

Advertising Compliance in the New Digital Age: Influencer Compliance Issues

By:



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IZEA FEST2017

The Big Picture

- Advertising is subject to federal and state requirements governing how products can be advertised.
- Examples: FTC Act, Food, Drug & Cosmetic Act.
- Requirements apply regardless of marketing channel or method.
- Advertisers are responsible for claims they make in advertisements, and those made by influencers and advertising agencies.
- Influencers and agencies can also be liable for deceptive representations if they contribute to the preparation or distribution of the advertising, or know about the deceptive claims.
- Disclosures must be clear and conspicuous – the 4 Ps.
- Advertiser and influencer cannot infringe the intellectual property rights of third parties, such as the use of trademarks, copyrights and rights of publicity.

Who can challenge advertisements?

Advertisements can be challenged by:

- Federal or state regulators; self-regulatory bodies.
- Competitors.
- Consumers (including in class actions).

Section 5 of the FTC Act

- “[U]nfair or deceptive acts or practices in or affecting commerce are declared unlawful” (15 U.S.C. Sec. 45(a)(1)).
- Is the claim likely to mislead a reasonable consumer?
- Are the claims substantiated?
- Can the consumer reasonably avoid the injury?
- Generally viewed from the reasonable consumer’s perspective.



Key Points About Endorsements

- Must reflect honest opinions/experience of endorser.
- Bona fide user.
- Cannot be an express/implied representation that would be deceptive if made by advertiser.
- Material connection must be either obvious or disclosed.

FTC Enforcement Policy / Guidelines

- Disclosure obligations apply regardless of the platform, irrespective of space limitations.
- Tweets should begin with “ad” or #ad or include “Sponsored,” or “Paid Ad.”
- Disclosure must be made on ALL pages, posts, links, appear throughout videos.
- Disclosures must follow the 4P’s
 - Prominence: big enough to read?
 - Presentation: understandable?
 - Placement: will it be seen?
 - Proximity: close to the claim at issue?

How Do you Disclose a Material Connection Between the Advertiser and the Influencer?

FTC has stated that **any** material connections between brands and influencers must be disclosed:

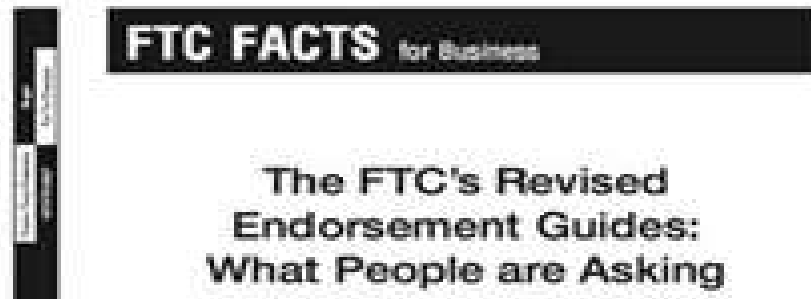
- Hired as influencers
- Employees
- Paid
- Provided discounts
- Provided free products
- Received an incentive (e.g. entry into a sweepstakes)

The disclosures need to be "clear and conspicuous." #sponsored; #ad; #sweepstakes

- Up front on blog itself not just in headers
- Disclosed numerous times if videos are lengthy
- At the beginning of a tweet
- **"Promoted by" is not enough!**



Why Should You Care?



- Liability for express and implied claims made by advertiser and the influencer.
- Liability for influencer and advertiser's failure to disclose material connection.
- Tarnishing of reputation.





Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay



I AM WILDCAT

[Subscribe](#) 3,127,000

379,565

[+](#) Add to [←](#) Share [⋮](#) More

[👍](#) 11,511 [💬](#) 131

Published on Oct 3, 2014

Thanks for watching! LIKE the video if you enjoyed and always leave comments, I read them all! :D Thanks for your support!

Click here for more info on Shadow of Mordor! <http://bit.ly/1vivrEL>

Click here for the trailer of the game! <http://youtu.be/9-ZXC-08gd8>

SHOW MORE

The screenshot shows a YouTube video player interface. At the top, there is a video player with a progress bar at 0:18 / 9:07 and standard playback controls. Below the player, the video title is "Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay". The channel name is "I AM WILDCAT" with a tiger profile picture, a "Subscribe" button, and a subscriber count of 3,091,534. The video has 378,647 views, 11,496 likes, and 131 dislikes. The description includes a publication date of Oct 3, 2014, a thank you message, links for more info and a trailer, a rating of M for Mature, and various social media links for Twitter, Instagram, Twitch, and a merchandise shop. At the bottom of the description, two lines of text are highlighted with a red box: "This video is sponsored by Warner Bros." and "No one reads this far into the description... what are you doing snooping around...". Below the description, the category is "Gaming" and the license is "Standard YouTube License". A "SHOW LESS" button is at the bottom of the description area.

This video is sponsored by Warner Bros.

No one reads this far into the description...
what are you doing snooping around...

In re Warner Bros. Home Entertainment

- Influencer marketing campaign for the video game Middle Earth: Shadow of Mordor.
- Influencers paid hundreds to tens of thousands of dollars, given free advance-release version of the game, and told them how to promote it.
- Warner Bros. did not tell influencers to include sponsorship disclosures clearly and conspicuously (instead telling them to disclose “below the fold”), and required the influencers to promote the game in a positive way and not to disclose any bugs or glitches they found.

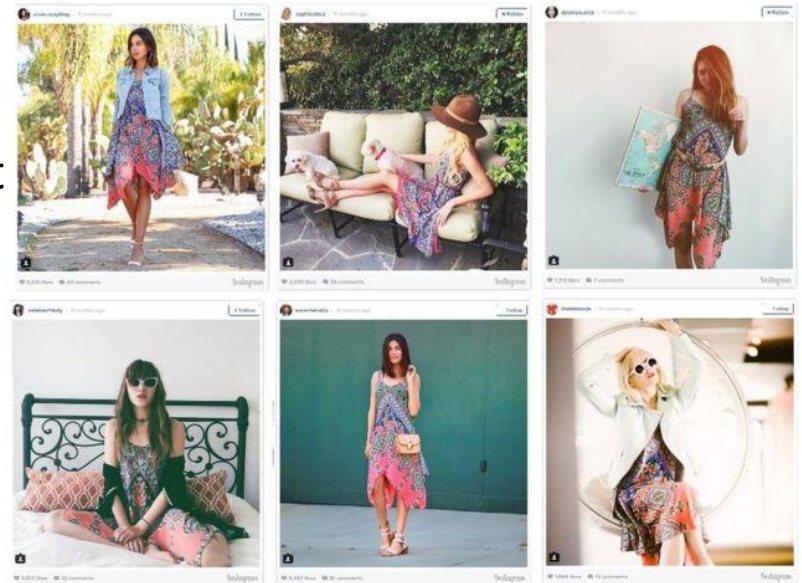
In re Warner Bros. Home Entertainment

CONSENT ORDER

- Warner Bros. barred from failing to make disclosures that content is sponsored, and misrepresenting that the reviews and gameplay videos, are the objective, independent opinions of video game enthusiasts or influencers.
- Warner Bros must educate influencers on sponsorship disclosures, monitor influencer videos, and terminate or withhold payment from influencers or ad agencies for non-compliance.

FTC v. Lord & Taylor: Fashion Faux Posts

- *Lord & Taylor* signed a contract with *Nylon* to run an article about L&T's Design Lab collection featuring a picture with a particular paisley dress.
- Also paid Instagram influencers to post picture with dress with specific hashtags -- #Designlab -- but no express disclosure of connection.
- FTC charged L&T with misrepresenting that Instagram images were independent statements. Failed to disclose that L&T sponsored the influencers and the *Nylon* article.



L&T FTC Settlement

- Lord & Taylor prohibited from misrepresenting that paid commercial advertising is from an independent or objective source.
- Also prohibited the company from misrepresenting that any endorser is an independent or ordinary consumer.
- Any unexpected material connection between the brand and any influencer or endorser must be disclosed.



Kim Kardashian West ✓

@KimKardashian

 Follow

OMG. Have you heard about this? As you guys know my [#morningsickness](#) has been pretty bad. I tried...
[instagram.com/p/5Vr42NOS0B/](https://www.instagram.com/p/5Vr42NOS0B/)

9:14 PM - 19 Jul 2015

  568  2,370

kimkardashian FOLLOW

452k likes 2d

kimkardashian OMG. Have you heard about this? As you guys know my #morningsickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis. I felt a lot better and most importantly, it's been studied and there was no increased risk to the baby. I'm so excited and happy with my results that I'm partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more www.diclegis.com; www.DiclegisImportantSafetyInfo.com view all 10,227 comments

azariasdev @beanz211 lol are you really that dumb? I don't argue with people like you. I'm just saying my opinion. Even if i didn't get pregnant doesn't mean I don't know how much it hurt!! this is one of

♡ Add a comment...

© kimkardashian/instagram

Fit Tea

kourtneykardash FOLLOW

331k likes

kourtneykardash Starting my new year right with a cup of @FitTea Who is joining me?! #teatime

view all 2,969 comments

noemiiiiir93 @sawaaaaa17

stephanie_kuang @chialex

shoegal1985 One make up ur minds. Lol FIT TEA OR SKINNY BUNNY TEA??? Lol

chialex @stephanie_kuang she gets paid to show it off but still haha

ryleighurbanczyk @finleybordano

♡ Add a comment...



khloekardashian

Follow

394k likes

5w

khloekardashian You know how I do!!
Getting my day started with my fav
[@fittea!](#) 🌸🌸 #spon ←

view all 2,962 comments

top_video_clip So Nice

maidenmissy You look great girl never
ever let the haters get you down!!!!

balardiniiveline Khloe, te acho linda,
maravilhosa, autêntica e verdadeira ao
extremo. Amo você e sua família. Bjs
linda

yanni_k.23

?

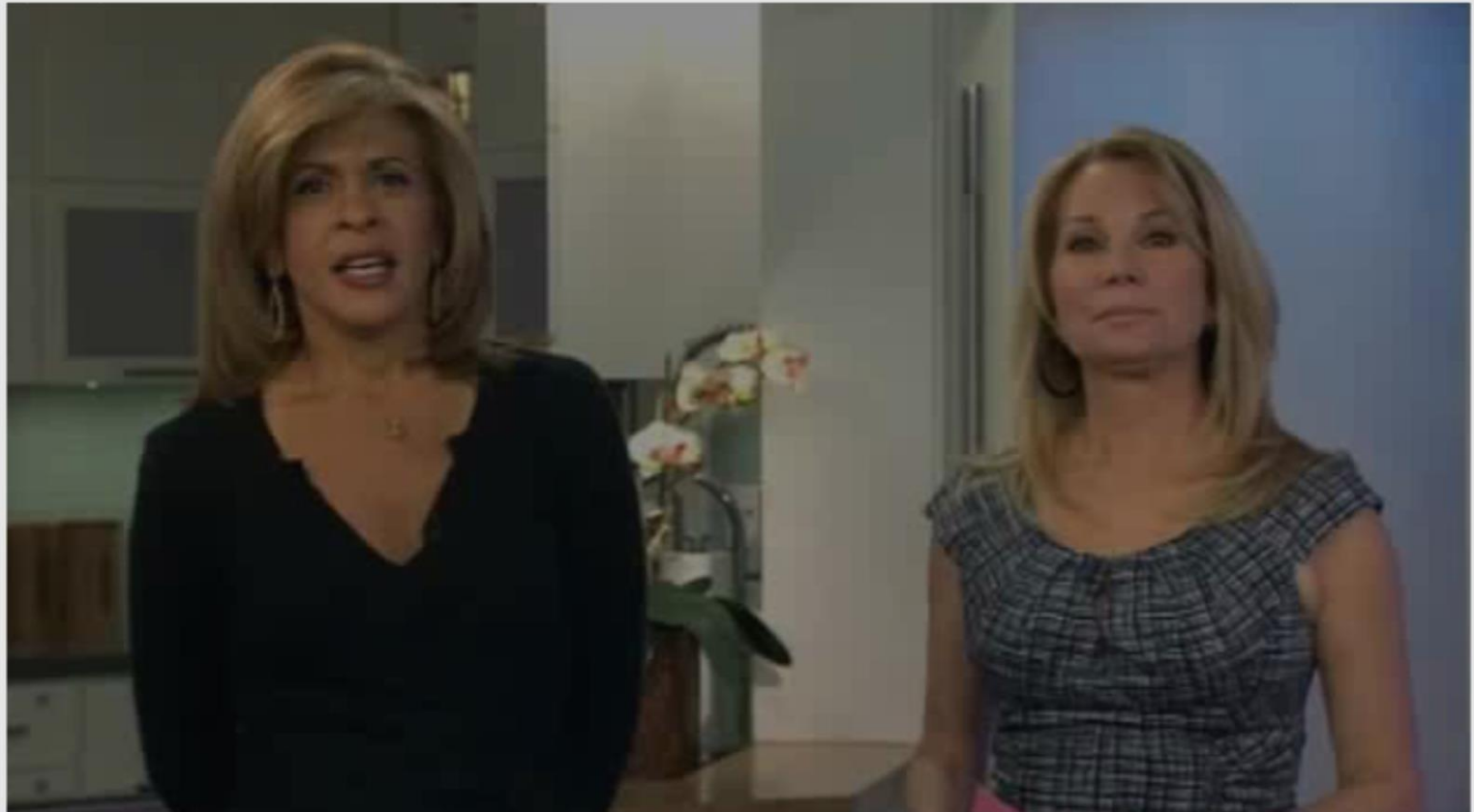
face

wwajahat03 So quite

t_quester

ashley_kamiah i use this and thin tea
together and i have lost 50 pounds so far...

“News” or Sponsored Ads?

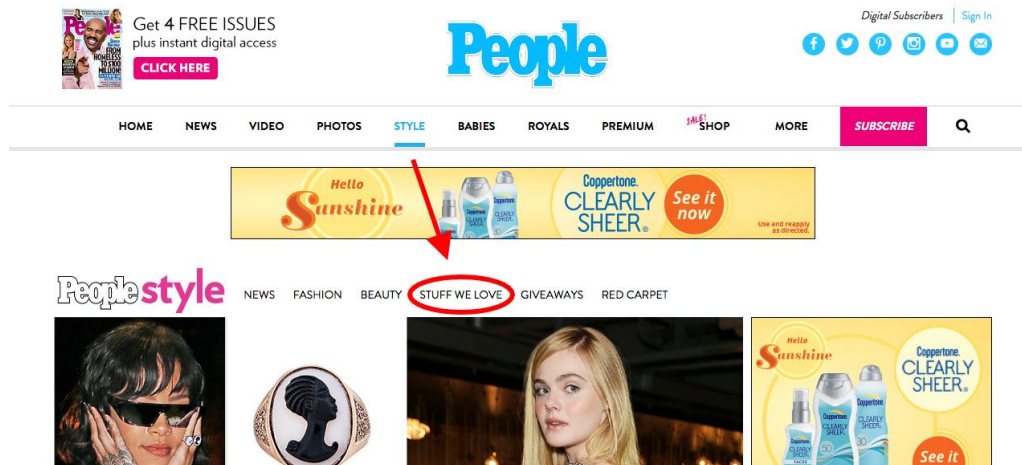


ADT Order

- The order:
 - Prohibits ADT from misrepresenting that any discussion or demonstration of a security or monitoring product or service is an independent review provided by an impartial expert.
 - Requires ADT to clearly and prominently disclose, in connection with the advertising of a home security or monitoring product or service, a material connection, if one exists, between an endorser and the company.
 - Requires the company to promptly remove reviews and endorsements that have been misrepresented as independently provided by an impartial expert or that fail to disclose a material connection between ADT and an endorser.

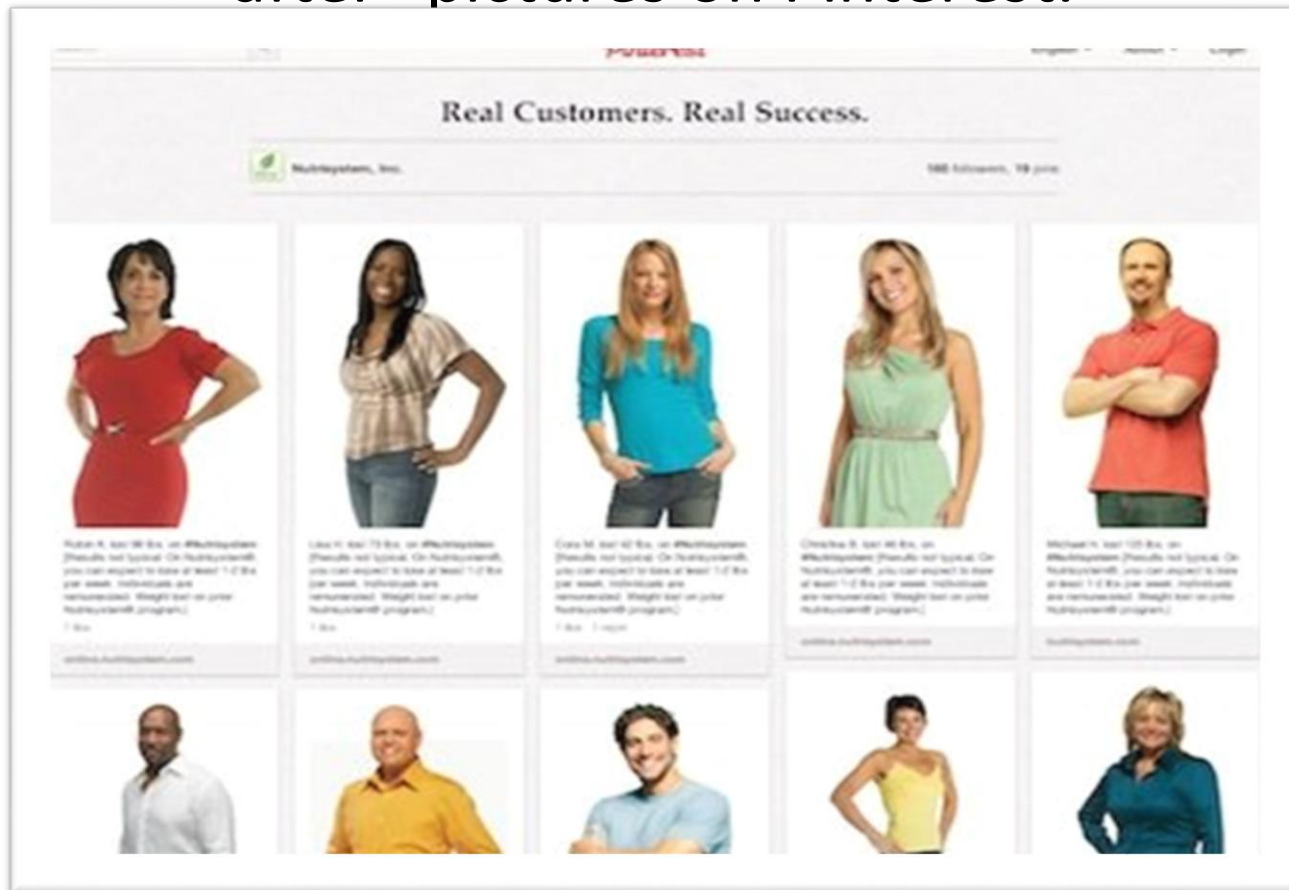
Joyus (May 2016)

- *Joyus* and *People Magazine* jointly produced a series of videos called “Stuff We Love” which described products that are sold by *Joyus* on their platform.
- NAD expressed concern that consumers may view a “Stuff We Love” video as representations of independent opinion of *People Magazine*.
- Recommended that *Joyus* modify the page to disclose that “Stuff We Love” is a shopping page, and that the videos are shopping videos.



Claims Have to Be Supported by Evidence

Nutrisystem asked consumers to post their real results “after” pictures on Pinterest.



Take Aways!

1. Embrace disclosure.
2. When in doubt, disclose, and do so prominently.
3. Be authentic, honest, and not misleading.
4. Don't have influencers do what brand itself cannot do.
5. Establish influencer guidelines.
6. Monitor compliance and address noncompliance.
7. Be smart and mindful. If in doubt, do not post it.



Questions & Answers

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