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Legal Pitfalls for Fashion Brands In Social Media

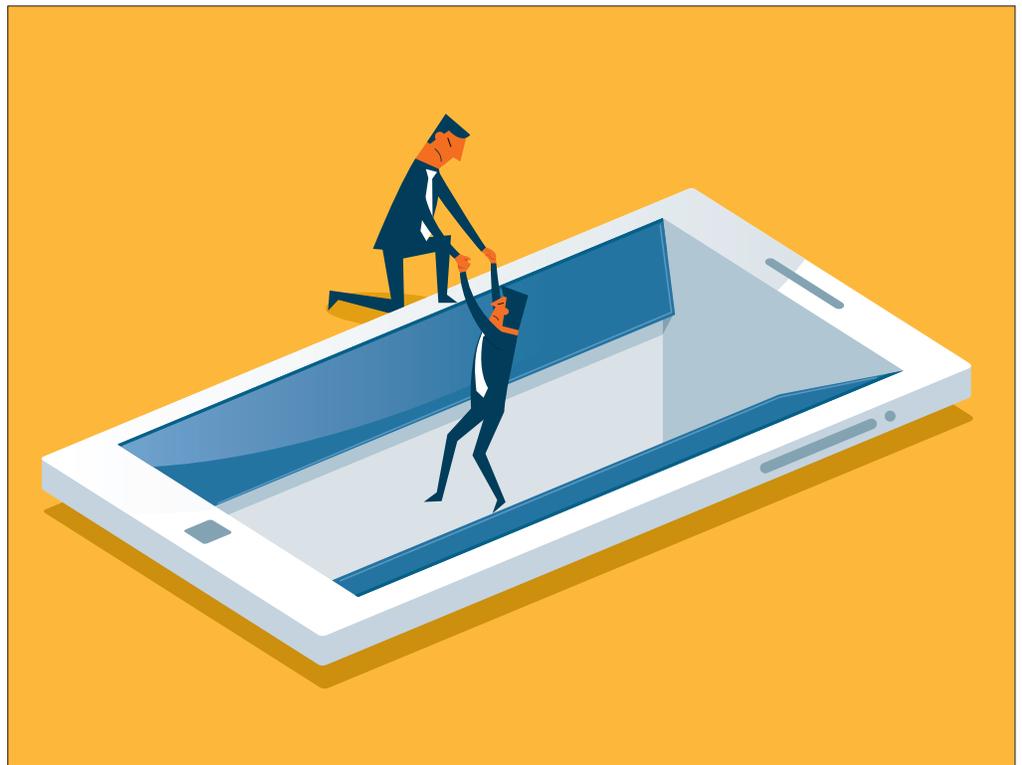
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Brands continue to rely heavily on social media influencers as an important way to reach and interact with consumers, particularly millennials. Brands crave social media's interactive nature with consumers, the ability to have an informal dialog, and the ability to deliver a message virtually instantaneously. In their desire to seize on social media's impact, brands sometimes forget that the same laws and restrictions that apply to traditional advertising and promotion also apply to these new forms of promotion.

Traditional Advertising Rules Apply Even in Social Media

The Federal Trade Commission (FTC) has increasingly focused its attention on the use of social media influencers. As is the case with traditional advertising, a speaker's statements must be their own good faith opinion, and any product claims must be consistent with what the brand could support and state in its own advertising.

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The FTC requires that in posts where the influencer is wearing or discussing the brand's products, the influencer must clearly and conspicuously disclose that there is a material connection with the brand, which can include receiving direct compensation, as well as complimentary clothing for approval. Assuming such a relationship, the influencer must disclose that the post is an advertisement or is sponsored. The disclosure must be made prominently—typically at the outset of the post—and

in a manner that can be readily understood. The disclosure obligation applies whether or not the brand has dictated the influencer's posting. While the FTC does not dictate the specific language or that it include a hashtag, it has recommended "ad" or "sponsored" be used at the beginning of the post and has frowned on using abbreviations such as "spon" or "sp."

These are not hypothetical obligations. Recently, the FTC brought charges against Lord & Taylor claiming that

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it deceived consumers by paying for native advertisements, including a seemingly objective article in an online publication, Nylon, and an Instagram post, without disclosing that they were actually paid promotions for Lord & Taylor's 2015 Design Lab clothing collection. The FTC also alleged that, as part of the Design Lab rollout, Lord & Taylor paid online fashion influencers to post Instagram photos of themselves wearing a particular dress from the collection, but failed to disclose that each "Influencer" was given the dress and received payment for their posts. While the influencers could style the dress as they wished, Lord & Taylor contractually obligated them to use the @lordandtaylor Instagram user designation and the hashtag #DesignLab in the photo caption. In addition to the negative publicity surrounding the FTC enforcement action, the retailer agreed to an injunction prohibiting it from misrepresenting that such posts are from an independent source, and is required to ensure that its influencers clearly disclose when they have been compensated in exchange for their endorsements.

Similarly, Warner Brothers settled FTC charges that it deceived consumers by failing to disclose that it paid social media influencers to post positive reviews and gameplay videos as part of a video game marketing campaign. Warner Brothers agreed to a broad injunction regarding its social media influencer marketing practices and an affirmative obligation to educate and monitor influencers regarding sponsorship disclosures.

The lessons from these settlements are clear: Brands must take affirmative steps to ensure that when the author of

the content is paid in some manner for the content, there is appropriate disclosure. This starts with training influencers on the disclosure obligations, and continues with monitoring their social media activity.

Can Brands Use Celebrity Photos in Social Media?

Brands can be held liable for the unauthorized use of someone's image in connection with the brand's social media page. This is an important consideration as celebrity photos are often used in connection with brands' social media. While many brands show photos of celebrities using their products in everyday life, celebrities earn substantial sums of money licensing the rights to use their name and likeness; thus it is important to ensure that these rights are not violated when promoting, marketing and advertising products. Even using a famous person's name without their image can be problematic.

For example, an unauthorized photo was taken of Katherine Heigl leaving Duane Reade, and the company posted the photo on Facebook and Twitter, tweeting, "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore." Heigl sued Duane Reade for \$6 million dollars. While the lawsuit settled, this illustrates how far celebrities will go to control the use of their images.

Lawsuit or not, brands can receive press backlash if a photo is used on social media without authorization. Valentino received a lot of negative press when it issued a press release boasting that actress Amy Adams was carrying a purse from the brand's collection, failing to mention that she

was carrying it at Philip Seymour Hoffman's wake. While Adams never filed a lawsuit, Valentino received enormous criticism for its tasteless promotion and had to issue an apology. Since it is so easy to repost photos on social media, companies do it quickly without clearing the photo, or in this case determining a photo's origins. To avoid such scenarios, companies need a formal social media policy to which all employees strictly adhere, as often several people in a company have the ability to post.

As a best practice, whenever a brand wishes to use a celebrity's name or likeness in any way, it should be cleared with the celebrity or a deceased celebrity's estate. Even if the name or likeness is not used in traditional advertising, as with social media, and the brand makes no express statements to indicate endorsement or sponsorship, the subject could still take issue with the unauthorized use.

Social media is an essential tool in brand promotion. However, it is important to remember that traditional intellectual property and right of publicity/privacy laws that typically apply to advertisements apply equally to social media. Ascertaining whether the appropriate rights have been secured need to be carefully considered, even if the brand is seeking to act in real time.

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