

Native Advertising Faces Growing Regulatory Focus

4th Edition: Trends in Marketing Communications Law

The continuing growth in native advertising is leading to increasing regulatory scrutiny into whether consumers can distinguish native advertisements from surrounding non-paid content, and whether disclosures are being used effectively.

Consumer protection principles apply to native advertising, as the Federal Trade Commission (FTC) has made clear in its “Enforcement Policy Statement on Deceptively Formatted Advertisements and Native Advertising: A Guide for Businesses.” The FTC wants consumers to understand when content is paid for by a marketer to promote the marketer or its products. According to the FTC, if consumers cannot distinguish native advertising from surrounding non-commercial content, disclosures such as “advertisement” may be necessary to prevent consumer deception.

Complicating the matter is that marketers are seeing a more nuanced phase of enforcement from the FTC, state attorneys general, and the National Advertising Division of the Council of Better Business Bureaus (NAD) that focuses not only on the existence of disclosures, but on their quality and adequacy. It also is unclear whether the FTC will take action against labels such as “sponsored content” and whether marketers, agencies, or publishers will be held responsible for such labels. Thus far, the FTC has focused on the marketers. Although it is possible that the FTC could take a flexible stance on disclosures such as “sponsored content” if there were adequate evidence that they were readily understandable and clearly identified the content’s commercial nature, unless and until that occurs, marketers should evaluate using FTC-sanctioned labels that specifically designate paid content as “advertising” or “sponsored advertising content.”

Emerging formats such as mobile video, augmented and virtual reality and messaging apps present new challenges for marketers balancing the need for compelling brand content with regulatory compliance. Mobile video requires disclosures tailored for smartphone-sized screens and that are visible before consumers watch the video. Augmented and virtual reality games and apps present unique challenges because consumers have greater control over the content they interact with, so marketers need to work with technology vendors to ensure that consumers are unable to bypass disclosures. Messaging apps such as Facebook Messenger and Viber may allow consumers to share native ads with family and friends, but disclosures cannot be left behind and must attach to each message.

Key Takeaways

- Publishers, marketers and agencies need to develop strategies for compliance to ensure they are one step ahead of the regulators.
- Native advertising, or content promoting an advertiser or its products, must be distinguishable from non-commercial content. Disclosures such as “advertising” or “sponsored advertising content” may be necessary.

- In addition to the FTC, state attorneys general and the NAD are monitoring for deceptive native advertising practices.
 - To mitigate risk of an enforcement action, publishers, marketers and agencies should adopt internal procedures to ensure best practices including regularly reviewing marketing practices, developing internal native advertising policies, and updating website disclosures to help to ensure compliance in this rapidly changing area.
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