

# Advertising Without a Safety Net: The Cost of Branded Content, Responsive Marketing, Influencers, and Endorsements

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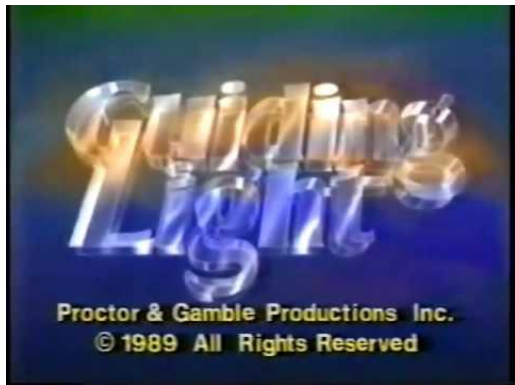
# Current Trends in Online Advertising

# Branded Content

- Creating content for the purpose of marketing
- Funded and/or produced by an advertiser
- Build brand awareness by association
- Typically, content is associated with the “values” of the brand
  - Creates an emotional connection
- Not necessarily measured in sales/conversions
  - Focus is on generating conversation about the brand
  - “Viral potential”
- May include product placement, but is not product placement

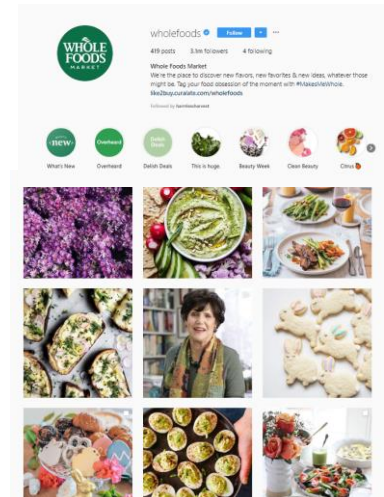
# Branded Content

- Historical Development



# Branded Content

- Did You Recognize It?



# Branded Content

- Did You Recognize It?

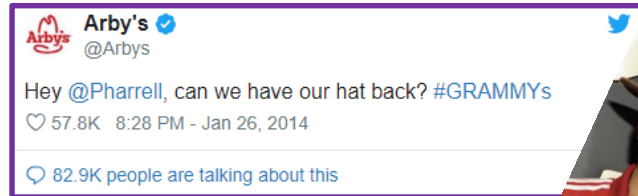
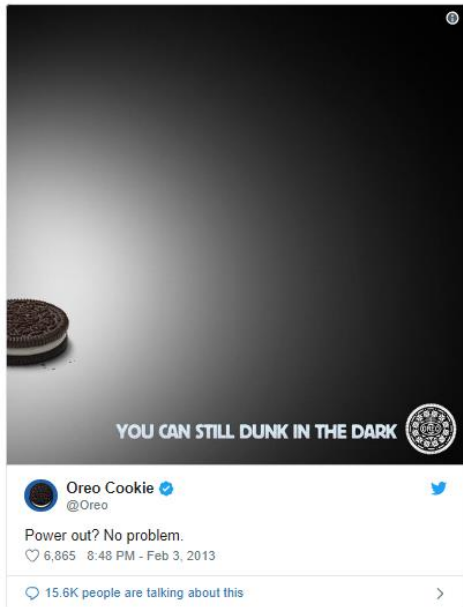


# Responsive Marketing

- “Satisfaction marketing”
- A plan for reacting -- to customers, situations, other brands -- that fits within a broader brand strategy
- Requires vigilant monitoring across channels
- Timing is everything!

# Responsive Marketing

*Oreo, during the 2013 Super Bowl blackout:*

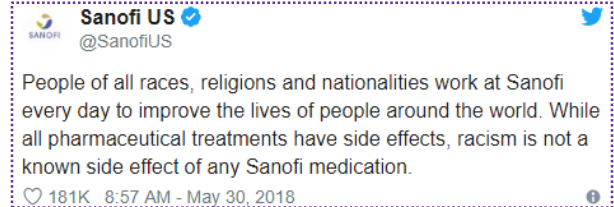




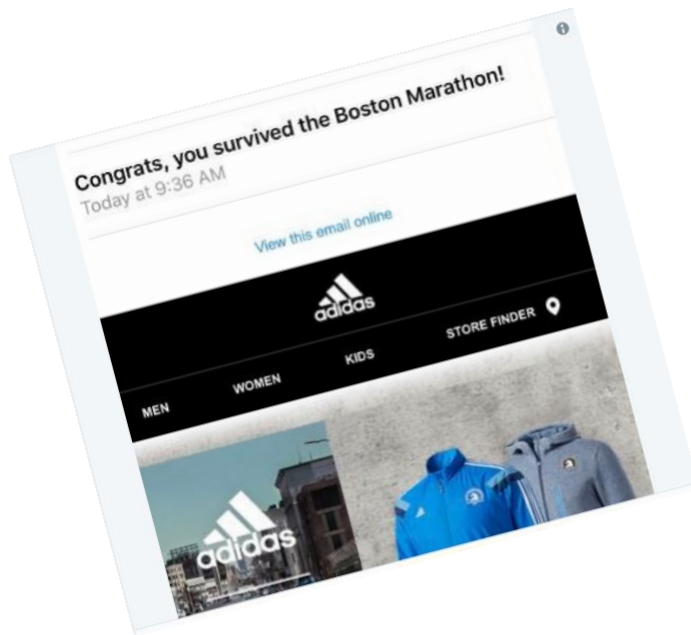
# Responsive Marketing



*Sanofi, in response to Roseanne Barr blaming her racist tweets on Ambien:*

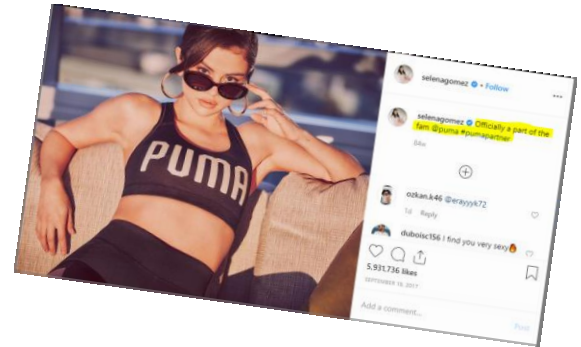
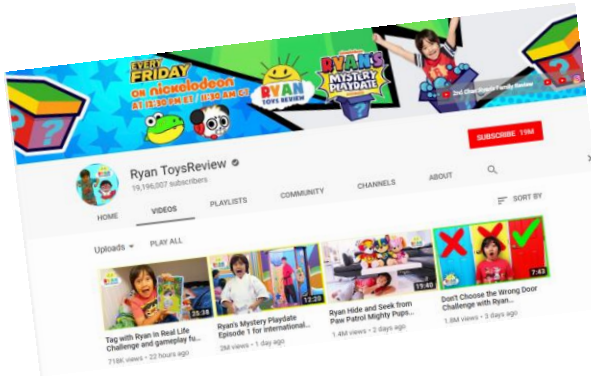


# Responsive Marketing



# Social Media Influencers

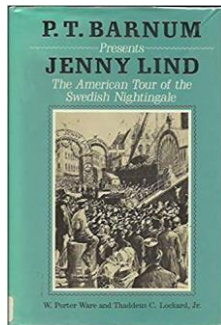
- Bloggers, celebrities, online entrepreneurs
- Anyone with credibility with the target market and widespread reach



# Social Media Influencers

- Historical Evolution

- 18<sup>th</sup> Century: Josiah Wedgwood creates creamware pottery and an impressed British Queen consort allows it to be sold as QUEENSWARE
- 19<sup>th</sup> Century: The Queen and the Pope endorse patented medicines; Jenny Lind merch sold
- 20<sup>th</sup> Century: Celebrity spokespersons and brand-created characters



# Hiring Social Media Influencers

- Key traits to look for:
  - Well-curated and organized content
  - Content and personality consistent with your brand values
  - Humble and positive vibe
  - Available and responsive

# Hiring Social Media Influencers

Resources for finding influencers:

- HypeAuditor
- Discover.ly
- Tweetdeck
- Social Crawlytics
- Alltop
- Podbay.fm
- Klout
- Crowdfire
- Full Contact
- SEOquake
- Hunter.io
- Personapp
- Similar Web
- Buzzsumo
- GroupHigh Monthly Influencer Lists

# Hiring Social Media Influencers

- Typical cost:
  - Instagram: \$700-\$1000 per 100,000 followers
  - Snapchat: \$500 per 24-hour campaign
  - YouTube: \$2000 per 100,000 followers

**Instagram Influencer Earnings Calculator**

The tools below are not official Instagram tools and not in any way associated or endorsed by Instagram. This tool was developed to provide earning potential guidelines to influencers.

**Enter your Instagram Username**

*\* This estimate is based on your 12 most recent posts*

**Calculate the Estimated Earnings of an Individual post**

<https://influencermarketinghub.com/instagram-money-calculator/>

# Best Practices



# Best Practices

## Creation of Branded Content

- Know who owns the rights to the content your company is creating, especially if third-party independent contractors contribute
- “Work made for hire” agreement (in writing)
- Copyright registration

# Best Practices

## Responsive Marketing

- Have a clear brand identity and marketing strategy
- Give freedom to the creatives within that strategic construct
- **TIMING**
  - Requires structure and trust
  - Creative team needs to be empowered to be nimble, but have clear boundaries
  - Checks and balances: what is right for your organization and its culture and risk tolerance?

# Best Practices

## Social Media Influencers

- Research and vet
- Play the long game -- develop a relationship with the influencer
- Written agreement
  - Guidelines and boundaries for the influencer
  - Clear and efficient approval requirements/process
  - Who owns the content that is produced? How can it be used/reused by the brand?
- Always disclose the relationship!!
- After you've researched, vetted, and developed a relationship, let the influencer's creativity control (but retain veto power!).

# UGC and Third-Party Content

# User Generated Content (UGC) and Third-Party Content

- How did you get it?
- How are you going to use it?
- Who owns the rights?
- If you don't own the rights, is there a good argument for you to use it without violating the owner's rights?

**JUST BECAUSE YOU FOUND CONTENT (PICS, IMAGES, GRAPHICS, ETC.) ONLINE DOES NOT MEAN YOU CAN USE IT!**

# UGC and Third-Party Content

## Layers of Rights

- Intellectual property rights
  - Copyright
  - Trademark
- Right of publicity
- Contractual rights



# Copyright Primer

- Copyright protects “original works of authorship fixed in any tangible medium of expression”
- Rights exist on fixation of the work
- Author is the owner of the copyrights in a work except:
  - (1) where author is an employee and the work was created as part of their work
  - (2) where author is an independent contractor, there is a written agreement with “magic” language, and the work is one of the types listed in the statute
- Registration is not required, but it enhances the rights that exist on creation of the work

# Copyright Primer

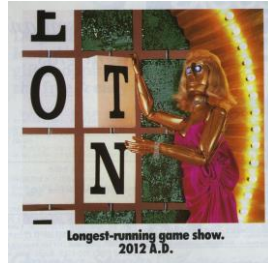
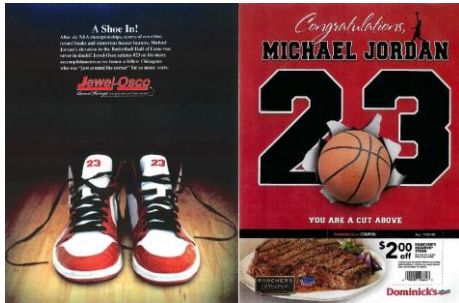
- Copyrights protects “a bundle of rights”, including the right to reproduce, display, publicly perform, distribute, etc.
  - Infringement does not require commercial use or even “public” use
- Consider when “fair use” applies
  - Nature of use
  - Purpose and character of use
  - Amount and substantiality of use
  - Effect of the use on the market for the original work



# Rights of Publicity Primer

- Right of Publicity
  - Protects an individual's right to control, protect, and commercially exploit their name, image, and likeness
  - Some states also protect voice, persona, signature, gestures, mannerisms, distinctive appearance, etc.
- State law construct (mix of statutory and common law protections)
  - Significant differences and nuances across the country
  - Push for a federal law
- Some states limit the right to celebrities and “famous people”; others extend to all individuals
- Post-mortem rights of publicity vary by state
  - 23 states recognize some post-mortem right
  - Survival term ranges from 10 years in Washington State (where there was no exploitation during life) to 100 years in Indiana and Oklahoma

# Copyright and Right of Publicity Headline Cases



Duane Reade  
@DuaneReade

Follow

Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore bit.ly/1gLHctl pic.twitter.com/uGTc3k1Mii

Reply Retweet Favorite More



RETWEETS  
74

FAVORITES  
181



# User Generated Content (UGC) and Third-Party Content

## Best Practices

- Use the social media platform's own functionality for further distribution of third-party content (e.g., share, retweet, link to, etc.)
  - *Common Approach:* When redistributing social media content, add minimal hashtags and commentary that are **factual** in nature and can be **independently substantiated**
  - *Conservative Approach:* When redistributing social media content, do not add hashtags or commentary
- When posting on social media, all comments and captions should be factual and written in a “reporter’s tone”
- Get permission from each celebrity (or their estate) before using their image, likeness, voice, etc.
- If a rights owner or celebrity asks you to take down content, immediately take it down (you can put it back later if we determine the take-down was not justified)

# User Generated Content (UGC) and Third-Party Content

## Best Practices

- Do not copy, share, retweet, link, etc. to third-party channels that post images of celebrities (unless you can confirm that such third party is authorized to post the image)
- Do not modify third-party content when sharing/linking/retweeting and never add your logo or hashtag to such content
- Do not add third-party logos to social media content that you are posting (or reposting)
- Do not copy content from social media channels for use outside that social media platform
- Do not state or suggest that any person (celebrity or otherwise) has “chosen” (or “likes”, “prefers”, “enjoys”, “endorses”, etc.) your goods/services unless it can be substantiated.
  - Avoid ascribing any emotion or belief, preferential or otherwise, based on a photo of a person.

# FTC Endorsement Guides and Disclosure Requirements

# FTC Endorsement Guides

## 16 CFR Part 255

- Common sense premise: Consumers treat information, recommendations, and reviews about products/services differently when the reviewer is associated with the products/services or the company that provides them
- Truth-in-advertising: endorsements must be **honest** and not misleading
- When there is a material connection between an endorser and an advertiser, the connection must be clearly and conspicuously disclosed
  - Material connection: business/family relationship, **free product/services**, monetary payment, gift, etc.
  - “...any connection that might affect the weight or credibility that consumers give to the endorsement”
  - Materiality is viewed from the consumer’s perspective
- Guides apply to both marketers and endorsers
  - Marketers must make sure their endorsers comply

# FTC Endorsement Guides

## Best Practices - Across Platforms

### DO:

- Use words or phrases that are clear and unambiguous (e.g., “sponsored by \_\_\_\_\_”, “paid advertisement”, “ad”, “sponsored ad content”, etc.)
- Include disclosure/sponsorship info “above the fold” (e.g., before the “more” button or as close to the content as possible where a viewer sees it without an additional click)
- Include proper disclosure even when using platform-provided tools for identifying branded content or paid promotions
- As close to the beginning as practical for the platform (before content if possible, if not, immediately after content)

# FTC Endorsement Guides

## Best Practices - Across Platforms

### DO:

- Where practical, superimpose disclosure over content (videos, etc.)
- Keep disclosure onscreen long enough to be read and understood
- Use clear, easy to read fonts in a color that contrasts with background
- Tag and identify sponsoring brands



# FTC Endorsement Guides

## Best Practices - Across Platforms

### DON'T:

- Use ambiguous phrases (e.g., “thanks to...”, “sp.”, “spon”, “collab”, “ambassador”, “\_\_\_brand rocks”, etc.)
- Rely *only* on platform-provided tools for identifying branded content or paid promotions
- Attempt to hide the disclosure at the bottom or end of the content, within a comment or content description, or buried deep in a list of hashtags
- Attempt to conceal the disclosure with small font or font that blends with the background
- Fail to verbally disclose sponsorship in video content

# FTC Guides

## Strategic Considerations

- FTC Guides apply to the brand and the endorser (both can be penalized for failing to comply)
- Discuss the gift/loan of products/services with the influencer or other third party beforehand
  - Gives you leverage for THE ASK
  - Maximize the value of the gift/loan of the product/service by asking for a review/endorsement (or more!)
  - We'll give you X, you post/share/review (following these rules) Y times on A, B, and C platforms.

# Takeaways & Questions

# Takeaways

- Online advertising evolves at the speed of technology
- Content advertising allows you to help your consumers connect with the values of your brand, but creates a number of legal risk points
- Copyright, publicity, trademark, and contractual rights are layered -- and sometimes mixed -- in online and social media advertising
- FTC continues to increase its oversight of online advertisers and influencers
- Common-sense approach for FTC compliance: Disclose early and often in a way that you, as a consumer, would understand the disclosure

# Questions?

# Thank you

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