Practice Update

FTC Acts Against Warner Bros.' YouTube Promotion Campaign

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Last week, the FTC announced an agreement containing a consent order, subject to final approval, resolving its claims against Warner Bros. Home Entertainment Inc. (Warner Bros.) for the company's misleading use of social media influencers to promote one of its video games before its official release in violation of Section 5(a) of the Federal Trade Commission Act. This represents another example in a series of recent enforcement actions brought by the FTC against companies for their misleading use of native advertising campaigns to promote, market and/or advertise their products. For example, the FTC brought an action against retailer Lord & Taylor for its alleged misleading and deceptive use of a native advertising campaign, utilizing Instagram fashion influencers and an online magazine to market–and ultimately sell-out–a dress from one of its fashion lines.

According to the FTC's Complaint against Warner Bros., in 2014, Warner Bros. hired an advertising agency, Plaid Social Labs, LLC (Plaid Social), to promote its soon-to-be-released video game called "Middle Earth: Shadow of Mordor" (*Shadow of Mordor*). Complaint, ¶ 4. As part of a coordinated social media campaign utilizing YouTube videos, which resulted in 5.5 million views by consumers, Warner Bros., through Plaid Social, hired videogame

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enthusiasts to post gameplay videos on YouTube featuring *Shadow of Mordor*. *Id.*, ¶¶ 5, 13.

Under this "YouTube Influencer Campaign," the gaming influencers were given free access to a pre-release version of the game and paid hundreds to tens of thousands of dollars, and in exchange, their YouTube videos became Warner Bros.' property as "work made for hire" products and/or Warner Bros. was deemed the author and exclusive owner. *Id.*, ¶¶ 5-6.

In addition, the Complaint alleges that the gaming influencers had to meet certain of Warner Bros.' conditions and requirements in order to be compensated for their sponsored videos. Specifically, Warner Bros. required, *inter alia*, that the videos feature *Shadow of Mordor*, have "strong verbal call-to-action to click the link in the description box", "promote positive sentiment about the [game]", and place specific written text in the "description box" that appears beneath the video portion of the web page, including an "FTC disclaimer disclosing that the post is sponsored." *Id.*, ¶¶ 7-8. The gaming influencers were also required to post on Facebook or Twitter to support their videos. *Id.* at ¶ 7.

According to the Complaint, the vast majority of the gaming influencers did not include any sponsorship disclosures in the gameplay videos and Warner Bros. did not require them to do so and, instead, "only placed their sponsorship disclosures 'below the fold' in the description box." The problem, as alleged, is that the disclosures contained in description box below the video is not visible to consumers without having to scroll down or click on a link for other information about the game. *See* Complaint, ¶ 9. Consequently, the FTC alleged that consumers were "unlikely to learn that the videos were paid promotions." *Id.*

Moreover, the FTC alleged that certain influencers failed to disclose that they were being paid to post

the videos and that, in one instance, Warner Bros. approved a video with an insufficient disclosure. *Id.*, ¶¶ 11-12. Further, with regard to the required Facebook and Twitter posts, the FTC alleged that "consumers were even less likely to see the required sponsorship disclosures because such posts did not include the Show More button." *Id.*, ¶ 10.

The FTC asserted two claims against Warner Bros.

- Count I alleges that Warner Bros. made false claims of independent reviews by representing, expressly or impliedly, that the YouTube videos of the game "reflect[ed] the independent opinions or experiences of impartial video game enthusiasts" when, in reality, the videos were paid promotions of the game as part of a social media advertising campaign. Complaint, ¶¶ 14-15.
- Count II alleges that Warner Bros. engaged in the deceptive failure to disclose a material connection between endorsers and seller because the YouTube videos "failed to disclose or disclose adequately that these individuals received compensation, including both a free game and monetary payment, to produce and disseminate the videos" and that this fact "would be material to consumers in their decision" to purchase the game. *Id.*, ¶ 16.

In the consent Decision and Order issued by the Federal Trade Commission, it was ordered, *inter alia,* that in connection with an "Influencer Campaign", Warner Bros.

- shall not "misrepresent... that an Influencer is an independent user or ordinary consumer of the product or service";
- shall "Clearly and Conspicuously disclose a Material Connection, if one exists, between the Influencer and [Warner Bros.]"; and
- shall "take steps sufficient to ensure that its Influencer Campaigns" comply with the directives of the order by, for example, providing future-

> hired influencers with a statement of his or her responsibility to disclose material connections, establishing a system for monitoring sponsored advertisements and maintaining reports demonstrating the results of such monitoring, and/or terminating or ceasing payments to any Influencer if he or she misrepresents their independence or impartiality, or fails to disclose a material connection between such Influencer and Warner Bros.

See Decision and Order, §§ I-III.

The Commission vote to issue the administrative complaint and to accept the proposed consent agreement was 3-0. The FTC will publish a description of the consent agreement package in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through August 10, 2016, after which the Commission will decide whether to make the proposed consent order final. Interested parties can submit comments electronically by following the instructions in the "Invitation to Comment" part of the "Supplementary Information" section of the Federal Register notice.

The takeaway from this enforcement action is that the FTC is continuing its efforts to crackdown on native advertising. Although Warner Bros. required the gaming influencers to disclose their relationship to Warner Bros., such disclosures were alleged to be inadequate. Because the gaming influencers posted their sponsored disclosures only in the description box of the web page and not in the videos themselves, such disclosures did not meet the FTC's strict standard for a "clear and conspicuous" sponsorship disclosure. The act of not requiring the influencers to make sponsorship disclosures in the videos and thereby relying on consumers to affirmatively scroll down the web page to find the sponsorship disclosure can, thus, be interpreted as an insufficient disclosure by the company.

Therefore, companies that intend to utilize social media marketing campaigns as part of a coordinated paid sponsorship program must meticulously require sponsorship disclosure by all of their influencers, ***in an adequate manner***, which, according to the FTC, means by making "clear and conspicuous" disclosures, as well as using all appropriate language to convey the connection between the sponsored ad and the company, in addition to continuing to monitor the Influencers throughout the campaign.

This action by the FTC demonstrates once again that this cutting edge social media advertising issue applies well-settled false advertising law: advertisers cannot expressly or implicitly mislead consumers in material ways; and one material way to mislead consumers is by failing to require the influencers hired by the company to disclose, clearly and conspicuously, that they were paid for their social media post.

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