

Paid / Sponsored Content Disclosure: A Practical Legal Guide for YouTubers and Streamers

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Two recent rulings by UK and US consumer protection bodies have brought to light how difficult it can be for brands, channels and YouTubers to navigate the regulations surrounding paid-for content.



WHAT ARE THE RULES - UK

The UK rules on non-broadcast advertising and marketing (which apply to YouTube) can be found in the [CAP Code](#) and are monitored and regulated by the Advertising Standards Authority (ASA). CAP has also produced some helpful guidance for vloggers on these, which can be found [here](#). In particular, section 2 of the CAP Code states that *'marketing communications' must 'be obviously identifiable as such'* ^(rule 2.1) and *'make clear their commercial intent, if that is not obvious from the context'*. ^(rule 2.3) The Code also states that *'marketers and publishers must make clear that advertorials are marketing communications'*. ^(rule 2.4)



Recent problems:

In November 2014 the ASA [issued a ruling](#) against Mondelez UK Ltd ordering the take down of a series of paid promotional videos they had created with 5 prominent YouTubers for an "Oreo lick race." This was on the grounds that the videos had breached rules 2.1 and 2.4 outlined above – i.e. the videos were not clearly identified as marketing communications. This ruling was surprising to some since the videos themselves and their descriptions did contain some degree of disclosure: each YouTuber stated that they had been working with Oreo, and all of the video descriptions contained some variation of the message "Thanks to Oreo for making this video possible." As a result, some confusion was caused as to what steps a content creator must actually take to flag that they have been paid to make a video.



WHAT ARE THE RULES - PLATFORMS

You should also bear in mind that in using platforms like YouTube to host your videos, you are agreeing to comply with their terms and conditions on [paid product placements and endorsements](#). In short, these state that it is your obligation to ensure that

all videos comply with the relevant local laws and that viewers should not be misled by paid-for content, which requires you being upfront and honest about commercial relationships with sponsors.



WHAT ARE THE RULES - US

The US laws on deceptive marketing and advertising can be found in the [Federal Trade Commission Act](#) which are monitored and enforced by the Federal Trade Commission (FTC). The act declares unlawful any *“unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”*. ^{(section 5(a)(1))} Like the UK rules this uses very broad language and it is difficult to know what to make of these words on their own. However, a recent [FTC ruling](#), [FTC Guidelines](#) and a series of [FTC Q&A](#) can help shed some light on this. The FTC states that one of the most important questions you must ask yourself is, if viewers knew you had been paid or given free products to talk about them, would this affect the credibility they give to your recommendation. If yes, you should disclose the fact that you have been paid or provided with the products.



Recent problems:

In September 2015 the Federal Trade Commission announced that it has [settled charges](#) (the original complaint is located [here](#)) against Machinima Inc. for engaging in deceptive advertising practices concerning Microsoft's Xbox One. YouTubers had been paid by Machinima (who in turn had been paid by Microsoft) to endorse the Xbox One *“in positive light,”* and were contractually bound to keep confidential at all times their dealings with Machinima. The FTC deemed this *“deceptive acts or practices in or affecting commerce”* since the videos were created to *“reflect the independent opinions of impartial video game enthusiasts,”* but were in fact part of a *“global advertising campaign”* and because no or insufficient disclosures had been made.

The FTC imposed strict penalties on Machinima that will last for the next 20 years. These include requirements that Machinima itself ensures future such videos have clear and prominent disclosures (and that content producers are not paid if their videos do not contain these disclosures), and that Machinima must submit to the complete review of the FTC.

A few important points:

- Although both the ASA and FTC rulings were brought against the two sponsors (Mondelez and Machinima) as content creators, you yourself are required to make sure your videos comply with these regulations - there is no excuse for not being aware of the rules, or for thinking that it was someone else's responsibility;
- The marketing and advertising regulations are intentionally opaque to provide regulators flexibility to operate, meaning there often are no definitive answers to questions;
- The ASA and FTC appear to take fairly different approaches when it comes to whether or not a video requires a disclosure; the ASA seems to focus largely on who has control of the content of the video, whereas the FTC deems its approach more based on common sense and whether or not viewers are likely to be misled. This could result in situations where each would respond differently given the same set of facts, meaning it may be worth airing on the side of disclosure when in doubt; and
- Other countries will have their own marketing and advertising laws and regulatory bodies, so please refer to the rules and guidance applicable to your local jurisdiction.

Legal stuff:

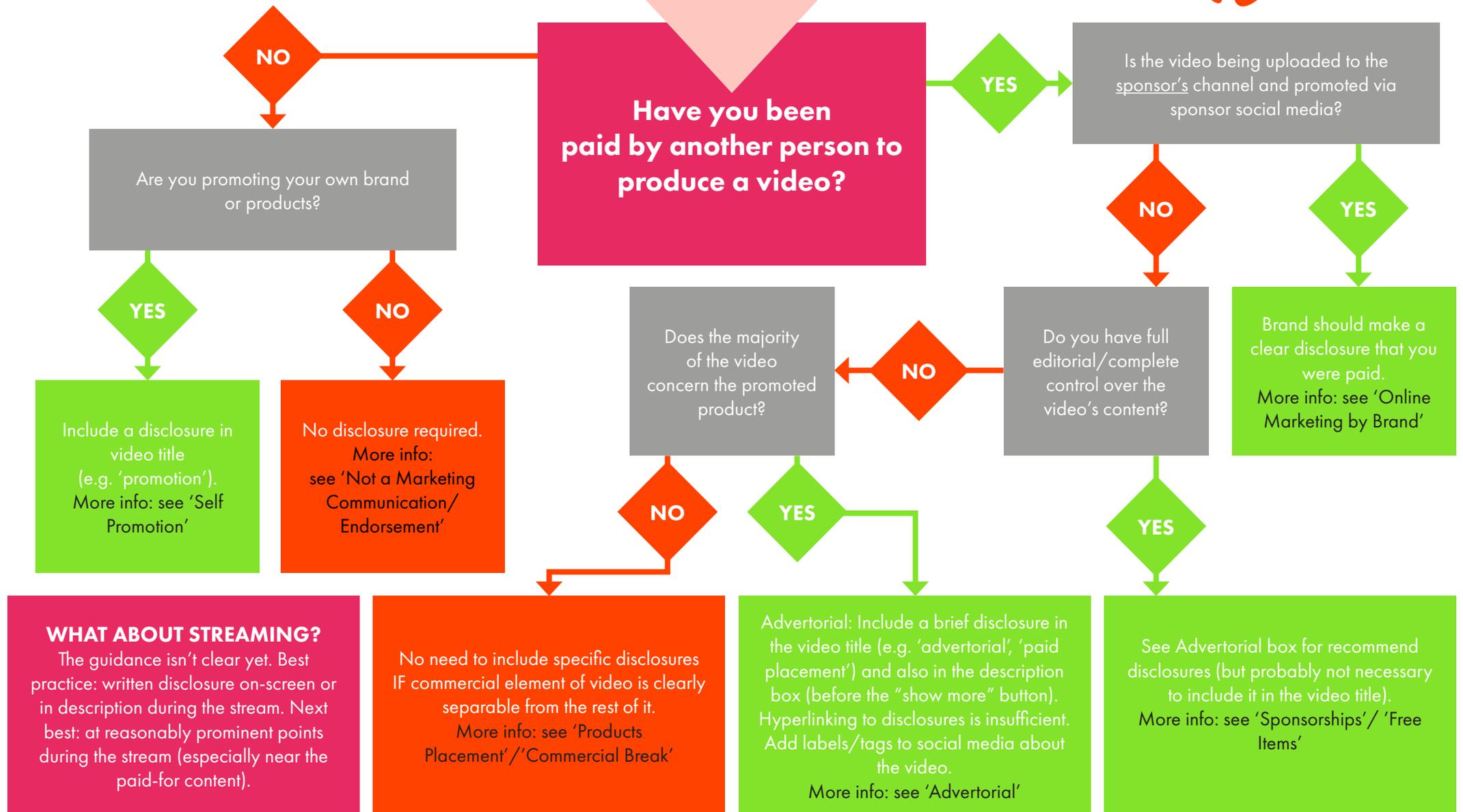
This note offers best practice suggestions for navigating FTC (US) and ASA (UK) rules on paid-for content for vloggers/Lets Players/streamers. It is current as of December 2015. Important: this isn't actually legally advice – you need a lawyer for that!

You can use the flowchart and table on the following pages to identify which type of promotional structure your video will be considered and the steps you can take to improve compliance with the above rules.

In the meantime here's some golden rules:

- 1.** Both the channel and the sponsor are responsible. If a regulator gets involved it will very likely take action against both of them.
- 2.** Disclosures need to be prominent and clear. At the start of the video, in the description box, potentially at the end – see below for the detailed guidance, but however it is done the disclosures need to be prominent and clear.
- 3.** If in doubt, go for more disclosure. The unifying theme of all the regulations are to be clear with consumers and not to mislead them. If there is any doubt about what to do, it's better to be more transparent with consumers than less.
- 4.** No magic bullet answers. The regulatory guidance is intentionally opaque to provide regulators flexibility to operate, meaning there often are no definitive answers to questions – if in doubt, take advice!
- 5.** Little international consistency. The UK and US authorities take slight but important differences in their approach. Most other countries have not even provided any guidance at all yet. For these reasons, there is unfortunately no absolutely definitive legal way to ensure international compliance. However, our practical guidance should provide a reasonable measure of help.

IDENTIFYING YOUR PROMOTIONAL DEAL



LEGAL STUFF: this flowchart offers best practice suggestions for navigating FTC (US) and ASA (UK) rules on paid-for content for vloggers/Lets Players/streamers. It's a summary – the important stuff is in the attached guidance. It is current as of December 2015. Also, this isn't actually legally advice – you need a lawyer for that! © Purewal & Partners LLP 2015. Thanks for reading this <3

DETAILED GUIDANCE FOR PAID CONTENT DISCLOSURES IN VLOGS /LET'S PLAYS / STREAMING

Detailed guidance for paid content disclosures in vlogs/Let's Plays/streaming

Type of Promotion	UK Rules	US Rules	Best Practice
Not a Marketing Communication / Endorsement	<ul style="list-style-type: none"> No promotion has occurred, so no disclosure required 	<ul style="list-style-type: none"> Not an endorsement, so no disclosure required 	<ul style="list-style-type: none"> ✓ No disclosure required
Self-Promotion	<ul style="list-style-type: none"> When video is solely about promoting your own products, this is a marketing communication Video title must make clear the video is promoting the content creator's products before they click / view it 	<ul style="list-style-type: none"> If it is sufficiently clear from the video that you are promoting one of your own products, unlikely that any further disclosure is required 	<ul style="list-style-type: none"> ✓ Include an appropriate description in the video title – e.g. "my new product" or "product news"
Online Marketing by Brand	<ul style="list-style-type: none"> Where video is only being uploaded and shared by the brand Context will automatically make clear this is a marketing communication No need for the brand to label as an "ad" 	<ul style="list-style-type: none"> FTC guidance does not directly address the situation FTC likely to require the brand to make clear that the YouTuber has been paid or was given a product free to produce the video 	<ul style="list-style-type: none"> ✓ Brand should make a clear disclosure that you were paid
Advertorial	<ul style="list-style-type: none"> Both the content creator and sponsor are responsible for marketing the video as an "advertorial" The fact a video is an advertorial must be made clear to viewers before they click / watch it. Including an appropriate label in the video title / thumbnails is most appropriate since these also appear on mobile platforms Including these labels in the description box alone is not sufficient, but may be helpful. This should be included before the "show more" section of the description Likely acceptable video titles are 'advertisement feature', 'ad', 'ad feature' and 'advertorial' or similar equivalent Likely unacceptable titles are 'sponsored', 'supported by', 'funded by' and phrases such as 'thanks to...' 	<p>"Full US Disclosure"</p> <ul style="list-style-type: none"> There is no prescribed form the disclosure must take – the point is to give the viewers the essential information Disclosures must be "clear and conspicuous" – to achieve this: <ul style="list-style-type: none"> » easy to read / hear, clear and easy to find (avoid having to scroll / click more to read) » must take account of people viewing on different platforms (e.g. mobile) – i.e. don't hide away in the description » general disclosures on your homepage or links to disclosures on other pages (e.g. "disclosure" or "legal" buttons) should be avoided » The disclosure "sneak peek" is not sufficient if you have been paid to create a pre-release video for a game » There does not appear to be a requirement to include this label in the video title Ensure any tweets etc concerning the video / product are labelled appropriately – e.g. 'Ad' or '#Ad' 	<ul style="list-style-type: none"> ✓ You should include an appropriate descriptor in the video title (such as advertorial) and also in the description box (before the "show more" button) ✓ Avoid linking to disclosures ✓ Label social media concerning the video appropriately

DETAILED GUIDANCE FOR PAID CONTENT DISCLOSURES IN VLOGS /LET'S PLAYS / STREAMING (CONTINUED)

<p>Sponsorship</p>	<ul style="list-style-type: none"> • Different from Advertorials as brand does not have any control over video content here • Sponsorships are not regulated by the CAP Code • But, the UK Competition and Markets Authority requires sponsors involvement to be clearly conveyed to viewers (simple reference in the video itself – and not necessarily the title / description - is likely sufficient) 	<ul style="list-style-type: none"> • Full US Disclosure required (see Advertorial) 	<ul style="list-style-type: none"> ✓ While ASA would appear to only require a brief mention in the video, the FTC may require full disclosure ✓ See best practice recommendations for “Advertorials” above
<p>Free items</p>	<ul style="list-style-type: none"> • If a content creator is sent free items without any conditions on how / if to review them, this falls outside the CAP Code • If an item is provided on the condition it be talked about in the video, this should be mentioned in the video itself (and not necessarily the title / description) 	<ul style="list-style-type: none"> • If an item is provided on the expectation that it be talked about in a video, Full US Disclosure required 	<ul style="list-style-type: none"> ✓ Probably unnecessary to include disclosure in video title ✓ See best practice recommendations for “Advertorials” above
<p>Commercial Breaks</p>	<ul style="list-style-type: none"> • This is when there is a commercial break in an otherwise independent video • Unlikely to be necessary to include a label in video title • Should be clear in the video when the commercial break starts and finishes • Optionally, include details of the sponsorship in the description box 	<ul style="list-style-type: none"> • If the segment is clearly identifiable as a commercial and it is clear the segment is not a reflection of your own opinions, likely that no further disclosure is required 	<ul style="list-style-type: none"> ✓ If the commercial element of a video is clearly separable from the rest of it, probably no need to include any further disclosures
<p>Product placement</p>	<ul style="list-style-type: none"> • If the video is largely editorial but includes product placement, this should be made clear during the video when the products are used / referenced • Likely unnecessary to include label in video description 	<ul style="list-style-type: none"> • FTC states that merely showing products in a video does not require disclosure, even if this has been paid for • If you are expressing opinions about the products, Full US Disclosure required 	<ul style="list-style-type: none"> ✓ If expressing opinions about the products, include an appropriate description in the description box.
<p>Streams</p>	<ul style="list-style-type: none"> • Not expressly discussed by the ASA • If the stream solely concerns the promoted product (e.g. a paid-for let's play), but you retain complete control over what you say about the game, please see “Sponsorship” box above • If you do not retain complete control over content, see “Advertorial” box above • If the stream is sponsored by a particular brand, but the content of the stream does not relate to the product, see “Commercial Break” box above 	<ul style="list-style-type: none"> • Viewers should see Full US Disclosure whenever they tune in 	<ul style="list-style-type: none"> ✓ Ensure a written disclosure is present either on-screen or near the video box during the entire stream ✓ If the stream is solely about a product you are promoting, consider including a suitable descriptor in the stream title



Do I really have to do all of this?

Technically, yes: these rules apply whether you have 10 viewers or 1,000,000. In practice, the risk of enforcement by regulators is probably higher the bigger your channel is but, still, it's worth following this stuff.

But isn't it obvious when I'm promoting a product?

While it may be to you, it may not be to the viewers (particularly minors). The whole point of the rules is so that viewers know the circumstances that *may* be influencing what you're saying.

Okay – in a nutshell, when is disclosure required?

Any time you have received free products, been paid or received stuff in order to make a video.

What do I have to say?

This is tricky since the rules around the world aren't consistent, but the basic idea is: if you've been paid, make it clear you've been paid - if you've been given free stuff, make it clear you've been given free stuff. Ambiguous wording like "Thanks to my friends at [X] for making this video possible" is not sufficient.

Where do I have to say this?

Rule of thumb: don't hide it away in lengthy video descriptions or in the last 10 seconds of a video – be clear and upfront about it. For example, put the disclosure at the top of the video description and make a verbal disclosure in the video itself. Best practice would be to include a disclosure in the video title / thumbnail, so viewers can identify an ad before they click on the video.

What if I've been given a copy of a game to review or let's play?

A simple disclosure in the video itself and the description that you've been given the game for free is probably sufficient here (but see our detailed guidance for more info).

What if I talk about the same product in multiple videos?

Since it is possible viewers will not watch every one of your videos, a separate disclosure should be made in every video concerning the sponsored product.

What about old videos I've already posted?

Best practice is for the disclosures to apply in all videos (and there has been at least one case where a YouTube channel had to update its old videos). In practice, the sooner you get compliant, the less work will be required over the long term.

What about streaming?

The guidance is not yet clear. A disclosure at the start or end of the stream alone may not be enough. Best practice is to make a disclosure at the start and at reasonably prominent points in-stream (especially the bits where paid content is involved).



About Purewal & Partners – We're a law firm in London, UK advising people involved in digital broadcast, including YouTube channels, Let's Players, vloggers and streamers as well as brands, networks and other businesses involved in digital broadcast. We're also active in the video games, eSports and tech industries. Come say hi!



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