



machinima settles ftc enforcement action over xbox one endorsements

MSK Client Alert

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On September 2, 2015, the FTC announced that it had settled its complaint against a California-based online entertainment network – Machinima, Inc. – for engaging in an allegedly deceptive advertising campaign to promote the 2013 release of Xbox One and specific Xbox games. Machinima is a popular distributor of online videos about games, including through a multi-channel network on YouTube.

The focus of the FTC's investigation was a late 2013 advertising campaign by Machinima, pursuant to which Machinima paid several of its network partners – video bloggers known as "influencers" – significant amounts of money to produce and upload favorable Xbox game play videos to their YouTube channels in the days immediately prior to and after the launch of Xbox One and Xbox games for the purpose of generating buzz about and driving sales of the console and games.

Machinima's influencers posted these videos to their channels without disclosing that they were being compensated for producing and uploading the videos. Thus, consumers who viewed these videos were not aware of the material connection between the influencer and the products they were positively promoting.

Section 5 of the FTC Act, codified at 15 U.S.C. sec. 45, prohibits unfair or deceptive acts or practices in interstate commerce. The FTC's Endorsement Guidelines and federal regulations make clear that Section 5 applies to endorsements, which must reflect the honest opinions, findings, beliefs or experiences of the endorser and must "clearly and prominently" disclose material connections between the endorser and the company/product that is being endorsed. (Material connections are defined as any connection that might materially affect the weight or credibility of the endorsement.) 16 C.F.R. sec. 255.1 (a). Both the endorser and advertiser are subject to liability for an endorser's false or unsubstantiated statements and failures to disclose material connections. 16 C.F.R. sec. 255.1(d).

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As to Machinima, the Consent Order (once effective) (i) prohibits Machinima from misrepresenting the independence of influencers in future campaigns; (ii) requires the company to require prominent disclosures of material connections between endorsers and advertisers and to not pay any influencer who fails to make the required disclosure; (iii) requires the company to actively monitor campaigns to ensure compliance; and (iv) requires the company to create and maintain records of its compliance for possible future FTC review. The Consent Order will bind Machinima for twenty years. (This is in-line with prior consent orders against others – e.g., ADT and Amerifreight - for similar non-disclosed endorsements.)

Notably, the FTC also investigated Microsoft and its advertising agency, Starcom MediaVest Group, but decided against bringing an enforcement action against either for the following reasons:

- The failures to disclose appeared to be isolated incidents.
- The failures to disclose occurred in spite of, and not in the absence of, policies and procedures designed to prevent such lapses, including specific legal and marketing guidelines concerning the FTC's Endorsement Guides.
- Microsoft had a robust compliance program in place when the Xbox campaign was launched and relevant training made available to employees, vendors and Starcom personnel.
- Microsoft and Starcom took swift action to require Machinima to insert disclosures into the campaign videos once they learned of actions at issue.
- Microsoft and Starcom adopted additional safeguards regarding sponsored endorsements and committed to monitoring influencer campaigns conducted by subcontractors.

The FTC enforcement action against Machinima is merely the latest example of the FTC's increased focus on disguised advertisements – i.e., endorsed content that fails to disclose the material connection between the endorser and the advertiser. Earlier this year, in February 2015, the FTC settled a similar action against a shipping company that was paying customers to positively review it on third-party review sites. More recently, in May 2015, the FTC updated its Endorsement Guidelines in response to increasing questions about advertising and endorsements on social media and through influencers.

The FTC enforcement action suggests an increased and widening focus on online advertising, which may soon expand to encompass native advertising and other less obvious forms of online advertising. It also underscores the importance of implementing and updating specific marketing policies and procedures, compliance programs and relevant training to ensure that relevant advertising law, including the FTC's Endorsement Guidelines, are being followed not only internally but by subcontractors as well. Indeed, the presence of such policies and the swift response by Microsoft and Starcom to the FTC's investigation were integral to those companies avoiding their own enforcement actions. Machinima, on the other hand, was not so lucky and while Machinima was not fined for its conduct, this does not minimize the impact and cost of both the FTC investigation, the publicity attendant to the FTC's announcement and the company's now twenty-year obligation to ensure, monitor and record compliance with the FTC's consent order.



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Aaron Wais is a Partner at Mitchell Silberberg & Knupp who counsels companies on complying with advertising and privacy laws, regulations and FTC guidelines, as well represents them in litigation and disputes over the same. He currently serves as a Co-Chair of the firm's Intellectual Property & Technology Group and is recognized by the International Association of Privacy Professionals as a Certified Information Privacy Professional/U.S.