

2016

Was That an Ad?

Rahmon Brown

Follow this and additional works at: <https://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Rahmon Brown *Was That an Ad?*, 29 Loy. Consumer L. Rev. 225 (2017).

Available at: <https://lawcommons.luc.edu/lclr/vol29/iss1/8>

This Consumer News is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

WAS THAT AN AD? *Rahmon Brown*

Well into the era of social media, society has become accustomed to sharing our experiences and interests through social media sites. In addition, society spends a great deal of time on social media keeping up with the lives of family, friends, athletes, celebrities, and other influential people. Marketers—faced with the use of pop-up blockers by consumers¹ and the increasing use of streaming services instead of traditional television²—are relying more and more on social media to reach consumers. With the growing use of social media to advertise products and services, the Federal Trade Commission (“FTC”) has grown increasingly concerned as it attempts to implement stricter disclosure rules.³

Much of the difficulty that the FTC faces arises out of the use of widely followed individuals who endorse various products and services on social media. For instance, a quick look at DJ Khaled’s Snapchat or Instagram page reveal multiple endorsements for products like Ciroc and Luc Beldaire.⁴ Other examples can be found by looking to the social media posts of celebrities like the Kardashian sisters.⁵ A brief look at their pages

¹ Kashmir Hill, *Use Of Ad Blocking Is On The Rise*, FORBES (Aug. 21, 2013), <http://www.forbes.com/sites/kashmir-hill/2013/08/21/use-of-ad-blocking-is-on-the-rise/#674129eb496b>.

² MarketingChart Staff, *The State of Traditional TV: Q2 2016 Update*, MARKETINGCHARTS (Oct. 5, 2016), <http://www.marketingcharts.com/television/are-young-people-watching-less-tv-24817/>. (Traditional TV viewing by eighteen to twenty-four-year-olds dropped nice hours a week from 2011 to 2016).

³ See *infra* note 9.

⁴ See *Id.*

⁵ Sapna Maheshwari, *Endorsed On Instagram By A Kardashian*,

will often reveal an endorsement for some type of household or personal care products, or a variety of services such as travel.⁶ In addition to the well-known celebrities, individuals referred to as “influencers” frequently post videos on YouTube in which they are endorsing a product or service through a review.⁷ Although personal endorsements have been around as long as advertising itself, the issue arises when the consumer is not aware of their compensation.⁸

In some cases, the consumer may have no idea whether a celebrity or influencer is being paid to promote the product or service, or if they have a genuine personal interest. According to FTC deputy Michael Os-theimer, the test is “did the consumers read it and comprehend it?”⁹ In many cases, a person may make a post on a social media platform that includes hashtags like #sp, #spon, or #ad thinking that they are following the rules. These hashtags, however, are commonly placed amongst other hashtags or at the end of the post, making it less likely for consumers to understand or even notice. These posts get to the very issue that the FTC wishes to address—whether the consumer knew that the endorser was compensated and whether that knowledge would alter the consumer’s view of the endorsement.¹⁰ YouTube influencers are faced with the same concerns. Last summer, Warner Brothers Home

But Is It Love or Just An Ad?, N.Y. TIMES (Aug. 30, 2016), http://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0.

⁶ *Id.*

⁷ David Murphy, *FTC Wants Better Disclosure For Sponsored Social Media Posts*, PC MAGAZINE (Aug. 7, 2016), <http://www.pcmag.com/news/346827/ftc-wants-better-disclosures-for-sponsored-social-media-post>.

⁸ *See infra* note 9.

⁹ Sarah Frier and Mathew Townsend, *FTC To Crack Down On Paid Celebrity Posts That Aren’t Clear Ads*, BLOOMBERG (Aug. 5, 2016), <https://www.bloomberg.com/news/articles/2016-08-05/ftc-to-crack-down-on-paid-celebrity-posts-that-aren-t-clear-ads>.

¹⁰ *Id.*

Entertainment Inc. settled a deceptive advertising claim with the FTC after it paid well-known influencer PewDiePie to promote a video game with good reviews, without disclosing that he was paid.¹¹

The FTC is now moving to stiffen the disclosure rules for social media advertising.¹² Ostheimer, in an interview with Bloomberg, stated that the FTC “believes consumers put stock in endorsements and [the FTC] wants to make sure they are not being deceived.”¹³ The FTC’s new rules will state that merely including the hashtags #ad, #sp, #spon, and #sponsored will no longer satisfy the disclosure requirements in many cases.¹⁴ But this is not to say that simply using the hashtag can never be sufficient. Indeed, using the hashtags #ad or #sponsored will be acceptable if it stands alone or comes first in a post.¹⁵ As for the abbreviated hashtags, #sp and #spon will not be acceptable regardless of the position, mainly because “consumers can’t reasonably be expected to know what they stand for.”¹⁶ Influencers who use video platforms such as YouTube to endorse products and services are encouraged to conspicuously disclose that the endorsement is paid.¹⁷ One way to do so is to display the word “sponsored” at the beginning of the video.¹⁸

The FTC will continue to bring cases against advertisers who engage in deceptive practices. Ostheimer and the FTC hope that by bringing these cases they can prevent the inadequate disclosures by marketers and influencers, but also get the message out to companies

¹¹ *Id.*

¹² *Id.* The FTC will be putting the burden on the advertisers to make sure that influencers comply.

¹³ Erik Sass, *FTC Tightens Disclosure Rules For Influencers*, MEDIAPOST (Aug. 8 2016), <http://www.mediapost.com/publications/article/282032/ftc-tightens-disclosure-rules-for-influencer>.

¹⁴ *Id.*

¹⁵ *See Id.*

¹⁶ *Id.*

¹⁷ Frier, *supra* note 9.

¹⁸ *Id.*

and influencers who may be confronted with this issue in the future.¹⁹

¹⁹ *Id.*