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FTC reins in #misrepresentation

By Mary Ellen Callahan
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Lord & Taylor's social media campaign to promote a dress from its new "Design Lab" collection made a splash on Instagram in March 2015 — but not just in the way the department store chain hoped. The retailer's online campaign to promote the Design Lab dress backfired when its efforts, which involved coordinated social media posts paid for and edited by the company itself, caught the attention of the Federal Trade Commission. The department store has now agreed to a settlement with the FTC based on allegations that it deceived customers by paying "fashion influencers" and the publication Nylon to promote the new collection through posting photos and content praising the dress in question, without requiring these endorsers to disclose the relationship or the fact that their enthusiastic content was a paid endorsement. The enforcement action demonstrates the pitfalls awaiting companies that seek to attract online buzz without a thorough understanding of how social media marketing can lead to charges of unfair or deceptive trade practices.

According to the FTC, Lord & Taylor paid Nylon, an online and print publication which covers pop culture and fashion, to post an article about Lord & Taylor's collection, focusing on the dress, on its website and to post a photo of the dress on its Instagram account in March 2015. Both the online article and the Instagram post were edited by Lord & Taylor, which paid Nylon for the content. Nothing in the online "article" or in the Instagram post revealed that Lord & Taylor had paid for the coverage. The Nylon content was considered "native advertising" — paid content designed to look like editorial content.

Lord & Taylor also provided the dress free of charge to 50 designated "fashion influencers." These were individuals chosen for both their style and number of social media followers, who were required to post photos of themselves wearing the dress on Instagram or another social media account over the same weekend as the Nylon post, in a coordinated "product bomb" campaign. The fashion influencers were paid between \$1,000 and \$4,000 per post. Lord & Taylor contractually obligated them to use the "@lordandtaylor" Instagram user designation and the "#DesignLab" hashtag in the photo captions. Before the posts were published, Lord & Taylor reviewed the posts for these requirements and for stylistic edits.



New York Times

A window display at a Lord & Taylor store in Midtown Manhattan.

There was no contractual requirement that the influencers disclose their relationship or contract with Lord & Taylor, and this was not disclosed in any of the posts. The FTC states that the campaign reached 11.4 million individual Instagram users in just over two days and resulted in 328,000 "brand engagements" (defined to include likes, comments, and re-postings) with the Lord & Taylor Instagram user designation. Lord & Taylor's interactions with the influencers were paid endorsements.

The complaint is based on three counts: (1) misrepresentation based on the fashion influencers' Instagram postings; (2) failure to disclose the fashion influencers' material connection; and (3) misrepresentations based on the Nylon Instagram post and online magazine article. The FTC's complaint against Lord & Taylor is its first to address native advertising since the release of its enforcement guidelines in mid-December 2015, which we addressed in a prior Daily Journal article. It may also be the first enforcement action to include multiple Instagram posts as illustrative exhibits. Given the rise of social media native and endorsed advertising, it is unlikely to be the last.

Although the FTC reports that the paisley dress sold out, the proposed settlement does not contain any financial penalty for Lord & Taylor. Instead, the consent order would prohibit Lord & Taylor in the future from misrepresenting "in any manner, expressly or by implication, that an endorser of such product or service is an independent user or ordinary consumer of the product or service." Relatedly, when Lord & Taylor conducts any advertising campaign involving endorsements, it must "clearly and conspicuously, and in close proximity to the representation, disclose a material connection, if one exists" between Lord & Taylor and the endorser. The company is also prohibited from representing that a paid commercial advertisement is a statement or opinion from an independent or objective publisher or source.

The order requires Lord & Taylor to take steps that include providing potential endorsers with statements of responsibility to disclose their material connections to Lord & Taylor and monitoring any endorsers involved in an "Influencer Campaign." Lord & Taylor is obligated to terminate any endorsers who willfully fail to disclose. And, among other documentation requirements, Lord & Taylor must retain copies of the promotional materials.

The FTC has helpfully distilled some of the big picture lessons of the settlement on its own blog — emphasizing consideration of the context of native advertising, clear and conspicuous disclosure of any material connections between companies and endorsers, and training and monitoring affiliates acting on the company's behalf. More specific guidance can be found in the proposed consent order. The order is notable for its specific instructions to Lord & Taylor regarding the definition of a "clear and conspicuous" disclosure and what it means for the disclosure to be in "close proximity." The consent order's definitions provide additional insight for companies seeking to interpret the December 2015 guidelines.

Nothing in the definition of a "clear and conspicuous disclosure" should be unfamiliar to advertisers. First, the disclosure must be in the same medium as the communication itself. Both visual and audible disclosures must be easily distinguished from the surrounding content, and easily understood by the intended audience. The diction and syntax must be "understandable to ordinary consumers" and must be in the same language as the underlying communication. Looking at the facts in this case, the message is clear: the hashtags and Instagram user designations in the posts sponsored by Lord & Taylor were insufficient to send this message.

The settlement also specifically addresses situations that may arise with online media. For communications that involve an "interactive electronic medium" — which is of course a growing proportion of media — the disclosure must be "unavoidable." Moreover, when addressing whether a disclosure is in "close proximity" to the endorsement, the order states that for interactive electronic media, "a visual disclosure that cannot be viewed at the same time and in the same viewable area as the triggering endorsement or representation, on the technology used by ordinary consumers, is not in close proximity." By the terms of the order, this means that a disclosure made

PIG Tales

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via hyperlink, pop-up, interstitial, or other similar technique is not a disclosure in close proximity — just as a disclosure on a separate page of a printed publication would not be in close proximity.

Overall, the language in the FTC's proposed consent order with Lord & Taylor is more detailed than the December 2015 guidelines, and these details are ones that companies engaging in social media ad campaigns cannot afford to ignore. The combination of both native advertising and paid endorsements in this FTC enforcement action demonstrates that companies need to understand their marketing obligations in multiple media in order to effectively and accurately promote their products.

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