

Notes from a Naïf on Native Advertising: Impressions from the FTC’s Workshop on Advertorials and other Disguised Advertising

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Moving a bit out of my comfort zone of information privacy law, I participated in the [Federal Trade Commission’s Blurred Lines, Advertising or Content Workshop](#) on “native advertising” this week. I was surprised to learn about how much advertisers have breached the wall between editorial and advertising. It was also surprising to see how much confusion existed among advertisers about the law of deception, and how their practices could easily be policed under decades-old FTC precedent (and the sometimes more aggressive state UDTPA laws).

Advertorials and other “native advertising,” are advertisements “disguised” as editorial content. They capture consumer attention, and are more positively received by consumers. My presentation focused on the problem that while native ads may be attention-getting, they pose consumer protection problems. In a [framework of deception theory](#) developed by Manoj Hastak and Michael Mazis, advertorials can be seen as manipulating consumers’ schema (how consumers think about the world, here, consumers think that the native ad is an article), advertorials employ “source-based misleadingness” (by drawing on the credibility of the publisher), and they omit material facts (the disclosures are often much smaller than company logos and titles of the fake articles and they did not disclose how the advertiser shaped the development of the content). Why does this matter? Detection of advertising helps consumers prepare themselves to more critically evaluate claims and avoid scams. Consumers are the first line of defense against deception because the volume of scam advertising is so great that regulators can only police a small fraction of it.

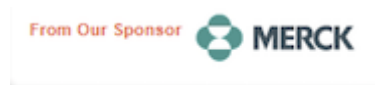
Here are some high level points from this interesting and troubling event--

Fraud in the Inducement Can Be Policed by the FTC, Yet, the Point of Native Ads is to Induce a Click

Leslie Fair, a FTC staff attorney, explained in detail how the agency had been policing sponsored content cases, going back to volume 1 of the FTC reporter (1917). Fair explained FTC precedent holding that deceptive “door openers” were illegal (situations where some ruse was used—here, a “survey”—in order to get access to a consumer and make a commercial pitch, [87 FTC 421 \(1976\)](#)), and that back in the 1960s the agency advised companies that advertorial had to have clear and conspicuous disclosure ([73 FTC 1307](#)).

Yet, the very purpose of native ads were described as a deceptive door opener—a way to get people to click on links they ordinarily would not visit if they realized it was advertising. More on that later.

Disclosures of these practices were neither clear nor conspicuous. They were not conspicuous in that often, the disclosure language was in a very small or less weighty font. Here is a typical example:



Directionality of “Sponsorships” Was Backward, Making Disclosure Unclear

When I see that a program was “sponsored by” or “brought to you by” a certain company, I assume that the company provided underwriting for the show. At the workshop, I used the example of the [PBS NewsHour with Jim Lehrer](#). No one assumes that British Petroleum, in supporting PBS, tells Mr. Lehrer what to cover, what to say, or what not to say. But three publishers presenting at the workshop—Mashable, The Huffington Post, and The Hearst Corporation—discussed how advertising shaped the genesis and drafting of what appears to be editorial content:

- Mashable, for American Express, Qualcomm, and Marriott, created *new* content that did not directly promote these companies’ brands, but somehow was related to their business. For instance, Mashable created new content for Qualcomm that profiled electronics made with Qualcomm components.
- Huffington Post, in order to promote a new waterproof device made by Sony, generated an article about popular water festivals. Sony’s payment to the Huffington Post and direction to create content was disclosed with “presented by Sony.”
- The Hearst Corporation created a [feature](#) for Nordstrom of Ugg shoes. The feature gave advice to consumers about how to transition to winter shoes (here’s a clue, dear consumer: boots) and of course some horrendous Uggs were

featured.

In my opinion, these are counterintuitive and misleading practices. The disclosures were unclear. For instance, “Presented by Sony,” could be interpreted in a number of ways, including the idea that Sony paid to have it placed on the homepage of Huffington Post, or Sony’s general support of Huffington Post.

I think most consumers imagine that a magazine commissions an in-depth review of a topic, say a visit to Guatemala, and when the article is finally slated to run, it tells likely advertisers that a Guatemala article is about to appear. Airline and hotel companies can then run relevant ads in the same issue. The opposite is occurring among these online publishers.

Advertisers Seemed not to Know the Law: Intent to deceive is not relevant, nor is “harm” required

The FTC’s organic statute prohibits practices that are likely to mislead a reasonable consumer to her detriment. This is basic, black letter law. Yet, participants were deeply confused about two aspects of it: first, §5 liability does not require intent to deceive. Participants repeatedly said that native ads were not intended to trick consumers but that is not the relevant legal issue. The issue is whether native ads are *likely* to mislead, even if the deception was an unintentional mistake.

Some participants argued that native advertising was good because it was more engaging and less jarring than normal advertising. These advertisers did not believe that they were tricking anyone, but rather engaging them in a friendlier way. But it is exactly that dissonance caused by recognizing advertising that causes the consumer to more skeptically evaluate (or avoid) an advertising claim. The “good” aspects of native advertising seemed to actually be very bad. The native ads advocates are modern versions of the Amway people—you are invited to a housewarming party and surprise, you are trapped and have to politely negotiate an edit.

Second, participants repeatedly raised the issue of “consumer harm,” but in FTC deception cases, the relevant inquiry is “consumer detriment,” a lower bar that clearly does not require monetary loss.

Rational Choice Cliché

Anyone who attends FTC workshops should be ready to hear the old clichés of rational choice theory: our customers are smart, they know what is going on; if they feel that this sketchy, they’re just a click away from the competition; if this practice does not work, the marketplace will eliminate it, etc. Of course, the basic problem with these arguments is that even if one is smart, a “reasonable consumer” may interpret “sponsored by” differently than the advertiser. Native advertising is a trick. Even rational actors can be tricked through guile, and it is the policy of US consumer protection law to not require consumers to scrutinize every disclosure as if they were an advertising attorney. Legal news flash: we are not in the Grand Bazaar. Caveat emptor is no longer the law in the United States.

Conclusion: Should the FTC Slow a Race to the Bottom?

No one mentioned critical theory at the event, but two speakers discussed the troubling nature of advertising’s effect on the autonomy of editorial. Professor [Nicholas Lemann](#), Dean of Columbia Journalism School, discussed the roots of modern journalism and the complex and shifting relationship it has had with advertising. Lemann discussed how newspapers have relied upon advertising to different degrees and in different ways over the past 150 years. Lemann pointed out that “puffs” are over a century old, with the first real expose of the problem appearing as Mike Sullivan’s *The Patent Medicine Conspiracy Against Freedom of the Press* in 1905. Lemann’s point raised a serious question—when an advertiser places an advertorial, can the advertiser suppress negative commentary by readers, or negative reporting by the publication’s writers? For what it is worth, I doubt we will see the truth about Uggs anytime soon in Harper’s Bazaar (that Paris looked good in them 10 years ago, at which point they should have been quietly moved to the back of the closet).

Professor [David J. Franklyn](#) discussed his research on consumers’ lack of attention to disclosures, but also emphatically made the point that some consumers simply do not care—or even prefer—that the content they are reading is really advertising.

Franklyn’s work is very valuable, and I have no doubt that advertisers themselves have measurements on whether consumers see these disclosures.

In the record, my colleague Professor Peter Menell submitted his recent [paper](#) arguing that, “growing integration of advertising into mass media and Internet services in the digital age represents a subtle, but real and present threat to expressive freedom, free will, and public well-being. What began as a largely innocuous means of cross-subsidizing print media and a solution to funding broadcast media has increasingly distorted the integrity of news reporting and creative expression.”

Lemann’s history of news and advertising highlighted the waxing and waning support of subscription and advertising for journalism. We clearly are in a period of heavy advertising support, and my [own work](#) argues that we would be better served to move to more subscription-based services.

Perhaps consumers know what they are getting, or simply do not care on the more frivolous news sources online. But how

long can distinguished newspapers defend themselves against advertisers who say, “why should I advertise with you when I can place content at your competitors, which are highly search engine optimized, and are willing to give ineffective disclosures?” With the Washington Post selling for a measly \$250 million, our most venerable institutions may be facing that pressure. The FTC could actually help publishers say no to such temptations by bringing new enforcement actions in this space. This workshop was an important reminder of the law, and an important contribution by that agency's staff to consumer protection.

P.S. Professor Rebecca Tushnet liveblogged the event here ([part 1](#) | [part 2](#) | [part 3](#)).