

Native Advertising

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Introduction

Native advertising guidance

- FTC issued long-awaited guidance on native advertising in December 2015
 - “Enforcement Policy Statement on Deceptively Formatted Advertisements”
 - “Native Advertising: A Guide for Business”
- Followed December 2013 workshop, “Blurred Lines: Advertising or Content?”

Blurred Lines: Advertising or Content? – An FTC Workshop on Native Advertising



DEC 4, 2013
10:00AM
FTC CONFERENCE CENTER
601 New Jersey Avenue, NW, Washington, DC 20001 | Directions & Nearby

Native advertising, defined

- “Advertising and promotional messages integrated into and presented as non-commercial content.”

Native advertising, defined

- Only applies to “commercial speech”
 - “The scope of this enforcement policy statement is restricted to commercial speech the Commission has authority to regulate”
- FTC applies the *R. J. Reynolds* factors
 - “Messages, means, and motives”

Background

FTC authority

- Section 5 prohibits “unfair or deceptive acts or practices”
- A practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is material to them
- Consider the “net impression”
- Enforcement Policy Statement is advisory only and not independently enforceable

Deceptive formats

- Consumers have the right to know when they are being advertised to
- FTC has long held that content that isn't identifiable as advertising is deceptive if it misleads consumers into believing the content is independent

FTC Enforcement

- Print ads
- Program length commercials
- Search engines
- Websites
- Misleading “door openers”
- Endorsements

FTC Policy

Deceptive formats

- Native advertising formats may blur the distinction between advertising and non-commercial content
 - Match the design, style, and behavior of the digital media in which it is disseminated
 - Inserted into the stream of the regular publisher content or embedded into entertainment programming

Deception

- Does the ad mislead reasonable consumers as to its true nature or source?
- A misleading misrepresentation is material if it is likely to affect a consumer's:
 - Purchasing decision
 - Conduct with respect to an advertisement
- Misleading formats are deceptive, even if the underlying product claims are truthful

Net impression

- Consider the “net impression”
 - How will consumers interpret the ad in a particular situation?
 - What does the ad look like?
 - Is it similar in style to other non-advertising content?
 - Is it distinguishable from non-advertising content?
 - What are consumers’ expectations for that media?
 - Who is the target audience?

Net impression

- Some formats may not be deceptive
 - Promotional nature of the native advertising content may make it clear to consumers that the content is really advertising (“come and drive X today”)
 - Product placements in entertainment content, where no claims are made about the product

Business Guide Example #2

- Winged Mercury Company pays an online magazine to publish an article, “The 20 Most Beautiful Places to Vacation”
 - Although the article promotes places where fitness enthusiasts might want to vacation, it doesn’t promote Winged Mercury’s products
- FTC says it’s not native advertising, since it doesn’t promote the company’s products

Business Guide Example #3

- Kitchen cabinet company pays an online magazine to publish an article, “10 Must-Haves for a Great Kitchen”
 - The article is in the same format as the other articles
 - The article promotes the advertiser’s products
- FTC says that consumers will not understand that it is advertising

Business Guide Example #10

- Video game includes characters using real branded stores and products
- Since no objective claims are communicated about the stores and products, consumers won't be misled by the format of the advertising (even if they don't know whether it's a paid placement)

Disclosures

- Proper disclosures can prevent native advertising from being misleading
 - To be effective, disclosures must be sufficiently prominent and unambiguous to change the apparent meaning of the claims and leave an accurate impression
 - Will the disclosure be seen, read, and understood by consumers?

Disclosures

- Disclosures should appear where the content is promoted and where the content is actually viewed
- Disclosures must stay with the content when it is shared by others
- When using a disclosure to cover more than one item, use visual clues to make that clear

Disclosures

- Is the disclosure clear and conspicuous?
 - Where is the disclosure located?
 - Is it made at the same time that the claim is made?
- Disclosures should be near the ad's focal point
 - Disclosures should appear *before or above the headline*
 - Disclosures *on the left* are better than those on the right
 - If the focal point is an image, then consider whether the disclosure should be on the image

Disclosures

- In order to be effective, disclosures must use understandable language
 - For example, “Ad,” “Advertisement,” “Paid Advertisement,” and “Sponsored Advertising Content”
- Avoid potentially ambiguous terms, unless the advertiser had no role in creating the content
 - For example, “Promoted,” “Promoted Stories,” “Presented By,” and “Sponsored By”

Business Guide Example #6

- Online magazine news feed includes, “Making Cleaning Fun: How Technology Has Changed Housekeeping,” which links to a native advertising piece sponsored by a vacuum manufacturer
- FTC says the headline, and the article itself, should have disclosures informing consumers that it’s advertising

Business Guide Example #8

- Online magazine publishes a favorable car review, which the manufacturer then promotes through a content recommendation widget
- FTC says that, in addition to ensuring that the promotion of the article has proper disclosures, the advertiser must ensure that the claims in the article are truthful

Business Guide Example #13

- Home improvement TV show features "do it yourself" videos, and one shows ZYX Paint being used to paint a deck
- FTC says disclosure is necessary, since consumers will understand the inclusion of the paint as a recommendation by the expert

Business Guide Example #15

- Website allows native advertising articles to be shared by consumers in social media
- FTC says that, in addition to the disclosure on the site, the consumers' posts must also include the proper disclosure

Business Guide Example #17

- ZYX Paint's video appears in search results as "Building a Deck: 5 Steps for Success"
- FTC says that consumers may not realize – when viewing the search results -- that the content is actually commercial content, so that should be disclosed there

FTC Enforcement

FTC v. Lord & Taylor

FTC v. Lord & Taylor

- In March 2016, FTC brought its first native advertising case
- FTC alleged that Lord & Taylor:
 - Placed a native ad in *Nylon* magazine
 - Paid 50 influencers to post photos of themselves on Instagram or other social media sites
 - Didn't require them to disclose their connection to the advertiser



FTC v. Lord & Taylor

- Reached 11.4 million Instagram users
- Dress quickly sold out
- Consent order requiring disclosures and monitoring

FTC v. Warner Brothers

FTC v. Warner Brothers



YouTube description box
before clicking “Show More”

FTC v. Warner Brothers

Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay

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Published on Oct 3, 2014
Thanks for watching! LIKE the video if you enjoyed and always leave comments, I read them all! :D Thanks for your support!
Click here for more info on Shadow of Mordor: <http://bit.ly/1vivrEL>
Click here for the trailer of the game! <http://youtube.be/9-ZxIC-0bg08>
This game is Rated M for Mature.

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Outro Song: The Wreckage - Breaking Through <http://www.youtube.com/watch?v=...>

Please flag hateful comments or spam... we don't need that here :D

This video is sponsored by Warner Bros.

No one reads this far into the descriptor...what are you doing snooping around.

Category Gaming
License Standard YouTube License

[SHOW LESS](#)

“This video is sponsored by Warner Bros.”

“No one reads this far into the description ... what are you doing snooping around.”

YouTube description box after clicking “Show More”

FTC v. Warner Brothers

- Warner Brothers hired an agency to conduct an influencer campaign
- Gamers were hired to post videos promoting the game, Shadow of Mordor
 - Gamers were paid and received free game access
 - Contract gave ownership of the games (and approval rights) to Warner
 - Gamers were required to endorse the game
- Over 5 million views

FTC v. Warner Brothers

- Influencers were told to put specific information in the description box for the video:
 - Information about the game was required to be “above the fold”
 - Sponsorship information was also required to be included there as well
- Only the first few lines of the description box are visible unless you expand it and scroll down

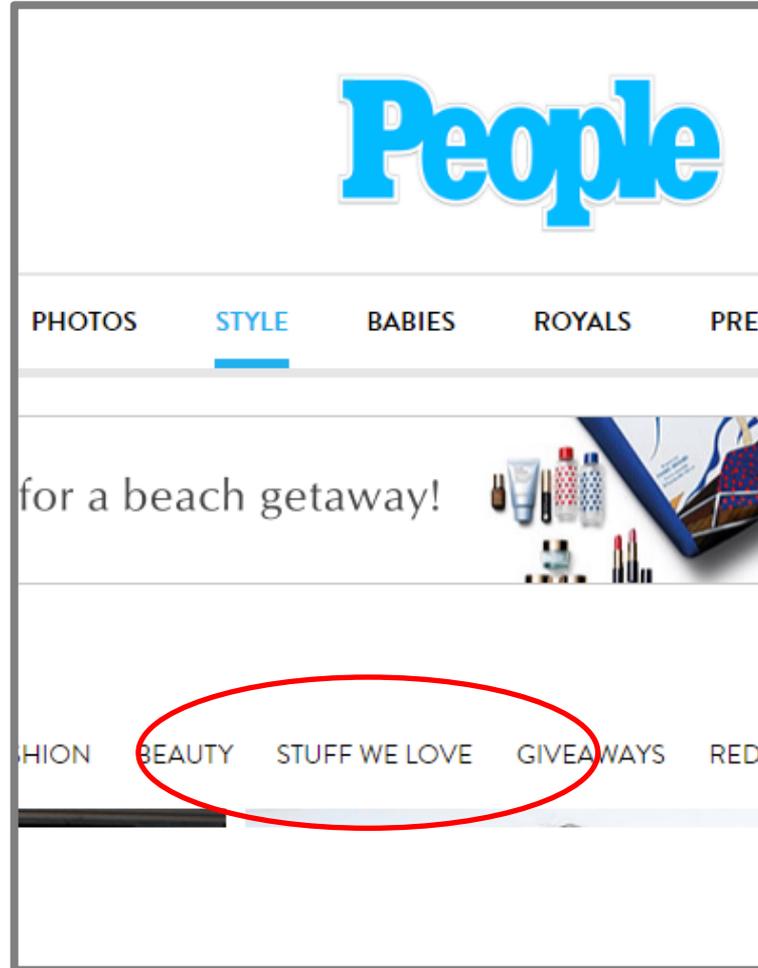
FTC v. Warner Brothers

- FTC said that Warner Brothers is responsible for the influencers failure to disclose the sponsorship information properly
 - FTC said that Warner Brothers failed to require proper disclosures, and in fact required insufficient disclosures
 - FTC said Warner Brothers even specifically approved some videos with insufficient disclosures
 - FTC said disclosing free game play wasn't enough, when they were paid
- Consent order

NAD Cases

Joyus

Joyus



Joyus

BEAUTY

Get Younger Looking Skin in Just 60 Seconds with This Cream

BY COLLEEN KRATOFIL · @CKCOLLEEN

POSTED ON JUNE 8, 2015 AT 10:00AM EDT

SHARE

TWEET

EMAIL

Usually anti-aging serums and injections take days, weeks (even months!) to get desired results. But we found a product that can get you younger looking skin in one minute (no, that's not a typo.). People are dubbing this [wrinkle-relaxing cream](#) "botox in a bottle" because of the rapid results. But there's one major different — no needles are required.

JOYUS SIGN UP FOR FREE SHIPPING ON ORDERS \$50 & OVER



Joyus

- People magazine promoted products through its “stuff we love” section
- NAD said that the “stuff we love” link should disclose that it links to advertising content

(May 2016)

American Media & Slim Fast

American Media & Slim Fast



American Media & Slim Fast

- Star magazine promoted a native advertising article about Slim Fast on its cover
- NAD said Star should have disclosed that the article was advertising

(November & December 2016)

For More Information

- FTC's consumer protection blog
 - www.ftc.gov/stay-connected
- Advertising law updates
 - Twitter @jeffgreenbaum
- Global Advertising Lawyers Alliance updates
 - Twitter @galalaw

Thank you!

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