



# RIMÔN LAW

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## Fake News, Troubled Endorsements and Social Media!

Presented by

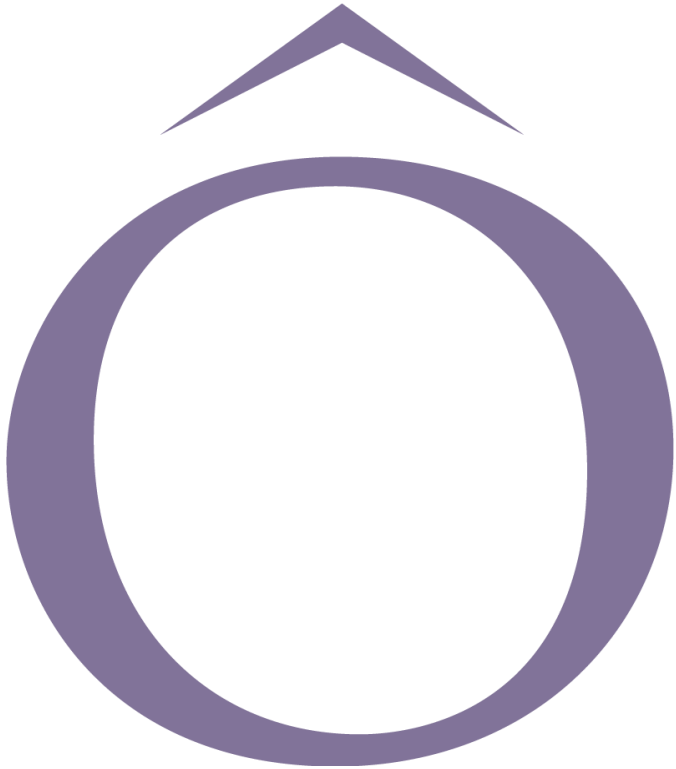
**Joseph I. Rosenbaum**

Partner, Rimon, P.C.

June 24, 2018

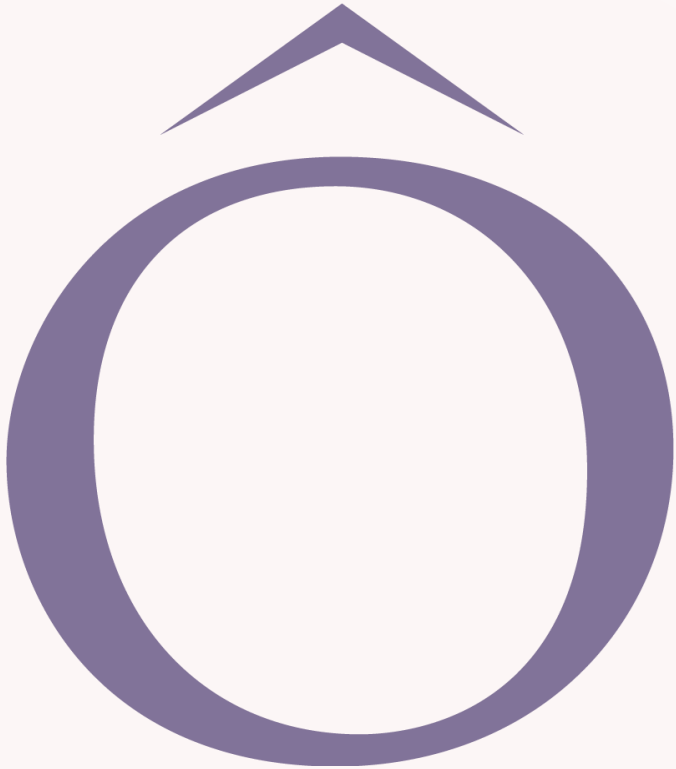
RIMÔN

# What We Will Cover



1. Fake News
2. Troubled Celebrity Endorsements
3. Social Media

# FAKE NEWS



1. **Fake News**
2. Troubled Celebrity Endorsements
3. Social Media

# What's the Difference

## FACT

Statements that are true and can be proven or objectively verified. Facts are true and correct no matter what.

## OPINION

Statements that hold an element of belief and describe how someone feels. Opinions may not always be true or even based on fact. They cannot be proven or disproven. Opinions often include 'biased' words: e.g., miserable, beautiful, exciting, frightening.

## FAKE NEWS

Statements that contain false, often sensational, information disseminated under the guise of news reporting. Source: Collins English Dictionary. Statements that appear credible, even from a reputable source, but that are incorrect, harmful to the subject and intended to financially or otherwise benefit the originator.

# Unreal News

## WTOE 5 NEWS

YOUR LOCAL NEWS NOW

TOP STORIES

COMMUNITY

ENTERTAINMENT

SPORTS

LIFE

ABOUT

LATEST NEWS

VID

### Pope Francis Shocks World, Endorses Donald Trump for President, Releases Statement

TOPICS: Pope Francis Endorses Donald Trump





# What's the Real Problem?

4/8/2018

Sinclair Broadcast Faces Backlash For Requiring Anchors to Recite

DOW JONES, A NEWS CORP COMPANY ▼

DJIA 23932.76 -2.34% ▼

S&P 500 2604.47 -2.19% ▼

Nasdaq 6915.11 -2.28% ▼

U.S. 10 Yr 15/32 Yield 2.77

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<https://www.wsj.com/articles/sinclair-broadcast-faces-backlash-for-requiring-anchors-to-recite-segments-1522713940>

## MEDIA & MARKETING

### Sinclair Broadcast Faces Backlash For Requiring Anchors to Recite Segments

Script includes criticism of 'fake news' but TV stations owner says promotions serve no political agenda



Sinclair Broadcast Group headquarters. PHOTO: KENNETH K. LAM/ZUMA PRESS

By Joe Flint

April 2, 2018 8:05 p.m. ET

Sinclair Broadcast Group Inc., [SBGI 0.34%](#) ▲ the nation's largest owner of broadcast TV stations is under fire for requiring news anchors at dozens of its local stations to read a segment saying they were concerned about "the troubling trend of irresponsible, one-sided news stories plaguing our country."

In the promo, the exact language for which was provided by the parent company, anchors accused national media outlets of publishing "fake stories without checking the facts first." The script goes on to say these journalists are using their platforms to "push their own personal bias and agenda" and are "extremely dangerous to our democracy."

There was an immediate backlash to the Sinclair promotions from media watchdog groups,

**"The fictions and fabrications that comprise fake news are but a subset of the larger bad news phenomenon, which also encompasses many forms of shoddy, unresearched, error-filled, and deliberately misleading reporting that do a disservice to everyone...."**

**From "We Have a Bad News Problem, Not a Fake News Problem" by David Mikkelsen, Snopes.com founder**

Three journalists leaving CNN after retracted article

by Brian Stelter @brianstelter

June 27, 2017, 6:00 PM ET

Three CNN journalists, including the executive editor in charge of a new investigative unit, have resigned after the publication of a Russia-related article that was retracted.

Thomas Frank, who wrote the story in question; Eric Lichtblau, an editor in the unit; and Lex Harris, who oversaw the unit, have all left CNN.

"In the aftermath of the retraction of a story published on CNN.com, CNN has accepted the resignations of the employees involved in the story's publication," a spokesman said Monday evening.

RELIABLE SOURCES

Big personalities. Big controversies. Big exclusives.

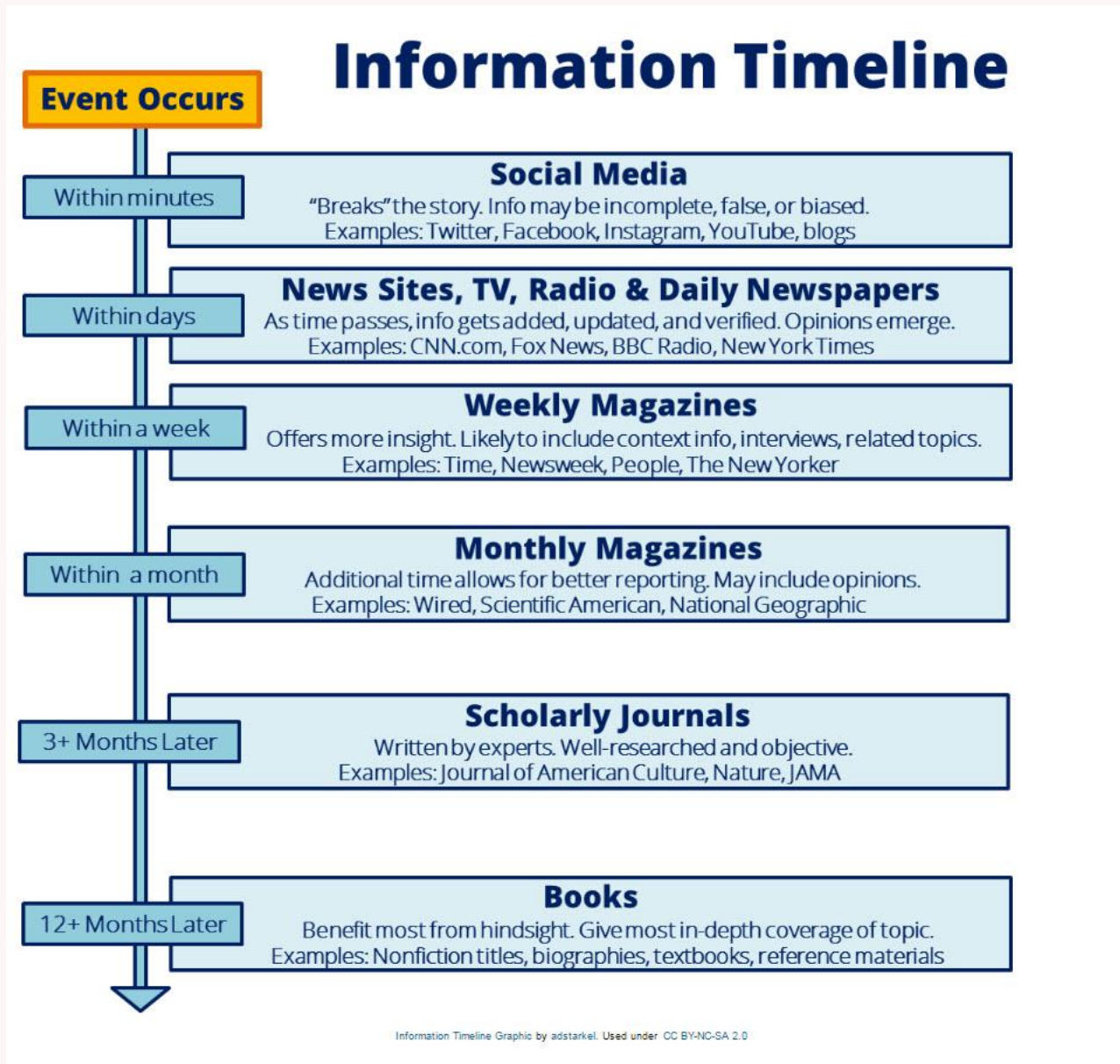
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Sign up sheet

# Speed, Scale and Social



# Fake News is Actually Old News

- Lying
- Mercenary Fake News
- Clickbait
- Propaganda
- Humor





# Defamation

Defamation has been defined as the “intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.”

- Governed by state law
- Statute of limitations short in most states, often a year
- Online posts generally considered “published” when first made publicly available under the “single publication rule” Opinions not defamatory
- Hyperbole generally not actionable
- Courts generally consider context and “totality of the circumstances”
- Anonymous speech, even repugnant speech, protected by the First Amendment

# CDA

## Section 230 of the Communications Decency Act (CDA)

- Grants certain immunities from specific liabilities
- Defamation, privacy and negligence
- Provider/Operator can't be “content provider”

Fair Housing Council of San Fernando Valley v. Roommates.com, LLC

506 F. 3d 716 - Court of Appeals, 9th Circuit, 2007; 521 F. 3d 1157

Court of Appeals, 9th Circuit, 2008; 666 F. 3d 1216 - Court of Appeals, 9th Circuit, 2012

# DMCA

## Section 512(c) of the Digital Millennium Copyright Act (DMCA)

**If** the website operator has a means for the rights holder to request removal **and** does not obtain any financial benefit directly attributable to the infringing activity, **then** the website operator is free from liability for copyright infringement.

**But** if a social media host or search engine serves advertising based on user search criteria, is that a sufficient financial benefit to defeat a Section 512(c) defense?

Is a social media host legally responsible for affecting or influencing decisions by selectively determining what information is available to a user or categories of users or for the risk created if information is fake or inappropriate or users are prevented from obtaining dissenting opinions or information based on 'preference' algorithms?

Applying selective screening and filtering algorithms, increase the likelihood fake news, misinformation and disinformation will be reinforced through social media, rather than counter-balanced or debunked.

**Summing Up:** The laws of defamation apply to a user who posts defamatory information, even if the host has statutory immunity, since users do not enjoy the immunities granted to social networking hosts under either the CDA or DMCA. In addition, a user who posts infringing content may be liable, even if the DMCA protects the network service provider or social media platform host or operator.

# Oh . . The U.S. Constitution

In cases alleging defamation or violations of right of publicity, in reviewing issues applicable to fake news, misinformation and disinformation, one must also take into account First Amendment and State constitutional free speech provisions.

Whether the information is political, commercial, directed at a political figure or a celebrity, a commercial enterprise or a foreign national and whether the fake news is harassing, threatening, indecent or a concerted effort to 'bully' another online is relevant to the legal basis of any action seeking to prevent or remove the information.



# Governments Respond

4/5/2018

India's Government Wages a Phony War on Fake News - WSJ

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DIA 29932.26 +2.34%

S&P 500 2604.47 -2.19%

Nasdaq 6957.11 -2.28%

U.S. 10 YR 15/32 Yield 2.71%

Crude Oil 61.95 -2.58%

## THE WALL STREET JOURNAL.

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<https://www.wsj.com/articles/indias-government-wages-a-phony-war-on-fake-news-1522701317>

EAST IS EAST

### India's Government Wages a Phony War on Fake News

Federal ministers took to Twitter to share a story from a dubious 'fact checking' website.



Supporters of India's ruling Bharatiya Janata Party celebrate Ram Navami in Kolkata, March 29. PHOTO: DEHA JYOTI CHAKRABORTY/OLMA PRESS



By

Siddhant Dharma

April 5, 2018 7:15 a.m. ET

Can India overcome fake news when the ruling Bharatiya Janata Party is often complicit in peddling it? The question arises from the latest skirmishes between the Narendra Modi government and the media. On Monday the Ministry of Information and Broadcasting in Delhi announced guidelines that would allow it to suspend the official accreditation of print and broadcast journalists for creating or propagating "fake news in various mediums." Faced with an outcry from journalists, the government withdrew the guidelines the next day.

# Legal Analysis

Start with Some Basic Questions:

- Can you determine from whom or where the information originated?
- Who or what is the subject matter?
- What is the context?
- Can the information be shown to have been known by the originator to be false?
- Is the information satirical or a parody?
- Is intellectual property being infringed?
- How easily can the false information be identified and reported?
- How easy is it to retract or correct the fake news?
- How effective are corrections or retractions?

# Evolving Landscape

Blurring distinctions between 'news,' sponsored advertising and pure entertainment

Volume of false information, traveling at light speed, makes prevention, detection and correction complex and difficult, if not impossible

Guess where Millennials and Generation Xers get their political news

Corrections don't spread as quickly or enjoy as wide circulation as original "false" news

We may not know if those viewing the correction were also viewers of the fake original

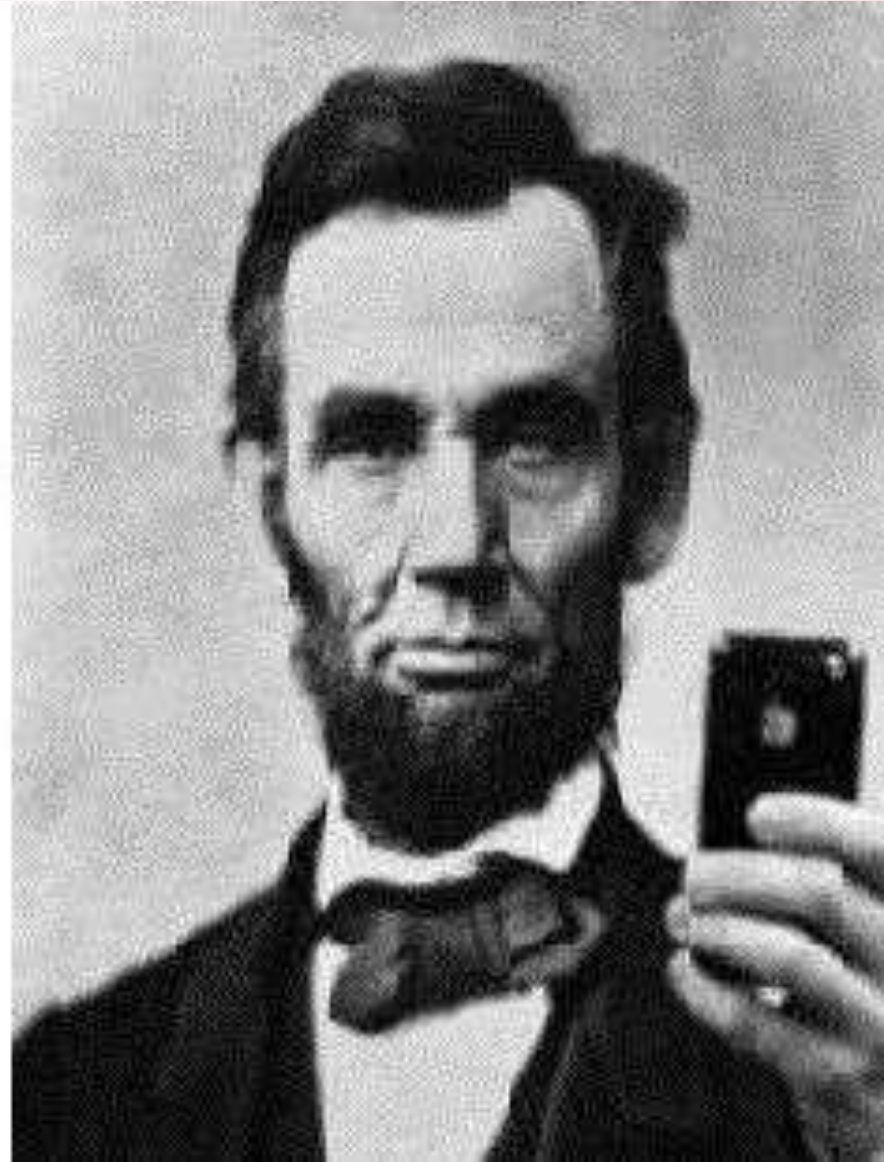
...and, yes, there is always the question of what is fake and how we define the truth.

The law and the courts must also ensure we are not suppressing legitimate forms of expression that enjoy protections not accorded fake news – e.g., parody, satire and fiction - in our zeal to ferret out harmful fake news – however we define 'harmful.'

# Even Honest Abe Can't Tell

*"The trouble with quotes on the Internet is that you can never know if they are genuine."*

*Abraham Lincoln*





# TROUBLED CELEBRITY ENDORSEMENTS



1. Fake News

2. **Troubled Celebrity Endorsements**

3. Social Media



# 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.

# What is the Law?

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

# What Does the Consumer Believe?

What does the average, reasonable consumer believe or understand when receiving the message and information?

**I'M NOT LYING,  
I'M ADVERTISING** 🤪



# Endorsements: What You Need to Know Part I

Endorsements are claims and advertisers are liable for false or unsubstantiated statements made through endorsements

Advertisers are liable for failing to reveal material connections to endorsers

Endorsements must reflect the honest opinions, findings, beliefs or experience of the endorser who may also be liable for false or unsubstantiated statements

If a blogger portrays her/him self as an expert or with unique qualifications to make laudatory statements about an advertiser's product or service, blogger may have independent responsibility

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

A consumer becomes an 'endorser', when – viewed objectively – the consumer is being sponsored by the marketer. If the speaker is acting solely independently, there's no endorsement, but if they do so on behalf of an advertiser (e.g., as part of a marketing campaign) it is an endorsement

# Endorsements: What You Need to Know Part II

Endorser must be an actual user(i.e., actually use product/service).

Accurate depiction, typical of consumer's experience.

May not contain representations or statements that could not be substantiated if made by advertiser.

Previously, experts and celebrities were treated the same way. Payments did not generally trigger disclosure requirements.

Celebrities can be paid, and no disclosures are required where consumers would normally expect a celebrity endorser to be paid (talk shows, public appearances), but if a celebrity has a relationship with the sponsor or compensation is tied to performance, disclosure is required (and all the other rules still apply).

Experts can be paid for endorsements, but may have independent liability.

If payment to an expert is related to success or not a flat fee, disclosure of compensation relationship may be required and if there is some other relationship or material connection, that must also be disclosed.

Consumers can't be paid, coerced or influenced to provide endorsement. So, obtain the endorsement before informing them of potential use in advertising.

# Rights of Privacy / Publicity

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 an individual – apparel, voice, caricature, silhouette - get a release.

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.

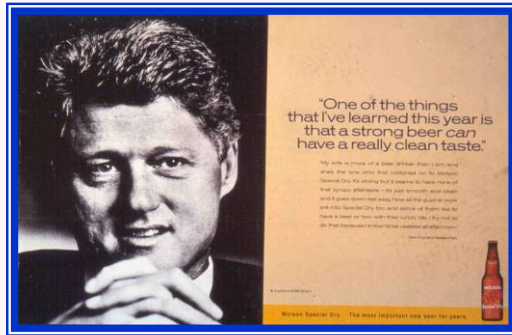
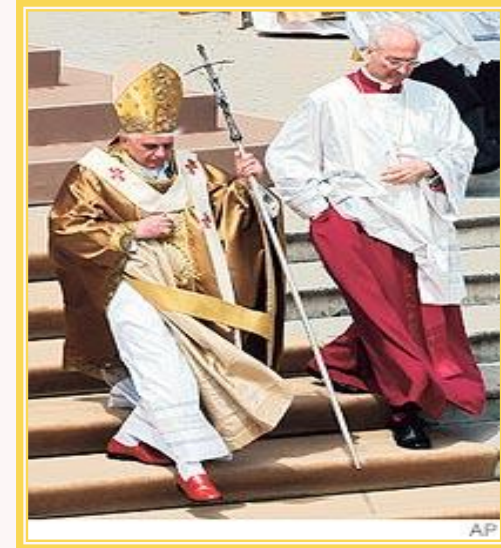
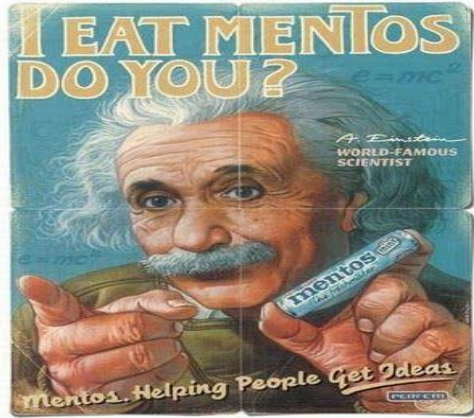


# Who is a Celebrity?

ADEATER



# But These People are in the News (your honor) !



# The Unwitting “Fake” Consumer Endorsement





# Do I Look Like a Celebrity?



White v. Samsung Electronics

# But I Can Parody a Celebrity . . Right?

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



Super Star® with cheese



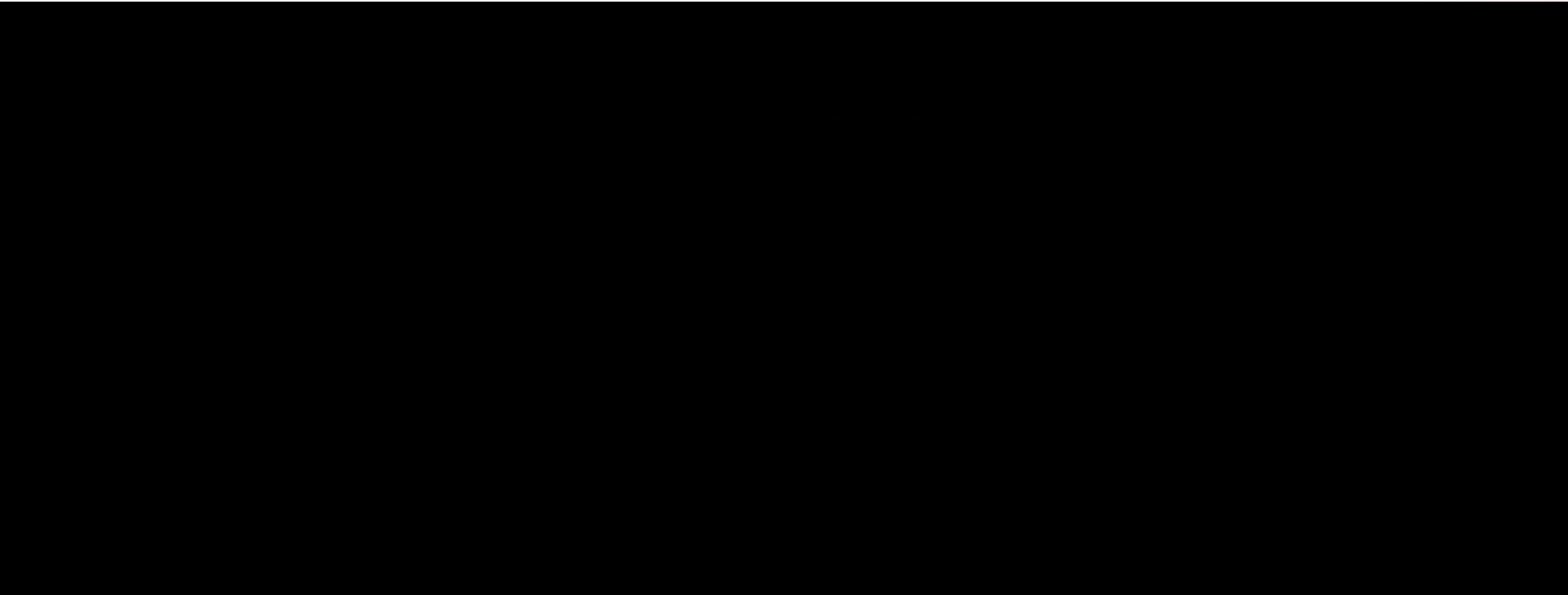
**It's gonna get messy.**



# But I Can Parody a Celebrity . . Right?

Carl's Jr. Advertisement

Accolo Parody (?)

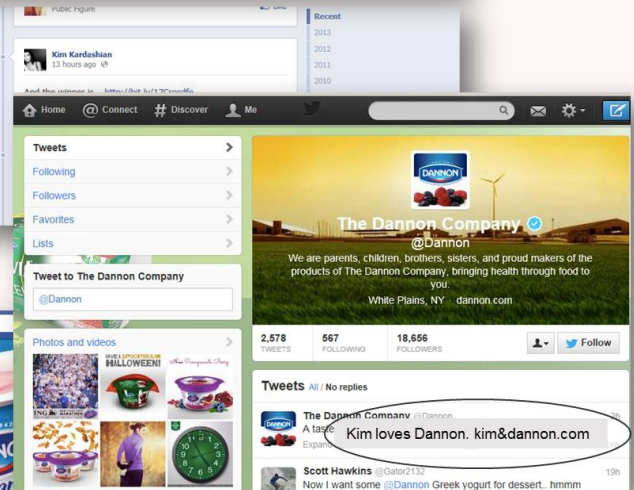
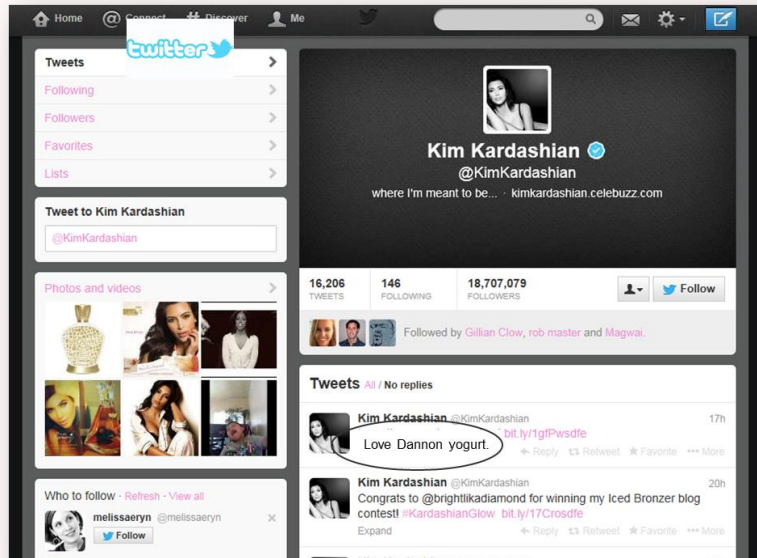




# Stealth Endorsements



facebook



RIMON



# Celebrity Endorsements: Good, Bad & Ugly



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# The (\$30mm?) Fox Super Bowl Promotion (2017)



# SOCIAL MEDIA



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# The FTC and Social Media

**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 ( Revised in 2009)
- .com Disclosures: How to Make Effective Disclosures in Digital Advertising (2013)
- FTC's Endorsement Guides: What People Are Asking (2015)

**But at least two things are clear:**

The FTC Endorsement Guides apply to social media; and

Truth in advertising is important in all media, whether they are traditional and have been around for decades (e.g., television and magazines) or whether they are relatively new or evolving (e.g., blogs, social media, mobile platforms)

# Buying Social Media Buzz

**You can't create, buy, or sell fake accounts or make up people or use automated systems to create what appear to be likes, approvals, endorsements, etc.**

As the FTC has said:

**"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 fake 'likes' could face enforcement action."**



# 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."





# Disclosure Depends on the Medium

If it's part of paid advertising or marketing activity, any form of apparent endorsement, approval or sharing with others - yes, even sharing a link on social media – will be considered an endorsement.

The FTC does appreciate that some platforms don't allow you to make the requisite disclosures and have guided advertisers to avoid endorsements that don't enable clear and conspicuous disclosures.

# Disclosure - Facebook



**Disclosures are necessary for each post endorsing a product or service:**

- It isn't enough to simply state (on each web page) that the person is a paid endorser.
- Include disclosures for each post – be mindful that someone reading an RSS feed, profile page or thread of any kind, might not know where you work, what products your employer or the sponsor makes or scroll down to see one original disclosure!



# Disclosure - Twitter

**Disclosures need to be made, even if the medium limits the space or the characters: \***

- Use words such as **Sponsored** or **Promotion** (9 characters)
- **Paid Ad** (7 characters)
- Starting a Tweet with **Ad:** or **#ad** ( 3 characters) might be effective

\* If the medium doesn't allow proper disclosure, you shouldn't use the medium

# Disclosure - YouTube



## **Video disclosures should be upfront and conspicuous:**

- Don't make disclosures only 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 is best up front and even multiple disclosures are better;
- AND
- Disclosures must be clear and conspicuous

The FTC has stated that if "YouTube has been enabled to run ads during your video, a disclosure that is obscured by ads is not clear and conspicuous."

# Whose Responsibility is It?

The advertiser can't delegate the responsibility and avoid liability.

"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."

Have a social media policy designed to prevent and detect problems.

Have a program in place to train and monitor those responsible for the your social media network?

Ask for regular reports to confirm the program is effective & working properly?

Monitor your social media network regularly.

BUT . . . . Advertisers are NOT required to monitor every single post.

The FTC has taken a realistic, practical approach and understands that it is not realistic to expect advertisers or their agencies to be aware of every single statement made by a member of its network.

That said, it is up to the advertiser to make a reasonable effort to know what their network participants are saying."

# An Effective Policy Helps

What type of training and monitoring program makes sense for your social media network:

The scope of the program that makes sense for you, depends on the likelihood of the risk and the size of the harm that deceptive practices by social media network participants could cause a consumer

For example, a social media network devoted to sales or pharmaceuticals or other health care products requires more and different types of supervision than one promoting new hats.

The FTC has set out ingredients “every program should include”:

- Members should be informed about what they can (and can’t) say about products (e.g., a list of the health claims they can make);
- Members should be instructed on their responsibilities for disclosing their connections to the company;
- There should be periodic searches to monitor and determine what your social media network members are posting or saying chat rooms;
- There must be follow up and remedial efforts if questionable practices are discovered.





# 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 bloggers were not required by the agency, to disclose they were being compensated.

In August 2015, the FTC settled the matter with Microsoft and did not seek an enforcement action against Microsoft or the advertising agency, because:

- 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 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 bloggers to insert disclosures into the videos.

# Lord & Taylor



The FTC alleged 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, the endorsers did not disclose they had been compensated for their posts

The FTC did not believe the posts clearly disclosed the material connection between Lord & Taylor and the endorsers

In March 2016, the FTC settled the matter with Lord & Taylor in March of 2016



# Warner Brothers

The FTC alleged Warner Bros. wanted to generate buzz for a video game, and through its advertising agency hired influencers to create sponsored videos and promote them on Twitter and Facebook

Warner Bros.' contract with the advertising agency required disclosure of the fact that the videos had been sponsored

But the FTC found the disclosure was not conspicuous –  
- it was hidden behind the “show more” button.

The FTC settled a matter with Warner Bros. in July of 2016



# The Finishing Touches

## Summing Up



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## Thank You



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