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**Presentation to ANA Members Only
Conference:
The Business of Marketing Law**

Negotiating Influencer and Brand Ambassador Agreements

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WHAT'S SPECIAL ABOUT INFLUENCER MARKETING?

- » Influencer Marketing isn't just the fastest growing channel for consumer acquisition – it's also one of the most cost effective
- » Studies have found that working with influencers on a multi-channel campaign can drive up to 16 times more engagement than paid or owned media
- » Today's social media users follow influencers with whom they feel a real connection – lifestyle bloggers, fashion influencers, and makeup vloggers
- » As brands continue to invest more in influencers, they expect more in return – and this is changing the process of contracting with influencer talent

WHAT'S SPECIAL ABOUT INFLUENCER AGREEMENTS?

- » Social media stars are collaborating with brands in new and creative ways to produce content that will engage their followers
- » Marketers and agencies are spending more money than ever on YouTubers, Instagrammers, and other social media influencers
- » Influencer agreements must address unique issues:
 - Regulatory compliance
 - Wide range of content, and associated production, ownership, and rights issues
 - Public relations risks

REGULATORY FRAMEWORK

» FTC Endorsement and Testimonial Guides


- All “material connections” must be disclosed, including payments or free products which consumers would not expect, such as event tickets, gift bags, tester products, and other benefits.
 - Influencers have a duty to disclose whether they received free products or other benefits from a brand.
 - Celebrities must disclose their relationships with brands when outside the context of traditional ads, such as on social media.
 - Employees promoting their employer’s products or services on social media should disclose their employment relationship.
- » Laws against deceptive advertising apply to influencers and brand marketers too! Brands, their agencies, and even individual influencers may be held liable for misleading or unsubstantiated statements.

FTC ACTION: WARNER BROTHERS (2016)


- » Warner Brothers hired an advertising agency to run a YouTube Influencer campaign for its video game Shadow of Mordor.
- » Agency hired individuals who had earned reputations as video game enthusiasts on YouTube to post positive videos promoting the game in exchange for free access to a pre-release version of the game and cash payments.
- » Warner Bros. told influencers to include disclosure in description box – not in the video.
- » The videos were viewed over 5.5 million times on YouTube.

0:18 / 9:07 CC Settings Full Screen

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

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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>
This game is Rated M for Mature.

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Outro Song: The Wreckage – Breaking Through <http://www.youtube.com/watch?v=LekDT7...>

Please flag hateful comments or spam...we don't need that here :D

This video is sponsored by Warner Bros.

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

Category Gaming
License Standard YouTube License

SHOW LESS



“This video is sponsored by Warner Bros.
No one reads this far into the description ... what are you doing snooping around ...”

FTC ACTION: WARNER BROTHERS (2016)

» Result: Warner Brothers agreed to:

- Ensure that all future advertisements include adequate disclosures;
- Provide each influencer with a statement of his or her responsibility to disclose the nature of its relationship, and have that influencer expressly agree to comply with it;
- Establish a monitoring program to review online videos and posts; and
- Immediately terminate (or direct its agency to terminate) its relationship with any influencer who failed to include an adequate disclosure (although Warner Brothers can give influencer an opportunity to cure if it determines the omission was inadvertent, provided it notifies the influencer that any subsequent failure will result in termination).

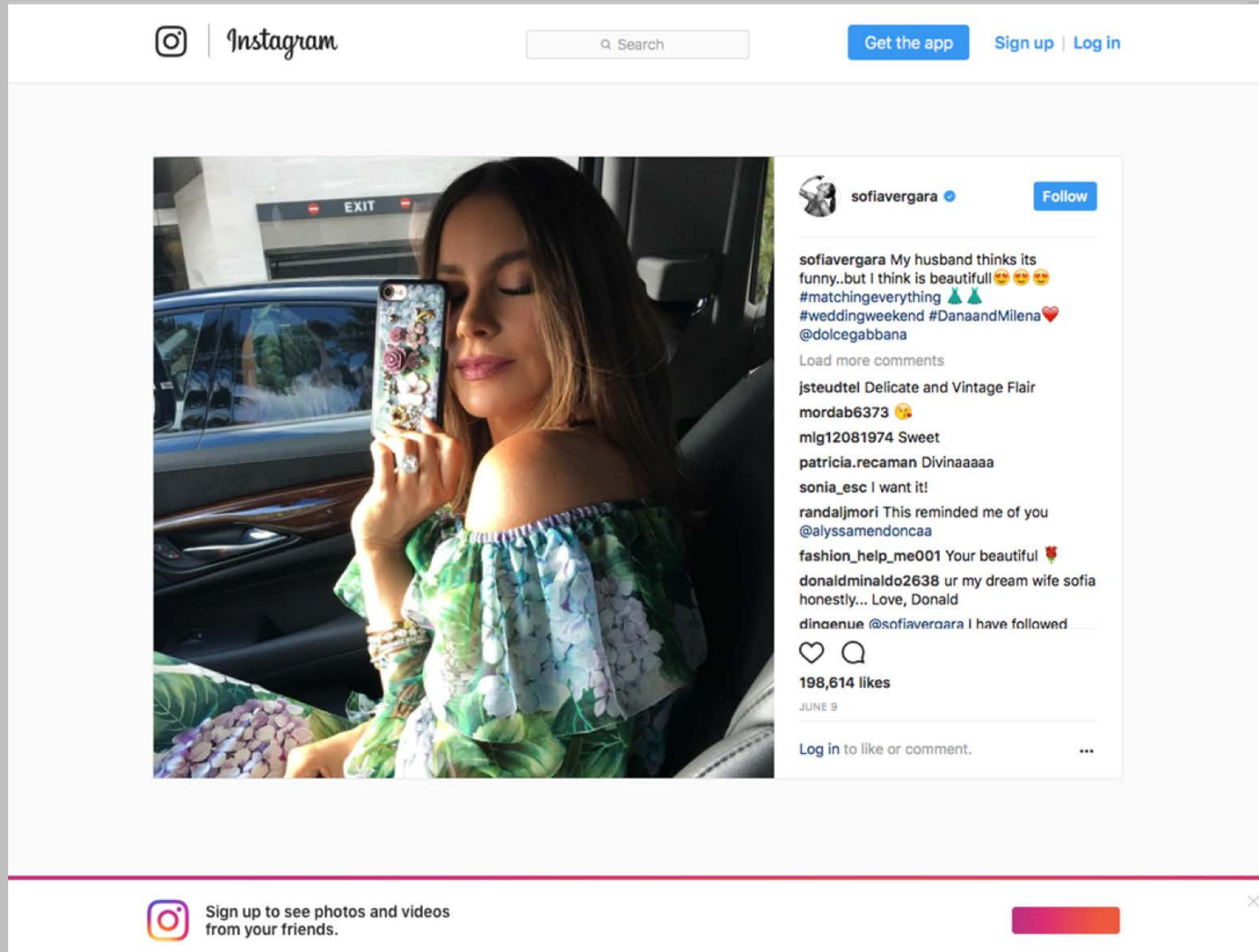
FTC ACTION AGAINST INDIVIDUAL INFLUENCERS: CSGO LOTTO (2017)

- » Trevor “TmarTn” Martin and Thomas “Syndicate” Cassell are two prominent social media influencers in the online gaming community who jointly owned the online gambling service CSGO.
- » They posted YouTube videos of themselves gambling on the site, as well as posts suggesting they had just found out about the service and encouraging others to sign up – without disclosing that they actually owned it.
- » They also had an influencer program in which they paid other influencers thousands of dollars to promote the CSGO Lotto site online, while prohibiting them from saying anything negative about it.
- » Result: FTC settlement prohibits misrepresentation that any endorser is an independent user or ordinary consumer of a product or service. Any unexpected material connections with endorsers must be clearly and conspicuously disclosed.

FTC'S 2017 WARNING LETTERS TO MARKETERS AND INFLUENCERS

- » In the spring of 2017, the FTC sent more than 90 letters to celebrities, athletes and other influencers – as well as to marketers – highlighting the need for influencers to “clearly and conspicuously” disclose their “material connections.”
- » FTC specifically referenced Instagram streams on mobile devices, advising that any material connection should be disclosed above the “more” button for posts longer than 3 lines.
- » In September 2017, FTC sent another 21 updated warning letters to influencers.

FTC'S 2017 WARNING LETTERS TO MARKETERS AND INFLUENCERS



FTC'S 2017 WARNING LETTERS TO MARKETERS AND INFLUENCERS



Mary K. Engle
Associate Director

United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

September 6, 2017

Ms. Sofia Vergara
c/o Frederick P. Bimble, Esq.
Cowan DeBaets Abrahams & Sheppard
41 Madison Avenue, 38th Floor
New York, New York 10010

Dear Ms. Vergara:

As you may recall, I wrote to you in March regarding one of your Instagram posts endorsing Dana Rebecca Designs bracelets. As I said in my earlier letter, if you are endorsing a brand and have a "material connection" with the marketer (that is, a connection or relationship that might affect the weight or credibility that your followers give the endorsement), then your connection should be clearly and conspicuously disclosed, unless the connection is already clear from the context of the endorsement. Material connections could consist of a business or family relationship, or your receipt of payment, free products or services, or other incentives to promote the brand.

Two of your other Instagram posts, attached to this letter, have recently come to our attention. In

FTC'S 2017 WARNING LETTERS TO MARKETERS AND INFLUENCERS

» What can we learn?

- Implement a written social media policy for endorsers.
- Instruct endorsers to disclose their relationship when speaking about your products.
- Disclosure should be clear and prominent, “above the fold,” above the “more” button, and not buried at the bottom of a text box or in hyperlinks.
- Add specific disclosure requirements to endorser’s contracts.
- Monitor endorsers to ensure they are making required disclosures.
- Terminate endorsers who do not make the necessary disclosures.

UPDATED FTC ENDORSEMENT FAQs:

- » The FTC doesn't mandate specific wording of disclosures, but the following would likely be effective: "Sponsored," "Paid ad" or "paid," and "Ad."
- » The use of "#ambassador" is ambiguous and confusing, but "#[Brand Name] Ambassador" will likely be more understandable.
- » A "thank you" to a company or a brand isn't enough, but the following disclosures should be sufficient:
 - "Thanks XYZ for the free product"
 - "Thanks XYZ for the gift of ABC product"
 - "Thanks to XYZ Resort for the free trip."
 - "XYZ Resort paid for my trip" or
 - "Sponsored by XYZ Resort."
- » On September 20, 2017, the FTC advised that it does not believe the Instagram, Facebook, or YouTube built-in disclosure tools are sufficient on their own.

KEY ISSUES TO CONSIDER WHEN NEGOTIATING INFLUENCER AGREEMENTS

#1 – WHO IS SIGNING THE AGREEMENT?

- » Increasingly, agreements are not negotiated with individual influencers but rather with influencer networks on behalf of many influencers. Brands should be aware of the following:
 - Networks frequently try to avoid direct responsibility for influencer content.
 - At the same time, agreements with networks may not allow the brand to directly hold individual influencers responsible for violations of the agreement.
- » Influencers are the new celebrities. Some have even signed with talent agencies, and negotiating these deals may require as much detail as a traditional celebrity talent agreement, including SAG-AFTRA issues and other considerations.



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Elise Joseph for LOreal



HELLO / SOCIETY
INFLUENCER NETWORK

#1 – WHO IS SIGNING THE AGREEMENT?

- » Determine whether your influencer is a member of SAG (or other union), and consider whether the influencer is primarily intended to serve as on-screen talent, or as a behind-the-camera producer.
 - Influencers also increasingly produce their own branded content, particularly in custom content deals included in a larger media buy. This can result in the influencer agreement resembling a production contract. If an influencer belonging to SAG produces a commercial production on behalf of an advertiser, SAG rules may apply.
- » Consult counsel to determine whether any waivers can be utilized.
 - » *New:* Digital low-budget (under \$50k) commercial content
- » Influencer agreements should specify whether the engagement is for a union production

#2 – DEFINE THE INFLUENCER CONTENT

- » Provide as much detail as possible on the content the influencer is going to create, including the format and length of each piece.
 - This exercise can also help determine whether the content constitutes a “commercial” for purposes of SAG.
- » How many times, and on what platforms, does the influencer need to promote the content? When and for how long?
- » Brands should provide influencers with detailed brand guidelines or a program brief establishing key messaging requirements for the content.

#3 – SPECIFY EXCLUSIVITY

- » Can the influencer mention multiple brands in one video, or is the content to be produced solely for one brand?
- » Is the influencer permitted to provide his or her services for other brands, including related or competing ones?
- » If the influencer is permitted to promote multiple brands, are there certain exclusivity restrictions within a certain product category?
- » Should any exclusivity requirement be limited by time?
- » Brands may wish to negotiate a right to approve additional sponsors.

#4 – SET UP A PROCESS FOR APPROVALS

- » How much time is required to preview material?
 - Five business days?
 - Five calendar days?
- » How many rounds of revisions, if any, is the brand entitled to?
- » Are the brand's revisions limited to certain types of comments?
- » What remedies are available if the influencer continually fails to provide acceptable material, or if the brand continually withholds approval of the content?

#5 – OWNERSHIP AND USAGE RIGHTS

- » Don't assume all influencers will agree to work for hire!
- » Many influencers expect to own the copyright in content they create.
 - In such a case, if the brand wants to use the content on its own channels, it must negotiate a license to do so as part of the influencer agreement.
- » Brands should consider whether outright ownership of the influencer content is truly necessary, or whether a broad license would be sufficient.

#6 – LEGAL/REGULATORY COMPLIANCE

“Our copyright-protected street-style photos are constantly being used without our consent ... **by influencers who use them in order to fulfill their contractual responsibilities to brands**[.]”

- Photographer Adam Katz Sindling speaking to the New York Times, “Street-Style Photographers Unite to Proclaim #NoFreePhotos”

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Photographers Band Together to Send a Message to Brands, Influencers and Bloggers

The #NoFreePhotos initiative kicked off earlier this week.

By Lorelei Marfil on September 22, 2017



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Follow

#NoFreePhotos

♥ 508 likes ● 16 comments

Asking for the respect for the guys in the street. It's not regarding revenue, it's about the respect of the guys in the street shooting all day trying to recreate the best way they can the atmosphere around the shows.

SEPTEMBER 23



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#6 – LEGAL/REGULATORY COMPLIANCE

- » Influencers should be contractually responsible for all legal and regulatory compliance.
- » Brands should require influencers to represent and warrant that their content will:
 - Comply with applicable laws and regulations, including the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, and the Native Advertising Guide
 - Not infringe any third party rights, including copyrights and rights of publicity. Don’t risk an infringement claim because of an influencer’s post!
- » Brands may wish to consider developing influencer guidelines that explain these contractual requirements in plain language.

#6 – LEGAL/REGULATORY COMPLIANCE

- » Examples of influencer instructions to include in brand guidelines:
 - Disclose material connection to brand
 - Maintain clear and proximate disclosures in all posts
 - Provide honest opinion of products and the brand
 - Only make factual statements that can be substantiated
 - Respect third party intellectual property rights
 - Comply with the law
 - Do not be inappropriate
 - Maintain confidentiality
- » When influencers are producing custom content, note that lines between native advertising and influencer marketing are blurring and creating new compliance issues regarding proper disclosures.

#6 – LEGAL/REGULATORY COMPLIANCE

- » Issue: How to ensure that influencers will actually comply with their contractual obligations and brand guidelines?
 - High profile or celebrity influencers may refuse to contractual terms making them responsible for legal/regulatory compliance. They may also simply refuse to adhere to such contractual terms in practice.
 - What to do? Consider practical risks, exposure, and whether more organic language may be palatable to the influencer
 - When an influencer's value is solely tied to his/her identity, then the influencer is not easily replaceable in the event of a breach.
 - Well-drafted agreements should include terms that:
 - Protect the brand, without overly burdening the influencer
 - Impose consequences for breach that incentivize the influencer's compliance, without prompting the influencer to walk away from the deal

#7 – MORALS / NON-DISPARAGEMENT

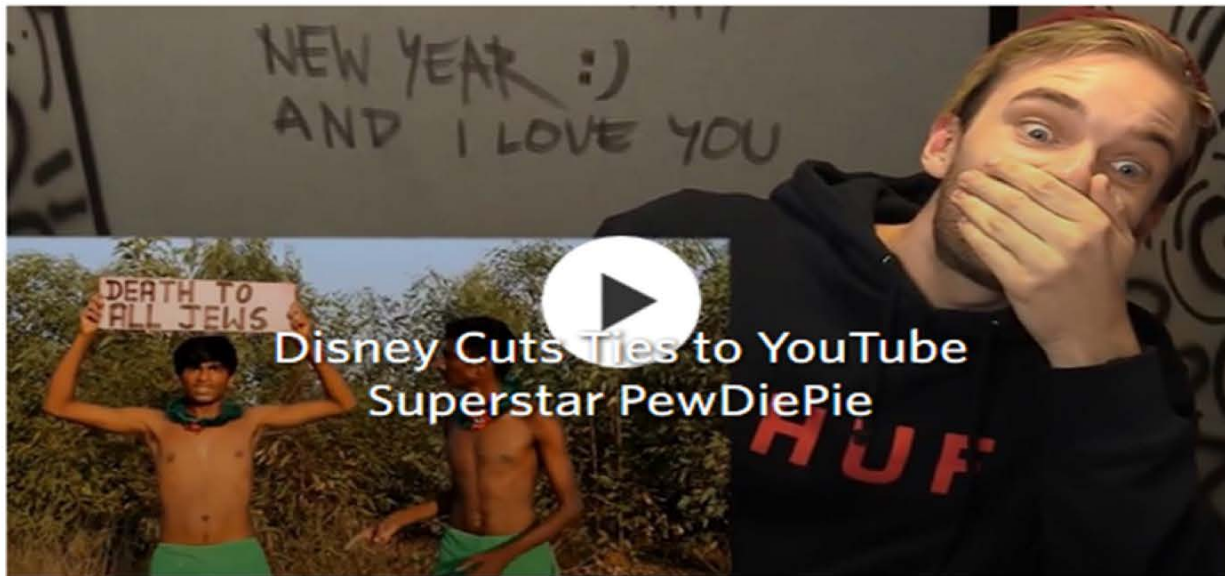
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Disney Severs Ties With YouTube Star PewDiePie After Anti-Semitic Posts

Move came after the Journal asked about videos in which he included anti-Semitic or Nazi imagery



Disney Cuts Ties to YouTube Superstar PewDiePie

Felix Kjellberg, who has 53 million subscribers to his "PewDiePie" YouTube channel,

The Dai



#7 – MORALS / NON-DISPARAGEMENT

- » Brands should ensure every contract has a robust morals clause that prohibits making offensive statements or engaging in activities of moral turpitude.
- » Influencers should also be contractually prohibited from making statements which would disparage the brand or its competitors.
 - However, use caution here, because influencers should not be prohibited from making truthful statements about their opinions of or experiences with the brand, even if negative.
- » Brands should have the ability to terminate the agreement if the influencer violates these requirements.
- » Since many influencers own the copyright in their content, brands may wish to negotiate for a clear right to demand immediate takedown of any material that violates the agreement.

#7 – MORALS / NON-DISPARAGEMENT

- » Celebrity influencers with strong bargaining power often resist agreeing to any morals clause.
 - However, due to the recent allegations against many public figures regarding past inappropriate/immoral/illegal activities, it is more important than ever to insist on strong morals clauses.
 - Brands should consider reviewing the temporal scope of their morals clauses.
 - Typically, the brand can terminate only if the influencer's breach occurs during the term of the engagement.
 - In light of recent events, brands should consider negotiating for the right to terminate an influencer if revelations emerge about violations the influencer committed in the past.

RECAP: KEY ISSUES TO CONSIDER WHEN NEGOTIATING INFLUENCER AGREEMENTS

- » #1 – Understand who is signing the agreement
- » #2 – Define the influencer content to be produced and promoted
- » #3 – Specify exclusivity
- » #4 – Set up a process for approvals
- » #5 – Establish ownership and usage rights over the content
- » #6 – Require influencer to be responsible for legal and regulatory compliance
- » #7 – Include morals clauses and non-disparagement provisions



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QUESTIONS?

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