

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

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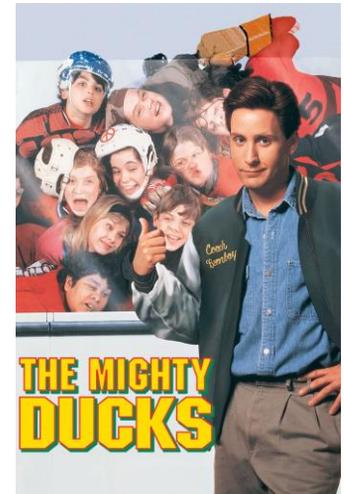
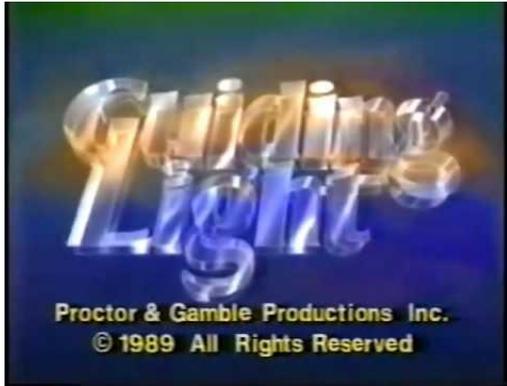
Current Trends in Online Advertising

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

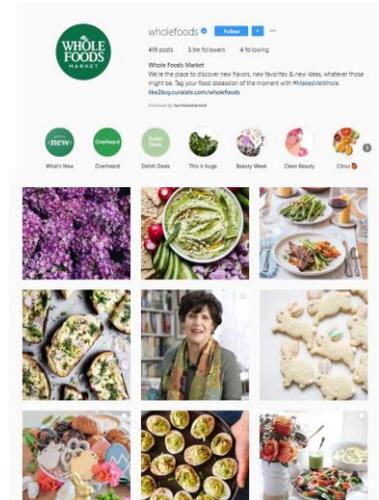
- Did You Recognize It?



 Dove "Real Beauty Sketches" Campaign reveals the dramatic difference between self-image and what others see.

An FBI-trained forensic artist conducted a social experiment to illustrate the ongoing struggle women have with recognising their own beauty.

Dove



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:



YOU CAN STILL DUNK IN THE DARK

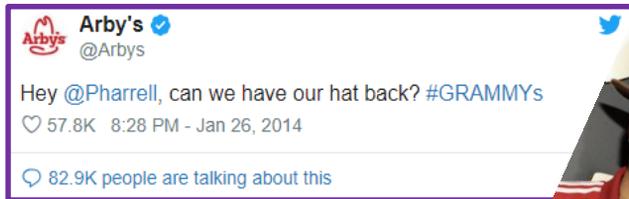
Oreo Cookie @Oreo

Power out? No problem.

6,865 8:48 PM - Feb 3, 2013

15.6K people are talking about this

The image shows a single Oreo cookie on a dark surface. The text 'YOU CAN STILL DUNK IN THE DARK' is displayed in white capital letters. Below the image is the Oreo logo. The tweet text includes the brand name, a verified account, a short message, engagement metrics, and a link to more replies.



Arby's @Arbys

Hey @Pharrell, can we have our hat back? #GRAMMYS

57.8K 8:28 PM - Jan 26, 2014

82.9K people are talking about this

The image shows a tweet from Arby's to Pharrell Williams. The tweet text includes the brand name, a verified account, a message asking for the hat back, engagement metrics, and a link to more replies. A small photo of Pharrell wearing a brown hat is visible on the right side of the tweet.



MoonPie @MoonPie

Lol ok

Hostess Snacks @Hostess_Snacks

Hostess has declared Golden CupCakes the official snack cake of the eclipse. #SolarEclipse2017

503K 8:29 AM - Aug 21, 2017

The image shows a tweet from MoonPie replying to Hostess Snacks. The tweet text includes the brand name, a verified account, a short message, a quote from Hostess Snacks, engagement metrics, and a link to more replies. Below the text is a photo of a Golden CupCake snack cake in front of a solar eclipse.

Responsive Marketing

 **Danny Gonzalez**  @dannygonzalez · Jan 17, 2017 

.@MerriamWebster why don't you just add "funner" to the dictionary you monsters

 **Merriam-Webster**  @MerriamWebster

.@dannygonzalez Why don't you look words up before complaining to the dictionary? merriam-webster.com/words-at-play/...

♡ 601 2:23 AM - Jan 17, 2017 



10 Legit Words that Look Illegitimate : Funner & funnest
Don't argue with the dictionary
merriam-webster.com

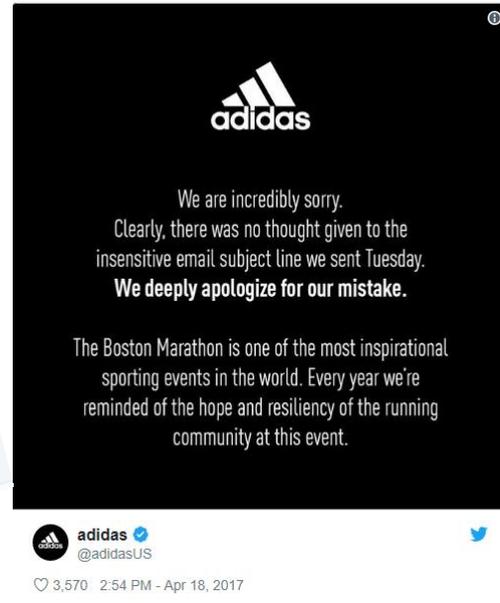
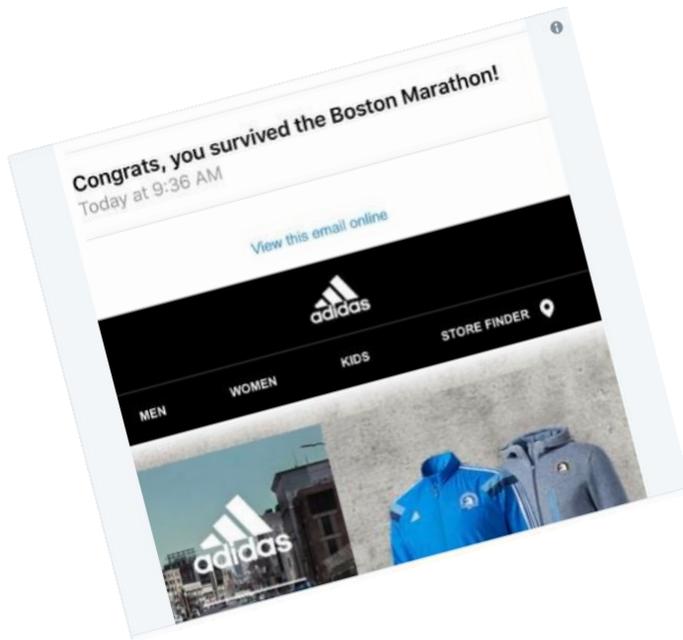
Sanofi, in response to Roseanne Barr blaming her racist tweets on Ambien:

 **Sanofi US**  @SanofiUS 

People of all races, religions and nationalities work at Sanofi every day to improve the lives of people around the world. While all pharmaceutical treatments have side effects, racism is not a known side effect of any Sanofi medication.

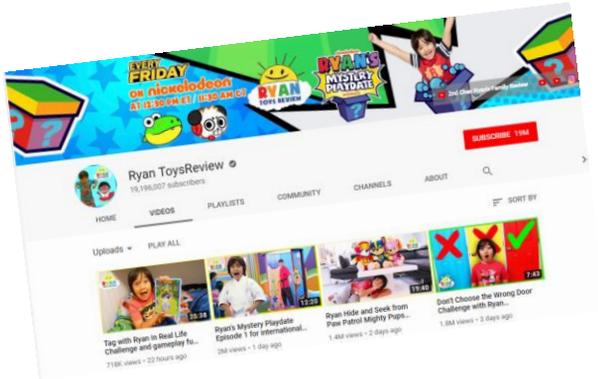
♡ 181K 8:57 AM - May 30, 2018 

Responsive Marketing



Social Media Influencers

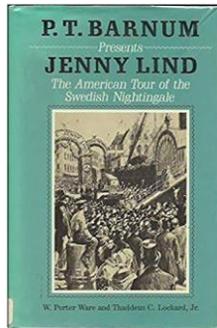
- Bloggers, celebrities, online entrepreneurs
- Anyone with credibility with the target market and widespread reach



Social Media Influencers

- Historical Evolution

- 18th Century: Josiah Wedgwood creates creamware pottery and an impressed British Queen consort allows it to be sold as QUEENSWARE
- 19th Century: The Queen and the Pope endorse patented medicines; Jenny Lind merch sold
- 20th 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

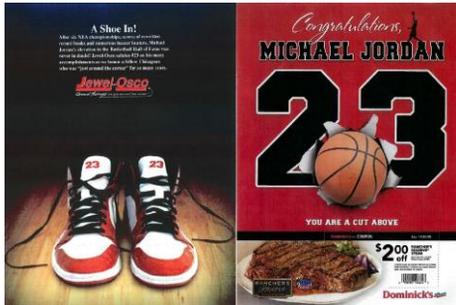
Copyright Primer

- 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

2 Follow

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