

Keys to Celebrity Use of Social Media & Paid Endorsements

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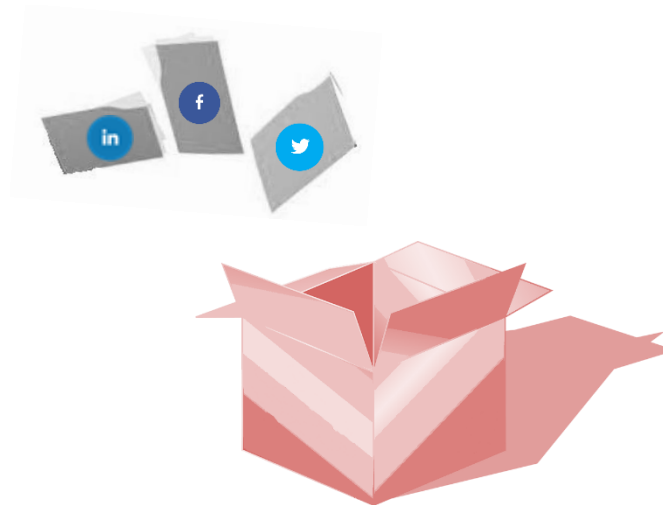
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Objectives Today

In this session, we explore celebrity use of social media and paid endorsements. In doing so, we will tackle the following:

- Can social media buzz be bought?
- Can a company delegate social media responsibility to third-parties?
- What must be disclosed when a celebrity endorses a product on social media?
- Provide perspective from a practicing attorney outside the United States.



Agenda

1.	Purchase of Social Media Buzz
2.	Celebrity Endorsements
3.	The EU Perspective
4.	Q & A



PART I

**Purchase of
Social Media Buzz**

The Law

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”

- What does this mean?

The FTC

The FTC has interpreted Section 5 of the FTC Act in a number of different documents:

- FTC Statement on Deception, 103 F.T.C. 174 (1984)
- Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009)
- .com Disclosures: How to Make Effective Disclosures in Digital Advertising (2013)
- The FTC's Endorsement Guides: What People Are Asking (2015)
 - Formally advises that the FTC Endorsement Guides apply to social media
 - "Truth in advertising is important in all media, whether they have been around for decades (like, television and magazines) or are relatively new (like, blogs and social media)"

What are the Rules for Buying Social Media Buzz?

THE OBVIOUS - You cannot create, buy, or sell fake accounts

- The FTC: "If 'likes' are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, and **both the purchaser and the seller of the fake 'likes' could face enforcement action.**"



What are the Rules for Buying Social Media Buzz?

Disclosure is Key:

"Under the law, an act or practice is deceptive if it misleads 'a significant minority' of consumers. Even if some readers are aware of these deals, many readers aren't. **That's why disclosure is important.**"



How You Disclose Depends on the Medium

LIKES



Using a “like” button, “pinning” a picture, or sharing a link to a product is an endorsement if part of a paid campaign:

- The FTC “realize[d] that some platforms – like Facebook’s ‘like’ buttons – don’t allow you to make a disclosure.”
- Thus, “[a]dvertisers shouldn’t encourage endorsements using features that don’t allow for clear and conspicuous disclosures.”
- But the FTC is still investigating the influence of “likes”: “we don’t know at this time how much stock social network users put into ‘likes’ when deciding to patronize a business, so the failure to disclose that the people giving ‘likes’ received an incentive might not be a problem.”

How You Disclose Depends on the Medium

FACEBOOK



Disclosures should be made for each post that endorses a product:

- Even if the individual page states that the person is a paid endorser, that is not good enough.
- Include an additional disclosure for each post because “[p]eople reading your posts in their news feed – or on your profile page – might not know where you work or what products your employer makes.”

How You Disclose Depends on the Medium

TWITTER



Disclosures still need to be made, even when the medium limits characters:

- Use words such as **Sponsored** or **Promotion**, which use only 9 characters.
- **Paid ad** uses only 7 characters.
- Starting a tweet with **Ad:** or **#ad** – which takes only 3 characters – would also likely be effective

How You Disclose Depends on the Medium

VIDEOS



Video disclosures should be upfront and conspicuous:

- Do NOT make disclosures at the end of videos:
 - "It's more likely that a disclosure at the end of the video will be missed, especially if someone doesn't watch the whole thing."
- Disclosure at the beginning is best.
- Multiple disclosures are even better.
- Make sure that the disclosure is clear and conspicuous
 - The FTC has warned: If "YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads is not clear and conspicuous."

All Parties are Responsible for Social Media

Cannot pass the buck – Delegation does not relieve responsibility

- "Delegating part of your promotional program to an outside entity doesn't relieve you of responsibility under the FTC Act."
- "Your company is ultimately responsible for what others do on your behalf."

All Parties are Responsible for Social Media (cont'd.)

Tips

- Make sure your public relations firm has an appropriate program in place to train and monitor members of its social media network.
- Ask for regular reports confirming that the program is operating properly.
- Monitor the network regularly.

Have an Effective Social Media Policy

- Important to have reasonable programs in place to train and monitor members of your network.
- **Scope:** The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm

For example, a network devoted to the sale of health products may require more supervision than a network promoting a new fashion line.

Have an Effective Social Media Policy

The FTC has laid out elements that “every program should include”:

- Members should be informed about what they can (and can’t) say about the products – for example, a list of the health claims they can make for your products;
- Members of the network should be instructed on their responsibilities for disclosing their connections to the company;
- There should be “[p]eriodic[] search[es] for what your people are saying”;
- There must be follow up if questionable practices are found.

Not Required to Monitor Every Post

- Social media policy should be designed to detect problems.
- But the FTC has taken a real world approach, and understands that “[i]t’s unrealistic to expect you to be aware of every single statement made by a member of your network. But it’s up to you to make a reasonable effort to know what participants in your network are saying.”

Examples

- In August 2015, the FTC settled a matter with Microsoft.
- Microsoft's ad agency paid video bloggers to produce and upload Xbox One game play videos as part of the launch of Xbox One. The video bloggers were not required to disclose that they were being compensated.
- The FTC did not seek an enforcement action against Microsoft or the ad agency, however, for the following reasons:
 - Both companies had policies and procedures in place to prevent such lapses.
 - Microsoft had a robust compliance program in place at the time of the violation.
 - Microsoft, prior to the violation, provided relevant training to employees and its agents.
 - Since the violation, additional safeguards were added, including requiring their employees to monitor blogger campaigns conducted by subcontractors.
 - Since the violation, Microsoft took swift action to require that the bloggers insert disclosures into the videos.



Examples (cont'd)

- In March 2016, the FTC settled a matter with Lord & Taylor.
- The FTC alleged that Lord & Taylor paid endorsers to post Instagram photos of themselves wearing a dress from the collection along with a @lordandtaylor mention and #DesignLab hashtag.
- However, endorsers did not disclose that they had been compensated for their posts.
- The FTC did not believe that the posts clearly disclosed the material connection between Lord & Taylor or endorsers.

*Lord &
Taylor*



Examples (cont'd)

- In July 2016, the FTC settled a matter with Warner Bros.
- The FTC alleged that Warner Bros. wanted to generate buzz for a video game, and through its ad agency hired influencers to create sponsored videos, and promote them on Twitter and Facebook.
- Warner Bros. and ad agency had contract to disclose that the videos had been sponsored.
- But the FTC found that the disclosure was not conspicuous – including being hidden behind the “show more” button.





PART II

**Celebrity
Endorsements**



What is an Endorsement?

A verbal or visual communication that consumers, acting reasonably, would be likely to understand to be expressing the opinions, beliefs, findings, or experiences of someone other than the sponsoring advertiser.



Note: The FTC and the Courts now use the terms “endorsement” and “testimonial” virtually interchangeably.

Who is a Celebrity?



The right to control use of your name, image and/or likeness for commercial purposes.

Everyone has a right of privacy: The use of a **living individual's** name, likeness, photograph, voice, or indicia of identity for purposes of advertising or trade is prohibited without the person's written consent.

Celebrities have a right of publicity: If a person is recognizable or one can identify distinctive characteristics or trademarks of the individual – apparel, voice, caricature, silhouette - get a release. Even using a quote from a celebrity can run afoul of the right of publicity if the quote implies an endorsement. Under many state laws, the right survives and can be protected **after death**.



Publicity became a property right, rather than personal right [In *Factors v. Pro Arts*, 597 F.2d 215 (2d Cir. 1978), regarding an Elvis Presley poster, confirmed publicity was a property right, surviving the death of the celebrity].

Note: The FTC defines an **expert** as an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

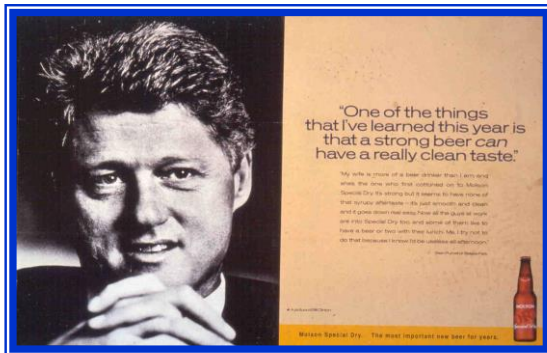
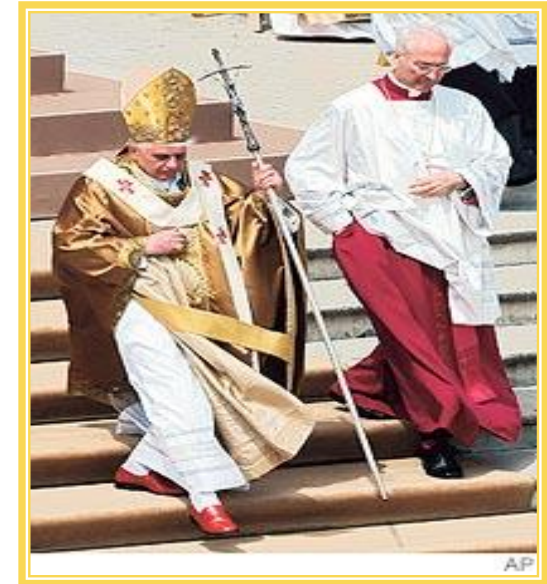
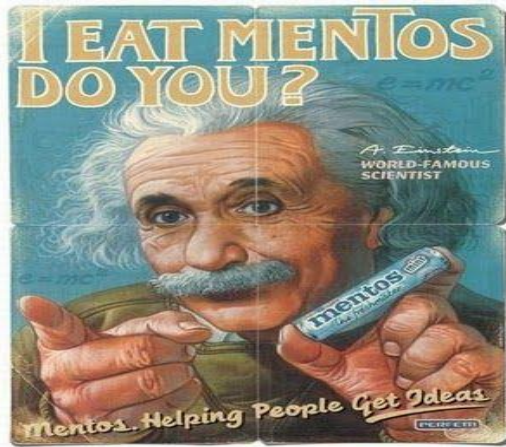


The Classic Right of Publicity Case





Deal or No Deal



White v. Samsung Electronics



You Can Follow Celebrities on Social Media



Leave a comment with your name, valid email address, and tell me what you will wear with your C/E Jeans if you win.

Extra Entries: (Leave 1 comment for each extra entry.)

- 2. [Follow @thehousewife on Twitter](#)** (include your Twitter name in comment!)
- 3. [Follow @Chickdowntown on Twitter](#)** (include your Twitter name in comment!)
- 4. Tweet about this contest** 1 entry per tweet, up to 4x daily. Leave 1 comment for each tweet with link to tweet. ([click here](#) to tweet automatically or copy & paste the following:)

Enter to win a pair of JEANS! Chickdowntown.com Giveaway offered by @thehousewife <http://bit.ly/IYdc8> Please RT!

- 5. [Subscribe To Our RSS Feed](#)**



OMG! Ads Trgt TiVo Usrs + Txtrs



Unilever

Marketers Try to Be 'Kewl'
With Text-Message Lingo

Unilever's OMG Moment

“Brace yourself, big marketers are getting hip to text-message lingo. In ads that begin in two weeks for a new line of Degree deodorant for teen girls, Unilever is highlighting “OMG! Moments.”

The Wall Street Journal, April 3, 2008



Clipped from the Internet





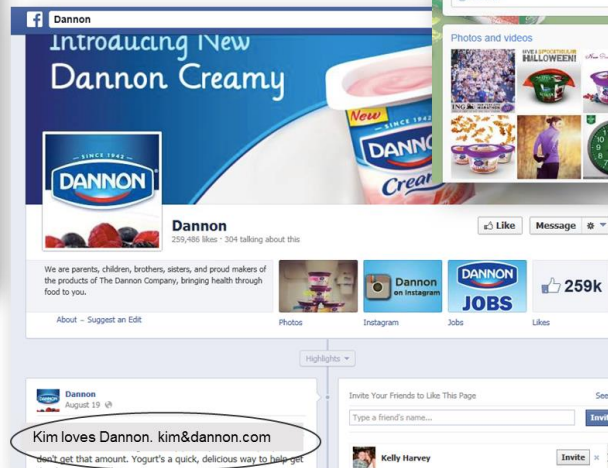
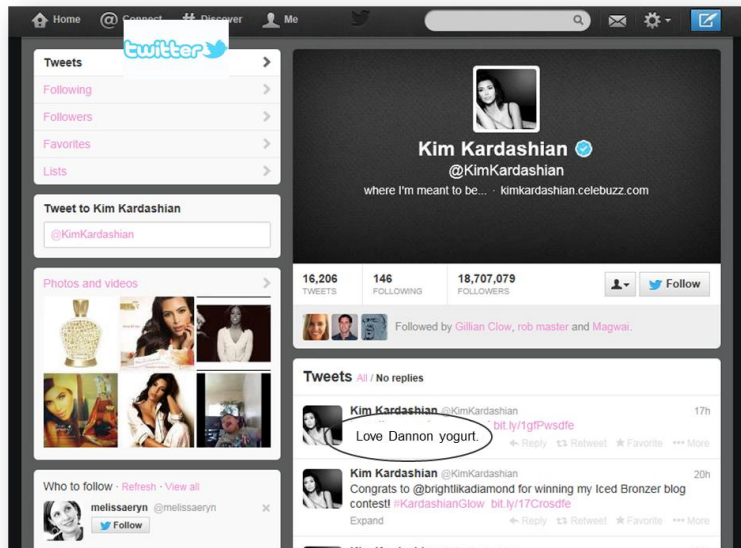
Endorsements are Claims

- Endorser must be an actual user throughout.
- Accurate depiction, typical of consumer's experience.
- Reflect honest opinions, findings, beliefs or experiences.
- May not contain representations or statements that could not be substantiated if made by advertiser.
- Individual must actually use product/service.
- Previously, experts and celebrities were treated the same way. Payments did not generally trigger disclosure requirements.
- Celebrities can be paid BUT . .
 - there may be disclosure requirements; AND
- Now experts can be paid for endorsements, but may have independent liability.
- If the payment is not a flat fee or the fee is related to success, disclosure of compensation relationship is required; and
- Where consumers would normally expect a celebrity endorser to be paid, no disclosure is required, but How do you know?

Stealth Endorsements



facebook.



RIMON

Celebrity Endorsers: The Good, the Bad & the Ugly



Internet Advertising



She'll tell you
size doesn't matter.
She's lying.



Super Star® with cheese



It's gonna get messy.





Commercial Blogs, Vlogs & Splogs

Commercial blogs & vlogs (videoblogs) are subject to Section 5 of the FTC Act and actionable if they are false or deceptive *

Although great latitude may be accorded for blog & vlog opinions, “sponsored” opinions (“splogs”) enjoy less protection.

Blogs, buzz, viral and word of mouth advertising and marketing campaigns **MUST** disclose any material connection between the speaker and the advertiser.

* Federal Trade Commission v. Enternet Media, Inc., Civ. Action No. CV05-7777CAS (AJWx), File No. 052 3135 (C.D. Cal., filed Nov. 10, 2005)

What You Should Know: Lessons Learned



Guides Concerning the Use of Endorsements and Testimonials in Advertising

16 C.F.R. Part 255

First promulgated in 1975, previously revised in 1980 and most recently revised effective 2009

- ❖ Advertisers subject to Guides when “sponsoring” ads
- ❖ Advertisers liable for “sponsored” endorsers
- ❖ Celebrity endorsers ensure adequate basis for claims
- ❖ “Results Not Typical” no longer a safe harbor
- ❖ Disclose “material connections”

The only relevant criterion in determining whether a statement is an ‘endorsement’ is whether consumers believe the statement reflects the endorser’s views.

End Note: A Word About Contracts & Intellectual Property



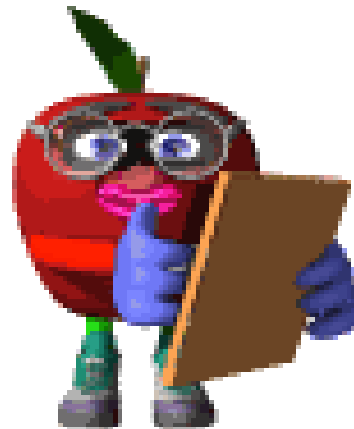
Focus on Social Media Implications . . . BUT

When dealing with celebrity endorsements online, mobile and on social media, contractual issues and intellectual property rights are not identical to those you may be used to in traditional print, radio and television advertising.

**Whether you are representing the advertiser or advertising agency
or the talent/celebrity**

There are a number of distinct issues that should be considered !

Thank You





PART III

EU Perspective



General Overview

Example: Consumer Protection Act of India

“Jail term of up to 5 years, apart from a penalty of Rs 50 lakh for false and misleading ads”

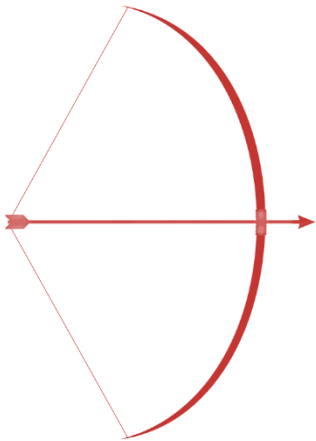
Nod to the new law will likely trigger a debate and polarise the ad industry as well as celebrities, particularly cricketers and filmstars.



EU Specifics



- 1) Advertising Standards Authority
- 2) CAP Code
- 3) Vloggers Perspective
- 4) Celebrity Perspective
 - lawful endorsement
 - sponsorship;





Endorsements

- 1) Online Endorsements
- 2) Competition and Markets Authority (CMA)



Final EU Thoughts





PART IV

Q & A

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