



## FROM INSTAGRAM TAKEOVERS TO USER-GENERATED CONTENT: ANALYZING ISSUES ARISING IN SOCIAL MEDIA

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# Presenters:

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# Overview

- **User-Generated Content**
- Influencers and Endorsements
- Instagram Takeovers
- Social Media Policies
- California Consumer Protection Act and Social Media

# What is User Generated Content/UGC?

- Publicly-viewable content produced by a user of a website/app rather than by the business behind that website/app.
  - Text
  - Images
  - Posts
  - Blogs
  - Reviews
  - Comments
  - Videos
  - Audio



# Pros and Cons of UGC?

## PROS

- Customer engagement
- Free advertisement
- Free ideas/suggestions
- Builds brand awareness
- Improves search engine ranking

## CONS

- Many potential legal pitfalls and risks

# UGC – Ownership Issues

- Just because someone tags your company in an image, it doesn't mean that you have approval to use that image for marketing or commercial purposes.
- **Generally the photographer has ownership rights (copyrights) in the photo**
- **HOWEVER, additional permission is needed IF:**

# UGC – Ownership Issues (continued)

Image includes other people

Triggering right of publicity and privacy rights

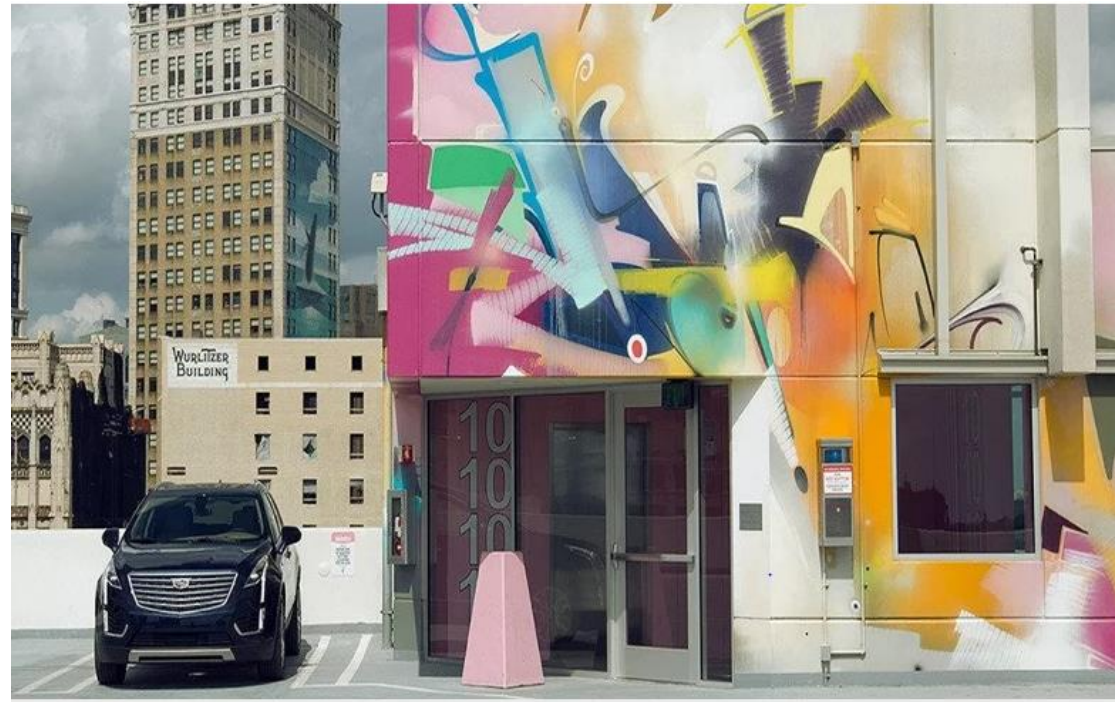




# UGC – Ownership Issues

## Image includes third-party copyrights

Adrian Falkner vs. General Motors



7.7 You agree that Content you submit to the Service will not contain any third party copyright material, or material that is subject to other third party proprietary rights (including rights of privacy or rights of publicity), unless you have a formal licence or permission from the rightful owner, or are otherwise legally entitled, to post the material in question and to grant YouTube the licence referred to in paragraph 8.1 below.



# UGC – Ownership Issues

Image includes third-party trademarks



# UGC – Passive Consent

- Relying on the Terms of Service of social media platforms
  - The Terms generally give the platform broad permission to share and display content that's posted on *their* platforms, but rights given to third parties to exploit such content vary, **but unlikely to offer protection against 3<sup>rd</sup> party claims** (see *AFP v. Morel*, 10 Civ. 02730 (AJN) (S.D.N.Y. Jan. 14, 2013))



: allows company using Twitter's API to identify and access tweets and grants that company a license to "copy a reasonable amount of and display" the tweets through company's own services.

: allows Twitter to make user's content "available to the rest of the world and to let others do the same"

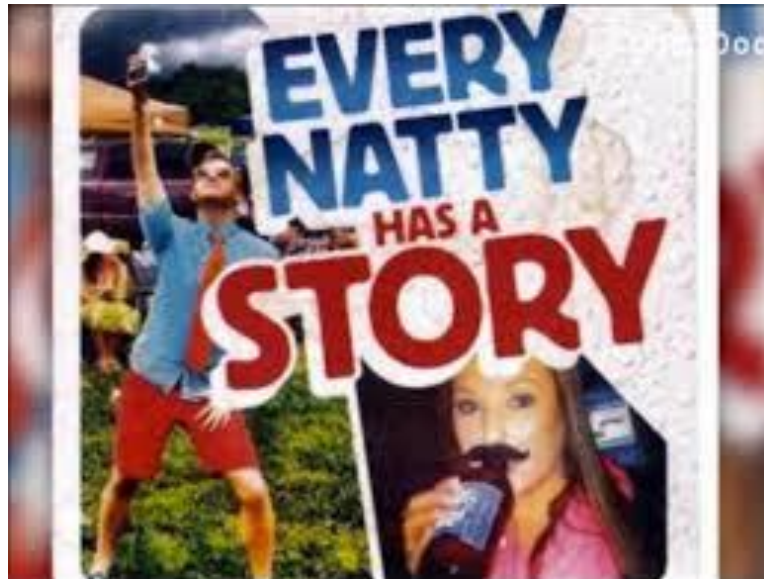


: company using Instagram's API must "comply with any requirements or restrictions imposed on usage of Instagram use photos and videos by their respective owners"

# UGC – Passive Consent (continued)

- Solely obtaining photo credit
- Assuming participation in contest or sweepstakes is consent
- Creating brand hashtag and encouraging consumers to use it
- Still BEST practice to get explicit consent! WHY?

**Kayla Kraft vs. Anheuser-Busch (“Natty Ice” lawsuit)**



# UGC – Express Consent

Remember most people are happy to allow companies to use / repost their content!



# UGC – Express Consent



## PetSmart

- Request express consent of photographer and anyone in photo
- Give photo credit in any repost

# UGC – Express Consent



## Airbnb

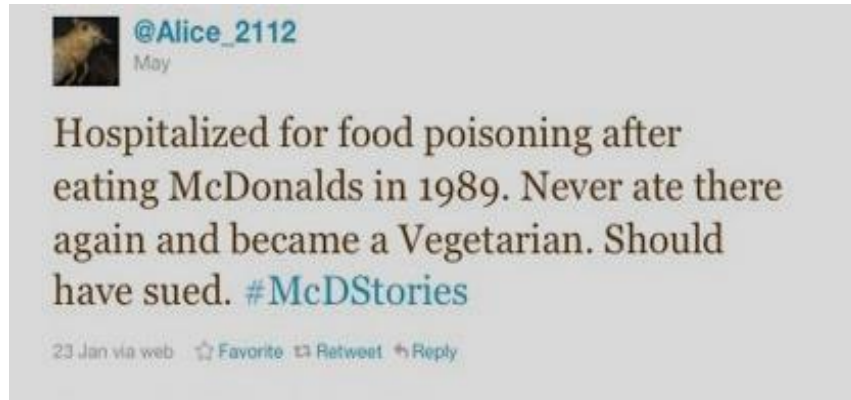
- Obtain express consent
- Confirm acceptance of company's Terms of Use
- Explain how company plans to use the UGC
- Give photo credit in any repost

# Beware Hashtag Hijacking!

- Be careful associating your trademarks with UGC!
- Ad campaigns can be hijacked by UGC which can damage the trademark or embarrass the company
- Hashtag hijacking = when a company-created hashtag is used for an unintended purpose -> negatively impacting the company, event, or brand.
- Monitor campaigns and have policy in place to deal with hijacking crisis.



# UGC – Hashtag hijacking



#McDStories,  
#ILoveWalgreens,  
#SupportJapan (Bing),  
#WhyIStayed (DiGiorno)



# UGC Tips

- Create clear policy and guidelines for UGC
  - Include in Terms of Service
    - Permitted and prohibited uses
    - Express License grants
    - Indemnification
    - Ownership of derivative works
    - Take-downs and reporting infringement
    - DMCA compliance
- Create clear internal policy and guidelines for your employees
- Carefully review social media platforms' terms regarding UGC

# UGC Tips (continued)

- Consider investing in Digital/Advanced Rights Management (DRM or ARM) tools & software if you rely heavily on UGC
- Consider hiring someone to exclusively handle UGC
- Evaluate use of UGC against potential risks (hijacking)
- Be clear with UGC owners as to how you plan to use their UGC – never monetize without express consent!



- User-Generated Content
- **Influencers and Endorsements**
- Instagram Takeovers
- Social Media Policies
- California Consumer Protection Act and Social Media

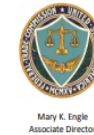
# The Use of Influencers in Social Media

- Influencer marketing, that is, the use of an individual (such as a blogger) to promote your goods or services to their social network is commonplace in 2019.
- Many influencers are celebrities and most are even human! *But see:*



# The Use of Influencers in Social Media

- Influencers are hired by companies to advertise their products through all manner of social media, including Facebook, Twitter, and Instagram.
- Oftentimes influencers (and the companies hiring them) forget that their advertising activities are subject to the same general truth-in-advertising standards applicable to other media.
- The FTC, however, has not forgotten—in 2017 it sent warning letters to numerous influencers concerning their failure to comply with the FTC’s Endorsement Guides.



Mary E. 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.<sup>1</sup>

I am writing regarding your attached Instagram post endorsing {product or service}.<sup>2</sup> 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.

<sup>1</sup> The Endorsement Guides are published in 16 C.F.R. Part 255.

<sup>2</sup> The post is available at {URL}.

# The Use of Influencers in Social Media

- Section 5 of the FTCA prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”
  - Deceptive- likely to mislead consumers and affects consumer’s behavior or decisions about a product or service
  - Unfair- if injury it causes or is likely to cause is substantial, not outweighed by the benefits, and not reasonably avoidable
- Website designers, marketers, and advertising agencies may be liable for making or disseminating deceptive representations, and may be liable for comments made by endorsers.



# The Use of Influencers in Social Media

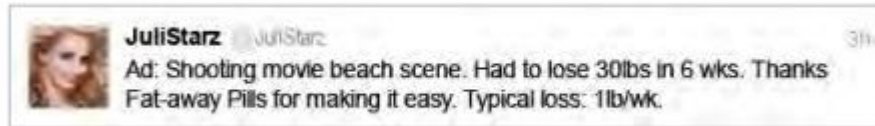
- Endorsements must:
  - Be truthful
  - Reflect the honest opinions of the endorser
  - Not contain any representation that would be deceptive if made by the advertiser
  - Disclose material connections between themselves and advertisers, including that the influencer is being paid for services (if applicable)
  - Be substantiated, if applicable
  - Contain disclosures that are clear and conspicuous, and readily viewable by the consuming public (e.g., #Ad prominently displayed)

# The Use of Influencers in Social Media

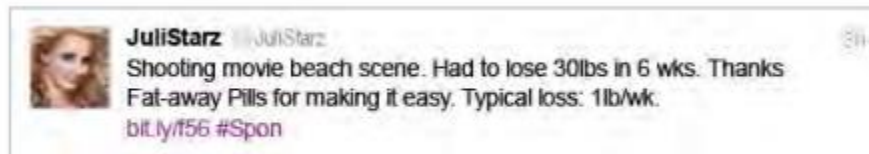
- Examples of Disclosures:

## THOUGHTS?

GOOD:



BAD:



# Real Life Consequences: CSGO LOTTO

HOW IT WORKS

GAME HISTORY

PLAY

HIGH ROLLER

30 MAX

DUEL ARENA

CURRENT ROUND STATS

ROUND COUNTDOWN

0

CURRENT JACKPOT

0

PLAYERS

00:00

TIME LEFT

0

SIGN IN TO PLAY

Sign in with your steam account to join this round

Sign in through STEAM

NEW!

DUEL ARENA MODE

CHECK IT OUT!

DAILY

CHAT

Oh snap! You must sign in to chat!

PLAYERS IN ROUND

PLAYER	ITEMS ADDED	TOTAL	ODDS
GAME: # Winning Hash: (?)			
Winner Narby	24 items	163.14	29.95
WINNING Percent: 31.572290393523872% Winning Hash: (Validate) 1fb0d7f8ce34475c40f510e50dfe44 Round Key: W8LNX2auwt Total Tickets: 16321			
lowkey	10 items	36.89	22.61
The_Irregular CSGORAFFLING.COM	1 items	20.56	12.6
AgressOr_ csgolotto.com	1 items	26.92	16.5
NekoCat <3 CSGORumble.com	1 items	5.21	3.19
Narby	1 items	48.86	29.95

SUPPORT

TERMS OF USE

PRIVACY POLICY

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CSGO ANALYST

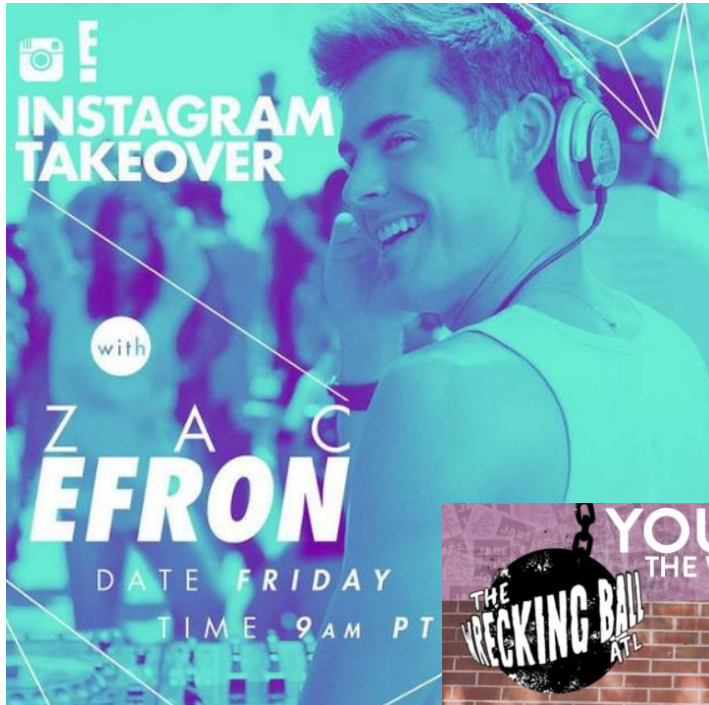
OPSKINS

- User-Generated Content
- Influencers and Endorsements
- **Instagram Takeovers**
- Social Media Policies
- California Consumer Protection Act and Social Media

# Instagram Takeovers

- **Instagram takeovers** consist of one user taking over another **Instagram** account temporarily and sharing original content with their audience. **Takeovers** usually take place between influencer and brand **Instagram** accounts within the same industries or geographic locations.
- **Instagram takeovers** have been around for a few years. In a **takeover**, you arrange for someone to take over your **Instagram** account for regular **Instagram** posts. The **takeover** might happen for a day or during a special event, and can help grow your **Instagram** community and build brand awareness.

# Instagram Takeovers



**PSST...**  
Guess who's taking over  
*@CoroSoCal*  
Instagram Feed  
for the week!





# Instagram Takeovers

- Veritable cornucopia of potential issues
- Legal Issues
  - People permissions
  - Appropriate disclosures for influencers
    - Paid, sponsored, or otherwise
- Business Issues
  - Bad behavior on your Instagram feed
    - Contrary to brand image
    - Illegal or immoral activities
  - Regaining control of your Instagram account





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# Social Media Policies

- What is a social media policy?
  - Helps employees participate responsibly online (whether or not in the workplace and whether or not using their employer's technology resources) and helps their employer maintain its reputation
  - Typically resides in an employee handbook
    - Right after the section on appropriate use of the employer's technology

# Social Media Policies

- What is a social media policy?
  - Addresses both the potential distraction of social media; and
  - Provides guidance for employees relating to posts about their employer
    - For Example:
      - Defending their employer from online “haters”; or
      - Disclosing confidential information
        - (Conveniently ignoring First Amendment issues in this presentation)

# Social Media Policies

- Two questions to ask
- Question No. 1. Do you have a social media policy, and if not, should you?
- Question No. 2. If you have a social media policy, is it enforceable?

# Social Media Policies

- Question No. 1. Do you have a social media policy, and if not, should you?
- Lets employees know what is and isn't acceptable
- Helps prevent damage to a company's reputation
- Assists in branding
- Protects confidential and sensitive information

# Social Media Policies

- Question No. 2. If you have a social media policy, is it enforceable?
- National Labor Relations Act protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.

# Social Media Policies

- Question No. 2. If you have a social media policy, is it enforceable?
- Best practices:
  - Should be specific and easily understood by employees
  - Free speech implications
  - Can't hide employees
  - Limits to management's power
  - Logos may not be totally under company control



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# The California Consumer Privacy Act

**January 1, 2020**

It's coming...

# The CCPA and Social Media

- Applicable to entities who do business in CA who:
  - Have annual gross revenue over \$25 million;
  - Annually buys, sells, receives for commercial purposes, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; **OR**
  - Derives 50% or more of annual revenue from selling consumers' personal information.
- PI broadly defined: information that **identifies, relates to, describes, is capable of being associated with, or could reasonably be linked with a consumer** or household
  - Names, IP addresses, browsing history, & geolocation information.
  - Not limited to information collected electronically.

# The CCPA and Social Media

- Right to obtain categories and specific pieces of personal information
  - businesses are required to inform consumers of categories of collected information and purposes of use; cannot collect more or use in new ways absent notice
- Right to request a business delete personal information
  - businesses must disclose this right in privacy policy; if deletion request received, business must delete PI and so must service providers (exceptions exist)

# The CCPA and Social Media

- Right to receive information about PII collected
  - (i) categories of PI collected; (ii) categories of sources from which the PI was collected; (iii) business purpose for collecting or selling PI; (iv) categories of third parties with whom business shares PI; (v) specific pieces of PI collected about consumer; must be disclosed via privacy policy and updated every 12 months
- Right to not be discriminated against for exercising privacy rights
  - financial incentive program permitted in certain circumstances and subject to qualifications

# The CCPA and Social Media

- Right to request info. about sale or disclosure of PI
  - consumers can obtain: (i) categories of PI collected; (ii) categories of PI sold about consumer and categories of third parties to whom sold; and (iii) categories of PI disclosed for a business purpose; business must disclose in privacy policy a list of categories of PI sold or disclosed about consumers in preceding 12 months; prohibits businesses from selling PI about a consumer if obtained from a third party absent express notice and opt out

# The CCPA and Social Media

- Right to opt out from sale of personal information
  - clear and conspicuous link on webpage titled “Do Not Sell My Personal Information” that enables a consumer to opt out of the sale of PI; business must describe this right and include separate link as set forth above in privacy policy and in any CA-specific description of rights; appropriately train individuals who handle such requests; business must refrain from selling PI if consumer opts out and must respect same for 12 months; opt-in is required for consumers 16 and below (including verifiable parental consent for consumers below 13)

# The CCPA and Social Media

- Implications with respect to social media are unclear.
- Photographs or images could be deemed “personal information”, subjecting such information to the CCPA’s various requirements.
- Businesses who utilize social media to collect personal information will need to be aware of the Act’s requirements and take steps to comply with same.
- Keeping track of User-Generated Content that includes personal information will be much more important.
- May be required to delete UGC upon request.





THANK YOU!

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