

Health Law Webinar

What Health Organizations Should Know about
Intellectual Property and Advertising Law

June 8, 2022

Fredrikson
& BYRON, P.A.

Ad Law Legal Issues

- Copyright and Trademark Issues
- Libel and Defamation
- Data Privacy Issues including COPPA
- False/Deceptive Advertising
- Sweepstakes/Promotions
- FTC Testimonial Guides
- Product Placement
- Publicity/Privacy Infringement
- Gift Certificate/Rebate/Sales Rules
- Site-Specific Guidelines
- Industry Contracts

False Advertising Basics

False Advertising Liability: Who Challenges Claims?

- **Industry Self-Regulation**
 - NAD, NARB, Network Clearance, MMA, DAA, etc.
- **Regulatory Proceedings**
 - FTC and FDA
- **State Attorneys General**
- **Private Lawsuits**
 - Competitors
 - Individuals

Enforcement

- Many enforcement targets likely to remain constant
 - Health claims – CBD products
 - COVID claims
 - Privacy issues
- Different emphasis under Biden Administration
 - More aggressive
 - Federal privacy regulation
 - Target big tech
 - Target individuals and cash
 - Targeting interest-based ads

What is False Advertising?

- A **material** representation or omission **likely to mislead** a consumer **acting reasonably** under the circumstances
- What *you* actually say doesn't matter
- Deception flows from what the consumer understands
- Must be able to **substantiate** all claims

Bud Light & Corn Syrup

Substantiation

- What is Substantiation?
 - **Support** for advertised Claims
- Measurable Claims – explicit and implied
- What is needed:
 - amount of substantiation consumers would expect, based on the overall impression of the claim
 - a “**reasonable**” basis
- Prior Substantiation
- Results must directly support claim

Scrawny Arm Rob Lowe

Nissan Frontier

#1
HOSPITAL IN
SOUTH FLORIDA



A Top Health System in Florida



Weston Hospital



Indian River Hospital



Martin Health

Online Risks

- Online reviews
- Selective statements
- Native advertising
- Unqualified/embellished claims

Goop: Inner Judge Flower Essence

[Flower Essences](#) > [Flower Essences](#) > Inner Judge Flower Essence Blend



Inner Judge Flower Essence Blend



A purifying floral blend that assists in the clearing of guilt, shame, self-criticism and blame.

½ fl oz (15 mL) | Stock strength

\$26.00

1

Add to Cart

Flower Essence Blend Claims

- Prevents shame spirals
- Cures depression

Native Advertising

- What is it:
 - Advertising that does not appear to be advertising
 - Deception occurs when an advertisement misleads reasonable consumers and such misleading representation is material
 - FTC cracking down on advertising that appears to be user commentary

STAT Doctors promoting treatments on social media routinely fail to disclose ties to drug makers

There is a Non-Hormonal Treatment Option For Hot Flashes!

Innovative Solutions

James A. Simon MD

James A. Simon MD @JamesASimonMD

There is a non-hormonal prescription option for hot flashes? Get the facts – QUIT SUFFERING! buff.ly/1kzZbwz

11:40 AM - 23 Oct 2015

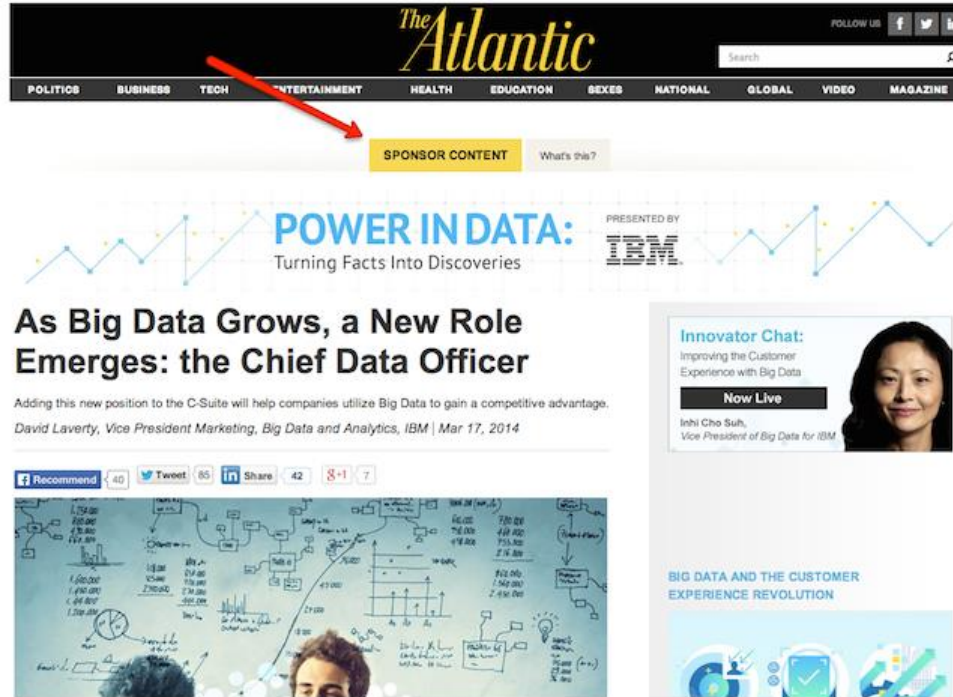
The tweet links to a blog post he wrote promoting the medication Brisdelle. It's made by a company that paid him \$142,000 in 2013 and 2014.

READ MORE

Special Report: Popular heart surgery carried hidden danger

RECOMMENDED STORY Drug makers now spend \$5 billion a year on advertising. Here's what that buys. MORE STORIES

Sponsored Content



The screenshot shows the top navigation bar of The Atlantic website. A red arrow points from the 'ENTERTAINMENT' link to a yellow 'SPONSOR CONTENT' button. Below the navigation bar, the main content area features a sponsored article titled 'As Big Data Grows, a New Role Emerges: the Chief Data Officer' by David Lavery, dated March 17, 2014. The article is presented by IBM and includes a sub-headline 'POWER IN DATA: Turning Facts Into Discoveries'. To the right of the article is a sidebar with a section titled 'Innovator Chat: Improving the Customer Experience with Big Data' featuring a photo of Inhi Cho Suh, Vice President of Big Data for IBM, and a 'Now Live' button. Below the article, there are social media sharing options (Facebook, Twitter, LinkedIn, Google+, Reddit) and a large image of a person's face overlaid on a background of data visualizations and charts.

The Atlantic

POLITICS BUSINESS TECH ENTERTAINMENT HEALTH EDUCATION SEXES NATIONAL GLOBAL VIDEO MAGAZINE

SPONSOR CONTENT What's this?

POWER IN DATA:
Turning Facts Into Discoveries

PRESENTED BY
IBM

As Big Data Grows, a New Role Emerges: the Chief Data Officer

Adding this new position to the C-Suite will help companies utilize Big Data to gain a competitive advantage.
David Lavery, Vice President Marketing, Big Data and Analytics, IBM | Mar 17, 2014

f Recommend 40 Tweet 85 Share 42 +1 7

Innovator Chat:
Improving the Customer Experience with Big Data

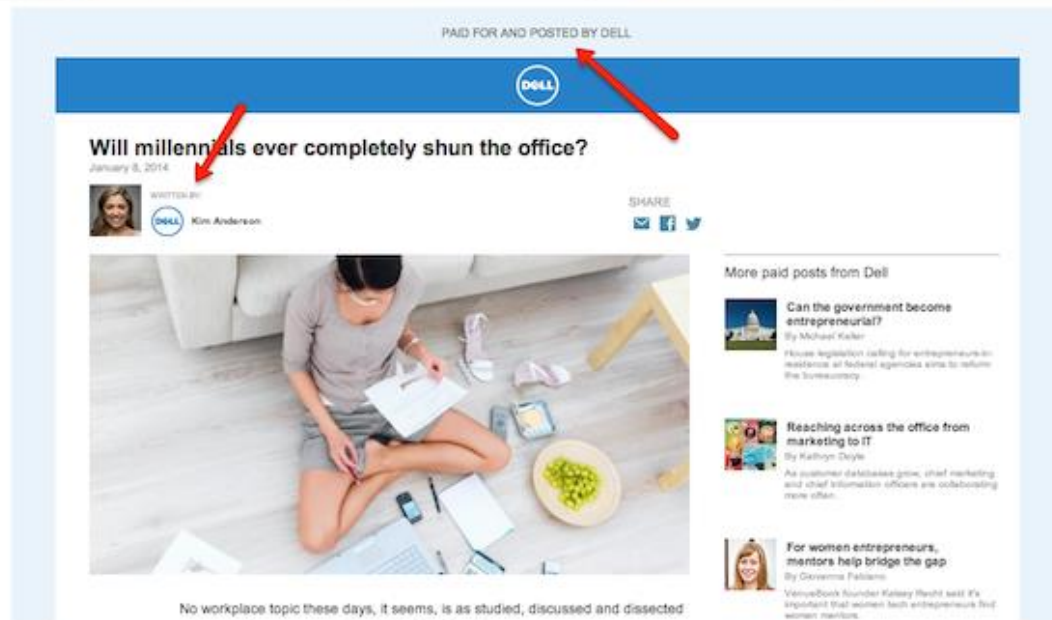
Now Live

Inhi Cho Suh,
Vice President of Big Data for IBM

BIG DATA AND THE CUSTOMER EXPERIENCE REVOLUTION

Online Disclosures

- FTC's .com Disclosure guidance for businesses
 - “clear and prominent” disclosures
- New guidance also adds factors, for example, disclose near the focal point or in front of or above the “headline”
- FTC suggests that for multimedia ads (such as videos) the disclosure be “delivered as close as possible to the advertising message” itself
- Use “Ad,” “Advertisement” or “Paid Advertisement,” and not terms like “Promoted” or “Sponsored”



OVO PATIENT REVIEWS

DIFFERENTIATE - COST / AFFORDABLE / FINANCE / ACCEPTS - HSA + FSA / OVO has the best LASIK price, guarantee and experience in Minneapolis, Minnesota.

G



MELLISA P. / Google Reviews

"I was referred to Dr. Lobanoff by another LASIK specialist who said he would be the best to handle my high correction. I'm so glad I was connected to him - Dr. Lobanoff was very informative, friendly, and made the whole process comfortable."

G



JENNIFER P. / Google Reviews

"Extremely happy with my LASIK! Dr. Lobanoff made me feel very comfortable and made sure I understood what to expect. Very professional, very friendly."

G



NICK B. / Google Reviews

"Dr. Lobanoff was very professional and explained everything that was going to happen during my procedure very accurately. I will be recommending him to all of my friends."

Copyrights

PROGRESSIVE®

Commercial



Commercial

Toyotathon



Flossing

Fair Use

- Some unauthorized uses are “fair”
- Very unpredictable
- Commentary/parody
- Paraphrase/link

Trademark Rights

Purpose of Trademarks

- To distinguish your products from your competitor's products
- To protect consumers from confusion, mistake and deception
- To protect businesses from unfair competition

What is a Trademark?

- Can Be Anything – word, phrase, symbol, design, sound, smell, color, product configuration, group of letters or numbers, or combination of these
- Used by a company to identify products and
- Distinguish them from products of others

- Traditionally, words or logos

Trademark Fair Use

- Okay to use third party marks truthfully
 - Comparative advertising
 - Identify actual third-party goods/ services
- Be careful:
 - Logo/photo use
 - Implications of endorsement or affiliation



After Hours Walk-in Clinic Now Open!



The After Hours Clinic is a low cost option to an Emergency Room visit. Services include but are not limited to: treatment of common illnesses and non-emergent conditions, minor injuries, ongoing health management, physicals, and vaccines/immunizations.

4235 Secor Road, Toledo, Ohio, Monday – Friday 3pm – 9pm, Saturday & Sunday 10am – 4pm 567.420.2512

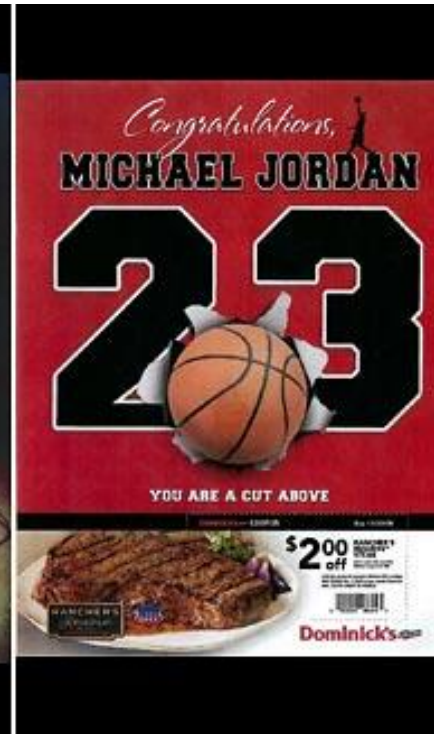
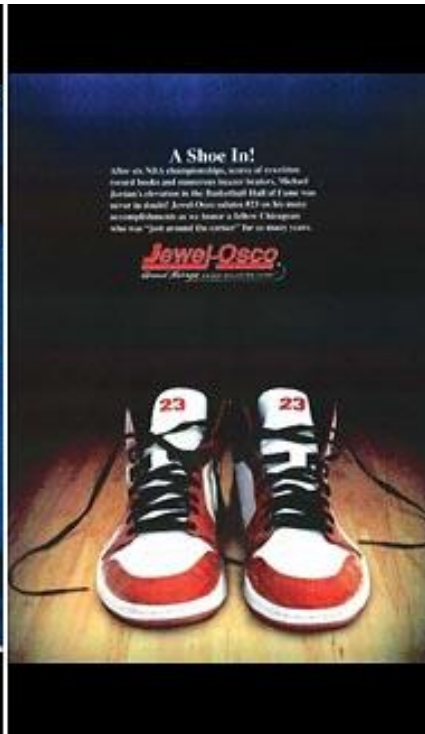
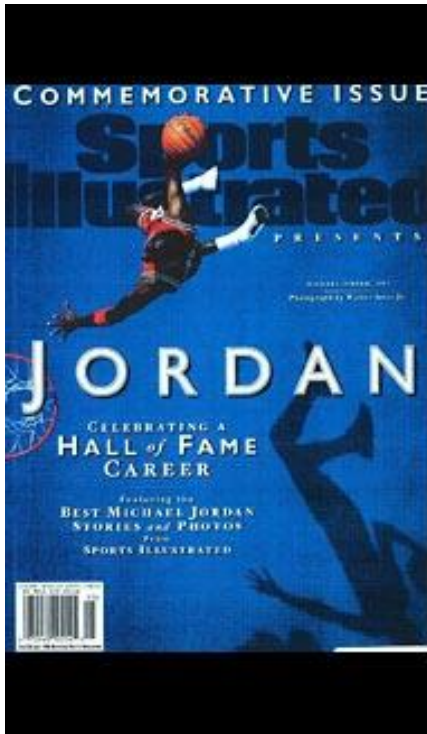

[Find a Physician](#)
[Patient Portal](#)
[Pay My Bill](#)
[Schedule Appointment](#)
[Compliance Hotline](#)
[MENU](#)

Procedure Cost Table

	THE TOLEDO CLINIC	PROMEDICA FLOWER HOSPITAL	PROMEDICA TOLEDO HOSPITAL	PROMEDICA BAY PARK HOSPITAL	MERCY ST. VINCENT	MERCY ST. ANNE'S	MERCY ST. CHARLES
Amylase \$14.48	\$197.00		\$197.00	\$197.00	\$173.00	\$227.00	\$193.00
CBC w/Diff \$20.06	\$150.00		\$150.00	\$150.00	\$196.00	\$256.00	\$243.00
Comp Met Panel (CMP) \$26.06	\$418.00		\$418.00	N/A	\$411.00	\$567.00	\$523.00
Urine Culture \$22.00	\$193.00		\$193.00	\$193.00	\$143.00	\$160.00	\$218.00

Publicity Rights







**Arby's** @Arbys Jan 26
Hey @Pharrell, can we have our hat back? #GRAMMYS
Expand [← Reply](#) [↻ Retweet](#) [★ Favorite](#) [*** More](#)

**Pharrell Williams** @Pharrell Jan 27
Y'all tryna start a roast beef? 🤔 " @Arbys: Hey @Pharrell, can we have our hat back? #GRAMMYS"
[🔄 Retweeted by Arby's](#)
[♥ Hide conversation](#) [← Reply](#) [↻ Retweet](#) [★ Favorite](#) [*** More](#)

16,988
RETWEETS

14,195
FAVORITES



1:23 AM - 27 Jan 2014 · Details



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

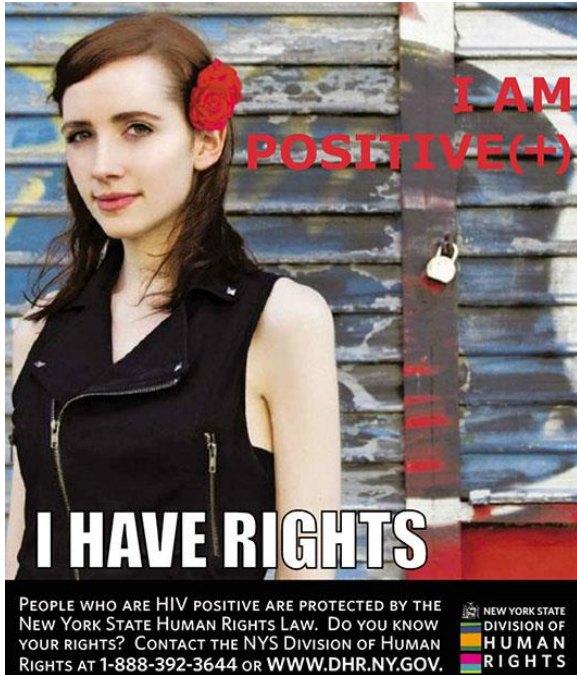
FAVORITES
181



Licensing Rights

Waivers/Releases/Licenses

- People have become more aggressive
- Get releases for prominent uses
- Know any limits on use and convey them to team
- Maintain records for as long as possible
- Image and music license trolls
- Consider all people, places, buildings, props, music, etc. in ad



- The ad, shown to the left, appeared across New York City in the April 3, 2013, edition of the newspaper **amNY**.
- It features 25-year-old Brooklyn woman Avril Nolan as a poster child for the rights of the HIV-positive community.
- Splashed across the portrait are the words, “**I AM POSITIVE(+)**,” and, “**I HAVE RIGHTS.**”
- **Nolan is *not* HIV-positive.** Upset that she was depicted as such in the ad, Nolan sued Getty Images for selling her photograph to the New York State Division of Human Rights without her consent.
- She has asked for \$450,000 in damages and sued the Division of Human Rights for defamation.

Getty Images settled with Nolan in January 2015.

Separable Works



Dirty Dancing

TD Ameritrade Ad

Testimonials / Endorsements

Testimonial and Endorsers

- Consumers must know when an ad is an ad
 - Material disclosures
 - No insulation from misleading and unsubstantiated claims
- Advertisers and endorsers both potentially liable

Online Endorsements

- Endorsements: must reflect the honest opinion of the endorser
- Must disclose the endorser was paid or compensated for the endorsement
- Disclose Studies Paid For by Advertiser
- Disclose Expert Experience
- Includes Influencers

Crackdown on Undisclosed Endorsers

- FTC fired off 90 letters
- Will enforcement be next?



Mary K. Engle
Associate Director

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

[Date]

[Address]

Dear [Influencer]:

The Federal Trade Commission is the nation's consumer protection agency. As part of our consumer protection mission, we work to educate marketers about their responsibilities under truth-in-advertising laws and standards, including the FTC's Endorsement Guides.¹

I am writing regarding your attached Instagram post endorsing [product or service].² You posted a picture of [description of picture]. You wrote, "[quotation from Instagram post]."

The FTC's Endorsement Guides state that if there is a "material connection" between an endorser and the marketer of a product – in other words, a connection that might affect the weight or credibility that consumers give the endorsement – that connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the communication containing the endorsement. Material connections could consist of a business or family relationship, monetary payment, or the provision of free products to the endorser.

The Endorsement Guides apply to marketers and endorsers. [If there is a material connection between you and [Marketer], that connection should be clearly and conspicuously disclosed in your endorsements.] or [It appears that you have a business relationship with [Marketer]. Your material connection to that company should be clearly and conspicuously disclosed in your endorsements.] To make a disclosure both "clear" and "conspicuous," you should use unambiguous language and make the disclosure stand out. Consumers should be able to notice the disclosure easily, and not have to look for it. For example, consumers viewing posts in their Instagram streams on mobile devices typically see only the first three lines of a longer post unless they click "more;" and many consumers may not click "more." Therefore, you should disclose any material connection above the "more" button. In addition, where there are multiple tags, hashtags, or links, readers may just skip over them, especially where they appear at the end of a long post.

¹ The Endorsement Guides are published in 16 C.F.R. Part 755.



Heidi Klum  @heidiklum · 16h

This is NOT a sponsored Dunkin Donuts postand I did NOT get payed for that !!!



 28

 30

 298

Paid Endorsers

- Provide some content instruction
- Signed agreement
 - Indemnification
 - Necessary disclosures – when/what
 - Paid, free product, ownership interest
 - #paid, #sweeps, #ad, etc.
 - Honest statements
 - Avoid negative posts
 - Retain some control for brand
- Reasonably monitor activity

Social Media Marketing

Social Media Marketing Tips

- Define risk tolerance
- Avoid commingling commercial and non-commercial
- Timely/newsworthy responses are lower risk
- Immediately respond to removal requests
- Avoid prickly celebrities
- Follow laws - False Advertising Rules
- Know and verify the technology

Presenter



John Pickerill

612.492.7306

jpickerill@fredlaw.com