



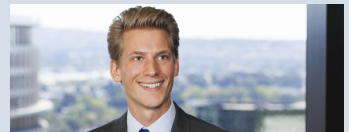
Reading Between the Lines: Navigating the Native Advertising Landscape

Is the Federal Trade Commission’s guidance to online content providers any clearer than the distinction between native advertising and editorial content?

By Perry J. Viscounty, Jennifer L. Barry, David D. Troutman and Brian Kollatz¹

What is Native Advertising?

Even the most casual of internet users has undoubtedly encountered instances of “native advertising”—that they may not have recognized it is exactly the point. Native advertising—also known as “sponsored content” or, more creatively, “masquer-ads”—is a form of paid online or mobile advertising intended to integrate paid advertisements seamlessly into an internet user’s online experience. Simply put, it is advertising (*i.e.*, sponsored content) mingling with, or even masquerading as, editorial (*i.e.*, non-sponsored) content. For example, a visitor to a contemporary news organization’s website will almost certainly encounter links to “sponsored stories” tucked between the editorial content generated by the news organization’s reporters. Similarly, a close examination of search engine results will likely reveal “sponsored results” above or beside the organic keyword search results. These are simply two common examples of a quickly growing number of contexts in which online users are encountering—whether they realize it or not—native advertising. Because the success of native advertisements depends, at least in part, on the seamless integration of the ads into the online consumer’s user experience, the practice is inherently risky for the advertiser. After all, federal law prohibits advertisers from deceiving consumers. context is blurry, at best. This article aims to (1) identify the general
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principles that would likely be applied to determine which side of that line a particular native advertising scheme would fall on; and (2) provide some practice pointers for those interested in both engaging in native advertising and staying on the “legal” side of the line.

Native Advertising And The Risk Of Consumer Deception

Inherent in native advertising’s goal of seamlessly integrating sponsored and non-sponsored content is the very real potential to confuse consumers in violation of the Federal Trade Commission (FTC) Act’s prohibition against “deceptive acts or practices in or affecting commerce.”² The inherent tension between native advertising’s goal and the FTC Act’s prohibition begs the question: to what degree must an online advertisement be differentiated from editorial or non-sponsored content to avoid unlawfully deceiving consumers? In other words, how clearly must the true nature of a native advertisement be disclosed to the online consumer?

Through the years, the FTC has issued numerous guidelines and policy statements requiring advertisers and/or publishers to make certain disclosures to consumers to prevent deception. The FTC has not, however, issued definitive, comprehensive guidelines specific to native advertisements. Thus, divining the line between legal and illegal native advertising practices requires an analysis of the FTC’s generally applicable principles on consumer deception, as well as the limited (but growing) body of statements or actions that the FTC has made or taken in the native advertising context.

In 1983, the FTC articulated the general rule for determining whether an advertisement is deceptive:

- If the advertisement contains a representation, omission or practice that is likely to mislead a consumer acting reasonably under the circumstances; and
- If the representation, omission, or practice is material, that is, likely to affect the consumer’s conduct or decision with regard to a prod-

uct or service.³

While advertising has certainly evolved since the early 1980s, these bedrock principles for determining deception remain intact and provide the framework in which the FTC Act’s prohibition on consumer deception should be interpreted and applied.

In more recent years, the FTC has encountered situations requiring it to, or at least providing a potential context in which it could, apply these principles to certain aspects of native advertising. For example, in 2010, the FTC charged a public relations firm with engaging in deceptive advertising because it provided misleading online endorsements of gaming apps developed by its client. The allegedly deceptive act-at-issue was the PR firm’s practice of using its employees to post favorable reviews of a client’s products in various online fora without disclosing that the reviews came from paid employees working on behalf of the developers. In other words, the reviews were paid advertisements masquerading as editorial, non-sponsored content. The FTC and the PR firm settled the case prior to the issuance of a formal FTC decision. Nevertheless, the fact that the FTC brought the action indicates, at the very least, that sponsored content without any disclosure whatsoever violates the FTC Act.⁴ While clearly the true nature of sponsored content must be disclosed, the question still remains as to how clear or conspicuous a disclosure must be to suffice.

In March 2013, the FTC provided further guidance by updating its advertising disclosure guidelines for mobile and online advertisers.⁵ While these updated guidelines are not specific to native advertisements, they do provide some valuable insight. As an initial matter, the FTC clarified that “advertisers have the flexibility to be creative in designing their ads, as long as necessary information is communicated effectively and the overall message conveyed to consumers is not misleading.”⁶ The FTC then, among other things, provided case studies and evaluated whether particular examples of disclosures and online advertisements were likely to run afoul of the FTC Act’s prohibition on deceptive advertising. For example, perhaps harkening back to the 2010 action

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involving the PR firm's paid endorsements deceptively masquerading as non-sponsored consumer reviews, the FTC provided guidance on how to properly disclose, on a space-constrained website, that the person posting a review or comment is a paid endorser for the product and that consumers should not expect to have the same experience as the paid endorser.⁷

The FTC has also issued guidance regarding another iteration of native advertising—*i.e.*, the integration of paid-for content in search engine results. In 2002, the FTC's Bureau of Consumer Protection published a letter recommending that all search engine companies review their websites to ensure that (1) paid results are distinguished from non-paid results with clear and conspicuous disclosures, (2) the use of paid inclusion in a search engine's index is clearly and conspicuously disclosed, and (3) no affirmative statement is made that might mislead consumers as to the basis on which a search result is generated.⁸ More recently, in 2013, the FTC revisited the issue in letters sent to general purpose and specialized search engines.⁹ In those letters, the FTC noted, among other things, that paid search results had become less distinguishable as advertising, especially for advertising located immediately above the natural results ("top ads").¹⁰ Specifically, the FTC recommended that search engines use more prominent shading, clear outlines, and prominent borders as means to distinguish top ads or other paid content from the natural search results.¹¹ The FTC stated that, in addition to these visual differentiators, search engines should also utilize conspicuous and consistent text labels that unambiguously differentiate between sponsored and non-sponsored search results.¹²

In addition to issuing the above-described (unfortunately, narrow) guidance on a few aspects of native advertising, the FTC also held a workshop in December 2013, to broaden the FTC's understanding of the issues surrounding native advertising.¹³ To this end, the workshop included a variety of presentations from industry stakeholders, legal analysts, and FTC representatives. The content of

those presentations underscored the uncertain terrain on which native advertisers tread. Indeed, while workshop participants generally agreed that transparency and disclosures are important, they contested the specifics. For example, during the panel discussion regarding best practices for written disclosures, panelists disagreed about the appropriate terminology to be employed ("sponsored" vs. "presented by" vs. "From Around the Web" vs. "You May Also Enjoy" vs. others) and how consumers are likely to understand certain terms.¹⁴ In closing, acknowledging the complexity of issuing general guidance, the director of the Bureau of Consumer Protection stated that native advertising takes many forms and it may not be possible to craft a single definition or solution.¹⁵ The FTC has yet to issue policies as a result of the workshop, but has indicated that native advertising is subject to enforcement based on existing law.¹⁶

Unwilling, and unable from a practical standpoint, to wait for definitive guidance from the FTC, some industries have proactively developed their own guidelines and best practices.¹⁷ The Interactive Advertising Bureau ("IAB") has done exactly that, declaring that "for paid native ad units, clarity and prominence of the disclosure is paramount," identifying six types of native advertisements, and offering examples of disclosure language most commonly used for each type of ad.¹⁸ For example, the IAB notes that "promoted listings" (*i.e.*, ads offering an advertiser's product or showcasing its brand in a manner identical to listings for other products offered on the website) are typically disclosed by words such as: "Ads," "Sponsored Products," and "Product Ads from External Websites."¹⁹ Additionally, the IAB noted that "[i]n addition to language, shading, or other visual cues associated with native ads, many publishers also include additional disclosure cues such as a separate roll-over link using language such as "What's this?" to provide the consumer with additional information on the origin of the content in the ad."²⁰ However, because of the rapidly evolving native advertising landscape and the shifting perceptions of consumers, who are becoming more familiar with different types of native advertising, the IAB concluded that "it is not possi-

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ble to recommend a single, one-size-fits-all disclosure mechanism.”²¹ Without further official guidance from the FTC, more industry groups will likely follow suit and develop their own best practices.

Takeaways

While native advertising may be an attractive option to increase revenue, both for advertisers and online content providers, such advertising, by its very nature, risks deceiving consumers and running afoul of the FTC Act (as well as potentially other laws). Thus, those engaging in (or considering) native advertising ought to consider that risk and the uncertain regulatory landscape. To minimize the risk, native advertisers should ensure they clearly and conspicuously disclose the nature of their content. Of course, what that means in practice is open to interpretation and may vary depending on the medium, industry, and content of the advertisement. Evaluating possible disclosure language against standards issued by industry groups may provide some further insight as to common practice. However, without further regulatory guidance, those standards cannot be considered the final word on whether any specific disclosure is sufficient. Some factors to consider when evaluating whether a disclosure is sufficiently clear and conspicuous in the context of native advertising include:

1. The proximity between the disclosure and the advertisement;
2. The font color and size of the disclosure when compared to the non-sponsored content;
3. The clarity of the language used to identify the advertisement, like “sponsored” or “ad”; and
4. The degree to which the advertisement is distinguishable from the surrounding content, for instance by using shading, a different font color, and a border to separate it from the other content.

In short, while native advertising may open up a

brave new world of potential revenue, advertisers and publishers should proceed cautiously on this relatively uncertain terrain to ensure they are not the first bold explorers to discover exactly where the regulatory and legal dangers lie.

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² 15 U.S.C. § 45(a)(1).

³ FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/ftc-policy-statement-on-deception>.

⁴ FTC Press Release, *Public Relations Firm to Settle FTC Charges that it Advertised Clients’ Gaming Apps Through Misleading Online Endorsements*, August 26, 2010, available at <http://www.ftc.gov/news-events/press-releases/2010/08/public-relations-firm-settle-ftc-charges-it-advertised-clients>.

⁵ FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (March 2013), available at <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>.

⁶ *Id.* at 7.

⁷ *Id.* at 43 - 46.

⁸ FTC Commercial Alert Response Letter (June 27, 2002), available at http://www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercialalertletter.pdf.

⁹ See, e.g., FTC, Sample Letter to General Purpose Search Engines (June 24, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchengine-generalletter.pdf>; FTC, Sample Letter to Specialized Search Engines (June 24, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginespecializedletter.pdf>.

¹⁰ FTC, Sample Letter to General Purpose Search Engines (June 24, 2013), at 1-2, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>.

¹¹ *Id.* at 3.

¹² *Id.* at 3-4.

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¹³ FTC, Workshop, “Blurred Lines: Advertising or Content?” (transcript), available at http://www.ftc.gov/system/files/documents/public_events/171321/final_transcript_1.pdf.

¹⁴ *Id.* at 235-42.

¹⁵ *Id.* at 297.

¹⁶ *Id.* at 300.

¹⁷ See, e.g., American Society of Magazine Editors, *ASME Guidelines for Editors and Publishers* (updated May 2014), available at <http://www.magazine.org/asme/editorial-guidelines>; Interactive Advertising Bureau, *IAB Native Advertising Playbook* (Dec. 4, 2013), available at <http://www.iab.net/media/file/IAB-Native-Advertising-Playbook2.pdf>.

¹⁸ Interactive Advertising Bureau, *IAB Native Advertising Playbook* (Dec. 4, 2013), at 15, available at <http://www.iab.net/media/file/IAB-Native-Advertising-Playbook2.pdf>.

¹⁹ *Id.* at 13.

²⁰ *Id.* at 18.

²¹ *Id.* at 16.