

The Law of Marketing via Social Media

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“While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.”

- Justice Anthony Kennedy

Packingham v. North Carolina

137 S. Ct. 1730, 582 U.S. (2017)

I. Introduction

With over 82% of the adult U.S population maintaining at least one social networking profile, and in an environment boasting over 2.2 billion users on Facebook, over a billion accounts each on Instagram, Twitter, and YouTube, marketing via social media has become more important than ever to corporate America. Instagram, to take just one example, features 4.2 billion “likes” each day, as well as over 100 million photos and videos uploaded daily. Small wonder, then, that 71% of all U.S. business are on Instagram (which features 25 million businesses). 7 out of every 10 hashtags on Instagram are branded. The site has more than 1 million monthly advertisers, 8 million Business Profiles, and it generated roughly \$7 billion in mobile ad revenue in 2018 alone. 78% of social media influencers prefer Instagram for brand collaboration, and 55.4% of these influencers use Instagram Stories for sponsored campaigns. Brands like Nike, General Electric and Walt Disney have all employed sponsored ads on the site.

But such rewards are inevitably accompanied by legal risk. Social media marketing is subject to a number of regulatory laws and agency oversight, including the Securities & Exchange Commission (SEC), the National Labor Relations Act, the Federal Trade Commission (FTC), Food and Drug Administration (FDA), and Health Insurance Portability and Accountability Act (HIPAA). Marketers today face heightened regulatory scrutiny of marketing practices at the core of many popular digital media campaigns, and recent actions demonstrate that the FTC and other regulatory authorities are expanding endorsement actions. In addition, social media sites create a host of issues for companies to consider regarding protecting and monitoring for infringement of their intellectual property. For example, blog posts, tweets, pictures taken or created and posted are all potentially copyrightable with user-generated content creating legal considerations of its own.

This paper will focus on the FTC and its regulation of social media endorsements as marketing, including celebrity endorsements.

II. The Rise of the Endorsement

As more and more companies started advertising on social media, so too has followed a desire for innovative advertising—a way for products and services to be set apart from an increasingly large crowd—on these platforms. Enter: the celebrity endorsement. Celebrity endorsements in advertising are nothing new. They stretch decades back into television commercials in the 1970s and well before.¹ Studies have shown that such endorsements can have massive financial benefits.²

With the prevalence of social media in today's society and the huge potential for monetary gain for both corporations and public figures, it's logical that such relationships would form. Such relations may form organically, such as when “a celebrity may genuinely value the brand's product or service and at-mention the brand, telling the brand how much the celebrity likes them.”³ Some instances, the company reaches out, while in others, the would-be endorser makes the first move. However, in forming these relationships, public figures and companies must be cautious. In the past, it was much more clear what constituted an advertisement: celebrities would appear in ads, commercials, on product labels, etc.⁴ However, when figures

¹ Kerry Segrave, *Endorsements In Advertising: A Social History*, 109, (2005).

² Kevin YC Chung, Timothy P. Derdenger & Kannan Srinivasan, *Economic Value of Celebrity Endorsements: Tiger Woods' Impact on Sales of Nike Golf Balls*, 32 *Marketing Sci.* 271, 290 (2013). Finding that Tiger Woods' endorsements for Nike golf balls from 2000 to 2010 helped Nike earn \$176 million in extra revenue.

³ Kristin M. Adams, *Tweet Upon A Star: Organic Brand Engagement with Celebrities on Social Media Platforms*, 8 *Wm. & Mary Bus. L. Rev.* 137, 140 (2016)

⁴ See 16 C.F.R. § 255.5 (2009). “Example 2: A film star endorses a particular food product. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but regardless of whether the star's compensation for the commercial is a \$1 million cash payment or a royalty for each

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