

MARCH 2016

DEVOTED TO
LEADERS IN THE
INTELLECTUAL
PROPERTY AND
ENTERTAINMENT
COMMUNITY

VOLUME 36 NUMBER 3

THE *Licensing*
Journal

Edited by Gregory J. Battersby and Charles W. Grimes

Praxis



Advertising

Julie O'Neill and Adam Fleisher

FTC Guidance on Native Advertising

“Native advertising”—ads that may blur the distinction between advertising and editorial, video or other content—has been a hot topic in recent years for both marketers and regulators. It is popular with marketers because it has become a very effective advertising model. The Federal Trade Commission (FTC), on the other hand, contends that it may be deceptive when the advertising content is not readily identifiable to consumers as such. As a result, the FTC has just issued guidance on how advertisers can stay on the right side of the law.

A Warning from the FTC

On December 22, 2015, the FTC released an *Enforcement Policy Statement on Deceptively Formatted Advertisements* that focuses in particular on “native” advertising, along with guidance for businesses on native advertising that further fleshes out the FTC’s expectations. The guidelines can be found at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guidebusinesses>.

The Enforcement Policy Statement defines “natively formatted advertising” as communications “that match the design, style, and behavior of the digital media in which it is disseminated.” For example, an advertisement

may be integrated into a newspaper Web site, with a “headline” and then a few lines of text, so that it appears similar to substantive, publisher-generated news articles posted on the Web site. Native advertisements also may appear on social media platforms and may be delivered as videos or through other media.

Regardless of format, the rule is the same. As the Statement puts it:

Deception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material.

In light of this principle, the FTC may deem an advertisement that looks like an ordinary news article to be deceptive if consumers are not provided with sufficient information to differentiate the advertisement from publisher-generated, non-advertising content. This information may be inherent in the nature of the advertisement, or it may require a separate disclosure indicating that the advertisement is a marketing communication. For instance, in *FTC v. Coulomb Media, Inc.*, FTC File No. 112 3072 (March 21, 2012) and *FTC v. Coleadium, Inc.*, FTC

File No. 102 3239 (Sept. 12, 2012), as well as other cases, the FTC alleged that defendants deceptively used fake news Web sites to market açai berry products. Similarly, and more recently, in *FTC v. NourishLife, LLC*, FTC File No. 132 3152 (Jan. 9, 2015), the FTC alleged that the defendants misrepresented that a so-called research Web site was an independent source for information about the speech disorder apraxia, when in fact the Web site advertised the health benefits of the company’s products.

A disclosure may be important because, even if the substance of the natively formatted advertisement is not deceptive, the *nature of the advertisement itself* can be deceptive. In this regard, the FTC recently has brought enforcement actions and warned about advertising that appears to be user-generated commentary about a product or service but is in fact marketing content created by or on behalf of an advertiser. (For more information about these recent enforcement actions, see our Privacy Minute on the *In re Machinima* case and our Client Alert on the *Deutsch LA* case.)

To put it another way, the Enforcement Policy Statement holds that “an ad is deceptive if it promotes the benefits and attributes of goods and services, but is not readily identifiable to consumers as an ad.” But what, exactly, does that mean? The Policy Statement and the guide for businesses offer some considerations of what may make an advertisement “readily identifiable.” The guidance lists 17 mini case studies that provide examples of what does and does not require a disclosure. (The fact that 17 examples are necessary suggests the potential complexity in determining what does or does not constitute an advertisement that requires a disclosure.) The

recurring theme of the examples is whether the consumer reasonably can ascertain that the advertisement is paid marketing material and not content organically generated by the publisher (or by a user in the case of social media or video-hosting Web sites).

Disclosures Required for Native Advertising

For cases in which native advertising requires a disclosure, the new guidance recaps the FTC's *com Disclosures* guidance for businesses, which lays out basic requirements for making "clear and prominent" disclosures. (These guidelines can be found at <https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital>.) The guidance also adds some new considerations, such as the need to disclose that the native content is advertising near the focal point of the ad, or in front of or above the "headline" of the native advertisement. (This disclosure needs to convey to the consumer that the material is advertising *before* the consumer clicks through the ad to the main advertising page.) In addition, the guidance suggests

that, for multimedia ads (such as videos), the disclosure should be made in the video itself *before the consumer receives the advertising message*. That is, if the advertisement is only a small part of the overall video, the disclosure must be "delivered as close as possible to the advertising messag[e]" itself. Finally, the guidance affirms that the disclosures should include terms likely to be understood, such as "Ad," "Advertisement," or "Paid Advertisement," and *not* terms such as "Promoted" or "Sponsored," which are ambiguous in this context and could imply, for example, that a sponsoring advertiser funded the content but did not create or influence it.

Conclusion

As the FTC continues to scrutinize various mechanisms for delivering advertising online, companies should make sure that consumers are aware when they are being marketed to, even as the participants in the digital advertising ecosystem come up with new and innovative ways to deliver those marketing messages. All participants, including the companies whose products are being marketed, are potentially at risk of an

FTC enforcement action if their advertisements are found to be deceptive, and thus every participant should pay heed to the FTC's recent statements and guidance. In light of the FTC's aggressive approach in this area, making sure that innovative forms of advertising meet the FTC's timeless disclosure standards should be on every company's radar.

Julie O'Neill, Of Counsel in the Privacy + Data Security Group at Morrison & Foerster LLP, regularly counsels clients in all areas of consumer protection law, including online and offline privacy issues, advertising in all media; all forms of communications and direct marketing, marketing through social media, mobile, online and offline tracking and personalization, and sweepstakes and other promotions.

Adam J. Fleisher is an associate in the Privacy + Data Security Group at Morrison & Foerster LLP, where he helps clients with all manner of challenges relating to privacy and data security, from compliance strategies to defending FTC and state attorney general regulatory investigations.

Copyright © 2016 CCH Incorporated. All Rights Reserved.
Reprinted from *The Licensing Journal*, March 2016, Volume 36, Number 3, pages 22–23,
with permission from Wolters Kluwer, New York, NY,
1-800-638-8437, www.wklawbusiness.com

