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Insta-Sham: When Influencers Fail to Disclose Sponsorships

BY [SPENCER BRACHFELD](#)/ ON NOVEMBER 3, 2019



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First, a caveat: I do not exactly have an Instagram. It is true that I am in possession of a blank account that I infrequently use to keep tabs on a whopping 28 followers, but I nevertheless often “like” a picture by double-tapping it, when my intention is to use the “zoom” function. Evidently, it is safe to say that I have not ingratiated myself within the everyday happenings of Instagram influencer-fare – and yet, even I am aware of how lucrative the Instagram influencer economy is. In 2018, over 3.7 million sponsored posts were made on Instagram, and that number is projected to grow to over 6.1 million for the year of 2020.^[1] The Instagram influencer market is projected to reach \$1.7 billion by the end of 2019, with top influencers like Kylie Jenner and Ariana Grande earning about \$1 million for each sponsored post they make.^[2]

Yet, with great power comes great responsibility, and the Federal Trade Commission decided in 2017 that many Instagram influencers were not “posting” responsibly. In April 2017, the FTC sent over 90 letters to different influencers and marketers, informing them that they were in violation of Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce,” [3] by failing to make disclosures in posts featuring a product that the posts were advertisements. [4] The FTC notes in the FTC Endorsement Guides that if a “material connection” exists between the endorser and marketer of a product, the connection must be “clearly and conspicuously disclosed.” [5] The reasoning behind this rule is that consumers are more likely to give credence to positive claims about a product when the positive claims originate from a third party, not the advertiser themselves.

An important line that the FTC has drawn here is whether or not the endorser has communicated an opinion about the product being advertised, so as to potentially mislead a consumer in thinking the endorsement is solely rooted in a genuine belief in the product. [6] When an influencer posts a picture of themselves wearing a clothing item or holding a beauty product, a reasonable consumer could infer that this communicates a positive opinion about the product, and thus constitutes an endorsement of the product by the influencer. Consequently, the FTC suggests that influencers use clear disclosures like “Company X gave me this product to try,” “#sponsored,” or “#ad.” [7] FTC examples of murkier disclosures include putting “#ad” near the bottom of a post instead of the top, so that a reasonable consumer would be less likely to notice it, and thanking a company/product without noting that the product was given to the influencer for free or for an endorsement. [8] Yet, despite these seemingly clear FTC guidelines and the scores of letters that have been sent to influencers and marketers, the practice of failing to make clear disclosures for endorsements persists, as cited by the non-profit company Truth in Advertising, which made a new complaint to the FTC in April 2019. [9]

One obvious comparison to influencer advertising is product placement in movies and television. The Communications Act of 1934 mandates that broadcast stations make disclosures “fully and fairly” regarding product placements that the stations receive money for. [10] In a June 2008 Federal Communications Commission notice of inquiry, the FCC sought comment on a proposed rule change to have a standardized disclosure lettering font size and for such lettering to air for a decided amount of time. [11] Then-commissioner Jonathan Adelstein noted those rule changes were critical to shield Americans from over-commercialization. [12] However, those changes would still not constitute a clear and conspicuous disclosure, as the prior discussion of influencer sponsorships lays out. In an Instagram post, the word “#ad” is of the same uniform font size as the rest of the caption language, and it is present at all times while a consumer is observing the post, yet if “#ad” is not placed in a conspicuous spot within the caption, a reasonable consumer could easily overlook it. Accordingly, showing a message in readable font for a fair amount of time at the end of a television episode or film would probably not inform a reasonable consumer unless it

was displayed concurrently with the embedded advertisement – the equivalent of an Instagram caption next to a picture.

It is crucial for sponsorships to contain disclosures, as subconscious observances of ads affect consumers' preferences much more potently than conscious observances of ads.^[13] Nonetheless, the FTC and FCC have both struggled to find consistent solutions to address their respective disclosure issues. At this point, the FTC continuing to send individual notices to the most popular offenders is a viable strategy for the time being, as influencers with the most followers put the highest amount of consumers at risk of being misled and harmed. Additionally, the FTC could attempt to pressure Instagram to place sanctions against scofflaws, such as removing an influencer's verified badge and consequently reducing the credibility of the account in the eyes of consumers that could potentially be harmed. And now that we have gotten that out of the way, please excuse me while I attempt to zoom in on this sugar-dusted cronut.

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^[1] Mediakix, *Instagram Influencer Marketing is a 1.7 Billion Dollar Industry* (Mar. 7, 2019), <https://mediakix.com/blog/instagram-influencer-marketing-industry-size-how-big/#gs.11iq8q>.

^[2] *Id.*

^[3] 15 U.S.C.S. § 45 (2019).

^[4] Federal Trade Commission, *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship* (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose>.

^[5] Federal Trade Commission, *The FTC's Endorsement Guides: What People are Asking* (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#about>.

^[6] See *id.*

^[7] *Id.*

^[8] *Id.*

[9] The Fashion Law, *Truth in Advertising Wants the FTC to Take Action Against Influencers, Actresses for Not Disclosing Sponsored Posts* (Mar. 5, 2019), <http://www.thefashionlaw.com/home/truth-in-advertising-inc-wants-the-ftc-to-take-action-against-influencers-actresses-for-not-disclosing-sponsored-posts>.

[10] 47 C.F.R. § 73.1212 (2019).

[11] 73 FR 43194 (2008).

[12] *Id.*

[13] See Rensselaer Polytechnic Institute, *Effects of Unconscious Exposure to Advertisements*, Science Daily (Dec. 15, 2008), <https://www.sciencedaily.com/releases/2008/12/081209125828.htm>.