FTC Continues to Scrutinize Social Media Influencer Programs

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This week, as part of its ongoing focus on influencer programs, the Federal Trade Commission (FTC) settled charges against Warner Brothers Home Entertainment, Inc. regarding its use of such a campaign to market the video game *Middle Earth: Shadow of Mordor.* This investigation of Warner Bros. was brought under the FTC Act, which prohibits deceptive marketing, and requires that endorsers "clearly and conspicuously" disclose any "material connection" to the brand they are endorsing.

In late 2014, Warner Bros. and its advertising agency, Plaid Social Labs, LLC, hired "influencers" (i.e., individuals with large social media followings) to create videos and post them on YouTube, and promote the videos on Twitter and Facebook. One of the influencers hired for the program, PewDiePie, is the most-subscribed individual creator on YouTube, with more than 46 million followers. Warner Bros. paid each of the influencers from a few hundred to tens of thousands of dollars for the videos, in addition to providing free copies of the game. Under these contracts, Warner Bros. had the ability to review and approve the videos.

The FTC alleges that Warner Bros. failed to require sponsorship disclosures clearly and conspicuously in the video itself, where viewers were likely to notice them. Instead, Warner Bros. instructed influencers to place the disclosures in the description box below the video. Warner Bros. also required the influencers to include other information about the game in the description box, so most of the disclosures appeared "below the fold," visible only if consumers clicked on the "Show More" button. Additionally, when influencers embedded the YouTube videos on Facebook or Twitter, the description field (and thus, the disclosure) was completely invisible. Some of the disclosures also only mentioned that the game was provided free, and did not disclose the payment.

This continues the FTC's focus on influencer programs with insufficient disclosures. In March, the FTC settled charges against national retailer Lord & Taylor related to its use of an Instagram influencer program with insufficient disclosures, where the influencers were paid and provided with a free dress. The influencers were required to make a post with the hashtag #DesignLab, and tagging @LordandTaylor, but were not instructed to disclose the payment or the free goods. At the same time, Lord & Taylor placed a paid article in Nylon, an online magazine, and purchased a paid placement on the Nylon Instagram account. Neither the post nor the article indicated they were paid advertising.

Likewise, in September 2015, the FTC settled charges against Machinima, an online entertainment network. Microsoft, through its advertising agency, hired Machinima to promote its Xbox One gaming console and video games. The FTC alleged Machinima gave pre-release versions of the console and games to influencers, as well as payments of tens of thousands of dollars in some cases, in exchange for their uploading and posting endorsement videos. Machinima did not require that the influencers disclose the sponsorship.

In each of these cases, the FTC entered consent agreements that require the brands to closely monitor and review its influencer content for appropriate disclosures, and terminate influencers who fail to accurately and conspicuously disclose their paid endorsements. The brands must keep records of their compliance and the FTC may review them at any time—with penalties of $16,000 per violation.

As marketing teams continue to try to reach consumers in new and creative ways, the FTC continues to signal its intention to closely scrutinize each development. As these methods evolve, brands should be conscious of their obligations to ensure appropriate disclosures in every format and to monitor for compliance.

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