

#OnlineMarketing: Legal Compliance in a Viral World

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Program Materials

1. PowerPoint Presentation

Reference Materials from *The TMCA.com* blog

1. Quirky Questions: Using the Registration symbol (®), the Trademark symbol (™) or Neither? (May 4, 2018)
<https://thetmca.com/quirky-questions-using-the-registration-symbol-the-trademark-symbol-or-neither/>
2. Copyright Fair Use in the Land of Famous Potatoes (November 3, 2017)
<https://thetmca.com/copyright-fair-use-in-the-land-of-famous-potatoes/>

3. “Fastest Growing Brand” – Don’t Mix and Match Ad Claim and Substantiation (April 25, 2018)
<https://thetmca.com/fastest-growing-brand-dont-mix-and-match-ad-claim-and-substantiation/>
4. Healthy Holidays From the FTC: Reminders from the FTC to Keep Health Advertising Claims Healthy (December 8, 2015)
<https://thetmca.com/healthy-holidays-from-the-ftc-reminders-from-the-ftc-to-keep-health-advertising-claims-healthy/>
5. #HonestAds: A Wrap Up from the 2018 NAD Conference (September 26, 2018)
<https://thetmca.com/honestads-a-wrap-up-from-the-2018-nad-conference/>
6. “No beer flow” – NHL sues seller of Stanley Cup-themed beer cups for trademark infringement (August 7, 2018)
<https://thetmca.com/no-beer-flow-nhl-sues-seller-of-stanley-cup-themed-beer-cups-for-trademark-infringement/>
7. The Latest Influencer Advertising Tips from the FTC – When, How & Where to Make Effective Disclosures (September 18, 2017)
<https://thetmca.com/the-latest-influencer-advertising-tips-from-the-ftc-when-how-where-to-make-effective-disclosures/>
8. Dear Influencers: It’s the FTC, Again – FTC Issues 21 Follow-up Warning Letters (September 8, 2017)
<https://thetmca.com/dear-influencers-its-the-ftc-again-ftc-issues-21-follow-up-warning-letters/>
9. Ambush Marketing – World Cup 2018, 2019 and Beyond (June 15, 2018)
<https://thetmca.com/ambush-marketing-world-cup-2019-and-beyond/>
10. Sued for Retweeting – Yes, That Just Happened (September 27, 2017)
<https://thetmca.com/sued-for-retweeting-yes-that-just-happened/>
11. P. Diddy on Instagram – No Free Pass on Copyright Law (June 7, 2017)
<https://thetmca.com/p-diddy-on-instagram-no-free-pass-on-copyright-law/>
12. Trick or Tweet? Team Trump Gets Sued Over Skittles Twitter Pic (October 20, 2016)
<https://thetmca.com/trick-or-tweet-team-trump-gets-sued-over-skittles-twitter-pic/>
13. Don’t Let Your Super Bowl Promotion Get Sidelined (February 1, 2016)
<https://thetmca.com/dont-let-your-super-bowl-promotion-get-sidelined/>

For more information on Trademarks, Copyrights, and Advertising matters, see **Dorsey’s TMCA blog** at <https://thetmca.com/>.

Materials are Available on www.dorsey.com at <https://www.dorsey.com/newsresources/events/event/2018/10/corporate-counsel-symposium-2018-materials>

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Test Question:

Do You Like Chocolate?

- (A) Yes!!
- (B) Who Doesn't?
- (C) Yes, But Don't Tell My Kids
- (D) No But I Like Broccoli

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Blitz Bliss



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Prelaunch Considerations

- **TM Clearance – US Preliminary and Full Searches**
 - Also consider designs, acronyms, and taglines
 - Use investigation to confirm non-use
- **Marking – TM versus ®**
- **Filing basis: Intent-to-Use versus Use**
- **Product configuration trade dress protection**
- **Copyright protection**

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Which Application Can We File Before the Launch?

- (A) Trademark Application for Blitz Bliss
- (B) Trademark Application for the Football Shaped Chocolates
- (C) Copyright Application for the Package Design
- (D) All of the Above

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Advertising Claims

- Advertisers are responsible for **all reasonable interpretations** of their claims, not simply the messages they intended to convey
- Advertisers should have a **reasonable basis** for advertising claims **before** they are disseminated
- The standard is reasonable, **scientific evidence** that is sufficiently **reliable**

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Claims Must Fit the Data

- Independent lab test confirmed the following

	Broccoli	Blitz Bliss Chocolates
Vitamin A	18%	36%
Vitamin B12	0%	30%
Calcium	7%	20%
Protein	4.2g	25g

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Which Claim Fits Our Data?



- (A) Eat chocolate for dinner
– Blitz Bliss is better for you than broccoli

- (B) The most fun protein supplement on the market –
Blitz Bliss chocolate is also packed with vitamins
and more protein than broccoli

- (C) Ounce per ounce, Blitz Bliss beats broccoli with
more vitamins, minerals and protein

- (D) Both B and C

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The Television Commercial

- Will use “Thriller” by Michael Jackson
- Candies will do the “Thriller” dance
- Some candies may wear the iconic red and black jacket or a shimmering glove

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Which Licenses do we Need to Use the Music in the Commercial?

- (A) Synchronization and master use license
- (B) Mechanical license
- (C) Grand rights license
- (D) Both A and B

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Music Licensing

- **Two separate copyrights to consider**
 - the song
 - the sound recording
- **Synchronization license**
 - required to pair a piece of music with visual images
 - benefits the songwriter or owner of copyright in the song
- **Master use license**
 - required if licensee wishes to use the master recording of the song
 - benefits the owner of the copyright in the sound recording of the song



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Other Licenses Needed for “Thriller” Commercial

- **Choreography license**
 - copyright protection applies to choreographic works that are fixed in a tangible medium of expression (17 U.S.C. § 102(a)(4))

- **Right of publicity license**
 - The right of a person to control use of his/her name, likeness, persona, or other characteristics in commercial settings
 - Only 38 states recognize common law right and 22 have statutes
 - The right is not descendible to heirs in some states (e.g., New York)

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Employee Social Posts



Liz Buckingham

@LizBuckingham5



So excited about the launch of Blitz Bliss! Best chocolate ever!!



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FTC Guidance



“Put yourself in the reader’s shoes. Isn’t the employment relationship something you would want to know before relying on someone else’s endorsement? Listing your employer on your profile page isn’t enough. After all, people who just read what you post on a review site won’t get that information.”

The FTC’s Endorsement Guides: What People Are Asking

<https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>

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Employee Social Posts Continued ...

- **Company Policy: No positive reviews about our products without clear disclosure**
- **Company Monitoring**
- **Why #employee and #DWCandy_Employee might not work**



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Proper Employee Disclosure



Liz Buckingham
@LizBuckingham5

Happy to share that my company launched Blitz Bliss chocolates just in time for Halloween #sogood #BlitzBliss



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Influencers



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Influencers



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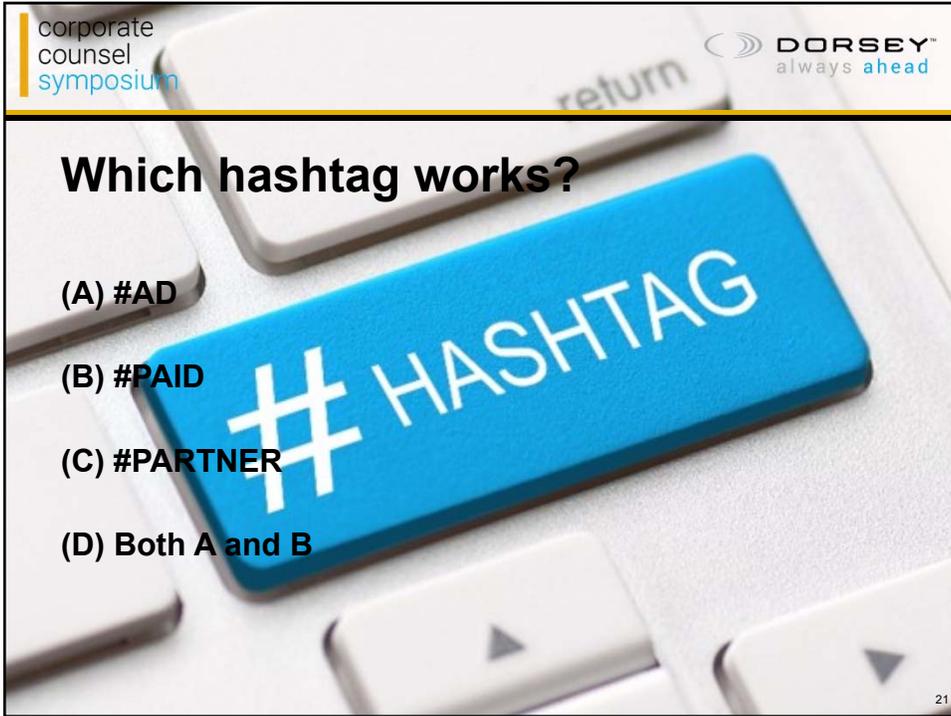
Influencers more ...



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Which hashtag works?

- (A) #AD
- (B) #PAID
- (C) #PARTNER
- (D) Both A and B



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We Have a Mobile App!



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User Generated Content “UGC”



Your Average Consumer
@ImNotaDogorAml

Bliss Blitz Chocolates are so good! They taste great and they cured my migraines - I guess I wasn't getting enough protein #blissblitz #ChocolatelsGood



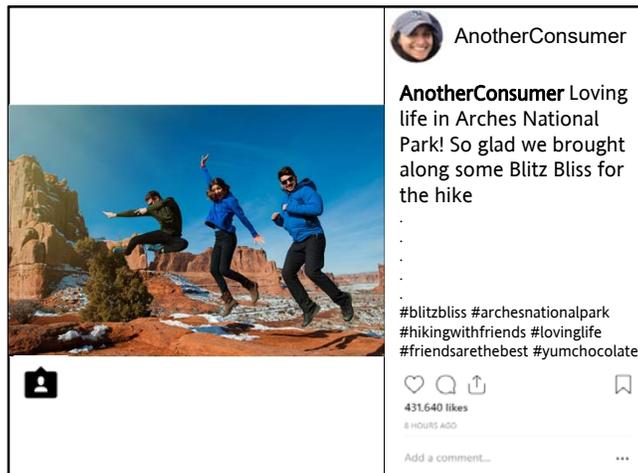
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Should We Retweet?

- (A) Yes – If we verify the accuracy of the statement with the consumer’s doctor.
- (B) Yes – If we have a study showing that consuming protein can cure migraines.
- (C) No, but we should ask that the Tweet be removed because the FTC could charge us with false advertising and the consumer got our trademark wrong.
- (D) No.

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More UGC



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What Can We Do With User Generated Content (“UGC”) ?

- **Potential Actions:**
 - Retweet/share
 - Like
 - Respond
 - Post on the Dorsey Candy Co. Social Channels or elsewhere
- **Issues to Consider:**
 - Advertising Substantiation
 - Copyright
 - Right of Publicity
 - Releases
 - Differentiating UGC from other Content

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Comparative Advertising & Puffery



- BLITZ BLISS – Better than KISSES or HUGS. 🍫
- BLITZ BLISS – America’s favorite chocolate! #WeAreNumber1
- BLITZ BLISS – The best chocolates on planet Earth.

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The Big Game Giveaway

- Trademark Considerations
- Sweepstakes vs. Contests vs. Lotteries
- Official Rules
 - #BBBigGameGiveaway
- Registration and Bonding
- Privacy Concerns