



## Machinima, Lord & Taylor And The Need For Native Ad Policies

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As various forms of sponsored content — e.g., native and influencer advertising — continue to grow in prominence, so too does the Federal Trade Commission’s focus on it. Recently, on March 17, the FTC announced that it had approved a final consent order with Machinima Inc. — a popular distributor of online video game-related videos, including through a multichannel network on YouTube — that required the company to disclose when it has compensated influencers to post YouTube videos or other online product endorsements as part of influencer campaigns. The FTC’s announcement came mere days after its announcement that it had settled a separate action against national retailer Lord & Taylor LLC over allegations that Lord & Taylor had deceived consumers by paying for articles and posts for one of its clothing collections to be published online but failing to disclose that the posts were actually paid promotions.

### In the Matter of Machinima

The FTC’s final consent order against Machinima brought to a close its enforcement action against the company for its 2013 advertising campaign related to Microsoft Corp.’s launch of its new Xbox One console and games. As part of that campaign, Machinima paid its top video blogging “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. Specifically, Machinima paid certain influencers anywhere from \$15,000 to \$30,000 to produce positive videos for Xbox One. These videos eventually garnered between 250,000 and 730,000 views. Machinima also paid other influencers \$1 for each video view (up to a total of \$25,000). Machinima’s influencers posted these videos to their channels without disclosing that they were being compensated for producing and uploading the videos. In total, it was alleged that Machinima’s influencers produced and uploaded to YouTube over 300 videos that in November and December, 2013 alone generated more than 30 million views.

Per the FTC’s press release:

The final order settling the complaint prohibits Machinima from misrepresenting in any influencer campaign that the endorser is an independent user of the product or service being promoted. Among other things, it also requires Machinima to ensure that all of its influencers are aware of their responsibility to make required disclosures, requires Machinima to monitor its influencers’ representations and disclosures, and prohibits Machinima from compensating influencers who make misrepresentations or fail to make the required disclosures.

### In the Matter of Lord & Taylor

The FTC’s action against Lord & Taylor concerned both influencer marketing and a native advertising campaign in support of the retailer’s Design Lab clothing collection. According to the FTC’s complaint, Lord & Taylor paid 50 online fashion influencers between \$1,000 and \$4,000 to post Instagram pictures of themselves wearing the same dress — the Design Lab Paisley Asymmetrical Dress — over the course of the same weekend. Lord & Taylor, however, did not require the influencers to disclose that the company had compensated them for posting these photographs.



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In addition, Lord & Taylor paid for native advertisements, in the form of blog posts, photos and video uploads posted to social media platforms, as well as editorials in online fashion magazines, to promote the same clothing collection. Although Lord & Taylor paid for, reviewed, and pre-approved these posts, the compensation was not disclosed.

According to the FTC's press release, the FTC's proposed consent order:

prohibits Lord & Taylor from misrepresenting that paid commercial advertising is from an independent or objective source. It also prohibits the company from misrepresenting that any endorser is an independent or ordinary consumer, and requires the company to disclose any unexpected material connection between itself and any influencer or endorser. Finally, it establishes a monitoring and review program for the company's endorsement campaigns.

### **The FTC Is Firmly Focused on Native Advertising**

These two enforcement actions make clear that the FTC will continue to strongly police native ads and sponsored content, particularly given their growing popularity. Guidance for complying with the law (and avoiding regulatory scrutiny) can be found in the FTC's "Enforcement Policy Statement on Deceptively Formatted Advertisements," as well as its guide "Native Advertising: A Guide for Business," both of which were released in December 2015. These materials are detailed, but the bottom line is that, for the FTC, "the watchword is transparency." Thus, an advertisement or promotional message cannot imply it is anything other than an ad. Moreover, when a disclosure is necessary to avoid customer confusion, it must be displayed clearly and prominently. In this regard, it is important to remember that:

- In evaluating whether an ad is deceptive, the FTC considers the net impression the ad conveys to consumers by considering both the content of the ad and the format used to convey that information.
- Disclosures should be clear and conspicuous.
- This means that for print ads, the disclosure should be in clear and unambiguous language, as close as possible to the native ads to which they relate, in a font and color that's easy to read, and in a shade that stands out against the background.
- For video ads, the disclosure should be made at the outset and be on the screen long enough to be noticed, read, and understood.
- For audio ads, the disclosure should be made at the outset and should be read at a cadence that is easy for consumers to follow and in words consumers will understand.

Moreover, the FTC will not limit regulatory enforcement to advertisers, but may also take action against other parties involved in the allegedly deceptive advertising, including the ad agency or the operator of an affiliate advertising network. Conversely, the FTC may try to hold the advertiser or ad agency liable for the acts of its affiliate and third-party marketers. Thus, advertisers and ad agencies should also ensure that they:

- Keep and update compliance policies for advertising, including influencer and native advertising.
- Communicate these policies to employees and ensure that employees are knowledgeable about and trained on the policies.



- Communicate these policies to third-party marketers and ensure that the third-party marketers contractually agree to adhere to the policies when marketing the company or (in the case of an ad agency) the agency's clients.
- Periodically assess compliance with the policies.

In sum, no different than other forms of marketing, if a company is involved in creating or presenting native ads, it has a vested interest in implementing and updating specific marketing policies and procedures, compliance programs and relevant training to ensure that it has appropriate policies and that those policies are followed, not only internally but by subcontractors and marketers as well.