

FTC Regulation of Native Advertising: How New Federal Rules Impact Public Relations Practice

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Abstract

This paper examines native advertising and the FTC regulations that affect its content. Specific attention is given to the FTC 2015 guidelines *Native Advertising: A Guide for Business* and their *Enforcement Policy Statement on Deceptively Formatted Advertisements*. The study concludes with three suggestions on how these FTC regulations will affect public relations practitioners working on native advertising content.

Executive Summary

Native advertising is one of the fastest growing areas of online promotion. By 2017 revenue generated from native advertising is estimated to reach \$20.9 billion (Boland, 2016). Large public relations firms now are offering native advertising services to clients. This seems to be a natural fit for PR practitioners because native advertising uses skills frequently seen in press releases and news announcements to craft content. Additionally, the use of social media platforms provides a natural outlet for native advertisements. Understanding publics' use of social media is essential to effectively creating salient native ads.

Since 2000 the Federal Trade Commission (FTC) has produced numerous guidelines and policy statements that directly address promotional social media and internet content. Among these guidelines include issues related to disclosures, endorsements, truth in advertising, and transparency. These documents present a uniform approach the FTC takes when dealing with online promotional content. The values of honesty, disclosure, truth, and consumer awareness are found throughout these guidelines and policy statements. Additionally, these documents recognize that technological realities, particularly social media and mobile technology, directly affect how content creators present and comply with FTC regulations.

In December 2015 the FTC issued guidelines and a policy statement concerning native advertising. The guidelines reiterated some of the standard rules found in older FTC rules and guidelines. However, these native advertising guidelines gave pointed information to content creators and publishers concerning when disclosures in native advertisements are mandatory, the logistics of disclosures in a variety of technological outlets, and the format disclosures need to take in particular native advertising content.

While the particulars of these suggestions are nuanced and embrace a case-by-case application, there are general rules that PR practitioners can use when dealing with content creation for native advertising. First, PR practitioners should be aware that the FTC places liability on all those who are involved in the native advertising process. Content creators and clients are responsible for the effects of native advertising. Looking at the FTC endorsement guidelines there is precedent in the agency that states there is an expectation of environmental scanning by an organization to ensure consumer confusion is not taking place. The fact that native advertising is used by consumers in a unique way suggests that online environmental scanning may be an absolute necessity in order to reduce liability for organizations.

Second, native advertising regulations suggest that disclosure is not required for all native ads. The FTC guidelines suggest that some content is obviously promotional, and in those circumstances a disclosure is not required. However, PR practitioners should note that this aspect of native advertising regulation is determined on a case-by-case basis. This means that content producers must make the ultimate decision of whether to give a disclosure. This study suggests that if in

doubt there should be disclosure made as a preventative measure against claims of unfair advertising.

Third, native advertising regulations show that the FTC is attempting to apply older false advertising and transparency standards to this new form of promotion. However, FTC guidelines only tell industry how the agency thinks about a particular rule. Because these guidelines were only recently released it would be prudent for industry to watch how the FTC enforces their guidelines. While the guidelines provide hypothetical examples of native advertising compliance, the best indicators of agency application are actual cases. It is important for practitioners to stay current on these developing trends as these new guidelines are applied to industry.

Native advertising presents a unique opportunity to public relations firms. It also is an example of how the communication industry is using tactics and strategies that cross between public relations and advertising. Knowing the FTC's policies on native advertising not only allows public relations practitioners to draft well structured native ad content, but also gives public relations practitioners the ability to engage in the development of this new, and lucrative, communication practice.

Introduction

Public relations practice has evolved in the past decade to include many types of strategic communication. One area that presents unique opportunities for public relations practice is native advertising. For public relations practitioners native advertising has emerged as a new form of communication that provides unique benefits for clients. Because native advertising is paid promotion it falls under the control of the Federal Trade Commission (FTC). FTC regulations on promotional content is constantly evolving, and those PR practitioners who engage in native advertising should be aware that new guidelines and policies directly impact content. This paper examines the FTC's regulation of promotional materials with specific attention paid to recent guidelines and policies on native advertising. Because regulation of native advertising is influenced by older guidelines on endorsements and disclosure, this paper also provides an overview of those regulations. From this examination of FTC regulations this paper concludes with practical suggestions for public relations practitioners, and suggests future legal trends in native advertising regulation.

Native Advertising

Although native advertising is a current buzzword within communication practice giving a precise definition is difficult. Bakshi (2014-2015) points out that since 2010 the definition of native advertising has evolved from meaning paid user promotions to mean packaging promotional content similar to other non-promotional content on a website or social media platform. Other definitions provide a more diffused definition for native advertising. *The Native Advertising Playbook* states that native advertising takes various forms including: "In-Feed Units," "Paid Search Units," "Recommendation Widgets," "Promoted Listings," "In-Ad (IAB Standard) with Native Element Units," and "Custom" (The Native Advertising Handbook, 2013, pp. 4-5). These various types of native advertising represent different integration strategies. Kurnit (2014) argues that native advertising's main characteristic is found in how organizations "seamlessly place their messages into the flow of information and content" (p. 1). Regardless of the definition, native advertising is big business, and absent a major change in communication practice or law it is here to stay.

Part of the reason for this interest in native advertising is the revenue it produces. In 2016 *Business Insider* reported that native advertising revenue accounted for 56 percent of all revenue, and by 2021 74 percent of all ad revenue will be derived from native advertising. In 2017 it is predicted that native advertising will constitute \$20.9 billion dollars (Boland, 2016). The International News Media Association and Native Advertising Institute released a 2016 study that found 48 percent of all newspapers use native advertising for revenue (McMullan, 2016). However, the newness of this communication practice is causing some issues within the communication profession. The study also found that one of the largest issues in native advertising is “explaining native advertising to marketers and convincing advertisers to tell real stories” (McMullan, 2016, para. 8).

Native advertising seems to be closely aligned with what public relations firms currently do. In 2013 *Advertising Age* noted that the PR firms Edelman and Weber Shandwick began working on native advertising (Johnson, 2013). At the 2013 FTC workshop on native advertising Steve Rubel, chief strategist for Edelman, stated that “as native advertising and sponsored content has blossomed, it’s obviously become very interesting to our business. And we now see it as a kind of arrow in our quiver of different things we can do....” (Federal Trade Commission, 2013a, p. 67). Part of the reason native advertising lends itself so well to public relations is it builds on relationship management, image maintenance, environmental scanning, and reputation. Perhaps more importantly, native advertising’s success largely depends on consumer trust and image management. As Robinson (2016) points out, public relations practitioners are essential to these processes especially when an organization is dealing with reputational issues. PR firms have recognized this area of opportunity.

Overview of FTC Regulations and Guidelines

Native advertising, similar to most promotional communication, is commercial speech. This is important because commercial speech receives some, but not full, protection under the First Amendment of the U.S. Constitution (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 1976). Because of that, native advertising is subject to the regulations imposed by federal agencies, such as the FTC. However, the distinction between commercial and non-commercial speech is not one of self-identification. Rather, courts look to the nature of the speech itself to determine whether it is commercial. In *Bolger v. Youngs Drug Products Corporation* (1983) the U.S. Supreme Court held that courts should look at three factors when determining when speech was commercial: 1) whether the speech is an advertisement; 2) whether the speech specifically mentions a product; and 3) whether the speech in question has an economic purpose. Under this test native advertising clearly is commercial speech, and the FTC and other agencies’ constitutional authority to regulate this speech is well established. The U.S. Supreme Court further refined commercial speech laws in 1980 when it put forth a test for when government can regulate commercial speech. In *Central Hudson Gas v. Public Service Commission of New York* (1980) the court held that state regulation of commercial speech can occur only when 1) the speech in question is protected by the First Amendment, 2) there is a substantial government interest in the regulation, 3) the regulation advances the stated government interest, and 4) the regulation is not “more extensive than necessary to serve that interest” (*Central Hudson Gas v. Public Service Commission of New York*, 1980, p. 566). The U.S. Supreme Court revisited the issue of government regulation of commercial speech again in 2011 in *Sorell v. IMS Health Inc.* That case involved a pharmaceutical company’s use of doctor’s prescription drug records for direct marketing. Vermont law forbade the use of this prescription information for commercial marketing

purposes. The U.S. Supreme Court held that although the case involved direct marketing it was subject to “heightened judicial scrutiny,” which suggests that the U.S. Supreme Court could be moving closer to giving commercial speech full First Amendment protection (*Sorrell v. IMS Health Inc.*, 2011, p. 557).

Commercial speech regulation frequently falls to federal agencies, particularly the FTC. Agencies use rules and guidelines to regulate certain issues. Although rules and guidelines are legally distinct they are both regularly followed by industry. An agency rule is similar to a statute; it is the law of the agency that sets forth certain restrictions or procedures that must be followed (Administrative Procedure Act, 2012). A guideline is not a law; rather it is an interpretation of rules and how they should be applied in the field. The Code of Federal Regulations Section defines agency guidelines the following way:

They [guidelines] provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry (Guides Concerning the Use of Endorsements and Testimonials in Advertising, 2009a, para. a).

The practical result is that guidelines are followed the same way as rules. In some respects agency guidelines can be more informative than rules because they illustrate how the agency is interpreting a particular rule and how they believe violations can occur in industry. Federal agency rules are interpreted and refined by the agency. Federal courts give agencies great deference in interpreting their own rules, because the agency is considered the expert in the area it is regulating. This deference, commonly called Chevron deference, states that a federal court evaluates an agency’s interpretation of its own rules by asking 1) has Congress has “directly spoken” on the issue, and if not then 2) “whether the agency's answer is based on a permissible construction of the statute” (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1983, pp. 842-843). The practical result of this is that agency interpretation of its own rules is rarely overturned by federal courts, and those industries evaluating how agencies will impose their regulations would be well advised to follow the guidance in agency produced guidelines.

What this means for native advertising is that federal agency regulation is the primary way these types of communications will be regulated. While states may pass individual laws about false advertising, PR practitioners and communication professionals should pay close attention to federal regulations. Because public relations firms are already engaged in native advertising they should be aware that they will be subject to advertising regulations. While it is true that public relations practice and advertising are professionally distinct, those distinctions are irrelevant when PR practitioners are engaging in native advertising.

FTC Regulations and Guidelines on Deceptive Advertising

Created in 1914 the Federal Trade Commission has largely been responsible for regulating deceptive advertising practices. The highest level of the FTC is made up of five commissioners appointed by the President of the United States. The commission is bipartisan and only three commissioners can be of the same party (Federal Trade Commission Act, 2012, section 45, subsection a(1)). Since its creation the FTC is given the right to prevent and stop “unfair or deceptive acts or practices” from occurring in the U.S (Federal Trade Commission Act, 2012). This responsibility is rooted in the history surrounding U.S. commerce prior to 1914 when advertisers

used reading notices, a form of paper insert that looked like an editorial comment, into newspapers (Bakshi, 2014-2015). Congress eventually passed the Newspaper Publicity Act in 1912, which, among other things, regulated how postage would apply to reading notices that had proliferated. One of the first FTC cases involving deception concerned an advertisement that was portrayed as a newspaper editorial. In that case, which is very similar to the current issues in native advertising, the FTC found that Muenzen Specialty Company posed as unaffiliated reviewer that recommended its particular vacuum cleaner. The FTC held that this was engaged in deceptive advertising and ordered Muenzen to cease its early form of native advertising (*FTC v. Muenzen Specialty Co.*, 1917).

By the end of the twentieth century the FTC had clearly defined deceptive advertising in a series of federal cases and agency rules. The FTC has developed a definition of deception. Articulated in *Cliffdale Associates Inc.* (1984) and later in the Federal Trade Commission Advertising Enforcement document, the FTC held that advertising deception “contains a misrepresentation or omission that is likely to mislead consumers acting reasonable under the circumstances to their detriment (Federal Trade Commission, 2008, p. 1). The major issue in deception is not actual injury to consumers; all that is required to show advertising deception is that consumers’ choice was influenced. This means that it is easier for the government to find deception because unlike most lawsuits injury is not required; instead all that needs to be shown is consumer confusion.

The FTC has developed a robust set of cases, rules, and guidelines that regulate advertising and online communication. This material shows that there are patterns in how the FTC views the responsibilities and roles of organization in their promotional messages. In 1983 the FTC stated in a policy statement that deceptive advertising has three basic elements: 1) “there must be a representation, omission or practice that is likely to mislead the consumer;” 2) the consumer using the product must do so “reasonably;” and 3) “the representation, omission, or practice must be a ‘material’ one” (Federal Trade Commission, 1983a, p. 1). This definition of deception is broad because it looks at both what is contained in and omitted from the advertising content. This rule concerning omission includes omission of relationship. The *FTC Policy Statement on Deception* noted that relationships between salespeople and customers are deceptive if the salesperson does not disclose his true relationship with the company. However, the FTC’s definition of deception does not include “every conceivable misconception, however outlandish” (Federal Trade Commission, 1983a, p. 3 citing *Heinz W. Kirchner*, 1963, p. 1290). However, customer perception of deception is group specific, and advertising targeted to more vulnerable groups, such as children, can be subject to different standards of deception based upon that groups’ perception. Perhaps the most important factor in deception is what is the root of the deception; sometimes this is referred to as the materiality of the ad. The FTC states that materiality is important because deception based on material content is more likely to result in consumer injury. The FTC looks particularly at content and what statements are actually made in the advertisement. Related to this, the FTC also considers what information is left out, specifically information that directly relates to “health, safety, or other areas with which the reasonable consumer would be concerned” (Federal Trade Commission, 1983a, p. 5).

FTC regulations have expanded to include how advertisements must be crafted. One mandate is that that advertisements must have substantiation, or verification, for both express and implied claims (*In the Matter of Thompson Medical Company, Inc.*, 1984). This regulation is prevalent in promotional materials that cite expert studies or statistics contained in an ad. However, substantiation is required even when a claim is only implied. This can create a problem for

organizations who do not intent their advertisements to be interpreted a certain way. However, the FTC states that an implied claim must be substantiated so long as the implication is based on a consumer's "reasonable interpretation" (Federal Trade Commission, 1983b, para. 6).

These older FTC standards are applicable to native ads. The FTC's philosophy on deception does not change with technological innovation. While native advertising presents unique challenges to content creators, they should remain aware that the core tenets of FTC deception policy is the same. What the FTC tries to do is apply its previous rules to new platforms, and not create new interpretations of advertising regulations.

FTC Regulation of Online and Digital Promotions

Advertising deception and substantiation are well-established tenets of FTC policy. However, with the prevalence of digital and online technology the FTC began issuing new rules and guidelines concerning how promotions and ads could be presented on the internet and using digital technology. One of the first of these guidelines was the 2002 search engine letter the FTC issued concerned search engine advertisement. In that letter the FTC specifically stated that advertisements that emerge in search engine results must be displayed distinctly from other non-promotional results and that promotional advertisements be displayed in a manner that does not "mislead consumers" (Hippisley, 2002, p. 3).

Similar to search engine promotions, the FTC issued guidelines on online promotional content in 2000 and again in 2013. The *Dot Com Disclosures* guidelines emphasized that online advertising was subject to the same FTC rules and regulations that were written in a pre-internet era. It also noted that disclosures needed to be made on certain content, particularly content that involves "terms of a transaction" (Federal Trade Commission, 2000, p. 1). The major thing that *Dot Com Disclosures* did was recognize that disclosure requirements for certain products were affected by the technology of the internet. For instance, banner ads, pop-up displays, and placements of disclosures within a website were specifically addressed in the guidelines. Although the *Dot Com Disclosures* guidelines are somewhat rooted in the technological realities of the late 1990s and early 2000s its philosophy of providing easily identifiable disclosures is relevant today. For instance, the guidelines specifically give directives that the "prominence" of a disclosure is extremely important for consumers and that "distracting factors" should be avoided (Federal Trade Commission, 2000, p. 13). The 2013 update *.com Disclosures* reiterated many of the themes presented in its 2000 predecessor. These more recent guidelines speak directly about social media disclosures and the technological limitations certain platforms have in providing legally sound disclosures (Federal Trade Commission, 2013b).

The 2013 *.com Disclosures* specifically mentioned where disclosures should be placed within online content. The FTC was particularly concerned with the amount of work a user had to do to find disclosures. For instance, hyperlinks and scrolling for disclosure information was criticized for being too hidden from consumers. The guidelines also pointed out large amounts of content that may need multiple disclosures throughout. The FTC noted that there were also platform constraints within social media. In the appendix of the guidelines that FTC gave an example of a disclosure found in a bit.ly link on a tweet. The FTC stated that that type of link was not good enough to constitute a valid disclosure because consumers may not click on it to redirect to the site. Technological limitations not only apply to platform, but also to mobile devices. In another example the FTC noted that using a disclosure on a website that was not easily displayed on a smart phone would not be a sufficient disclosure because consumers may overlook it. Although

the FTC stopped short of requiring monitoring of disclosure traffic, the guidelines did suggest that organizations that may want to use software to monitor the amount of visits to disclosure hyperlinks. They suggested that if the link is not visited then the organization should reconsider how they are making disclosures online (Federal Trade Commission, 2013b).

The disclosure issues related to technology are part of a bigger question of what exactly do organizations have to disclose? The FTC provided insight into this issue in May 2015 guideline that provided an overview of endorsements, particularly how endorsements work on social media and blogs. The core tenet of FTC endorsement guidelines is honesty. The endorser must be honest in both the claims he or she makes about a product or service, and also must be honest about his or her relationship with the product he is endorsing. The FTC views the relationship between endorser and product as extremely important because it affects consumer perception about the endorsement. However, in the social media and digital age endorsements can be deceptive because the platforms may lead consumers to believe that the endorsement is an unpaid, authentic claim (The Federal Trade Commission, 2015d).

Blog endorsements have emerged as a major concern for the FTC. Although endorsement guidelines are the same across platforms, blogs present a unique endorsement situation because unlike traditional media it cannot be assumed that blog endorsements are automatically paid-for. Social media or blog endorsements regulations require that a person who receives free products (even temporarily) or compensation must reveal their affiliation with the manufacturing organization. Celebrity endorsements or corporate ambassadorships work much the same way; if the audience would not automatically know the endorser is paid for endorsement then disclosure is required. Endorsement does not necessarily mean that there is a large write-up of a product; liking and sharing a product page and writing social media reviews constitute endorsement that must be disclosed when the endorser is compensated. This compensation also takes many different forms. Receiving products (even low cost samples) in press kits or directly from the manufacturer is considered compensation. Other forms of compensation can include coupons, sweepstakes entry, or discounts for products. Additionally, this disclosure of compensation is not platform specific; both endorsements done on personal social media and blog sites as well as customer reviews on an organization's or third party site must be disclosed (The Federal Trade Commission, 2015d).

Language on endorsements is important, but the FTC states there is no "special wording" that must be used (The Federal Trade Commission, 2015d, p. 10). However, the FTC suggests disclosure should include compensation, especially if it exceeds merely a complimentary trial/product. This does not mean the disclosure has to list all of the details of the agreement, but if there is payment given for endorsements consumers should be made aware. The FTC is much more direct in the location and prominence of the disclosure on a social media or blog site. Hyperlinking or using catchall disclosures is discouraged by the FTC, and their guidelines suggest those disclosures would not be good enough to meet agency regulations. The disclosures must be "conspicuous" to consumers (The Federal Trade Commission, 2015d p. 12). However, this conspicuousness is related to the platform or technology used. For instance, the FTC states that Twitter disclosures can contain hashtags such as "#ad" "sponsored," "promotion" or "paid ad" in the specific tweet (The Federal Trade Commission, 2015d, p. 12). In other media, such as blogs, websites, and YouTube videos there must be conspicuousness depending on the platform. The guidelines state that those crafting disclosures should look at five things when evaluating the quality of the disclosure:

- 1) Close to the claims to which they relate;

- 2) In a font that is easy to read;
- 3) In a shade that stands out against the background;
- 4) For video ads, on the screen long enough to be noticed, read, and understood;
- 5) For audio disclosure, read at a cadence that is easy for consumers to follow in words consumers will understand. (The Federal Trade Commission, 2015d, p. 12).

Endorsers also have to follow certain rules about the endorsement itself. FTC regulations require that endorsers only endorse products positively if their experience is positive. The Code of Federal Regulations states that “endorsements must reflect the honest opinions, finding, beliefs, or experience of the endorser” and that endorsers may not make claims concerning the product or service that the manufacturer or owner of an organization cannot legally make (Guides Concerning the Use of Endorsements and Testimonials in Advertising, 2009b, para. a). In other words, endorsements may not be used to surreptitiously to provide unfounded information (The Federal Trade Commission, 2015d).

For those organizations that use third party bloggers and others with influential social media accounts there is an expectation of monitoring content. While the FTC does not mandate that organizations scour the internet for all things said about a product or service, the FTC does expect that organizations establish parameters for third party endorsers. *The FTC’s Endorsement Guides* give the following suggestions:

- 1) Given an advertiser’s responsibility for substantiating objective product claims, explain to member of your network what they can (and can’t) say about the products—for example, a list of the health claims they can make for your products;
- 2) Instruct members of the network on their responsibilities for disclosing their connections to you;
- 3) Periodically search for what your people are saying; and
- 4) Follow up if you find questionable practices (The Federal Trade Commission, 2015d. p. 16).

Sensing that organizations frequently leave the task of environmental scanning to in-house public relations departments or public relations firms, the FTC specifically mentioned that PR practitioners need to have an “appropriate program in place to train and monitor members of its social media network” (The Federal Trade Commission, 2015d, p. 17). Specifically the FTC suggests that practitioners may want to provide clients with “regular reports” that provide an overview of online endorsement behavior (The Federal Trade Commission, 2015d p. 17). The FTC noted that “delegating” online scanning and monitoring to PR practitioners does not absolve the organization’s accountability under FTC rules.

These regulations on disclosure and endorsement are important to understand for two reasons. First, native advertising is directly informed by previous guidelines on transparency in online promotions. Second, these endorsement and disclosure requirements may be applied within a native advertisement. For instance, a native advertisement that also uses a celebrity endorsement would need to follow both regulations on endorsements and native ads.

Native Advertising Regulation

Promotion disguised as non-promotional content has been challenged by the FTC for decades. However, the rise of native advertising has caused the FTC to pay special attention to this particular form of promotion. Because native advertising has so much success for businesses and digital platforms, the practice of native advertising has proliferated in the past decade. At first the FTC did not provide rules or guidelines for the use of native ads. This led to some notable examples of especially deceptive native advertisements that caused reader and consumer confusion. One well-known example occurred in 2013 when *The Atlantic* ran a native advertisement entitled “David Miscavige Leads Scientology to Milestone Year” (Bakshi, 2015; Edwards, 2013). Although the advertisement contained a disclaimer at the top left of the article that said “Sponsor Content,” the disclosure required users to follow a link that explained the actual sponsorship of the article (Wemple, 2013). This caused criticism from news outlets, and *The Atlantic* ultimately issued an apology for its mishandling of this content (Fallows, 2013).

The issue of native advertising and the potential deception that occurs in this type of content was of concern to the FTC. In 2013 the FTC held a workshop on native advertising entitled *Blurred Lines: Advertising or Content An FTC Workshop on Native Advertising*. In her closing remarks at the workshop Jessica Rich, Director of the Bureau of Consumer Protection, recognized the popularity and interest in native advertising while also acknowledging issue of deception. She said, “There appears to be a strong consensus about the need for transparency in order to preserve trust and protect or preserve the value associated with the brand” (Federal Trade Commission, 2013a, p. 298). The workshop was designed as a conversation about issues in deception in native advertising and the media. It did not produce concrete rules for native advertising disclosure, but in its presentation the FTC signaled that there was serious concern about consumer confusion. The proposed remedy for this issue appeared to be proper labeling of content as sponsored or paid advertising (Federal Trade Commission, 2013a).

In December 2015 the FTC issued guidelines and an enforcement policy concerning native advertising that detailed how the agency viewed native advertising, and how it should be treated by media outlets. The foundation of these guidelines is found in Rich’s statement concerning online users. She said “People browsing the Web, using social media, or watching videos have a right to know if they’re seeing editorial content or an ad” (Federal Trade Commission, 2015b, para. 3). The guidelines entitled *Native Advertising: A Guide for Business* and the *Enforcement Policy Statement on Deceptively Formatted Advertisements* are rooted in the same FTC policies on deception (Federal Trade Commission, 2015a, 2015c). The guidelines specifically mention that when the FTC is evaluating a native advertisement it is not looking at specific aspects of the content. Rather, the FTC examines “the net impression the ad conveys to consumers” (Federal Trade Commission, 2015c, section I, para. 2). What this means is that content and technological context is of significant importance in determining deception of a native ad. The FTC goes so far as to say that some native advertisements may obviously be ads and that disclosure is not required. However, the FTC emphasized that when it comes to native advertisements “the watchword is transparency” (Federal Trade Commission, 2015c, section I, para. 6). However, it is important to note that transparency is a standard that cuts across content and platform. While the archetype of native advertising is found in paid articles in online magazines or newspapers the FTC recognizes that native ads are also found in “email, infographics, images, animations, and video games” (Federal Trade Commission, 2015c, section II, para. 1).

The decision of when to disclose native advertising is based on the specific context of the content. It is a misnomer to think that all native advertising requires a disclaimer. Depending on how the

native ad is situated within the larger theme and text of the website or platform determines when disclosure is required. The FTC gives specific examples of when disclosure may not be required. For instance, if a native ad contains clearly promotional language, such as directing consumers to a link to find out more about a product, that would not require disclosure. Similarly, if a company pays a video game manufacturer to include the company's products in the video game (e.g. virtual billboards or characters wearing certain clothing) that does not require disclosure. On social media accounts a sponsored message from an organization that appears in a news stream does not necessarily require disclosure because the user most likely is aware that the information is an advertisement (Federal Trade Commission, 2015c).

Instances where content does require disclosure comes in specific scenarios where the content ceases to be exclusively promotional. The FTC states that disclosure is required when content addresses subjects that may be related to products. For instance, the FTC gives an example of an appliance manufacturer who buys native ads in a home magazine in which the ad displays pictures of kitchens with the manufacturer's appliances. That particularly scenario would require disclosure because the content of the ad and the subject of the magazine are closely integrated that consumers may not be aware that the kitchen photos are not part of the magazine's normal content. Videos also present a unique issue with disclosure. The FTC's guidelines state that even if it is obvious that a video is promotional users may not realize it is promotional content until they watch it. Because of that disclosure needs to be made prior to the user downloading or streaming (Federal Trade Commission, 2015c).

Disclosure recommendations for native advertising follow almost verbatim the advice given in the FTC's 2013 *.com Disclosures* guidelines (Federal Trade Commission, 2013b). Clarity both in language and visuals is important to native advertising disclosure. Placing an organization's logo coupled with distinct coloring or font is in many instances sufficient for disclosure. Similar to the *.com Disclosures* and *Dot Com Disclosures* the "proximity and placement" of the disclosure is important, and the FTC recognizes that the best place for placement is at the beginning of content (Federal Trade Commission, 2013b, p. 13; Federal Trade Commission, 2000, p. 6). The FTC's native advertising guidelines specifically addresses the new technological reality of sharing on social media. According to the FTC, the disclosures required on native advertising needs to be able to remain when shared. The guidelines specifically mention that URLs of native ads need to contain "disclosure at the beginning of the native ad's URL" (Federal Trade Commission, 2015c, section III (A), para. 5).

Similar to the FTC's Endorsement Guides the native advertising guidelines prize clarity of disclosure. The FTC even provides a list of items that should not be used in native ad disclosures. They include:

- 1) Technical or industry jargon;
- 2) Different terminology to mean the same thing in different places on a publisher site;
- 3) The same terminology to mean different things on a publisher site;
- 4) Terms that customarily have different meanings to consumers in other situations;
- 5) Unfamiliar icons or abbreviations;
- 6) Company logos or brand names unaccompanied by a clear text disclosure (Federal Trade Commission, 2015c, section III (C), para. 1).

While the FTC does not mandate that certain language be used in disclosures for native ads, they do provide some suggestions. Direct attribution is one suggestion to avoid native advertising confusion. Examples of this include “Presented by,” “Brought to you by,” or “Sponsored by” (Federal Trade Commission, 2015c, section III (C), para. 2). Other suggestions include placing a identifying word or phrase at the beginning of content. This includes things such as “advertisement,” “paid advertisement” or “sponsored advertising content” (Federal Trade Commission, 2015c, section III (C), para. 2).

It is important to note that liability is only briefly mentioned by the FTC guidelines on native advertising. However, despite its short section, it states that those who create content are not immune from liability merely because they are representing a client. Content creators, according to the FTC, are responsible for ensuring that content is not confusing to consumers. Given the role that public relations practitioners may play in native advertising creation, and the fact PR departments frequently engage in online environmental scanning makes liability issues in native advertising all the more important (Federal Trade Commission, 2015c).

Implications for Public Relations Practitioners

The success and lucrativeness of native advertising means it will continue for some time. Because of that, PR practitioners need to be aware of three major issues involving native advertising. However, the largest issue for public relations practitioners is navigating a legal system and federal regulations that is continually evolving and attempting to apply older regulations to rapidly changing technology. Working in this environment public relations practitioners should recognize three major things about native advertising’s affect on PR practice:

1. Public relations can be subject to advertising laws.

Public relations practice has long been concerned with how it is legally categorized. This issue reached a critical point in 2003 with the *Nike v. Kasky* (2002, 2003) case that addressed whether public relations practice could be subject to false advertising claims (Myers, 2016).¹ However, the public relations industry’s entry into native advertising means that public relations practitioners are not operating in a legally gray area. Native advertising is clearly commercial speech, and the FTC’s regulation of native advertising squarely applies to any work done in this area. Additionally, the FTC’s guidelines on native advertising make it clear that even if PR practitioners are partially involved with the production of native advertising they can be held liable under the FTC’s code (Federal Trade Commission, 2015c). They should remember the law makes no distinction between relationship management and persuasive content. Rather they look at the objective and substance of the communication in order to determine whether content is commercial speech (Bolger, 1983).

Despite being subject to native advertising laws PR practitioners should embrace their role in the native advertising industry. Setting aside the obvious financial benefits of working on native ads, the public relations practice is a natural fit for producing native advertisements. This is because native advertising is a content driven communication that places a high value on relationships, honesty, and transparency.

¹ This issue is still unresolved nationally because the U.S. Supreme denied certiorari on this case.

2) Native advertising regulations will change based on consumer awareness.

The current guidelines on native advertising were first published in December 2015. In the next five years PR practitioners and other communication professionals will have a better sense of how the FTC regulations will be applied to native advertising. Given the newness of the current guidelines it is still unclear exactly how the FTC will apply its guidelines to actual scenarios the actual rules governing native advertising may change. The current FTC guidelines only provide hypothetical examples of how native ads will be regulated. However, actual cases rarely mirror hypothetical scenarios. There potentially could be an unanticipated issue with the way native ads are formatted or interpreted that may prompt the FTC to issue more guidelines or rules.

Despite the limitations guidelines they are important for interpreting how the FTC will regulate native ads. It is important for PR practitioners to know these rules are the best way to anticipate regulation and future cases. Given the deference federal courts give agencies in interpreting and enforcing their own rules it would be prudent for PR firms and practitioners to carefully examine these guidelines when they are creating native content.

3) When in doubt disclose and be honest.

The biggest take away from the FTC's guidelines on native advertising, disclosure, and endorsement is that honesty and disclosure is highly valued. The mechanics of these disclosures seem to be consistent in all of the guidelines the FTC has issued since *Dot Com Disclosures* (Federal Trade Commission, 2000). In the 2015 *Native Advertising: A Guide For Business and Enforcement Policy Statement on Deceptively Formatted Advertisements* there are instances where disclosure is not required (Federal Trade Commission, 2015a, 2015c). Usually these instances occur when the consumer would clearly interpret the content as an advertisement. However, it should be noted that these instances are a matter of interpretation. While the FTC guidelines on native advertising gives specific examples of when disclosure is not required it is important to note these instances present no objective rules for determining when disclosure is not required. The best PR practitioners can do is assess the situation and make a judgment call based on the native advertising guidelines' examples. Because of that those creating native ads should make the proper disclosures, or be prepared to challenge an FTC inquiry.

Native advertising presents one of the most lucrative and evolving areas of communication. It is important to note that FTC guidelines, while important, are not the same as agency rules. PR practitioners should monitor the rules and guidelines produced by the FTC because new ones may be created in response to emerging trends. However, it is equally true that the older guidelines and rules of the FTC are still in effect and apply to native advertising, even if they do not explicit say so. By staying current with native advertising regulations PR practitioners will not only be able to produce legally sound content, but they will be able to contribute the growth of this area of communication in a significant, perhaps indispensable, way.

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