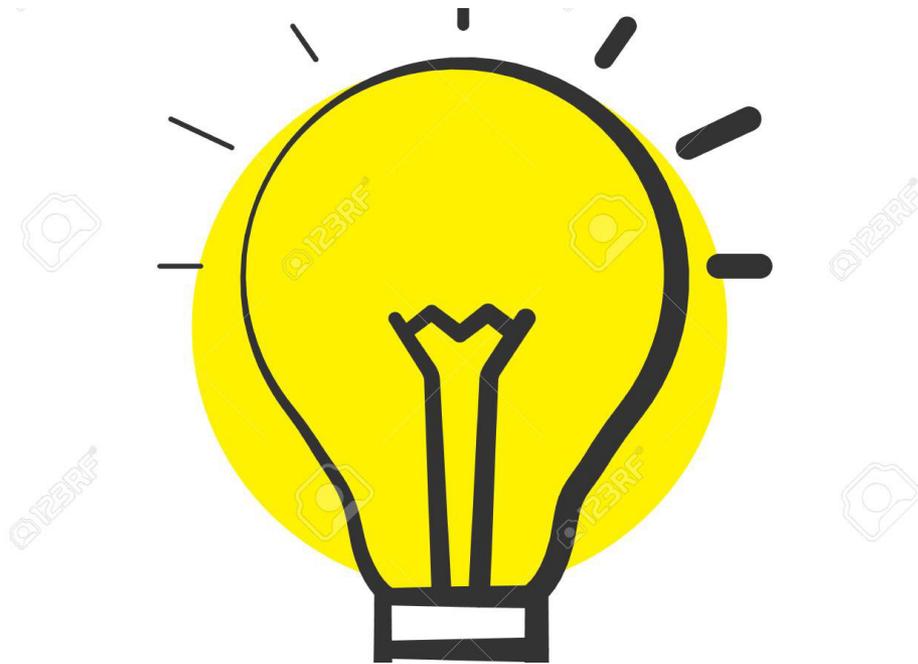
Examples of Registered Hashtag Trademarks

- #INGENUITY for business consultation services
- #SLUGGERTIME for clothing
- #DADCHAT for counseling services
- #BLAMEMUCUS for pharmaceutical preparations and decongestants
- #EVERYDAYMADEWELL for clothing
- #STEAKWORTHY for restaurant services



Practice Tips for Registering Hashtag Trademarks

- Submit specimens of use showing that the mark is used *as a trademark*, and not merely to facilitate an online search
- Use non-Internet uses, such as prominent display of mark on the goods or in displays associated with the goods



Acceptable Specimens of Use for Hashtag Trademarks

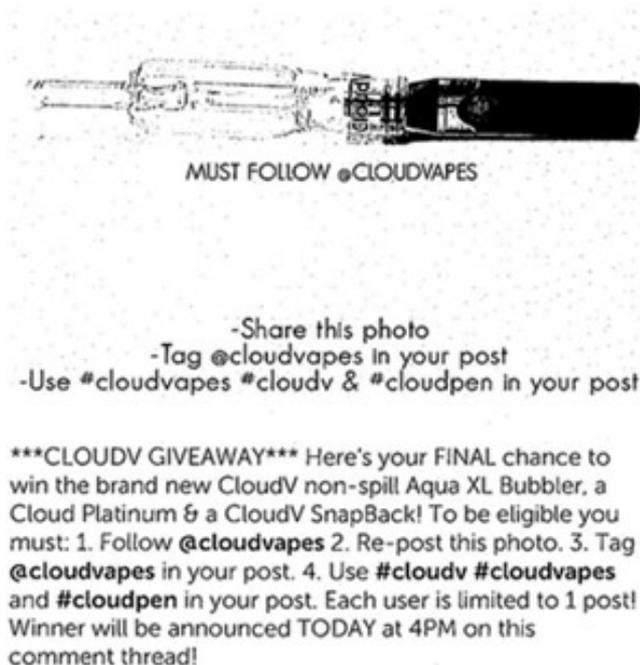




Are Hashtag Trademarks Enforceable?

According to One Court, the Answer is No

- Eksouzian v. Albanese, 116 U.S.P.Q.2d 1972 (C.D. Cal. 2015)
 - Owner of CLOUD PEN trademark for e-cigarettes claimed that competitor breached settlement agreement by using #cloudpen in Instagram posts
 - Settlement agreement prohibited competitor from using “CLOUD PEN” as a mark
 - Court found no breach of settlement agreement
 - “Hashtags are merely descriptive devices, not trademarks, unitary or otherwise, in and of themselves.”
 - The use of #cloudpen in social media posts was a “functional tool to direct the location of Plaintiffs’ promotion so that it is viewed by a group of consumers, not an actual trademark.”



But Wait, There's More!

- *Fraternity Collection LLC v. Fargnoli*, No. 3:13-CV-664-CWR-FKB (S.D. Miss. Mar. 31, 2015)
 - Clothing company sued competitor for trademark infringement and false advertising based on use of the hashtags #fratcollection and #fraternitycollection
 - Court refused to dismiss the case
 - Use by competitor of the company's name in a hashtag in social media posts "could, in certain circumstances, deceive consumers."



Most Definitive Case To Date

- *Public Impact v. Boston Cnsltng Grp.*, 169 F.Supp.3d 278 (D. Mass. 2016)
 - Plaintiff owned registered trademark for PUBLIC IMPACT for education consultancy services
 - Defendant used the hashtag #publicimpact to identify itself and as a mark to “announce and promote articles written by BCG consultants.”
 - Court focused on facts that mark and hashtag were identical and the consumer markets overlapped
 - Discounted evidence of consumer sophistication, finding confusion was likely
 - Granted preliminary injunction against use of #publicimpact

Cases That Survived Motions to Dismiss



***3 Ratones Ciegos v. Mucha Lucha Libre Taco Shop 1 LLC,
Case No. 16-CV-4538 (D. Ariz. Sept. 27, 2017)***

3 Ratonos Ciegos v. Mucha Lucha Libre Taco Shop 1 LLC, Case No. 16-CV-4538 (D. Ariz. Sept. 27, 2017)

- Plaintiff owned registered trademarks for LUCHA LIBRE and LUCHA LIBRE TACO SHOP
- Defendant used the hashtags #luchalibre and #luchalibretacoshop to promote its own restaurants
- On the defendant's motion to dismiss, the court held that the plaintiff "stated plausible claims for trademark infringement and unfair competition"
- Plaintiff alleged instances of actual confusion, directly competing services, overlapping customers, and close similarities of the parties' respective marks
- Key fact: Defendant used hashtags consisting of plaintiff's registered marks to refer to the defendant's own restaurants

Cases That Survived Motions to Dismiss



- *Chanel, Inc. v. WGACA, LLC*, Case No. 18-cv-2253 (S.D.N.Y. Sept. 14, 2018)

Chanel, Inc. v. WGACA, LLC, Case No. 18-cv-2253 (S.D.N.Y. Sept. 14, 2018)

- Chanel sued the vintage clothing retailer counterfeiting, trademark infringement, false advertising, unfair competition, and false endorsement
- Claimed that WGACA is misleading customers into believing it has an official relationship with Chanel
- WGACA used the hashtag #WGACACHANEL
- Court sided with Chanel: “Chanel’s amended complaint plausibly alleges that WGACA’s use of the hashtag #WGACACHANEL infringes Chanel’s trademarks. It alleges that WGACA conjoined its acronym with the Chanel trademark to create the impression that WGACA is affiliated with Chanel or is an authorized Chanel retailer. Courts have upheld similar complaints.”

The Law is Still Unsettled

- No *per se* rule that use of another's trademark as a hashtag constitutes trademark infringement
- Context is everything
- Nominative fair use permits the use of another's trademark to refer to that person's goods or services
- But brand owners should be wary of using a competitor's trademark as a hashtag on social media
- The law on keyword advertising may provide guidance

#theend[®]

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