

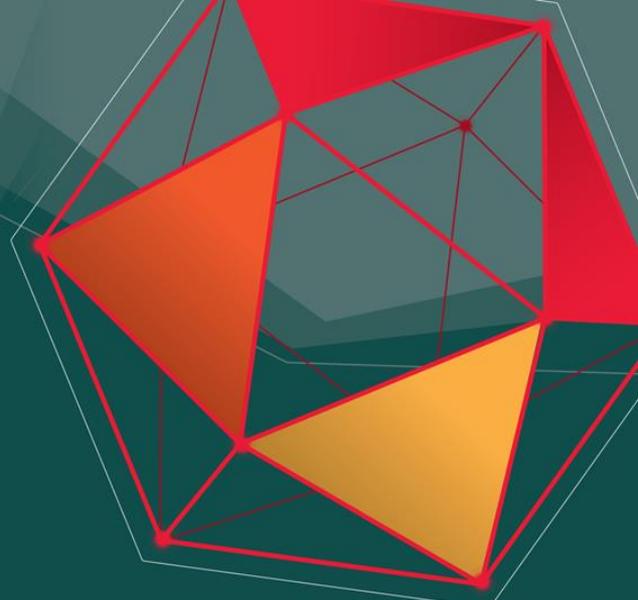
GDC

Social Media Influencers and Non-traditional Marketing: Legal Pitfalls and Loopholes

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Debevoise
& Plimpton



What We Are Covering

- Social media influencers and non-traditional marketing =
 - any endorsement
 - any person
 - explicit or implicit
 - product or service
- Reviewing practices that carry a high risk of legal repercussions, and concrete steps to substantially reduce legal risk.

Core Rule: FTC Endorsement Guides

“If there is a connection between an endorser and the marketer that consumers would not expect and it would affect how consumers evaluate the endorsement, that connection should be [fully] disclosed.” - *FTC’s Endorsement Guides: What People Are Asking*. See also 16 C.F.R. Part 255.5

What This Means for You

- Social media influencers: if you create content related to a game or company that paid you, gave you a gift, or that you are materially connected to, you need to properly disclose that connection.
- Game developers and publishers: if you pay or otherwise create a material connection with a social media influencer, you need to provide guidance instructing the influencer to properly disclose the material connection, and monitor your influencers to ensure guidelines are followed.

FTC Enforcement Action: Material Connection



Tom 🙌 ✓
@ProSyndicate

Follow



Bruh.. i've won like \$8,000 worth of CS:GO Skins today on @CSGOLotto I cannot even believe it!

4:34 PM - 30 Mar 2016

75 Retweets 960 Likes



48

75

960

Hypothetical

- Game developer Shady Corp.
- Releases “Drawn Out Chess” for mobile and PC.
- Game is the classic game of chess, monetized by selling skins, or “chess sets,” to users.
- Game just launched, and Shady Corp. starts a marketing campaign.

Which posts need a disclosure?

- Posts about the game from @ShadyCorp  account.
- CEO posts a  video on his channel.
- Sending free copies of the game to  **Polygon** and  **IGN**.
- Sending free copies of the game to  streamers.

Takeaways

- Social media posts clearly from the product's creator do not need a disclosure, but the connection must be obvious to a substantial majority of viewers.
- Receiving a free copy of a game, or any thing else of value, creates a material connection that needs to be disclosed.
- Professional critics do not need to disclose if the only thing of value they receive is a free copy of the game.
- The FTC does not consider Twitch streamers, YouTubers, and most other social media influencers to be professional critics.

Shady Corp. Attempts to Boost Reviews

- “Drawn Out Chess” has had decent sales but is receiving mediocre reviews in the relevant app stores.
- Shady Corp. creates an in-game display prompt asking users to review the game.
- Are any of these examples an issue?



Shady Corp. Attempts to Boost Reviews

Enjoying Drawn Out Chess?



Yes, rate it now!

No, send feedback.

Dismiss

Five game **hot streak!** Take a moment to rate Drawn Out Chess before you get back to dominating?



No thanks!

Yes!

Takeaways

- Giving any compensation to users for reviewing your game, even in-game aesthetic items that cannot be sold or traded, creates a material connection and must be disclosed.
- The FTC has not brought enforcement against applications using divergent prompts which redirect dissatisfied users away from review pages, but be careful if you adopt this approach.
- Creative timing of review prompts to appear when players are likely enjoying their user experience is a lower risk alternative to divergent prompts and still has the effect of promoting better ratings.

Disclosures



Tina the Twitch Streamer

@ShadyStrategyGamer



Follow

Love my new pirate chess set in Drawn Out Chess! I'll be streaming it all day [here!](#) #arr #oldschoolgamer #partner #streaming



2:48 PM - 6 May 2017

Takeaways

- Disclosures can take many forms—even hashtags.
- The FTC has only approved a limited number of hashtags, such as: "#ad," "#sponsored," "#[Your Company's Name]_Ambassador" or "#[Your Company's Name]_Partner."
- The FTC has specifically stated that the following hashtags are insufficient disclosures: "#sp," "#spon," "#collab," "#partner," "#consultant," "#ambassador," and "#Thank_You_[Your Company's Name]."
- Disclosures lost in a sea of hashtags are insufficient. If a hashtag is used for a disclosure, it should be the first hashtag.

FTC Enforcement Action: Disclosures

Published on Sep 4, 2014
Get Shadow of Mordor: <http://bit.ly/SoMInfl>
SoM YT: <http://youtube.com/shadowofmordor>
Comment: #OrcPoods
Get awesome games: <http://www.g2a.com/PewDiePie>

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Get My Headphones ► <http://rZR.to/QhxzU>

Game: Middle-earth: Shadow of Mordor
2014
Explore in YouTube Gaming

Category: Gaming
License: Standard YouTube License

SHOW LESS

Comments are disabled for this video.

FTC Finding

- “Warner Bros. instructed influencers to place the disclosures in the description box appearing below the video. Because Warner Bros. also required other information to be placed in that box, the vast majority of sponsorship disclosures appeared ‘below the fold,’ visible only if consumers clicked on the ‘Show More’ button in the description box. In addition, when influencers posted YouTube videos on Facebook or Twitter, the posting did not include the ‘Show More’ button, making it even less likely that consumers would see the sponsorship disclosures.” – Federal Trade Commission Website
- Complaint mentioned the amount of payment to influencers including PewDeePie, but did not object to fact total payment was not disclosed.

Disclosures

The image shows a screenshot of a Twitch channel page. The top navigation bar is purple and contains the Twitch logo, links for 'Browse', 'Get Desktop', and 'Try Prime', and a search bar. Below the navigation bar, the channel's statistics are displayed: 'Videos 325', 'Clips', 'Collections', 'Events', 'Followers 575,593', and 'Following 191'. There are 'Follow' and 'Subscribe' buttons. The main content area features a large video player showing a chessboard with several silver chess pieces. The video player has a red heart icon, a viewer count of '4,106', and a total view count of '35,458,890'. There are also 'Share' and a menu icon buttons. On the left side, there is a sidebar with 'Featured Channels' and 'Online Friends' sections. The 'Featured Channels' section lists 'TwitchPresents', 'AlpacaAsh', and 'NairoMK'. The 'Online Friends' section has a circular icon representing friends.

Takeaways

- Disclosures in videos should appear at the very beginning of the video.
- Including both an audible and written disclosure is the lowest risk practice.
- If a video is part of a stream, the video needs periodic or constant disclosures.
- FTC hasn't yet pronounced how often “periodic” needs to be.
- A constant disclosure can be achieved by having a text disclaimer within the video itself at the top or bottom.
- If a constant text disclosure is used, at no point in the video should it be obscured by advertising.

FTC Enforcement: Monitoring



Microsoft

Hired to Run Marketing Campaign for XboxOne



Starcom MediaVest™
GROUP

Hired to Run Social Media Influencer Campaign



Hired to Create Positive XboxOne Videos



“Microsoft had a robust compliance program in place when the Xbox One campaign was launched, including specific legal and marketing guidelines concerning the FTC's Endorsement Guides.” - FTC

“Microsoft and Starcom took swift action to require that Machinima insert disclosures into the campaign videos once they learned that Machinima had paid the influencer and that no disclosures had been made.” - FTC

Takeaways

- Regular, robust monitoring is a best practice.
- If non-complaint posts or videos are identified, they should be corrected to add a compliant disclosure or taken down.
- You can delegate marketing or monitoring, but delegation is neither required nor an excuse to avoid liability.
- FTC recommendation: delay payment to, or publication by, the influencer until after the post is reviewed for compliance.

Monitoring



Takeaways

- No official guidance on how long after an event that establishes a material connection an influencer must still disclose.
- Period likely indefinite if an influencer received a game or other product for free without any corresponding obligation.
- Period likely limited to length of contractual obligation if one imposed.
- Very low risk for companies if posts featuring the game or other product appear after contractual term without a disclosure; more risk for influencers themselves but no risk for non-commercial speech.
- Restrictions on content in social media beyond the promotional period may be useful to preserve brand image, but also extends the period in which disclosures are required.

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