

Communications

Consumer & Retail

Internet & Social Media

March 24, 2016

Lord & Taylor Case Shows the Importance of Transparency in Advertising

By Lori Levine, Kimberly Buffington, Carolyn S. Toto and Lauren Lynch Flick

Consumer protection is always in style with the Federal Trade Commission (FTC). Under the FTC Act, a company cannot make a misrepresentation that would affect the consumer's conduct or decisions with regard to a product or service. The statute also prohibits companies from misleading a consumer into believing an advertisement is not an advertisement. Advertisements are increasingly indistinguishable from news articles, editorials or everyday online content, especially when posted to social media. The recent Lord & Taylor case and others highlight the importance of the statute in regulating advertisements that may not look like conventional promotions and the challenges advertisers face when marketing on social media platforms.

The FTC routinely takes action to ensure that consumers are aware they are being marketed to. For instance, in a case against an app developer, the FTC came down on the company for having its employees post reviews about the app without disclosing their relationship to the company. In another case, a home security firm hired spokespersons who appeared on television and radio programs as impartial expert reviewers but did not disclose their connections to the company. Retailer Lord & Taylor, drew the FCC's attention due to its "deceptive" marketing of a dress online.

To promote the company's Design Lab Paisley Asymmetrical Dress and its "Design Lab" clothing collection, Lord & Taylor launched a comprehensive social media campaign aimed at women ages 18 through 35. As part of the campaign, Lord & Taylor gifted the Paisley Asymmetrical Dress to 50 select fashion influencers. Lord & Taylor paid the influencers in amounts ranging from \$1,000 to \$4,000, to post one photo of themselves wearing the Design Lab dress on Instagram. Under the terms of their contract with Lord & Taylor, the company required the influencers to tag their photos "@lordandtaylor" and include the campaign hashtag "#DesignLab" in photo captions.

Lord & Taylor additionally contracted with *Nylon* magazine to post a photo of the dress on its Instagram account and run an article about Lord & Taylor's clothing collection in its online magazine.

The campaign was successful, reaching 11.4 million individual Instagram users and causing the dress to sell out. All of this would have been fine, and legally sound, had Lord & Taylor also required the bloggers and *Nylon* to disclose that Lord & Taylor paid them to promote the dress. None of the Instagram posts featuring the Lord & Taylor dress, however, indicated that the style influencer had been paid for the post, that the post was part of Lord & Taylor's advertising campaign, or that the dress had been given to the influencer for free. Likewise, neither the *Nylon* Instagram post nor the *Nylon* article disclosed that the features had been paid for, reviewed and pre-approved by Lord & Taylor.

When the FTC caught wind of the Design Lab campaign, it brought a complaint against Lord & Taylor for the various misrepresentations made in its campaign to promote the Design Lab collection. Specifically, the complaint charged the company with: (1) misrepresenting that the 50 Instagram images and captions reflected the independent statements of impartial fashion influencers, when in fact the posts were part of an advertising campaign to promote sales of the Design Lab collection; (2) failing to disclose that the fashion influencers were paid endorsers for Lord & Taylor—a deceptive practice; and (3) failing to disclose that the *Nylon* article and Instagram post were not independent statements and opinions, but rather, paid-for commercial advertisements.

Under the terms of the proposed settlement with the FTC, Lord & Taylor is prohibited from misrepresenting that an endorser of its products or services is an ordinary consumer, when in fact Lord & Taylor paid for their endorsement. The settlement further requires Lord & Taylor to “clearly and conspicuously, and in close proximity to the representation” disclose the connection between the endorser and Lord & Taylor. The settlement also lays out various monitoring and compliance obligations that require Lord & Taylor to obtain signed acknowledgements from endorsers that they will disclose their connection to the retailer. The settlement requires Lord & Taylor to monitor endorsers to ensure they are in compliance.

The Lord & Taylor case serves as a cautionary tale for companies seeking to promote their products and services via social media, and the terms of the Lord & Taylor proposed settlement serve as a solid guide post to better compliance. In evaluating whether an ad's format is misleading, the FTC will consider the “net impression” that the advertisement conveys to reasonable consumers. If the content is such that a consumer would be deceived into thinking that the content was neutral, it would violate the FTC Act. Thus, as in the Lord & Taylor settlement, qualifying information—for instance, a disclosure that the content is sponsored, that clothes have been gifted or that the influencers were paid—can help companies ensure compliance with FTC guidelines and avoid scrutiny from the FTC. To further ensure compliance, companies should make such information conspicuous and available in proximity to the claim it is intended to qualify.

For more information on the subject, read the FTC's [Enforcement Policy Statement on Deceptively Formatted Advertisements](#).

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Lori Levine [\(bio\)](#)
Los Angeles
+1.213.488.7189
lori.levine@pillsburylaw.com

Kimberly Buffington [\(bio\)](#)
Los Angeles
+1.213.488.7169
kbuffington@pillsburylaw.com

Carolyn S. Toto [\(bio\)](#)
Los Angeles
+1.213.488.7238
carolyn.toto@pillsburylaw.com

Lauren Lynch Flick [\(bio\)](#)
Washington, DC
+1.202.663.8166
lauren.lynch.flick@pillsburylaw.com

Pillsbury Winthrop Shaw Pittman LLP is a leading international law firm with 18 offices around the world and a particular focus on the energy & natural resources, financial services, real estate & construction, and technology sectors. Recognized by *Financial Times* as one of the most innovative law firms, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their unsurpassed commercial awareness.

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2016 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.