

# PATTISHALL

*insights*

JANUARY 2018

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## Influencing via Social Media – Risky Business

By Kristine A. Bergman

The Federal Trade Commission continued this past year to crack down on influencers' paid-for social media posts to sell the products of their sponsors. In 2017 for the first time, the FTC brought enforcement actions against influencers, and not just the companies sponsoring the content. As influencer marketing continues to grow, 2018 will show further FTC activity through enforcement actions and directives like its social media guidelines. Advertisers and influencers are well-advised to understand and implement certain principles to avoid running afoul of the FTC.



### Who are Influencers?

Influencer marketing has surged in the past several years. Almost anyone with a social media following can become an influencer, as many users already routinely comment on products and services via their personal accounts in their daily lives. Some users like bloggers and product reviewers become famous and successful. Even children can be astonishingly powerful influencers – seven-year-old Ryan of Ryan Toys Review, for example, reportedly makes \$11 million a year reviewing toys in YouTube videos.

Influencer marketing is appealing to advertisers for several reasons. It presents opportunities for businesses to connect with consumers in a more organic environment that incorporates promotions more naturally into everyday lives. Consumers are more likely to trust a product or service endorsed by their favorite celebrity, product reviewer, or personal friends.

### Sounds Great! But Are There Risks?

While the organic feel of advertising on social media appeals to marketers, the FTC insists that consumers be informed they are seeing a paid-for advertisement. This year, the FTC affirmed it is the responsibility of both advertisers and their influencers to make fair and adequate disclosures about content for which the influencer received a benefit. As the FTC stated:

The legal responsibility for disclosing the relationship between an influencer and a brand is a two-way street. Influencers should clearly let people know about that connection and marketers have an obligation to make sure they do – usually by educating their influencers and monitoring what the influencers are doing on their behalf.

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Our newsletter article of October 2015 discussed an investigation of reviewers who wrote positively of Microsoft's Xbox One gaming system, but failed to disclose they were being compensated for the favorable reviews. The FTC placed the onus on Microsoft and its advertising agencies to ensure influencers were making adequate disclosures. Although Microsoft and its advertising agencies instructed influencers to make proper disclosures, problems still arose from the absence of procedures to monitor influencer compliance.

In 2017, for the first time, influencers were investigated and warned about their failure to make adequate disclosures. In April 2017, the FTC sent more than 90 educational letters to celebrities, athletes, and other influencers, 21 of whom later received follow up warning letters.

In September 2017, the FTC took its first formal action against influencers. The FTC filed a complaint against CSGO Lotto, Inc., and its two presidents, Trevor Martin and Thomas Cassell. CSGO Lotto is a service for players of the Counter-Strike: Global Offensive videogame to bet “skins,” which can be used to decorate weapons in the videogame. Skins can also be bought, sold, or exchanged for real-world money, and the CSGO Lotto even offered a place to gamble skins.

The FTC cited numerous instances where Martin and Cassell posted about their winnings on the CSGO Lotto service, but failed to disclose their ownership of the company. The three respondents also allegedly ran an influencer campaign that contractually obligated influencers not to post negative comments about CSGO Lotto. In the complaint, the FTC alleged, among other things, the respondents falsely claimed that their social media content reflected independent views about CSGO Lotto, and that the two owners failed to make disclosures of their ownership in CSGO Lotto. The action was terminated in November pursuant to a Consent Agreement, whereby respondents were ordered to disclose, going forward, any material connection between the content and the service being endorsed. The order also required the respondents to actively monitor their influencers to ensure their compliance with disclosure requirements.

### How do I Remain FTC Compliant?

Influencers and advertisers using them should keep in mind two core principles: truth-in-advertising and disclosure of material connections.

As the cases above demonstrate, the FTC finds both advertisers and influencers responsible for adequate disclosures. Advertisers should instruct their influencers on adequate disclosures, and implement effective monitoring procedures. Influencers should know the FTC disclosure requirements and how the FTC prefers disclosures are made.

Like all advertising, influencer advertising must be truthful. Advertisers should encourage their influencers to post honest commentary.

The FTC also requires endorsers to clearly and conspicuously disclose any material connection between themselves and the content that is posted. While this language is subject to interpretation, any benefit received in relation to the content is likely a “material connection.” As for “clearly and conspicuously,” the FTC is constantly updating its views on what satisfies this requirement. In the hashtag context, for example, the FTC warned the 90 influencers in April that cryptic “disclosures” like “#sp,” “Thanks [Brand],” or “#partner” were not sufficiently clear to consumers. Designations like “#ad,” “#advertisement,” or “#sponsored” are deemed more appropriate. Moreover, to satisfy the conspicuousness requirement, it is recommended that endorsers make disclosures at the beginning of the post and not bury them among other hashtags or elsewhere.

In 2018, we will undoubtedly see more enforcement actions brought against influencers and advertisers alike. By having counsel review sponsored social media posts and keeping in mind the FTC's advertising principles, advertisers and influencers can play it safe in the Year of the Influencer. ■

# *firm* UPDATE

## APPOINTMENTS

### ■ Jonathan S. Jennings



Jonathan has been appointed to INTA's Leadership Development Committee and reappointed to IPO's U.S. Trademark Law Committee.

## PRESENTATIONS

### ■ Thad Chaloeintiarana



Thad spoke on "Strategies to Stop Gray Market Imports" at the Intellectual Property Council of the Automotive Aftermarket Suppliers Association in Sterling Heights, Michigan, on December

6, 2017. Thad also organized and moderated a panel discussion on "Careers in IP Law" at Northwestern Pritzker School of Law on October 30, 2017. The panel was sponsored by the American Bar Association Section of Intellectual Property Law.

### ■ Janet A. Marvel

Janet was a panelist on a Strafford Live Webinar entitled "Functionality in Trade Dress Prosecution and Litigation: Protecting the Look and Feel of Products and Packaging" on January 11.

### ■ Robert W. Sacoff



Bob made a presentation in a Lorman Live Webinar entitled "Administering Ethical and Admissible Pretext Investigations" on January 24.

## PUBLICATIONS

### ■ Jonathan S. Jennings

Jonathan wrote an article on the role of criminal sanctions in a U.S. civil action over counterfeit pharmaceuticals for the December 2017 edition of the Pharmaceutical Trade Mark Group's publication *Law Lore & Practice*.

# *firm* NOTEWORTHY

## Expert Witnesses in Major Litigation

Our firm's lawyers are often retained as experts in multi-million dollar intellectual property cases. Recently, **David Hilliard**, **Ashly Boesche** and **Jacquie Prom** were retained in a major trademark infringement case involving online crowdfunding platforms.

As David explains: our client (plaintiff) had used its mark and domain name since 1999, well before defendant knowingly launched a competitive business using a virtually identical mark. Through the defendant's extensive use of plaintiff's name and mark on defendant's website, its business grew to \$3 billion with over 1.85 million users. As a result of the defendant's conduct, the plaintiff's business drastically declined by 93.5%.

David identified defendant's conduct as a classic case of "reverse confusion" which "occurs when the junior user's advertising and promotion so swamps the senior user's reputation in the market that customers are likely to be confused into thinking that the senior user's goods are those of the junior user: the reverse of traditional confusion." *4 McCarthy on Trademark and Unfair Competition* § 23:10 (4th ed.); *See also, Big O Tire Dealers, Inc. v. Goodyear Tire and Rubber Co.*, 561 F2d 1365 (10th Cir. 1977).

With the report of our expert witness team, the case was settled favorably for the plaintiff.

## Illinois Super Lawyers 2018

**Brett A. August**, **Phillip Barengolts**, **Ashly Boesche**, **Thad Chaloeintiarana**, **Bradley L. Cohn**, **David C. Hilliard**, **Jonathan S. Jennings**, **Janet A. Marvel**, **Robert W. Sacoff**, **Belinda J. Scrimenti** and **Joseph N. Welch II** have been designated Illinois Super Lawyers for 2018.

## Law Bulletin Media

Ashly Boesche has been recognized by Law Bulletin Media as one of the 2017 Forty Illinois Attorneys Under 40 to Watch. Ashly was selected from more than 1,500 nominations for attorneys throughout Illinois.

## U.S. NEWS & WORLD REPORT

### Best Law Firms 2018

Pattishall McAuliffe has been designated a National Tier 1 Trademark Law Firm, and a Chicago Tier 1 Intellectual Property Litigation and Trademark Law Firm.



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