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Fashion Law 2018

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Smart In
Your World



Hot Topics

- Omni-Channeling and CRM
- AI, IoT and VR
- Data Collection and Privacy
- False pricing



Omni-Channeling and CRM

Omni-Channel

- Macy's is implementing Apple's iBeacon technology.
 - Will let customers receive personalized discounts, rewards and recommendations on their mobile phones when they visit Macy's stores.
- In 2013, Nordstrom tested technology that allowed it to track customers' movements by following the wi-fi signals from their smartphones.

Omni-Channel

- Omni-channel: tracking consumers across all brand platforms through data integration.
 - Consumers no longer have single brick and mortar point-of-contact with brands.
 - Companies collecting data from consumers in brick and mortar stores, websites, mobile apps, social media, etc.
- Example Privacy Policy disclosure:
 - “We collect information from our website, our mobile applications, our stores, and certain third parties. We may combine all the information we collect and we may disclose this information within the corporate family.”



Omni-Channel and In-store Tracking

- Brands can easily track online shopping patterns, but what about in-store shopping?
- In-Store Tracking: Using “mobile location analytics” retailers can use mobile phones to track customers in brick and mortar stores.
- Tracks repeat customers, customer shopping patterns, check-out waiting time, optimal store layout, etc.
- Could allow retailers to see a customer’s purchase history as soon as they walk in.



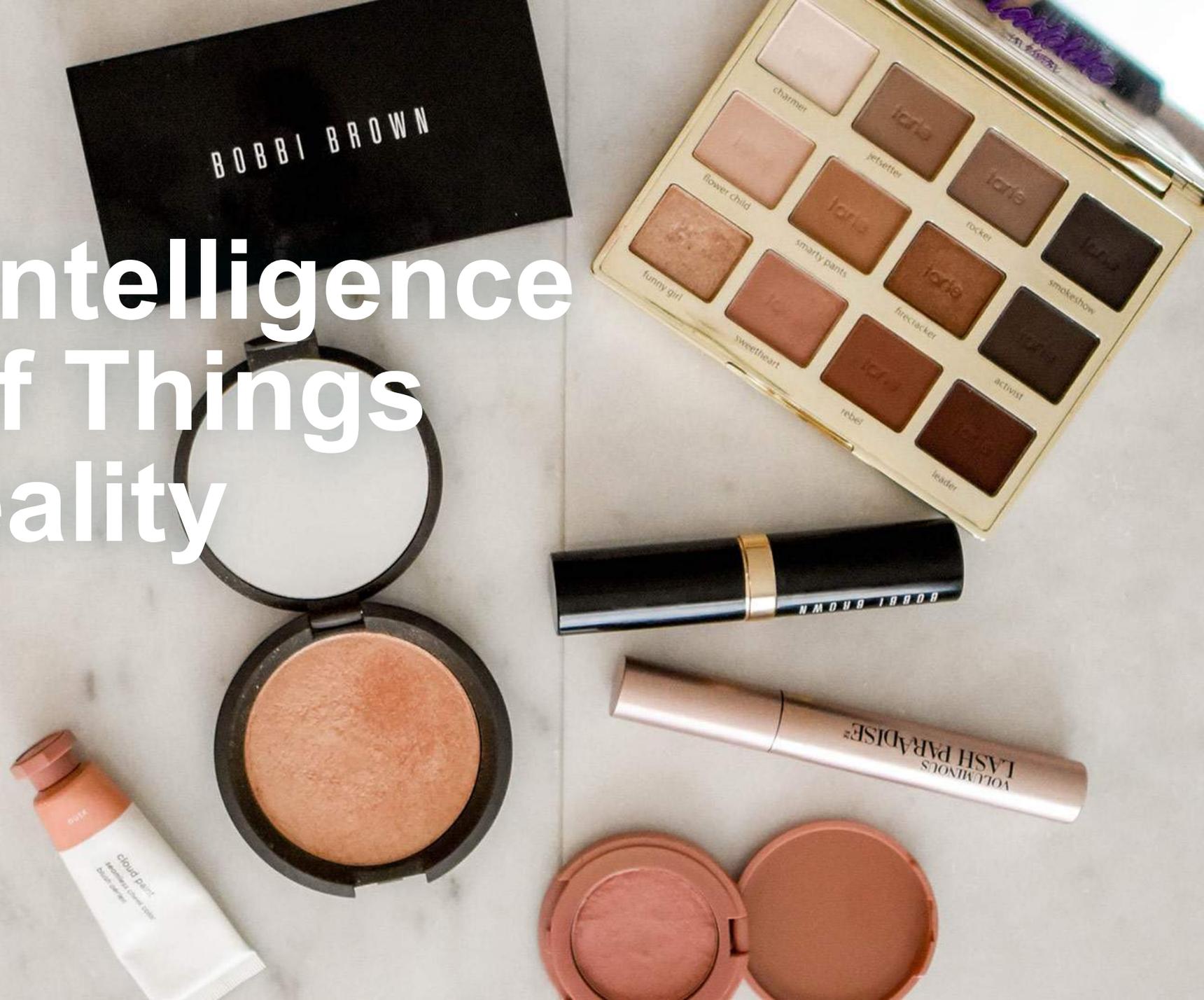
Omni-Channel and In-store Tracking

- Industry Code of Conduct attempts to set limits on use of in-store tracking.
 - Requires conspicuous in-store notice to consumers
- Example Privacy Policy Disclosure:
 - “We may collect certain non-personally identifiable information from you when you visit our stores. This may include your mobile device’s unique device identifier which can be collected anonymously.”



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Artificial Intelligence Internet of Things Virtual Reality



AI, IoT, and VR

AI is Radically Changing Retail

- Supply and distribution were often based on experience and intuition, resulting in surplus and big discounts
- AI and the IoT allow the use of bots to crawl websites and social media and to determine where they are selling, price points, and trends
- Pricing, discounts, client list, and inventory used to be trade secrets

AI, IoT, and VR

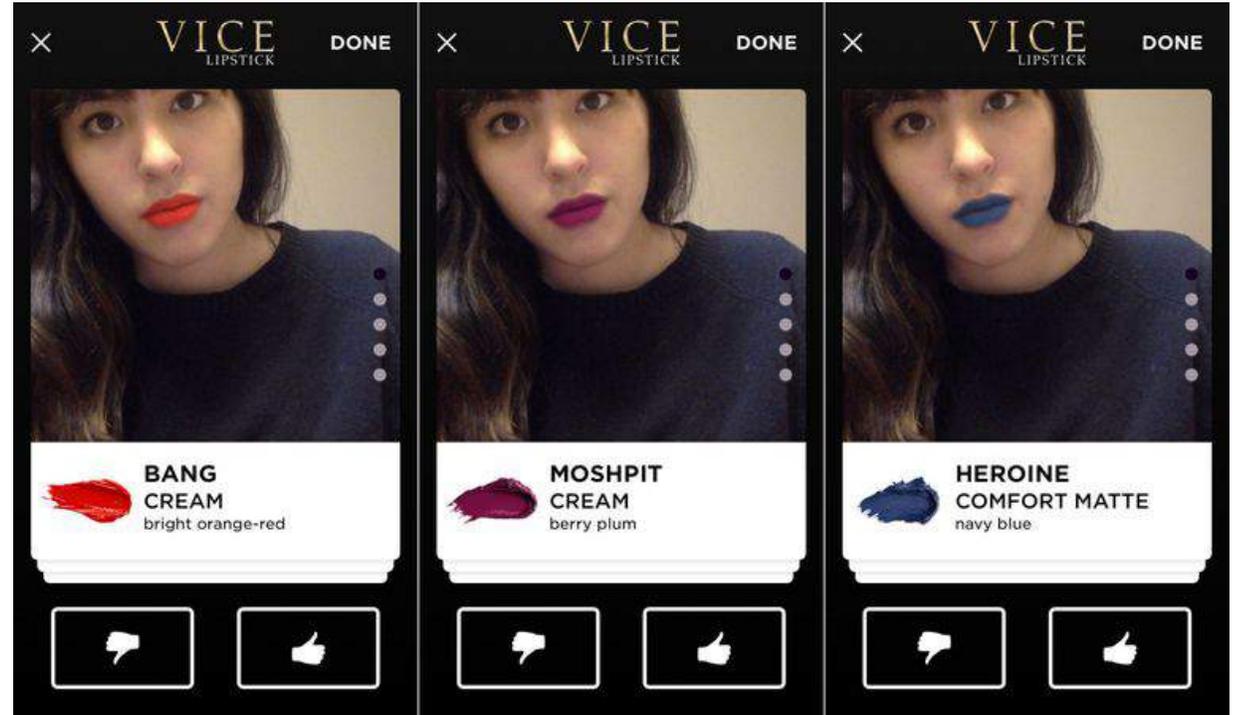
Amazon and Apple

- Amazon uses bots to determine discounts and then automatically price match
- Amazon Echo Look device can take pictures of the owner and offer style suggestions
- The iPhone X will allow retailers to use 3D sensors to map a customer's body and then provide a rendering of the products used on their bodies

Virtual Fitting Rooms



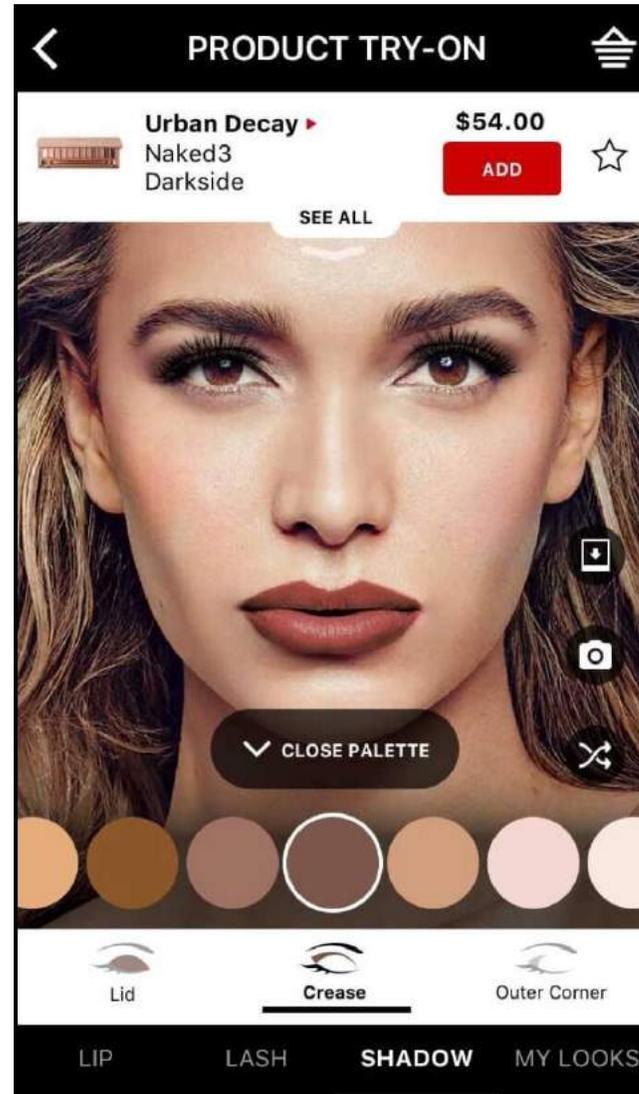
MEMOMI'S DIGITAL MIRROR



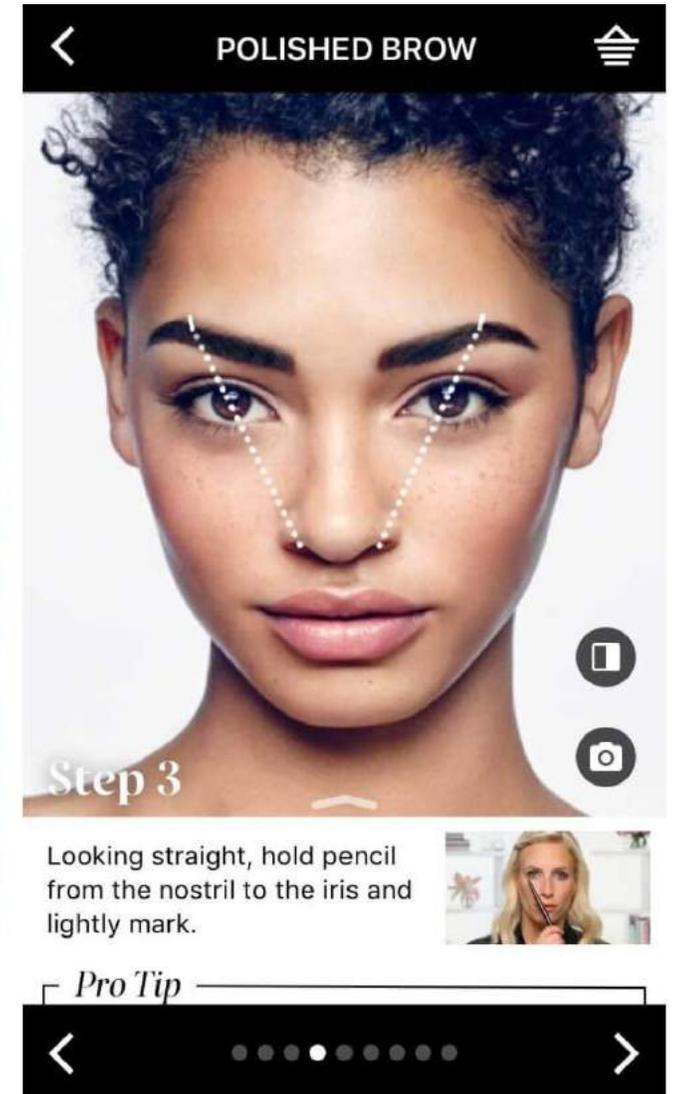
URBAN DECAY VICE LIPSTICK APP

What is a virtual fitting room?

- As e-commerce continues to grow, retailers are having to handle rising costs related to returns
- Retailers are using virtual reality to create virtual fitting rooms and ways to try on products



SEPHORA VISUAL ARTIST



What is a virtual fitting room?

- Consumers can enter basic measurements to create a virtual mannequin adjusting to fit specific dimensions
- Avatars can also be personalized to show skin tones and hair styles

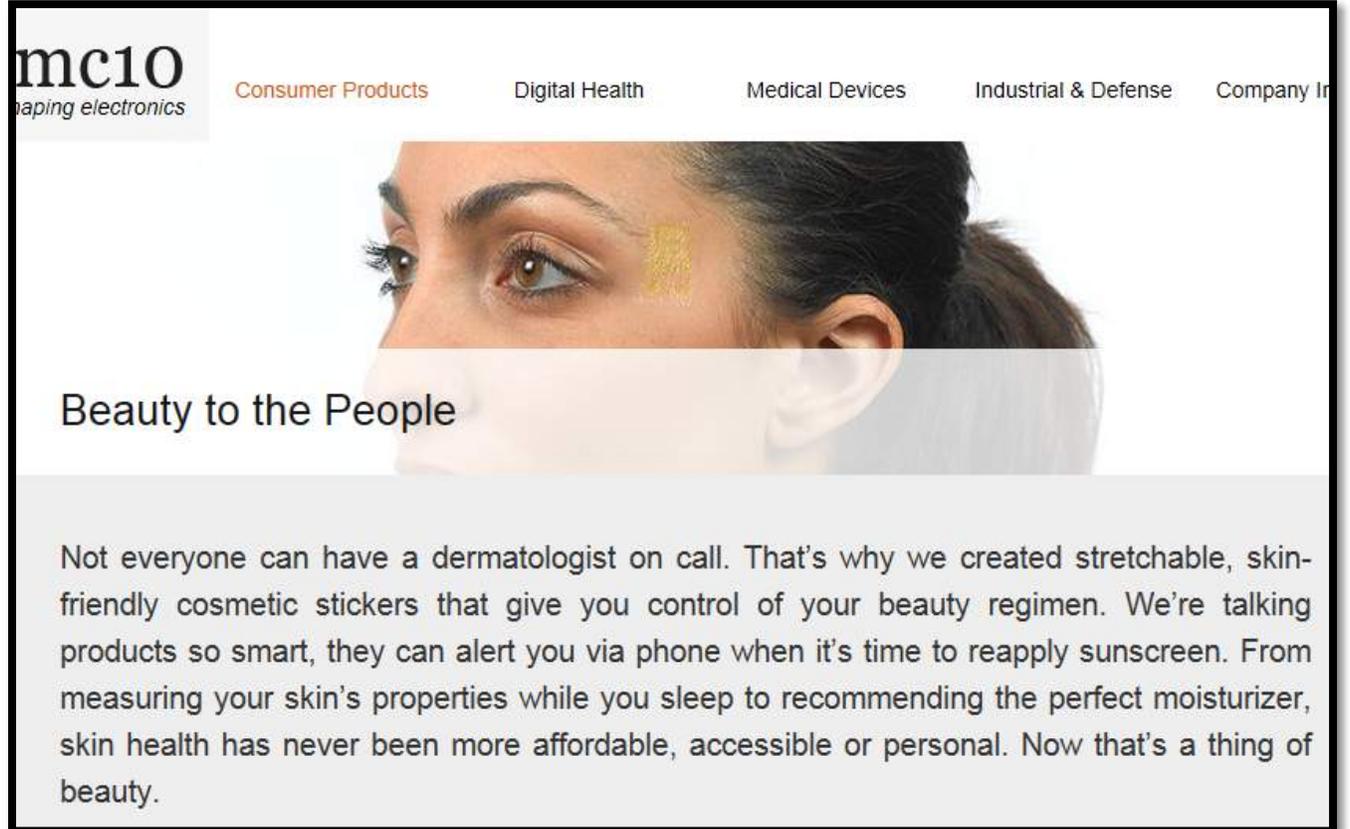


MODIFACE

Other AI areas

The Internet of Things

- Connected Cosmetics
 - “Cosmetic stickers” send sun exposure data to your smartphone so you know when its time to reapply.



mc10
shaping electronics

Consumer Products Digital Health Medical Devices Industrial & Defense Company Info

Beauty to the People

Not everyone can have a dermatologist on call. That's why we created stretchable, skin-friendly cosmetic stickers that give you control of your beauty regimen. We're talking products so smart, they can alert you via phone when it's time to reapply sunscreen. From measuring your skin's properties while you sleep to recommending the perfect moisturizer, skin health has never been more affordable, accessible or personal. Now that's a thing of beauty.

AI, IoT, and VR

Privacy and Data Collection

- What consents are you gathering on the front end from consumers?
- Is that data being stored for a consumer to use again?
- What security are you using to protect it?
- Where are you sharing it?
- And I guarantee your marketing people will want to use it to see how their products are being viewed
- Watch out for biometrics information: numerous class actions have been filed under the Illinois Biometric Information Privacy Act alleging improper collection of facial geometries in photos without notice and consent (see, e.g., *Norberg v. Shutterfly, Inc.*, No. 1:15-cv-5351 (N.D. Ill.))

AI, IoT, and VR

Trade Secrets and Confidentiality May Be Lost

- Competitors can see what consumers are posting and what is popular
- What distributors you are allowing to discount
- What pricing you are offering in different regions

Intellectual Property and Licensing Issues

Copyrights

- The rendering of the products and how they virtually fit will have to be approved by the Brand and who will ultimately own those images.

Trademarks

- Brand will have to consent to use of trademarks and platform may require the ability to license other third parties
- But Vendors can also easily suggest another competitors brand

Warranty Issues

Returns and Warranty Issues

- Ultimate product needs to look like it does in VR or you could have issues, especially if the product is specifically designed for the user.
- Return and Warranty policies must be conspicuously posted

FTC Comment on Internet of Things

The FTC recently addressed privacy/data security concerns and recommended

- Providing consumers with information related to security on their devices
- Providing clear pre-sale communications about security support period for products
- Adopting a uniform notification method about security updates that are not made automatically
- Providing real-time notifications about when support will end

False Discounts and False Advertising



Sales and Discounts

- General Rule: Companies advertising a sale or discount should ensure the regular price is offered for approximately 30 days.
- Federal Trade Commission
 - The advertised “regular price” must be a bona fide price.
 - Bona fide price: the price at which a product is openly and actively offered for sale, for a reasonably substantial period of time, in the regular course of business, honestly and in good faith – and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be made. 16 CFR 251.1(b)(2).
 - The FTC defines a “reasonably substantial period of time” as approximately 30 days.
- California
 - Even when the advertised “regular price” was an actual price, California law prohibits advertising a former price unless it “was the prevailing market price ... within three months [prior to] the advertisement” or unless the date of the “former price” is clearly stated in the advertisement. Cal. Bus. & Prof. Code §17501. Enacted 1941.

Sales and Discounts: Outlets

- Havaianas
 - Havaianas advertised merchandise with a price tag that sets forth a fictitious reference price and posted large signage immediately next to the items for sale that states ___% Off.
 - Havaianas outlet merchandise is created specifically for Havaianas outlets and is never offered for sale, nor sold, at the reference price.
- Kate Spade
 - Kate Spade advertised merchandise with a price tag that sets forth a fictitious reference price and posted large signage immediately next to the items for sale that states ___% Off.
 - Kate Spade outlet merchandise is created specifically for Kate Spade outlets, and is never offered for sale at the reference price.
- Tommy Hilfiger
 - Tommy Hilfiger advertised merchandise with a price tag that sets for a fake reference price, and posted 40% off next to the reference price.
 - Tommy Hilfiger outlet merchandise is created exclusively for Tommy Hilfiger outlets and is never offered on Tommy.com nor in non-outlet stores.
- Barneys New York
 - Barneys advertised its merchandise with a price tag that sets forth a fictitious reference price, which appears with a ~~striketrough~~ followed by the discounted price.
 - Barneys outlet merchandise is never offered for sale, nor actually sold by Barneys at the represented reference price.
- Saks off Fifth
 - Saks advertised its merchandise with a price tag that sets forth a fictitious reference price and represented that customers would receive a ___% Off.
 - However, the plaintiff in this case noticed the tag under Saks' reference price tag reflected a different original price.
 - Plaintiff contacted Saks, but the representative told him that the store has the right to sell items at any price it chooses.

Pricing

- Rule: Price reductions must be based upon clearly disclosed basis of comparison.
- Issues:
 - Misleading Comparative Pricing
 - Consumer Misconception of Outlets

Outlet

Misleading Comparative Pricing

- Use of “Compare At” or “MSRP” believed to indicate that products were originally sold at such price.



Suggested approach

- To Address Misleading Comparative Pricing
 - Do not list a comparison price OR list it as a “Value”
 - If a comparison price is listed, ensure that the products were originally sold at that price
- To Address Consumer Misperception: Signage regarding items sold at outlet stores.

NOTICE

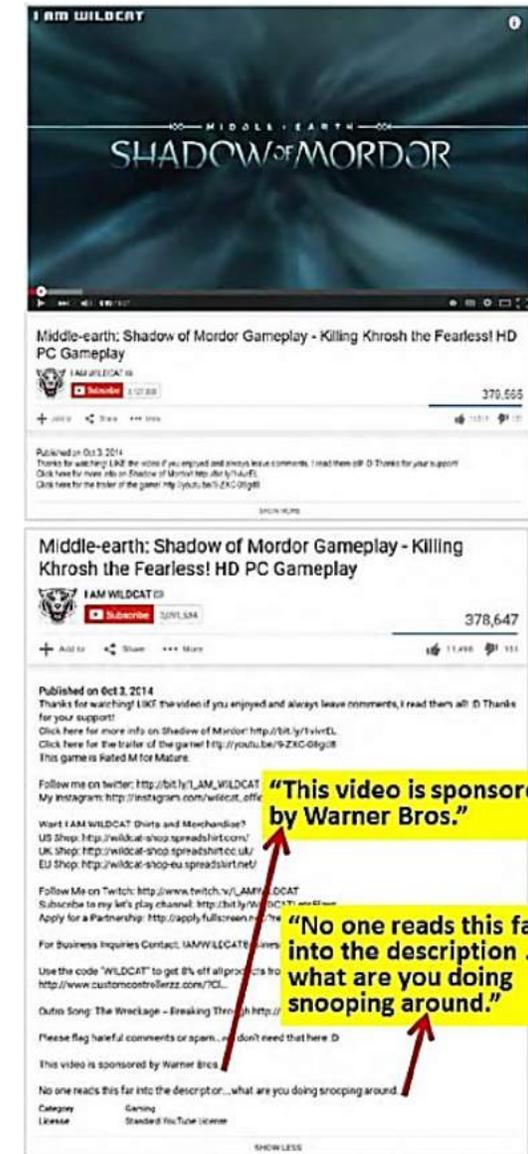
Items sold at X Store are made specifically for this outlet and were never sold at our non-outlet stores. The “value” listed is the what we have determined to be the value of the item and does not indicate a price at which the product was previously sold. Please see sales associate for questions.

On-line Issues

- Amazon – compared to highest price sold instead of market.
- Sears On-line – original price on washers deceptive since that price was never offered at listed price.
- Art.com – for having a perpetual sale that misled customers into thinking they are getting a discount.
- Hautelook.com and parent Nordstrom – inflating price of vintage watches.
- Explain how you determined the pricing, but be careful that it is not used against you.

Advertiser – Influencer Relationship: Warner Bros.

- Warner Bros. settled FTC charges that it deceived consumers by failing to adequately disclose that it paid e-sports influencers to develop and post positive gameplay videos on YouTube and social media, for the new release of Middle Earth: Shadow of Mordor.
- The disclosures were placed in the description box and only visible if consumers clicked the “show more” button.
- FTC requires:
 - Disclosures to be recorded in the videos themselves.
 - Companies to have reasonable programs in place to keep track of what others are saying about their products on social media.



False Advertising: Jessica Alba's The Honest Company

- The Honest Company settled a class action alleging the company's claim that its laundry detergent and dish soap is "Honestly free of SLS" (sodium lauryl sulfate) was false advertising as the products contained 14% concentrations of SLS.
 - The Honest Company stated that it uses SCS (sodium coco sulfate) which does not contain SLS. However, studies conclude SCS does contain SLS.
- A class action was also filed against The Honest Company alleging that its sunscreen did not protect skin from burning.
- The Honest Company subsequently settled 4 consumer class actions.

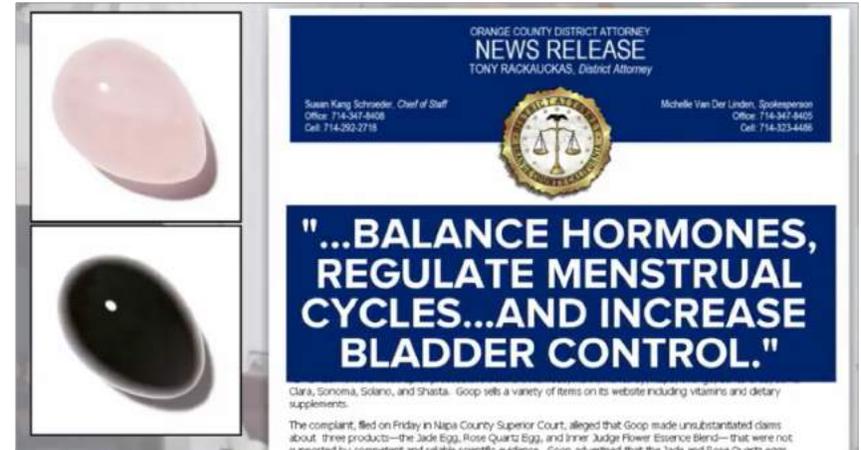
False Advertising: MillerCoors v. Anheuser-Busch

- MillerCoors brought false advertising claims against Anheuser-Busch for its Super Bowl ad campaign which attacked MillerCoors for using corn syrup to brew its beer and implied that consumers would consume high-fructose corn syrup.
- MillerCoors said during the fermentation process, corn syrup is broken down and consumed by yeast so none of it remains in the final product.
- Anheuser-Busch said the advertisements are truthful because MillerCoors' own website, which listed ingredients, is the source Anheuser-Busch cited.



Public Watchdogs: Gwyneth Paltrow GOOP

- Truth in Advertising filed a complaint with the California Food, Drug, and Medical Device Task Force requesting an investigation into Goop Products:
 - Jade eggs – increase hormonal balance and prevent uterine prolapse
 - Crystals – treat infertility
 - Perfume – improves memory and works as antibiotics
 - Essential oils – help with chronic issues like anxiety, depression and migraines
 - Flower essence – clears, stabilizes and soothes emotional trauma
- GOOP was fined \$145,000.
- Paltrow said she is sometimes baffled by the unconventional products and practices her brand promotes.
 - When asked about the practice of “earthing” (walking barefoot) she said “there’s some sort of electromagnetic thing that we’re missing. It’s good to take your shoes off in the grass.”



Public Watchdogs: Gwyneth Paltrow GOOP

– After attempting to defend her products Paltrow conceded:

“I don’t know what the f*** we talk about!”

