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GOING NATIVE: THE RISE OF ONLINE NATIVE ADVERTISING AND A RECOMMENDED REGULATORY APPROACH

A.J. Casale⁺

15 Animal Vines That Perfectly Describe Your Mood Right Now — BuzzFeed¹

11 Dad Jokes We've All Heard Before — BuzzFeed²

Many people see “listicle” titles like these while browsing social media and click on them for entertainment.³ What they may not realize is that a large corporation, like Geico in these instances, paid an estimated \$90,000 for each list.⁴ These advertisements are examples of a segment of the advertising industry, known as native advertising or sponsored content, that is expected to reach \$7.9 billion in revenue in 2015, a 69% increase since 2013.⁵ Native advertising revenue is expected to reach \$21 billion by 2018.⁶

Websites like BuzzFeed have thrived on native advertising, and traditional publications have taken notice.⁷ In July 2013, the Online Publishers Association

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1. *15 Animal Vines That Perfectly Describe Your Mood Right Now*, BUZZFEED (Mar. 5, 2015, 1:12 PM), <http://www.buzzfeed.com/geico/animal-vines-that-will-make-you-laugh-every-tim?b=1#.fl3a0BL4k>.

2. *11 Dad Jokes We've All Heard Before*, BUZZFEED (Jan. 22, 2015, 2:42 PM), <http://www.buzzfeed.com/geico/dad-jokes-weve-all-heard-before#.moDBR1P0y>.

3. A listicle is defined as “[a]n article on the Internet presented in the form of a numbered or bullet-pointed list.” *Listicle*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/listicle (last visited Aug. 10, 2015).

4. *15 Animal Vines That Perfectly Describe Your Mood Right Now*, *supra* note 1; *11 Dad Jokes We've All Heard Before*, *supra* note 2; Benjy Boxer, *What Buzzfeed's Data Tells About Pricing of Native Advertisements*, FORBES (Sep. 10, 2013, 12:28 AM), <http://www.forbes.com/sites/benjaminboxer/2013/09/10/what-buzzfeeds-data-tells-about-the-pricing-of-native-advertisements/> (estimating the price of a BuzzFeed sponsored listicle at \$92,300 “[b]ased on averages from the publicly released numbers”).

5. Brett Roslin, *Why Native Advertising is a No-Brainer for Publishers and Marketers*, OFFLINE PUB. INSIDER MEDIAPOST (Mar. 5, 2015, 4:20 PM), <http://www.mediapost.com/publications/article/245070/why-native-advertising-is-a-no-brainer-for-publish.html>.

6. *Id.*

7. Mike Isaac, *BuzzFeed Valued at About \$850 Million*, CNBC (Aug. 11, 2014, 2:21 AM), <http://www.cnbc.com/2014/08/11/buzzfeedvaluedatabout850million.html>; Boxer, *supra* note 4 (noting that *The New York Times* blamed digital advertising networks, of which BuzzFeed is one, for declines in online display advertising revenue in a 2012 SEC filing); *see also* N.Y. TIMES CO.,

reported that seventy-three percent of its members were offering native advertising, and another seventeen percent were considering offering it within the year.⁸ In other words, at least ninety percent of Online Publishers Association members, who are “[c]omprised of some of the most trusted and well-respected media brands,” are expected to have a native advertising offering for advertisers.⁹ Even *The New York Times*, which has been plagued by declining advertising revenue, now considers native advertising “[f]it to [p]rint.”¹⁰

While native is a new trend in the online advertising world, the concept has been around for decades.¹¹ Also referred to as “embedded advertising” by the Federal Communications Commission, it has been used since the early days of television advertising to integrate brands with programming.¹² Large consumer brands would sponsor popular programs like the Texaco Star Theater or the Kraft Television Theater.¹³ More recently, several companies have used “[b]rand integration,” another name for native advertising that “describe[s] weaving specific products and brands into entertainment content.”¹⁴ Examples

ANNUAL REPORT (Feb. 28, 2013), http://investors.nytc.com/files/doc_financials/annual/2013/2013%20Annual%20Report.pdf.

8. *Premium Content Brands Are Native Naturals*, ONLINE PUBLISHERS ASS’N (Jul. 10, 2013), <http://digitalcontentnext.org/wp-content/uploads/2014/09/2.pdf>. On September 19, 2014, The Online Publishers Association announced that it was changing its name to Digital Content Next, describing the change as “a rebrand that signals a renewed focus on defining and confronting critical, big picture issues.” Press Release, Digital Content Next, Online Publishers Association Announces Rebrand to “Digital Content Next” (Sept. 19, 2014), <http://digitalcontentnext.org/blog/press/online-publishers-association-announces-rebrand-to-digital-content-next/>.

9. *Premium Content Brands Are Native Naturals*, *supra* note 8, at 6; Press Release, Digital Content Next, Digital Content Next Announces Eight New Members (Aug. 5, 2015), <https://digitalcontentnext.org/blog/press/digital-content-next-announces-eight-new-members-abc-the-e-w-scripps-co-fusion-ijreview-onion-inc-refinery29-new-republic-and-tribune-publishing/>; *see* Digital Content Next, Online Publishers Association Announces Rebrand to “Digital Content Next,” *supra* note 8.

10. Michael Sebastian, *Five Things to Know About The New York Times’ New Native Ads*, ADAGE (Jan. 8, 2014), <http://adage.com/article/media/york-times-debuts-native-ad-units-dell/290973/> (describing the *Times*’ six-figure inaugural native advertising deal with Dell). “All the News That’s Fit to Print” has been *The New York Times*’ slogan since 1896. *Adolph Simon Ochs*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Adolph-Simon-Ochs> (last visited Jul. 24, 2014).

11. Ann K. Hagerty, *Embedded Advertising: Your Rights in the TIVO Era*, 9 JOHN MARSHALL REV. INTELL. PROP. L. 146, 147–48 (2009) (tracing the development of native advertising back to the use of embedded advertising notices in 1950s television programs).

12. *See id.*

13. *Id.* at 148. Former President Ronald Reagan was involved with one such embedded advertising campaign during his acting days as the host of the “General Electric Theater.” *See Ronald Reagan Visits General Electric*, HIST. & MEMORABILIA, <http://www.historyandmemorabilia.org/2014/04/ronald-reagan-visits-general-electric.html> (last visited Aug. 10, 2015).

14. Scott Shagin & Matthew Savare, *Lawyering at the Intersection of Madison and Vine: It’s About Brand Integration*, 23 ENT. & SPORTS LAW. 1, 37 n.1 (2005).

of brand integration include the Coca-Cola cups used by American Idol judges and the Sears products used on the show Extreme Makeover Home Edition.¹⁵

Despite this long history of related advertising practices, the online advertising industry still struggles to accurately define the term “native advertising.”¹⁶ Even the Interactive Advertising Bureau (IAB), which represents the “media and technology companies that are responsible for selling 86% of online advertising in the United States,” resisted a specific definition in its Native Advertising Playbook developed to help its members navigate this new landscape.¹⁷ The IAB wrote that “[n]ative is in the eye of the beholder,” and it may have a different meaning “depending on where one sits in the ecosystem and the strategic and media objectives of the marketer.”¹⁸

15. *Id.* at 33 (finding that “[a]lthough product-integration deals in television date back to the dawn of the medium, they have experienced a marked resurgence since 2000 with the proliferation of reality programming”).

16. *The Native Advertising Playbook*, INTERACTIVE ADVERTISING BUREAU 2 (Dec. 4, 2013), <http://www.iab.net/media/file/IAB-Native-Advertising-Playbook2.pdf>. Venture capitalist Fred Wilson is credited with coining the term “native advertising” when he described advertisements that are “unique and native to the experience.” Todd Wasserman, *What is “Native Advertising”? Depends Who You Ask*, MASHABLE (Sep. 25, 2012), <http://mashable.com/2012/09/25/native-advertising/>. Dan Greenberg, the chief executive of a native advertising company, liked the description and “evangeliz[ed]” the term “native advertising” around the advertising industry. *Id.*

17. *The Native Advertising Playbook*, *supra* note 16, at 2, 19 (noting that Interactive Advertising Bureau (IAB) members disagreed over the definition of native advertising).

18. *Id.* at 2, 7. Although the IAB has resisted a single, clear definition of native advertising, its *Native Advertising Playbook* “highlights six core interactive ad formats that are currently being used within the native advertising landscape.” Press Release, Interactive Advertising Bureau, IAB Releases Native Advertising Playbook To Establish Common Industry Lexicon, Evaluation Framework & Disclosure Principles (Dec. 4, 2013), http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-120413. The first of the six types is the in-feed advertisement, which has three sub-types: (1) “An endemic in-feed ad that is in a publisher’s normal content well, is in story form where the content has been written by or in partnership with the publisher’s team to match the surrounding stories, [and] links to a page within the site like any editorial story”; (2) “A linked in-feed ad that is in a publisher’s normal content well[,] is a promotional ad[, and] links off of the site to content, editorial content, or brand’s landing page”; and (3) “An in-feed ad that is in a publisher’s normal content well [and] is in story form to match the surrounding stories and allows for an individual to play, read, view, or watch without leaving to a separate page.” *The Native Advertising Playbook*, *supra* note 16, at 8–9. The second of the six types of native advertisements is search advertisements, which are “found above the organic search results, look exactly like the surrounding results (with the exception of disclosure aspects), [and] link to a page like the organic results.” *Id.* at 10. The third type of native advertisement recognized by the IAB is a recommendation widget “where an ad or paid content link is delivered via a ‘widget.’” *Id.* at 11. The widget is “integrated into the main well of the page, does not mimic the appearance of the editorial content feed, [and] links to a page off the site.” *Id.* The fourth type of native advertisement is promoted listings, which are “designed to fit seamlessly into the browsing experience, are presented to look identical to the products or services offered on a given site, [and] link to a special brand/product page.” *Id.* at 12. The fifth type is an in-advertisement unit “that is placed outside of the editorial well, contains contextually relevant content within the ad, [and] links to an offsite page.” *Id.* at 13. The sixth type of native advertisement unit, according to the IAB, is the custom unit, which does not fit neatly into a category. *Id.* at 14.

Sharethrough, an online advertising company that specializes in native advertising, defines it as “a form of paid media where the ad experience follows the natural form and function of the user experience.”¹⁹ No matter how it is defined, the goal of a successful native advertisement is to be “cohesive with the [publisher’s] page content, assimilated into the [publisher’s] design, and consistent with the [publisher’s] platform behavior [so] that the viewer simply feels [it] belong[s].”²⁰

The question with native advertising, however, is that if a brand or publisher accomplishes the goal of seamless integration between its paid and editorial content, as defined by the IAB, are the advertisers and publishers deceiving the consumers? Consumer advocacy groups, like Public Citizen, believe that native advertising is inherently “based on deceiving consumers” and “rel[ies] heavily on consumers not realizing they are being advertised to.”²¹ A recent survey showed that more than half of online readers do not trust sponsored content, and two-thirds of them “felt deceived” when they realized it was paid content, not editorial content.²² Public Citizen argues that consumers must be able to make this distinction, and it must be clear “who is doing the advertising.”²³

The Federal Trade Commission (FTC) has also taken notice, and in December 2013 it held a workshop “to examine the blending of advertisements with news, entertainment, and other editorial content in digital media, referred to as ‘native advertising.’”²⁴ Advertising is considered commercial speech, which receives reduced protection under the First Amendment.²⁵ Deceptive commercial speech can be regulated under the Federal Trade Commission Act of 1914 (FTC Act).²⁶ The FTC also occasionally issues “[i]ndustry guides” to help improve “conformity with legal requirements.”²⁷ Over the last twenty years, several guidelines have been issued by the FTC to assist the advertising industry, including the “.Com Disclosures” and “Guides Concerning Use of

19. *Native Advertising Insights*, SHARETHROUGH, <http://www.sharethrough.com/native-advertising/> (last visited Sep. 13, 2014) (defining native advertisements’ form as “match[ing] the visual design of the experience they live within, and look[ing] and feel[ing] like natural content,” and defining their function as “behav[ing] consistently with the native user experience, and function[ing] just like natural content”).

20. *The Native Advertising Playbook*, *supra* note 16, at 3.

21. Press Release, Public Citizen, FTC Should Ensure that Online “Sponsored Content” is Clearly Identified as What It Is: Advertising (Dec. 4, 2013), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=4036>.

22. Joe Lazauskas, *Study: Sponsored Content Has a Trust Problem*, CONTENTLY (Jul. 9, 2014), <http://contently.com/strategist/2014/07/09/study-sponsored-content-has-a-trust-problem-2/>.

23. Public Citizen, *supra* note 21.

24. *Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native> (last visited Sep. 13, 2014).

25. *FTC Extends Endorsement and Testimonial Guides to Cover Bloggers*, 123 HARV. L. REV. 1540, 1542 (2010).

26. 15 U.S.C. § 45(a)(2) (2006).

27. 16 C.F.R. § 1.5 (2014).

Endorsements and Testimonials in Advertising.”²⁸ The FTC has also promoted self-regulatory systems for various industries, and the advertising industry’s response, the National Advertising Division of the Council of Better Business Bureaus (NAD), is considered to be the standard bearer in self-regulation.²⁹

While the FTC has shown a recent interest in native advertising, it has yet to develop regulations, guidelines, or best practices in this area.³⁰ There was speculation this could have happened by the end of 2015.³¹ The lack of guidelines will continue to cause confusion for the advertising industry, publishers, brands, and most importantly, consumers. But the FTC should not look far to develop new guidelines. Rather, the guidelines and rules they have already developed provide a solid framework for how native advertising should be treated. To avoid confusion and better serve consumers, the FTC should develop native advertising guidance from its previous guideline frameworks that require proper disclosures of the connection between the advertiser and publisher.

This Comment will address native advertising—an important new form of advertising—its implications for the current marketplace, and its potential regulation. Part I will look at the history of commercial speech regulation under the First Amendment. Parts II and III will look at the FTC’s regulation of deceptive commercial speech as well as the guidelines it has produced in response to online advertising’s growth. Part IV will discuss the lack of clear guidelines and the impact it has on industry stakeholders and consumers. Finally, Part V will provide a recommended approach for clear FTC guidelines to un-blur the lines between paid and editorial content that will help the advertising industry, publishers, and most importantly, consumers.

28. 16 C.F.R. §§ 255.0–255.5 (2009); FED. TRADE COMM’N, COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING ii (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

29. John E. Villafranco & Katherine E. Riley, *So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, 27 ANTITRUST 79, 79–80 (2013) (describing how the NAD has become the “standard against which [other self-regulatory bodies] are compared”). “The NAD incorporates elements of what the FTC has described as an effective self-regulatory program: external monitoring, mechanisms that encourage participation, and an adjudicatory process that relies on standards applicable to an entire industry.” *Id.* at 80.

30. Kunal Gupta, *4 Big Threats Native Advertising Faces in 2015*, VENTURE BEAT (Oct. 24, 2014, 6:30 PM), <http://venturebeat.com/2014/10/24/4-big-threats-native-advertising-faces-in-2015/> (discussing the potential effect of future FTC native advertising regulations on the content marketing industry).

31. See Susan Borst, *What If the FTC Provides Native Advertising Guidance in 2015?*, INTERACTIVE ADVERTISING BUREAU (Jan. 6, 2015, 12:00 PM), <http://www.iab.net/iablog/2015/01/what-happens-if-the-ftc-provides-native-advertising-guidance-in-2015.html> (describing that the “question . . . on many people’s minds in the digital industry” in 2015 is whether the FTC will regulate or provide guidance for native advertising); see also Gupta, *supra* note 30 (discussing the possibility of FTC regulation being promulgated in 2015).

I. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

The Supreme Court has offered various definitions of commercial speech over the last seventy years, but the consensus definition from the Court is that commercial speech is “speech advocating the sale of commercial products or services.”³² To be considered commercial, and therefore entitled to protection as such under the First Amendment, speech must be motivated by financial gain.³³

A. *The Early Focus on Intent*

Prior to the 1970s, commercial speech was not given First Amendment protection.³⁴ One of the first cases to address the commercial speech issue was *Valentine v. Chrestensen*³⁵ in 1942.³⁶ In *Chrestensen*, an entrepreneur who owned and operated a former U.S. Navy submarine as a tourist attraction sued to enjoin the city from enforcing an ordinance that prohibited the “distribution in the streets of commercial and business advertising matter,” as opposed to materials “solely devoted to ‘information or a public protest.’”³⁷ The Court upheld the ordinance and found that the entrepreneur’s leaflets did not fall within the protection of the First Amendment, concluding that although one side of the entrepreneur’s leaflet advertised his submarine and the other side protested the city’s treatment of his docking lease, the protest side was likely just an attempt to circumvent the ordinance and disseminate his commercial speech.³⁸ Thus, the key inquiry in commercial speech cases is whether the business person intended his speech to be commercial.³⁹

Within the next ten years, the Court addressed similar commercial speech cases that involved door-to-door sales.⁴⁰ One year after *Chrestensen*, in *Martin v. City of Struthers*,⁴¹ the Court invalidated an ordinance that prohibited door-to-door distribution of advertising leaflets on the grounds that it impermissibly restricted freedom of speech.⁴² While this holding appeared to move away from

32. Martin H. Redish, *Commercial Speech, First Amendment Institutionalism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 74–75 (2007) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–54 (2001)).

33. *Id.*

34. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

35. 316 U.S. 52 (1942).

36. *See id.* at 54.

37. *Id.* at 52–55.

38. *Id.* The Court held that legislation could interfere with commercial enterprise as long as the means were deemed “an undesirable invasion of, or interference with, the full and free use of the highways by the people.” *Id.* at 54–55.

39. *See id.* at 55.

40. *See* *Martin v. City of Struthers*, 319 U.S. 141, 141–42 (1943); *Breard v. City of Alexandria*, 341 U.S. 622, 624 (1951).

41. 319 U.S. 141 (1943).

42. *Id.* at 141–42, 149.

Chrestensen, the Court's decision in *Breard v. City of Alexandria*,⁴³ eight years later, upheld the constitutionality of an ordinance prohibiting door-to-door sales.⁴⁴

The Court distinguished *Breard* from *Martin*, finding that the ordinance in *Breard* was solely focused on banning commercial advertising, whereas in *Martin*, the ordinance was phrased more broadly and led to a prohibition on distributing invitations to a religious meeting.⁴⁵ The Court found that the opinion in *Martin* "was narrowly limited to the precise fact of the free distribution of an invitation to religious services," and that "the selling" in *Breard* "brings into the transaction a commercial feature."⁴⁶ The rule that emerged in these cases is in line with the *Chrestensen* analysis, which looked to the specific intent of the speaker to engage in commercial speech.⁴⁷

B. Toward Overturning *Chrestensen*

In the years following *Chrestensen*, secondary opinions signaled a weakening of the Court's commercial speech doctrine.⁴⁸ In *Cammarano v. United States*,⁴⁹ Justice Douglas wrote in a concurring opinion that the decision in *Chrestensen* was "casual, almost offhand," and that "it has not survived reflection."⁵⁰ Similarly, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁵¹ Justice Douglas, this time in a dissenting opinion, again stated that his views on commercial speech had changed since the *Chrestensen* ruling and "that commercial materials also have First Amendment protection."⁵² Chief Justice Burger and Justice Stewart also questioned the validity of *Chrestensen* and commercial speech doctrine as it stood in separate dissenting opinions.⁵³

43. 341 U.S. 622 (1951).

44. *Id.* at 624, 644–45.

45. *Id.* at 641–42.

46. *Id.* at 642–43.

47. Compare *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942) ("If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct."), with *Breard*, 341 U.S. at 643 (holding that because "no element of the commercial entered into this free solicitation [in *Martin*] and the opinion was narrowly limited to the precise fact of the free distribution of an invitation to religious services, we feel that it is not necessarily inconsistent with the conclusion reached in this case," that an ordinance prohibiting door-to-door solicitation of magazine subscriptions is constitutional).

48. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 629 (1990).

49. 358 U.S. 498 (1959).

50. *Id.* at 514 (Douglas, J., concurring).

51. 413 U.S. 376 (1973).

52. *Id.* at 398 (Douglas, J., dissenting).

53. *Id.* at 393 (Burger, C.J., dissenting); *Id.* at 401 (Stewart, J., dissenting).

In 1975, the Court decided *Bigelow v. Virginia*,⁵⁴ in which “it became apparent that *Chrestensen* could not hold out much longer.”⁵⁵ In *Bigelow*, a newspaper editor was charged with violating Virginia law by publishing an advertisement that provided information about abortions.⁵⁶ Although the Court held that the lower courts “erred in their assumptions that advertising . . . was entitled to no First Amendment protection,” it still did not officially fold all commercial speech under the First Amendment umbrella.⁵⁷ According to the Court, advertising “may be subject to reasonable regulation that serves a legitimate public interest.”⁵⁸ *Bigelow* “left unanswered the issue of whether purely commercial speech also was deserving of First Amendment protection.”⁵⁹

C. Commercial Speech Protection Under the First Amendment

The Court finally tied commercial speech to the First Amendment in 1976, holding that “speech that does ‘no more than propose a commercial transaction’” is protected under the First Amendment.⁶⁰ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁶¹ a state regulation that made it illegal to advertise the price of prescription drugs was found unconstitutional because it was designed to “suppress the dissemination of concededly truthful information about entirely lawful activity” regarding the pharmaceutical industry.⁶² The Court further explained that, while commercial speech is protected, it may be regulated as to time, place, and manner.⁶³

The Court determined that commercial speech was protected, but it did not really answer the question of what is commercial speech. The Court did outline a definition in *Bolger v. Youngs Drug Products Corporation*⁶⁴ by offering certain criteria that is suggestive of commercial speech.⁶⁵ In determining whether or not pamphlets were considered speech, it outlined three components that make speech commercial in nature.⁶⁶ First, the pamphlets in this case were “conceded to be advertisements.”⁶⁷ Second, there was a “reference to a specific

54. 421 U.S. 809 (1975).

55. Kozinski & Banner, *supra* note 48, at 629.

56. *Bigelow*, 421 U.S. at 811–12.

57. *Id.* at 825–26.

58. *Id.* at 826.

59. Andrew S. Gollin, *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 MARQ. L. REV. 873, 880 (1998).

60. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24, 773 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

61. 425 U.S. 748 (1976).

62. See *id.* at 749–50, 773.

63. *Id.* at 770–71.

64. 463 U.S. 60 (1983).

65. See *id.* at 66–67.

66. *Id.*

67. *Id.* at 66.

product.”⁶⁸ Finally, there was an “economic motivation.”⁶⁹ The Court determined that “[t]he combination of *all* these characteristics . . . provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.”⁷⁰

D. Development of a Clearer Test for Commercial Speech

A few years after *Virginia State Board of Pharmacy*, the Court, in *Central Hudson Gas v. Public Service Commission of New York*,⁷¹ outlined a four-part analysis for any government regulation of commercial speech, whether federal or state.⁷² First, the speech must be “protected by the First Amendment,” meaning that it “must concern lawful activity and not be misleading.”⁷³ Second, the government’s interest must be substantial.⁷⁴ Third, the regulation being placed on commercial speech must advance those governmental interests.⁷⁵ Finally, the regulation must not be “more extensive than is necessary to serve that interest.”⁷⁶

E. A More Expansive Approach

The four-part test developed in *Central Hudson* has withstood time. In *Sorell v. IMS Health Inc.*,⁷⁷ the Court not only maintained the precedent, but also “elevated the rigor of judicial review of commercial speech to something stronger than the intermediate scrutiny applied to it under the *Central Hudson* framework.”⁷⁸ *Sorell* overturned a Vermont law that restricted “the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.”⁷⁹ The Court held that the “statute must be subjected to heightened judicial scrutiny.”⁸⁰ This holding makes commercial speech “virtually indistinguishable from noncommercial speech in the level of protection it enjoys.”⁸¹ The federal circuit courts of appeals, however, have not

68. *Id.*

69. *Id.* at 67.

70. *Id.*

71. 447 U.S. 557 (1980).

72. *See id.* at 566.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The fourth prong of the *Central Hudson* test was weakened by the Court’s ruling in *Board of Trustees of the State University of New York v. Fox*, which determined that “restrictions disallowed under *Central Hudson*[’s] . . . fourth prong have been substantially excessive.” 492 U.S. 469, 478 (1989).

77. 131 S.Ct. 2653 (2011).

78. Hunter B. Thomson, *Whither Central Hudson? Commercial Speech in the Wake of Sorrell v. IMS Health*, 47 COLUM. J.L. & SOC. PROBS. 171, 206 (2013).

79. *Sorrell*, 131 S.Ct. at 2659.

80. *Id.*

81. Thomson, *supra* note 78 at 206.

uniformly interpreted and applied the holding in *Sorell*, suggesting that the Supreme Court could be revisiting its commercial speech jurisprudence in the near future.⁸²

II. REGULATION OF DECEPTIVE COMMERCIAL SPEECH BY THE FEDERAL TRADE COMMISSION

The mission of the FTC is “[t]o prevent business practices that are anticompetitive or deceptive or unfair to consumers.”⁸³ Congress established the FTC more than 100 years ago with the passage of the FTC Act of 1914.⁸⁴ Section 5 of the FTC Act declared unlawful any “unfair or deceptive acts or practices.”⁸⁵ The “deceptive acts or practices” phrase was added by Congress in a 1938 amendment to the Act, which reflected “Congress’ concern for consumers as well as for competitors.”⁸⁶

The FTC Act does not define deceptive advertising.⁸⁷ This was not an oversight by Congress, but an intentional omission.⁸⁸ The Senate Committee on Interstate Commerce

gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair.⁸⁹

The FTC was given broad power to define what is deceptive and to “adopt[] and implement[] specific and nuanced deceptive advertising regulations.”⁹⁰

82. *Id.* at 192–93.

83. *About the FTC*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc> (last visited Sep. 19, 2014). The FTC also outlines three strategic goals: (1) protect consumers, (2) maintain competition, and (3) advance performance. *Id.* The first goal is most relevant to the advertising industry because the FTC seeks to “[p]revent fraud, deception, and unfair business practices in the marketplace.” *Id.*

84. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).

85. *Id.* § 45(a).

86. *Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965).

87. *See* 15 U.S.C. §§ 41–48.

88. *See* S. Rep. No. 63-597, at 216 (1914).

89. *Id.*

90. Linda J. Demaine, *Seeing Is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 ARIZ. L. REV. 719, 741 (2012).

Congress refrained from legislating a more precise definition of deception on several grounds. It lacked the expertise to identify all of the unfair practices then in use, it lacked the foresight to anticipate unfair practices that advertisers might adopt in the future, and determinations of deception are necessarily fact-specific making an abstract rule too blunt an instrument for protecting consumers and business firms in the commercial speech context.

Id.

A. *Defining Deceptive Advertising*

Over the years, the FTC has developed three basic principles of advertising law under Section 5 that define deceptive advertising.⁹¹ In various policy statements appended to commission decisions, the FTC outlined that advertising must be truthful and not misleading, substantiated, and cannot be unfair.⁹²

1. *Advertising Must Be Truthful, Not Misleading*

The FTC has determined that “an advertisement is deceptive if it contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances to their detriment.”⁹³ In 1983, the FTC responded to a Congressional inquiry regarding its enforcement policy against deceptive acts and practices.⁹⁴ In its letter, the commission outlined three elements that “undergird all deception cases.”⁹⁵

“First, there must be a representation, omission or practice that is likely to mislead the consumer.”⁹⁶ Second, the FTC applies a reasonable consumer test to the advertisement.⁹⁷ The commission will look at “how reasonable consumers are likely to respond.”⁹⁸ Third, there must be a material misrepresentation or omission.⁹⁹ If consumer choice or conduct regarding a product is affected by the misrepresentation in the advertisement, it will be considered material.¹⁰⁰

2. *Advertising Must Have Substantiation*

In *Thompson Medical Co., Inc.*,¹⁰¹ the FTC appended to the decision a statement that detailed its policy regarding advertising substantiation.¹⁰² The FTC requires “that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated.”¹⁰³ If an advertiser does not

91. FED. TRADE COMM’N, *supra* note 28, at 4.

92. See Lesley Fair, *Federal Trade Commission Advertising Enforcement*, FED. TRADE COMM’N 1, 12, 57 (2008), <https://www.ftc.gov/sites/default/files/attachments/training-materials/enforcement.pdf>.

93. *Id.* at 1.

94. *Cliffdale Associates, Inc.*, 103 F.T.C. 110 app. at 174 (1984). The letter was sent to Congressman John D. Dingell, the then-Chairman of the U.S. House of Representatives Committee on Energy and Commerce. *Id.*

95. *Id.* app. at 175.

96. *Id.*

97. *Id.*

98. *Id.* app. at 178.

99. *Id.* app. at 175.

100. *Id.* app. at 175–76.

101. 104 F.T.C. 648 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

102. *Id.* app. at 839–44.

103. *Id.* app. at 839.

possess “at least the advertised level of substantiation” for any claim made in an advertisement, they may be held in violation of Section 5.¹⁰⁴

3. Advertising Cannot Be Unfair

In 1980 the FTC replied to a congressional inquiry that solicited views on “the concept of ‘unfairness’ as it has been applied to consumer transactions.”¹⁰⁵ In its reply, the commission identified three considerations for unfair advertising.¹⁰⁶ First, there must be consumer injury, which must be substantial.¹⁰⁷ Typically, a substantial injury includes some type of monetary harm rather than just emotional harm.¹⁰⁸ Second, “[t]o the extent that the Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well-established.”¹⁰⁹ Third, it must be “immoral, unethical, oppressive, or unscrupulous.”¹¹⁰

Congress gave clear authority to the FTC to formulate its policy and in its 100-year history, the FTC has formulated a clear doctrine to regulate deceptive advertising.¹¹¹ Courts ultimately provide the final judicial review on deceptive advertising. The Supreme Court, however, “has frequently stated that the Commission’s judgment is to be given great weight by reviewing courts.”¹¹² This is particularly true in deceptive advertising cases because violations of Section 5 rest “so heavily on inference and pragmatic judgment.”¹¹³

III. FEDERAL TRADE COMMISSION GUIDELINES

Besides its enforcement power, the FTC has the ability to issue “rules and general statements of policy.”¹¹⁴ Additionally, the FTC produces industry guides, which “are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity

104. *Id.*

105. *Int’l Harvester Co.*, 104 F.T.C. 949 app. at 1070–71 (1984). The letter was sent to Senators Wendell H. Ford and John C. Danforth, the chairman and ranking member of the Consumer Subcommittee of the U.S. Senate Committee on Commerce, Science, and Transportation. *Id.*

106. *Id.* app. at 1072.

107. *Id.* app. at 1072–73.

108. *Id.*

109. *Id.* app. at 1076.

110. *Id.*

111. *See Fed. Trade Comm’n v. Sperry Hutchinson Co.*, 405 U.S. 233, 244 (1972) (explaining that Congress gave broad authority to the FTC to regulate both consumers and competitors by not explicitly defining “unfair methods of competition”).

112. *Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

113. *Id.* at 385.

114. 15 U.S.C. § 57a(a) (2012) (authorizing the FTC to develop “interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . and . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce”).

with legal requirements.”¹¹⁵ While they do not have the same effect as laws, “[f]ailure to comply with the guides may result in corrective action by the commission.”¹¹⁶ Many FTC guides focus on specific industries,¹¹⁷ but they also provide guidance on practices that are “common to many industries.”¹¹⁸

Online advertising is a common practice, and the FTC has issued guidelines concerning online advertising for more than a decade.¹¹⁹ Three important guidelines for the online advertising industry include the Endorsement Guidelines, the Search Engine Guidelines, and the .Com Disclosures.¹²⁰ These guidelines act as a good starting point for developing guidelines on native advertising regulation.

A. *Federal Trade Commission Endorsement Guidelines*

The FTC’s Guides Concerning Use of Endorsements and Testimonials in Advertising (Endorsement Guidelines) were updated in 2009.¹²¹ The Endorsement Guidelines address “endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of important connections between advertisers and endorsers.”¹²²

1. *Defining Endorsement*

An endorsement is defined as “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.”¹²³ Although any inquiry into

115. Commercial Practices, 16 C.F.R. § 17 note (2009).

116. *Id.* “The Commission has a program in place to systematically review its rules and guides to evaluate their continued need and to make any necessary changes. As needed, the Commission has and will continue to amend or clarify the scope of any particular rule or guide in more detail.” FED. TRADE COMM’N, *supra* note 28, at 3 n.7.

117. 16 C.F.R. § 17 note. Industry guides include: Guides for the Nursery Industry, 16 C.F.R. § 18 (2009); Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 C.F.R. § 23 (2009); Guide Concerning the Use of the Word “Free” and Similar Representations, 16 C.F.R. § 251 (2009); Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 16 C.F.R. § 410 (2009); Retail Food Store Advertising and Marketing Practices, 16 C.F.R. § 424 (2009); and Labeling and Advertising of Home Insulation, 16 C.F.R. § 460 (2011).

118. 16 C.F.R. § 17.

119. FED. TRADE COMM’N, *supra* note 28, at 1.

120. *See* Press Release, Fed. Trade Comm’n, FTC Consumer Protection Staff Updates Agency’s Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results (June 25, 2013), <https://www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search> (explaining the importance of using the Endorsement Guidelines, Search Engine Guidelines, and .Com Disclosures as resources to ensure compliance with FTC regulations).

121. Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), <http://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>.

122. *Id.*

123. 16 C.F.R. § 255.0(b) (2014).

endorsement violations will be fact sensitive, the FTC outlined the types of endorsements that fall under the guide, which include those that are both verbal and non-verbal.¹²⁴ The guide provides general considerations that should be taken into account for any endorsement advertising.¹²⁵ For example, an endorsement should reflect honest opinions and beliefs and actually be used by the person making the endorsement.¹²⁶

2. *Material Connections*

The updated version of the Endorsement Guidelines added an important provision regarding material connections. The new section suggested that any “connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement . . . must be fully disclosed.”¹²⁷ If the endorsement does not provide an apparent connection to the advertiser, the disclosure of the material connection is required.¹²⁸

B. Search Engine Guidelines

In 2002, the FTC published a letter (2002 Search Engine Letter) regarding deception in search engine marketing practices.¹²⁹ This letter led to clearer disclosures that better distinguished paid search results, as compared to organic search results.¹³⁰ However, due to a noticeable decrease in industry compliance with that letter, the FTC issued an updated version in 2013 (2013 Search Engine Letter).¹³¹ The 2013 Search Engine Letter encouraged the use of labels and “visual cues” to clearly disclose the fact that the search result was paid.¹³² Clear disclosures, according to the letter, are those that are “sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.”¹³³

124. *Id.*

125. *See generally id.* § 255.1.

126. *Id.* § 255.1(a), (c).

127. *Id.* § 255.5.

128. *See* Jeffrey Richardson, *Unintended Liability Under the FTC Guides*, 91 MICH. B. J. 28, 30 (2012).

129. Letter from Heather Hipsley, Acting Assoc. Dir. for Advert. Practices, Fed. Trade Comm’n, to Gary Ruskin, Exec. Dir., Commercial Alert (June 27, 2002), https://www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercial-alertletter.pdf.

130. *See* Letter from Mary K. Engle, Assoc. Dir. For Adver. Practices, Fed. Trade Comm’n 1 (June 24, 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>.

131. *Id.*

132. *Id.* at 1–3.

133. *Id.* at 2 n.5 (citations omitted) (internal quotation marks omitted).

While there is no specific labeling or visual cue requirement, the letter asked that the method used be “noticeable and understandable to consumers,”¹³⁴ offering visual cues and text labels as two key suggestions.¹³⁵

The FTC recommended that any paid search results have clear visual cues that signal to a reasonable consumer that the result is one that has been paid for.¹³⁶ It suggested using either one or both of the following methods to that end: prominent shading around the result with a clear outline or a “border that distinctly sets off advertising from the natural search results.”¹³⁷

The letter further advised that paid results should include clear text labels that “explicitly and unambiguously” indicate the result is paid.¹³⁸ That label must be easily visible and “located near the search result.”¹³⁹

C. .Com Disclosures

With the rise of online commerce, the FTC issued its .Com Disclosures in the year 2000, which “examined how the Commission’s consumer protection statutes, rules, and guides apply to online advertising and sales.”¹⁴⁰ The guidelines require that advertising disclosures are properly conveyed to consumers and are understandable.¹⁴¹ A disclosure must appear “clearly and conspicuously” on an advertisement to prevent running a deceptive ad.¹⁴² This is a fact-sensitive inquiry that should take the “perspective of a reasonable consumer.”¹⁴³ If a disclosure cannot be made to fit this standard and the advertising channel does not support the necessary disclosures, the advertisers should reconsider running the advertisement.¹⁴⁴

1. Proximity and Placement

The .Com Disclosures detail the considerations that should be made in determining if a disclosure is effective.¹⁴⁵ First is the proximity and placement of the disclosure.¹⁴⁶ “A disclosure is more effective if it is placed near the claim

134. *Id.* at 2.

135. *See id.* at 2–4.

136. *See id.* at 3.

137. *Id.*

138. *Id.*

139. *Id.*

140. FED. TRADE COMM’N, *supra* note 28, at 1.

141. *See id.* at i.

142. *Id.* at 1.

143. *Id.* at 6.

144. *Id.*

145. *Id.* at 7.

146. *Id.* at 7–8.

it qualifies.”¹⁴⁷ To this end, the FTC encourages looking to “empirical research about where consumers do and do not look.”¹⁴⁸

2. Prominence

A second consideration is prominence.¹⁴⁹ The FTC recommends looking at three factors to determine if disclosure is placed prominently enough on an ad: size, color, and graphics.¹⁵⁰ A disclosure should not be “buried” in an ad, such as being placed in the terms and conditions, which consumers rarely read.¹⁵¹

3. Distracting Factors

A third consideration is the distracting factors in an advertisement.¹⁵² A proper disclosure review will look at the ad as whole, and not solely at the disclosure, to ensure that a reasonable consumer would not be distracted by other components of the ad.¹⁵³

4. Repetition

A fourth consideration is to repeat the disclosure.¹⁵⁴ While it is more likely that repetition will help cement the disclosure, it “need not be repeated so often that consumers would ignore it or it would clutter the ad.”¹⁵⁵

5. Understandable Language

A final consideration is that consumers should be able to understand the language that is used in the disclosure.¹⁵⁶ Disclosures should be “simple and straightforward” and “avoid legalese or technical jargon.”¹⁵⁷ These considerations, as well as the other FTC Guidelines, help the FTC protect consumers while preserving the constitutional right to commercial speech in today’s innovative online advertising marketplace.¹⁵⁸

The regulation of deceptive advertising has evolved during the 100-year history of the FTC.¹⁵⁹ Through its ability to create guidelines, the FTC can

147. *Id.* at 8.

148. *Id.*

149. *Id.* at 17.

150. *Id.*

151. *Id.* at 18.

152. *Id.* at 19.

153. *Id.*

154. *Id.*

155. *Id.* at 19–20.

156. *Id.* at 21.

157. *Id.*

158. *See id.*

159. *See* Fed. Trade Comm’n, The FTC at 100: Where Do We Go From Here? Prepared Statement of the Federal Trade Commission Before the House Comm. on Commerce, Subcomm. on Commerce, Manufacturing, & Trade 2 (December 3, 2014), <https://www.ftc.gov/sites/>

provide guidance on how industries should operate. These guidelines have been helpful for the online advertising market by providing direction on how they must disclose endorsements and highlight to consumers the fact that advertising is paid, not organic.

IV. GROWTH OF NATIVE ADVERTISING ATTRACTS THE FTC'S ATTENTION

Spending on native advertising could reach \$5 billion by 2017.¹⁶⁰ Because of this rapid increase, consumer groups like Public Citizen have called for action from the FTC to improve its regulation of the growing industry.¹⁶¹ Journalists have cautioned about the growth of native advertising as well.¹⁶² Edward Wasserman, dean of the University of California at Berkeley's Graduate School of Journalism, stated that "[a]ccelerating the push toward more sponsored content will only deepen that confusion and intensify mistrust among thoughtful readers and viewers."¹⁶³ Wasserman admits that native advertising appears as if it is here to stay, and while it "may not be the media world [journalists] want . . . it sure looks like the one we're going to get."¹⁶⁴ With complaints from consumer groups, and journalists admitting that it is growing and will be a common advertising practice,¹⁶⁵ the FTC may be more inclined to place guidelines on native advertising.

A. *The Deceptive Nature of Native Advertising*

Native advertising is considered to be the seamless integration of editorial content with advertising content.¹⁶⁶ It is "inherently suspicious, if not deceptive."¹⁶⁷ Given this "deceptive" nature, publishers and advertisers must balance clear disclosures of the relationship between the content or the

default/files/documents/public_statements/prepared-statement-federal-trade-commission-ftc-100-where-do-we-go-here/131203ftcat100.pdf.

160. Erin Griffith, *Native Advertising Is a \$2.4 Billion "Thing," and It's Not Going Away*, PANDO DAILY (Dec. 24, 2013), <http://pando.com/2013/12/24/native-advertising-is-a-2-4-billion-thing-and-its-not-going-away/>.

161. Public Citizen, *supra* note 21.

162. See Edward Wasserman, "*Sponsored Content*" Gets a New Push for Legitimacy, UNSOCIAL MEDIA (Aug. 5, 2013), <http://ewasserman.com/2013/08/05/sponsored-content-gets-a-new-push-for-legitimacy/>.

163. *Id.*; see Edward Wasserman, *Faculty Bio*, U.C. BERKELEY GRADUATE SCHOOL OF JOURNALISM, http://www.journalism.berkeley.edu/faculty/ed_wasserman/ (last visited Sep. 10, 2015).

164. Wasserman, *supra* note 162 at 2.

165. See Jack Marshall, "*Native*" Ad Labeling is a Work in Progress, WALL ST. J. (May 29, 2014, 10:52 AM), <http://blogs.wsj.com/cmo/2014/05/29/debate-continues-around-native-ad-labeling/>; see also John Federman, *Native Advertising: Here to Stay*, BRANDING MAGAZINE (Oct. 7, 2014), <http://www.brandingmagazine.com/2014/10/07/native-advertising-here-to-stay/>.

166. Marshall, *supra* note 165.

167. August T. Horvath, *Breaking Down the FTC's Definition of "Native Advertising" in Games*, INSIDE COUNSEL (Apr. 18, 2014), <http://www.insidecounsel.com/2014/04/18/breaking-down-the-ftcs-definition-of-native-advert>.

publication and the sponsorship thereof with integration—and the FTC will need to establish clear guidelines to help them accomplish this goal.

1. Who is Responsible for Ensuring Advertising is Not Deceptive: Publishers or Advertisers? A Brief Look at The Atlantic's Failed Attempt at Seamless Integration

A native ad placed in *The Atlantic* in 2013 brought the issue of integration to the forefront.¹⁶⁸ After a native advertisement sponsored by the Church of Scientology was posted on its site, in the guise of an article, it “took a rough ride on the Internet” and was promptly removed.¹⁶⁹ Critics attacked *The Atlantic* for posting “blatant propaganda” because the article had an overtly promotional tone in its coverage of the controversial religion.¹⁷⁰ For example, the content stated “2012 was a milestone year for Scientology, with the religion expanding to more than 10,000 Churches, Missions and affiliated groups, spanning 167 nations—figures that represent a growth rate 20 times that of a decade ago.”¹⁷¹

To be successful, native advertising “has to feel at home in its host publication.”¹⁷² Even though it was labeled as “sponsor content,” the Scientology article was so out of place in *The Atlantic* that it caused serious alarm and embarrassed the publication.¹⁷³

2. Should the Separation of Church and State in the Publishing Industry Be Modified?

The newspaper and magazine publishing industry has long had a “church-and-state division,” where the editorial and advertising staffs of publications are divided.¹⁷⁴ The business side typically makes advertising decisions, while the editorial staff makes content decisions.¹⁷⁵ On his HBO television show,

168. See Erik Wemple, *The Atlantic's Scientology Problem, Start to Finish*, WASH. POST (Jan. 15, 2013), <http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/01/15/the-atlantics-scientology-problem-start-to-finish/>.

169. *Id.*

170. Charlie Warzel, *The Real Problem with The Atlantic's Sponsored Post*, ADWEEK (Jan. 15, 2013, 12:51 PM), <http://www.adweek.com/news/technology/real-problem-atlantics-sponsored-post-146553>.

171. Wemple, *supra* note 168 (internal quotations omitted).

172. Warzel, *supra* note 170.

173. *Id.*

174. Terri Thornton, *Native Advertising Shows Great Potential, But Blurs Editorial Lines*, MEDIASHIFT (Apr. 2, 2013), <http://www.pbs.org/mediashift/2013/04/native-advertising-shows-great-potential-but-blurs-editorial-lines092/>; see also Kara Bloomgarden-Smoke, *Time Inc. Editors Happier Without Wall Between Church and State, Says Time Inc. CEO*, N.Y. OBSERVER (Jun. 20, 2014), <http://observer.com/2014/06/time-inc-editors-happier-without-wall-between-church-and-state-says-time-inc-ceo/> (describing how *Time Inc.* CEO Joe Ripp removed the wall between the business and editorial sides of the company, possibly to the distrust of consumers).

175. See Bryan Goldberg, *The Separation of “Church and State” in Publishing*, PANDO (Apr. 19, 2013), <https://pando.com/2013/04/19/the-separation-of-church-and-state-in-publishing/>.

comedian John Oliver criticized the native advertising industry for crossing the “church and state” divide between the editorial and advertising staffs of publications.¹⁷⁶

The situation with *The Atlantic* raises the question of whether this division should be reconsidered when dealing with native advertising. The editorial staff could help make proper decisions on what content to promote based on their concern with the overall brand of the publication and the trust it conveys to the public.¹⁷⁷ Furthermore, editors, free from purely financial motivation, may be better suited to make decisions on what content should be accepted for native advertising.¹⁷⁸

B. *The FTC’s December 2013 Workshop*

For the last 100 years, the FTC has been tasked with regulating deceptive advertising.¹⁷⁹ Recently, the FTC has signaled its intent to take action to regulate native advertising due to the widespread belief that native advertising is rooted in deception.¹⁸⁰ The FTC took its first step in reviewing the native advertising issue on December 4, 2013, when it held a workshop entitled, “Blurred Lines: Advertising or Content? — An FTC Workshop on Native Advertising.”¹⁸¹ The

176. HBO, *Last Week Tonight with John Oliver: Native Advertising*, YOUTUBE (Aug. 3, 2014), https://www.youtube.com/watch?v=E_F5GxCwizc. This clip has received widespread attention and, as of September 2015, more than 5.2 million views on YouTube. *Id.* It also received quite a bit of attention from the advertising industry, including articles quoting executives who were happy to see “that things are going mainstream” with native advertising, and were taking the popularity of the video as a wake-up call to the industry to “get a better sense of how the real world looks at and listens to us.” Felix Gillette, *Native-Ad Experts Critique John Oliver’s Harsh Critique of Native Advertising*, BUSINESSWEEK (Aug. 5, 2014), <http://www.businessweek.com/articles/2014-08-05/ad-industry-execs-weigh-in-on-john-olivers-native-advertising-takedown>.

177. See Dean Starkman, *Native Ads’ Existential Problem*, COLUM. JOURNALISM REV. (Jan. 15, 2013, 11:00 PM), http://www.cjr.org/the_audit/native_ads_existential_problem.php?page=all&print=true.

178. *The New York Times* took an alternate approach to the native advertising process, deciding to “build a team of elite storytellers.” Joe Lazausaks, *How The New York Times Built Its Content Marketing Machine*, CONTENTLY: THE CONTENT STRATEGIST (Oct. 30, 2014), <http://contently.com/strategist/2014/10/30/to-make-this-work-you-have-got-to-compete-with-editorial-inside-the-nyts-native-ad-journey/>. To that end, they created the T Brand Studio and hired a former editor of *Businessweek* to be its editorial director. *Id.* The T Brand Studio, however, clearly discloses on its Facebook page and Twitter feed that the studio is part of the advertising department and “[t]he news and editorial staffs of The NYT have no role in this content’s creation.” *T Brand Studio*, FACEBOOK, <https://www.facebook.com/TBrandStudio> (last visited Nov. 22, 2014). The creation of and hiring at the T Brand Studio has allowed *The New York Times* to increase its revenue for online advertising by creating compelling content written by journalists who are separate from their news and editorial staffs. Lazausaks, *supra*.

179. See *About the FTC*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc> (last visited Sep. 19, 2014).

180. See Kirk Cheyfitz, *Why Native Advertising Won’t Survive, Regardless of FTC Involvement*, CONTENT MARKETING INST. (Apr. 20, 2014), <http://contentmarketinginstitute.com/2014/04/native-advertising-wont-survive-regardless-of-ftc/>.

181. *Blurred Lines*, *supra* note 24.

Commission invited an array of stakeholders—from advertisers and publishers to consumers—“to examine the blending of advertisements with news, entertainment, and other editorial content in digital media.”¹⁸²

While there was no indication on what, if any, action the FTC would take, the takeaway from the workshop involved two key themes: transparency and labeling.¹⁸³ Transparency is necessary “both to protect [the] publisher’s credibility with readers and to avoid potential deception in situations where consumers may have difficulty discerning that the content in question is a paid advertisement.”¹⁸⁴

During the workshop, there was a consensus that proper transparency is key to ensuring readers are not deceived, and that labeling is an effective way to achieve transparency.¹⁸⁵ The industry is hesitant to use the term “advertisement” as a label because it is a blunt term that is likely to disengage readers.¹⁸⁶ The FTC, however, seemed hesitant to accept the industry’s suggested labels, which included “Sponsored Content,” “Sponsored By,” “Presented By,” and “Promoted By,” because they may lead the reader to believe that the advertiser has simply underwritten the publication’s independently created content, rather than created it itself.¹⁸⁷ The proper positioning of a label is considered equally important.¹⁸⁸

C. Guidelines That Specifically Address Native Advertising Are Needed

While the industry has taken steps to self-regulate and adjust its traditional procedures, clear guidelines on native advertising will benefit all of the parties involved.¹⁸⁹ Consumers will have a better understanding of “when publishers

182. *Id.*

183. See *Highlights from FTC’s Native Advertising Workshop: More Questions Than Answers?*, FRANKFURT KURNIT KLEIN & SELZ PC: ADVERTISING LAW ALERTS (Dec. 9, 2013), <http://fkks.com/news/highlights-from-ftcs-native-advertising-workshop-more-questions-than-answer>.

184. *Id.*

185. See *id.*

186. Sophia Cope, *FTC Explores Native Advertising*, NEWSPAPER ASSOC’N OF AM. (Dec. 17, 2013), <http://www.naa.org/News-and-Media/Blog/FTC-explores-native-advertising.aspx>.

187. *Id.*

188. *Id.*

189. See Villafranco & Riley, *supra* note 29 at 79.

The Federal Trade Commission has been an active proponent of industry self-regulation. The agency has recognized that industry cooperation can lead to efficiency, innovation, and the dissemination of useful information, which can benefit both consumers and competitors. Self-regulation also allows the FTC to conserve resources and direct them to high priority competition and consumer protection policy matters, while deferring to an industry that may be more capable of regulating its members than a government agency. Notwithstanding these benefits, a tension exists between industry self-regulation and competition law, in that certain cooperative activities can be ineffective substitutes for competition in promoting proper social policy, and industry cooperation can have exclusionary and anticompetitive effects. Because of this, the FTC has sought to limit

are . . . exercising their independent judgment” by clearly knowing when the “placement has been purchased.”¹⁹⁰ The advertising agencies and other marketers can craft creative and compelling native content within a framework of guidelines so they do not risk putting their client in jeopardy. Advertisers will not risk losing public trust over a poorly executed native ad that consumers believe is trying to deceive them. Publishers can offer better options to advertisers by understanding what they can and cannot publish.

1. Native Advertising and Commercial Speech

Before it can even be subject to regulations or guidelines, native advertising must fall within the commercial speech doctrine.¹⁹¹ If a native ad does not fall within the criteria established in the Supreme Court’s commercial speech doctrine, it will not be subject to any guidelines from the FTC.¹⁹² In that case, any attempt to regulate the content will be held to a strict scrutiny standard of review.¹⁹³

To be included under the commercial speech umbrella, a native advertisement must pass the Supreme Court’s *Bolger* test and the native ad must clearly advertise a specific product with an economic motivation.¹⁹⁴ Therefore, a sponsored “listicle” on BuzzFeed that includes photos of puppies will only fall under this category if there is a clear tie-in to a product.

its support for industry self-regulation to sound self-regulatory efforts likely to yield efficient and nondiscriminatory results. . . . The National Advertising Division (NAD) of the Council of Better Business Bureaus, now in its forty-first year, is considered by many to be the standard against which these initiatives are compared.

Id.

190. Public Citizen, *supra* note 21.

191. See 15 U.S.C. § 45(a)(1) (2012) (authorizing the FTC to regulate commercial speech that includes “unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”).

192. In order for the FTC to have authority to regulate native advertising, it must be determined that the advertising falls within the test for commercial speech. *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983). To be commercial speech it must: (1) be conceded to be an advertisement, (2) refer to a specific product, and (3) have an economic motivation. *Id.* at 66–67. For the government to regulate native advertising as commercial speech, it must be: (1) lawful activity that is not misleading, (2) the government must have a substantial interest in regulating the advertising, (3) the regulation placed on the commercial speech must advance a government interest, and (4) the regulation must not be more extensive than necessary to advance that government interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

193. See Andrew J. Wolf, *Detailing Commercial Speech: What Pharmaceutical Marketing Reveals About Bans on Commercial Speech*, 21 WM. & MARY BILL RTS. J. 1291, 1303 (2012) (“[T]he Court generally reviews speech restrictions, whether commercial or otherwise, using a form of intermediate scrutiny, but elevates that scrutiny to strict or ‘heightened’ when certain red flags indicate that the restriction may encroach on a speaker’s First Amendment rights.”).

194. *Bolger*, 463 U.S. at 66–67.

2. *Not a One-Size-Fits-All Approach*

Publications offer their own versions of native advertising that are best tailored for their site to gain a competitive advantage over their competitors.¹⁹⁵ In December 2013, the IAB released its “Native Advertising Playbook” that listed six main categories of native advertising.¹⁹⁶ But the IAB also admits that given the fact that publishers are constantly creating new forms of native ads, “it is not possible to recommend a single, one-size-fits-all disclosure mechanism.”¹⁹⁷ Since a uniform standard is nearly impossible, the overarching goal of any disclosure guidelines should be geared toward the reasonable consumer, who “should be able to distinguish between what is a paid native advertising unit [and] what is publisher editorial content.”¹⁹⁸

V. A RECOMMENDED APPROACH TO GUIDELINES THAT MEETS THE GOALS OF ALL PARTIES INVOLVED IN THE ADVERTISING PROCESS

There is confusion within the industry and with consumers as to what constitutes native advertising.¹⁹⁹ Given native advertising’s success, it appears as if “[n]ative [advertising] is certainly here to stay.”²⁰⁰ While publishers want to capitalize on this success and provide new offerings to increase their advertising revenue streams, they should be crafted with the reasonable consumer in mind.

Native ad offerings must meet the goals of everyone involved. The publisher must craft advertising options that help increase revenue and provide relevant advertising content to its readers. The advertising industry and advertisers must work to seamlessly integrate their content into a publisher’s native advertising options to create a connection between their brand and the consumer, while also ensuring they increase the return on investment. Finally, the consumers must be able to clearly understand that the content they are viewing is paid for by a brand and is not editorial content from the publisher.

As the native advertising industry rapidly increases, the FTC needs to create guidelines that can easily be understood and implemented by advertisers and

195. *The Native Advertising Playbook*, *supra* note 16, at 1, 2.

196. *Id.* at 4–5.

197. *Id.* at 15.

198. *Id.*

199. See *supra* notes 16–18, and accompanying text; Joe Lazauskas, *Study: Article or Ad? When It Comes to Native, No One Knows*, CONTENTLY (Sept. 8, 2015), <http://contently.com/strategist/2015/09/08/article-or-ad-when-it-comes-to-native-no-one-knows/>.

200. Selina Petosa, *Why Native Advertising Won’t Overtake Traditional Ads—Yet*, ADAGE (Jan. 28, 2015), <http://adage.com/article/digitalnext/native-advertising-overtake-traditional-ads/296822/>; see also Federman, *supra* note 165 (explaining that despite assertions of its impending end, native advertising will not vanish, but rather will continue to change and evolve to suit consumers’ preferences); but see Cheyfitz, *supra* note 180 (maintaining that native advertising “is a dead end for advertisers and publishers—a passing fad in the slow demise of traditional advertising”).

publishers. Since native advertising can appear in so many different forms, the guidelines must be flexible enough to be applied across the spectrum. The FTC's online advertising guidelines and previous writings on deceptive advertising provide a solid framework that could be used to develop regulations for native advertising.

A. A Framework for FTC Guidelines

1. Clear and Conspicuous

The ultimate goal of the guidelines should be to ensure that advertisements use clear and conspicuous disclosures on any type of sponsored content. As the FTC has previously noted, these guidelines should include requirements of clear and unambiguous language that can easily be seen and understood.²⁰¹

Specifically, the FTC should provide guidance on how to make clear disclosures such as the disclosure of material connections that are easily seen in proximate and prominent locations.²⁰² Due to the nature of native advertising, the material connection rule would be key to ensuring that consumers understand that the content is paid for, not editorial. Given the rise of mobile advertising, the FTC should specifically address how advertisers can employ clear guidelines on small-screen mobile devices.²⁰³

2. Avoid Distractions

The guidelines should also detail how to avoid distractions on webpages, as originally suggested in the FTC's .Com Disclosures.²⁰⁴ "Distracting visual factors, extraneous information, and opportunities to 'click' elsewhere before viewing the disclosure can obscure an otherwise adequate disclaimer."²⁰⁵

201. See Press Release, Fed. Trade Comm'n, Operation "Full Disclosure" Targets More Than 60 National Advertisers (Sept. 23, 2014), <https://www.ftc.gov/news-events/press-releases/2014/09/operation-full-disclosure-targets-more-60-national-advertisers>.

202. 16 C.F.R. § 255.5 (2009); Letter from Mary K. Engle, *supra* note 130, at 1–3 (encouraging the use of strategically placed and illustrated visual cues and labels to distinguish between paid search results from natural search results); FED. TRADE COMM'N, *supra* note 28, at i (stressing the importance of placement and proximity of the disclosure to the content).

203. Mobile advertisement spending in 2013 was \$7.1 billion and is expected to reach \$19.2 billion in 2018. *U.S. Mobile Ad Spending Forecast to Exceed Display in 2016*, MARKETINGCHARTS (Jun. 11, 2014), <http://www.marketingcharts.com/online/us-mobile-ad-spending-forecast-to-exceed-display-in-2016-43254>. In addition, "eMarketer predicts that mobile advertising will this year surpass traditional media like newspapers, magazines, and radio, in terms of share of the overall U.S. ad market." Steven Perlberg, *Mobile Ad Revenue Has Soared but Questions on Effectiveness Remain*, WALL ST. J.: CMO TODAY (Aug. 13, 2014, 11:22 AM), <http://blogs.wsj.com/cmo/2014/08/13/mobile-ad-revenue-soars/>.

204. FED. TRADE COMM'N, *supra* note 28, at 13, 19.

205. *Id.* at 13.

Native ad disclosures should be free from distractions, such as “flashing images or animated graphics” that might reduce the prominence of a disclosure.²⁰⁶

3. Separation

Disclosures should also detail how to properly employ visual and locational separation. In its 2013 Search Engine Letter, the FTC detailed visual cues that should be used, such as prominent shading or clearly outlining an advertisement with a border.²⁰⁷ A text label can also be used and must be both explicit and large enough for it to signal to a consumer that it is a paid advertisement.²⁰⁸ Locational separation is also important and should be considered using research on where consumers look on screens.²⁰⁹ Additionally, a disclosure should not be buried so that it will be ineffective.²¹⁰

4. The Reasonable Consumer

The FTC should also adopt the IAB’s reasonable consumer test, in which a reasonable consumer should be able to distinguish between paid advertising and editorial content.²¹¹ Courts have imposed a similar test on plaintiffs in deceptive advertising claims, requiring a showing that “members of the public are likely to be deceived or misled by the business practice or advertising at issue.”²¹²

The FTC can elaborate on the reasonable consumer test and tailor it specifically to native advertising from within its current guidelines. If a native advertisement is designed so that the reasonable consumer understands that it is paid content and not an article or editorial, the advertiser will be able to point to previous FTC guidance to insulate itself from any FTC action.²¹³

5. Publisher Involvement

Finally, the FTC should encourage the publishers to develop their own guidelines. To do so, publishers should consider taking down the wall between their editorial and advertorial staffs to make the best decisions for the publication.

206. *Id.* at 19.

207. Letter from Mary K. Engle, *supra* note 130, at 3.

208. *Id.* at 3–4.

209. FED. TRADE COMM’N, *supra* note 28, at 8.

210. *See id.* at 18.

211. *The Native Advertising Playbook*, *supra* note 16, at 15.

212. David J. Lender et al., *Navigating Deceptive Advertising Consumer Class Actions*, PRACTICAL LAW (Apr. 22, 2014), http://www.weil.com/~media/files/pdfs/Navigating_Deceptive_Advertising_Consumer_Class_Actions.pdf (citing *Fink v. Time Warner Cable*, 714 F.3d 739, 741–42 (2d Cir. 2013); *Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123, 1131–32 (N.D. Cal. 2013); *In re Horizon Organic Milk Plus DHA Omega-3 Mktg.*, 955 F. Supp. 2d 1311, 1331–32 (S.D. Fla. 2013)).

213. FED. TRADE COMM’N, *supra* note 28, at 6 (recommending that digital advertisers generally adopt the perspective of a reasonable consumer in crafting their advertisements).

While many publications have recently hired journalists to serve as editorial directors of their native advertising units, that does not solve all of the problems that could arise from taking down the wall.²¹⁴ It is important for editorial staff to be at least tangentially involved in order to ensure that there is someone making advertising decisions who does not have strong financial motivations.²¹⁵ Clear guidelines on how this process should be implemented will allow publications to be more concerned with violating consumer trust, rather than violating the “church and state” division.²¹⁶

VI. CONCLUSION

“[D]eception can dampen consumer confidence in the online marketplace.”²¹⁷ Due to the amorphous and umbrageous nature of native advertising and its expected growth in the near future, the FTC should consider developing new guidelines to better help the advertising and publishing industry develop advertisement offerings. The development of clear native advertising guidelines along the framework recommended above will advance the interests of all involved and serve as an appropriate government regulation of commercial speech.²¹⁸ Ultimately, the consumer will be better served if native advertising is done in a manner that properly discloses the connections between advertisers and publishers.²¹⁹

Sites like BuzzFeed will continue to publish “listicles,” like the “12 of the Best Hybrid Dogs that the World Has to Offer,” that seemingly have little connection with the brand promoting it.²²⁰ However, if the ads consist of clear and conspicuous disclosures that take the reasonable consumer into account, consumers will not be deceived, and advertisers and publishers will not have any concern over potential action by the FTC.

214. See generally Ira Basen, *Breaking Down the Wall*, UNIV. OF WIS. CTR. FOR JOURNALISM ETHICS (Dec. 19, 2012), <https://ethics.journalism.wisc.edu/2012/12/19/breaking-down-the-wall/>.

215. See Ricardo Bilton, *Meet the Publishers Who Ask Their Reporters to Write Native Ads*, DIGIDAY (June 5, 2014), <http://digiday.com/publishers/publishers-enlist-reporters-write-native-ad-content/>.

216. See Bloomgarden-Smoke, *supra* note 174.

217. FED. TRADE COMM’N, *supra* note 28, at 25.

218. See *Cent. Hudson Gas v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (holding that commercial speech that is not misleading is protected by the First Amendment, but can be regulated under substantial government interests).

219. Public Citizen, *supra* note 21.

220. *12 of the Best Hybrid Dogs that the World Has to Offer*, BUZZFEED (Oct. 10, 2014, 2:30 PM), <http://www.buzzfeed.com/citidoublecash/the-best-hybrid-dogs-that-the-world-has-to-offer#.qfPOkLY2r>.

