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Robert A. Gottfried

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SIX WAYS THIS ARTICLE IS MOST DEFINITELY NOT AN AD: DECEPTIVE MARKETING AND THE NEED FOR CLEARLY-DEFINED DISCLOSURE RULES IN ONLINE NATIVE ADVERTISEMENT

*Robert A. Gottfried**

I. INTRODUCTION

As society moves further into the Digital Age, traditional methods of online advertisement become less effective. The advent of pop-up blockers and other internet browser extensions designed to filter out advertisements from a user's online experience suggests a hostile consumer attitude towards sponsored content.¹ In response, online content providers have turned toward a remodeled form of advertisement that is virtually indistinguishable from surrounding content in an effort to capture consumers' attention and, ultimately, their dollars. So-called "native advertisement" may be most familiar

* J.D./M.B.A. Candidate, May 2016, Loyola University Chicago School of Law and Quinlan School of Business.

¹ In a 2014 study, 5,000 consumers who visited business, entertainment, or news websites at least several times a week were asked to rank five types of online advertisement on scales of "most appealing" to "least appealing" and "most interesting" to "least interesting." INTERACTIVE ADVERTISING BUREAU & EDELMAN BERLAND, GETTING IN-FEED SPONSORED CONTENT RIGHT: THE CONSUMER VIEW (2014). The results showed that most of the consumers ranked pop-up advertisements and expandable advertisements—advertisements that grow larger when you click on or roll-over them—the lowest on both scales. *Id.* See also Andrew Rice, *Does Buzzfeed Know the Secret?*, NEW YORK MAGAZINE (Apr. 7, 2013), <http://nymag.com/news/features/buzzfeed-2013-4/> (statement of Gerry Graf, Founder and Chief Creative Officer of ad agency Barton F. Graff 9000) ("People hate advertising so much that they had to make inventions so they didn't have to look at it.").

as radio or television infomercials or full-page advertisements in print media, but it has reincarnated online, and lack of meaningful regulation poses potential legal issues. The Federal Trade Commission (“FTC”) has the authority to combat false and deceptive advertisement.² However, consistent and forceful application of these rules to native advertisement is necessary so consumers clearly understand that the content they interact with is commercial in nature, and possibly misleading or deceptive if not properly disclosed. Endemic in-feed advertisements in particular—those advertisements designed to expertly mimic a host site’s form, function and behavior³—mirror editorial content almost exactly, and are cause for the most concern to consumers as our tradition of non-biased journalism takes on overtly commercial overtures.⁴

Part Two of this Article attempts to define “native advertisement,” paying close attention to the Interactive Advertising Bureau’s (“IAB”) “Native Advertising Playbook” and its classification of native advertisement into six distinct categories, most notably its definition of endemic in-feed advertisement. Part Two will also examine the prevalence of native advertisement online.

Part Three provides a brief overview of the FTC’s creation and its efforts to regulate unfair and deceptive practices. It examines the FTC’s current guidelines, as well as updates to those guidelines in the wake of advanced technology and marketing techniques. Part Three also examines the IAB’s attempt to define the current native advertisement landscape and provide suggestions for best practices.

Part Four reveals the danger that unregulated and unmonitored native advertisement poses to consumers. In response, Part Five explores whether native advertisement can be accurately, efficiently, and lawfully regulated under existing FTC policies and IAB guidance. Part Five pays special attention to FTC disclosure

² See FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION (1983), available at <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

³ NATIVE ADVER. TASK FORCE, INTERACTIVE ADVER. BUREAU, *The Native Advertising Playbook* (2013).

⁴ Tanzina Vega, *Sponsors Now Pay for Online Articles, Not Just Ads*, N.Y. TIMES (Apr. 7, 2013), http://www.nytimes.com/2013/04/08/business/media/sponsors-now-pay-for-online-articles-not-just-ads.html?pagewanted=all&_r=2& (“Your average reader . . . [doesn’t] realize they are being fed corporate propaganda”).

requirements, and concludes with an exploration of the First Amendment's limited protection of commercial speech and its potential effects on native advertisement regulation.

II. THE EVOLUTION AND PREVALENCE OF NATIVE ADVERTISEMENT PRACTICES

Native advertisement is broadly defined as any advertisement done in a form that mirrors the host platform.⁵ In this context, print ads, radio spots, and television commercials—ostensibly *all* advertisement—classify as native: they are published in a format matching the medium on which those advertisements are run—print advertisements are published in print, radio in sound, and television in video.⁶ This definition paints the system with too broad of a stroke, as the benefits, and consequentially the pitfalls, of native advertisement arise when advertisements are designed to blend seamlessly with the host website's own work in terms of formatting *and* content.⁷

A. The IAB'S Definition and Classification of Native Advertisement

Native advertisement intentionally causes confusion, blurring the line between editorial and advertisement with the hopes that the advertisement becomes a credible source of information rather than, simply, an advertisement. In this regard, the IAB, a business organization established in 1996 with membership that includes some

⁵ Fahad Khan, *Toward (Re)Defining Native Advertising*, THE HUFFINGTON POST (Sept. 3, 2013), http://www.huffingtonpost.com/fahad-khan/toward-redefining-native-_b_3860826.html. Mr. Khan is the CEO of Tube Centrex, a cross-platform application that allows users to access TV and cable media, YouTube videos, and digital web content on a single device. See Anthony Ha, *Tube Centrex Aims to Build Video Apps for YouTube Stars, Luxury Brands, and Others*, TECHCRUNCH (Jan. 5, 2015), <http://techcrunch.com/2015/01/05/tube-centrex-launch/>. Mr Khan is also an adjunct professor of Entrepreneurship at Baruch College, Zicklin School of Business.

⁶ Khan, *supra* note 5.

⁷ Native advertisement creates a “media universe where it is increasingly difficult for readers to tell editorial content from advertising.” See Vega, *supra* note 4. See generally Mitch Joel, *We Need a Better Definition of “Native Advertising”*, HBR BLOG NETWORK (Feb. 13, 2013, 11:00 AM), <http://blogs.hbr.org/2013/02/we-need-a-better-definition-of/>.

of the largest media and technology companies,⁸ defines native advertisement most accurately: advertisement that is so interwoven with content, design and platform behavior that the consumer believes it belongs.⁹

The IAB separates native advertisements into several categories using six different factors to determine how “native” an advertisement really is: (1) Form—how well the ad figures in and conforms to the overall page design; (2) Function—how well the ad matches and works like the other elements on the page; (3) Integration—how well the ad “behaves” like other content on the site; (4) Buying and Targeting—how specific the ad’s placement is in terms of its location on the website; (5) Measurement—how effectively the ad’s success is calculated; and (6) Disclosure—how clearly the announcement of the ad as paid content is made.¹⁰ The most seamlessly integrated advertisements are dubbed “endemic in-feed.” Endemic in-feed ads, as defined by the IAB, are

in a publisher’s normal content well, [are] in story form where the content has been written by or in partnership with the publisher’s team to match the surrounding stories, link[] to a page within the site like any editorial story, [have] been sold with a guaranteed placement so the buyer knows exactly what context will surround it, and [are] measured on brand metrics such as interaction and brand-lift¹¹

⁸ The 650 members of the IAB account for 86% of online advertisement in the United States. *About the IAB*, INTERACTIVE ADVERTISING BUREAU, http://www.iab.net/about_the_iab (last visited April 5, 2015). The organization serves to not only create guidelines and best practices for digital and interactive advertisement, but also works to educate “marketers, agencies, media companies, and the wider business community about the value of interactive advertising.” *Id.*

⁹ NATIVE ADVERTISING TASK FORCE, *supra* note 3, at 3 (“[M]ost advertisers and publishers aspire to deliver paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform behavior that the viewer simply feels that they belong”).

¹⁰ *Id.* at 6.

¹¹ *Id.* at 8. The American Marketing Association defines “brand lift” as a measurable increase in consumer recall for a specific branded company, product, or service. *Dictionary, Definition of Brand Lift*, AM. MKTG. ASS’N, <https://www.ama.org/resources/Pages/Dictionary.aspx?dLetter=B&dLetter=B> (last visited April 5, 2015).

Endemic in-feed advertisements are thus the most “native” of native advertisement, blurring the traditional line between editorial content and business.¹² Endemic in-feed advertisements appear identical to a non-advertisement piece on the publisher’s website, functioning like any other piece of content as an organic addition to the site’s regular content offerings.¹³

B. *The Prevalence of Native Advertisement Online*

Buzzfeed, Inc.¹⁴ (“Buzzfeed”), a popular social news and entertainment website, is perhaps most notable for its use of, and success with, native advertisement.¹⁵ BuzzFeed states it is “redefining online advertising with its social, content-driven publishing technology.”¹⁶ Social media websites have embraced the native advertising trend as well. Facebook, Twitter, and Instagram all display some sort of Promoted Listing or in-feed advertisement, and while often endemic in nature, these advertisements take on many of

¹² BuzzFeed (*see infra* note 14) founder Jonah Peretti commented on this intermingling, stating that “[s]ome editorial content sucks, some ads are awesome, and for many readers this line is even more important than church and state.” Rice, *supra* note 1.

¹³ NATIVE ADVER. TASK FORCE, *supra* note 3.

¹⁴ Established in 2006, BuzzFeed is a popular social news and entertainment website responsible for creating some of the Internet’s most widely-shared, “viral” pieces of content. *See* Jennifer Yeh, *Bright Lights, Bright Line: Toward Separation and Reformation of the Transformative Use Analysis*, 32 CARDOZO ARTS & ENT. L.J. 995, 995-96 & n.1. BuzzFeed is a leader in the field of native advertisement, and was recently described as a “hybrid of news publisher and ad agency.” Michael Meyer, *Should Journalism Worry about Content Marketing?*, COLUMBIA JOURNALISM REV. (Oct. 29, 2014), http://www.cjr.org/innovations/should_journalism_worry_about.php. In December 2014, BuzzFeed reported 76.8 million unique visitors in the United States, an astounding 19.6 million more visitors than *The New York Times*’ website and 25.8 million more visitors than *The Wall Street Journal*. Lukas I. Alpert, *Buzzfeed Nails the ‘Listicle’; What Happens Next?*, WALL ST. J. (Jan. 29, 2015, 1:38 PM), <http://www.wsj.com/articles/buzzfeed-nails-the-listicle-what-happens-next-1422556723>.

¹⁵ *See* Rice, *supra* note 1. In 2013-2014, BuzzFeed’s advertising revenue grew seventy-five percent and it currently generates around \$143,000 in revenue per employee. Alpert, *supra* note 14.

¹⁶ *About*, BUZZFEED, <http://www.buzzfeed.com/about> (last visited April 5, 2015).

the forms defined by the IAB.¹⁷ Growing numbers of news and news-aggregate websites, including *The Huffington Post*, *The Atlantic*, *The Washington Post*, and Mashable, have offered endemic in-feed advertisements as a method of leasing advertisement space on their pages.¹⁸ The alarming aspect of this trend is that advertisers and hosts alike *recognize* the indistinguishable nature of these advertisements, and continue to format ads specifically for that purpose.

However unsettling the tactic may be, native advertisement has clear benefits for businesses looking for a better way to reach consumers. A recent native advertisement developed by BuzzFeed for Virgin Mobile USA caused a *ninety-five percent* spike in sales the day the campaign launched.¹⁹ Further, a native advertisement created by entertainment website Thrillist for General Electric generated so much consumer awareness that the company's limited-edition "moon sneakers"—what the advertisement was created to promote—sold out within seven minutes of their release and prompted the creation of a black market.²⁰ In a modern online environment where traditional online advertising methods are ineffective,²¹ businesses utilizing outdated marketing techniques watch as their competitors' native posts enjoy increased shares and interaction on social media websites and visit times up to *thirty percent* longer than visits to general editorial content.²²

¹⁷ NATIVE ADVER. TASK FORCE, *supra* note 3, at 8. See Fernando A. Bohorquez, Jr., *A Guide to Native Advertising's Legal Issues* (Dec. 2, 2013), <http://www.imediaconnection.com/content/35490.asp#singleview>. Further, many websites across the internet feature "Recommendation Widgets" at the bottom of the page, which share links to other websites using words such as "You might like," or "Elsewhere around the web." NATIVE ADVER. TASK FORCE, *supra* at 11.

¹⁸ Vega, *supra* note 4.

¹⁹ Rice, *supra* note 1.

²⁰ Mike Shields, *Thrillist Takes Native Advertising to the Moon with GE-Produced Sneaker*, WALL ST. J. (Aug 11, 2014, 1:10 AM), <http://blogs.wsj.com/cmo/2014/08/11/thrillist-takes-native-advertising-to-the-moon-with-ge-produced-sneaker/>. The 100 limited-edition shoes, which sold for \$197, sold on eBay for \$2,000. *Id.*

²¹ INTERACTIVE ADVER. BUREAU & EDELMAN BERLAND, *supra* note 1.

²² Shields, *supra* note 20. On BuzzFeed's landing page for potential advertisers, they report that clients who purchase "custom social posts" (the BuzzFeed version of an endemic in-feed ad) see an average increases of 48.8% in brand affinity and

While the benefits are justifiable, the rush toward widespread implementation of native advertisement campaigns raises concerns that content created with little regard for the distinction between editorial and advertisement could erode consumer trust. The appropriate question, therefore, is not whether native advertisement is an improper choice—carefully executed and monitored content should not be so classified—but rather whether undisclosed or poorly disclosed native advertisement is deceptive, and thus harmful to consumers.

III. THE FEDERAL TRADE COMMISSION'S REGULATORY AUTHORITY

A. *The Federal Trade Commission Act Section 5 and the FTC's Policy Statement on Deception*

IN 1914, Congress created the FTC by passing the Federal Trade Commission Act ("the Act").²³ Congress declared unfair methods of competition in commerce to be unlawful²⁴ and originally empowered the FTC under Section 5 of the Act to prevent such methods. In 1938, Congress amended the Act to include jurisdiction over unfair or deceptive acts or practices as well,²⁵ memorializing the legislature's intention to promote consumer well-being as well as fair competition.²⁶

Currently, the FTC's Section 5 authority includes the right to sue offending parties, to issue complaints stating the offense committed, to provide the offender with an opportunity for a hearing, and, among other remedies, to issue orders directing the offender to cease and desist any trade practice it finds unfair or deceptive.²⁷ The FTC must demonstrate three things in order to prove that an act or practice is deceptive and thus in violation of Section 5: that (1) a representation, omission, or practice (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) that

42% in purchase intent. *Advertise*, BUZZFEED, <http://www.buzzfeed.com/advertise> (last visited April 5, 2015).

²³ 15 U.S.C. § 41 (2013).

²⁴ 15 U.S.C. § 45(a)(1) (2013).

²⁵ 15 U.S.C. § 45(a)(2) (2013).

²⁶ *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965).

²⁷ 15 U.S.C. § 45(b) (2013).

the representation, omission, or practice is material.²⁸ The Supreme Court recognized that the FTC is in the best position to determine what constitutes a deceptive practice under the Act, and thus the FTC's judgment is given great weight by reviewing courts.²⁹ In determining whether a consumer acted reasonably under the circumstances, the advertisement must be misunderstood by a significant segment of the audience it was designed to target.³⁰ Upon the filing of a consumer complaint, the FTC can investigate whether marketing schemes were inaccurate or whether incomplete information was provided,³¹ and may scrutinize the visual and aural elements in the advertisement to determine the impression made by the advertisement as a whole.³²

However, in order to be actionable under Section 5, the representation, omission, or practice must be material. Importantly, the representation, omission, or practice must be likely to affect a consumer's choice or conduct regarding a product or service.³³ The FTC's Policy Statement on Deception makes clear that material information concerns information that is important to consumers, and that a finding of materiality also constitutes a finding that injury is likely to exist *because* of the alleged deceptive practice.³⁴ Injury exists where consumers would have chosen differently but for the

²⁸ *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984); FED. TRADE COMM'N, *supra* note 2.

²⁹ *Colgate-Palmolive*, 380 U.S. at 385. Chief Justice Warren warned that this "admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation . . . rests so heavily on inference and pragmatic judgment." *Id.*

³⁰ *In re Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

³¹ See FED. TRADE COMM'N, *supra* note 2.

³² *Am. Home Prod. v. F.T.C.*, 695 F.2d 681, 688 (3d Cir. 1982); *Beneficial Corp. v. F.T.C.*, 542 F.2d 611, 617 (3d Cir. 1976) ("The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.").

³³ *Colgate-Palmolive*, 380 U.S. at 387; FED. TRADE COMM'N, *supra* note 2; *c.f.* *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.").

³⁴ FED. TRADE COMM'N, *supra* note 2. In equating finding of materiality to a finding of injury, the FTC included that this includes injury caused by "representation, omission, sales practice or marketing technique." *Id.* (emphasis added).

deception; thus, it is not necessary for the FTC to find explicit evidence of an injury for a claim to be actionable. The law only requires a material misrepresentation that causes consumers to choose differently.³⁵

B. The FTC's Guide Concerning the Use of Endorsements and Testimonials and its Application to Digital Advertisement

Since the FTC's inception, social and technological advancement has brought changes to the way businesses market their products and services to consumers.³⁶ The FTC adapts to changing technologies and marketing techniques by developing "guides." The guides are the FTC's "administrative interpretation" of the law, and provide the public with examples and directions on how to avoid unfair or deceptive acts or practices.³⁷ Guides do not have the force of law, but alert the reader that the FTC may bring an enforcement action alleging deceptive practices in violation of Section 5 if the reader fails to comply with the guide.³⁸ In 2009, the FTC revised its Guide Concerning the Use of Endorsements and Testimonials (the "Endorsement Guides") to be current with contemporary practices in advertisement.³⁹ The FTC reminded marketers and businesses that any new technique is still subject to the same truthful advertising laws that other forms of advertising always have been.⁴⁰

³⁵ *Id.*

³⁶ At the height of radio's popularity in the early 1940s, advertising revenue from radio constituted eleven percent of all advertising revenue in the United States. CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* 838-39 (3d ed. 2002). By 1985, radio's share of advertising revenue dropped to seven percent, while television's share skyrocketed to twenty-two percent. *Id.* at 523-24.

³⁷ 16 C.F.R. § 1.5 (1967); 16 C.F.R. § 255.0(a) (2009); FED. TRADE COMM'N, *DOT COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING* 2 & n.5 (2013).

³⁸ FED. TRADE COMM'N, *supra* note 37, at n.5; *see* 15 U.S.C. § 45.

³⁹ *The FTC's Endorsement Guides: Being Up-Front with Consumers*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements> (last visited Mar. 29, 2015). The Endorsement Guides were updated in October 2009 so they could remain current with new marketing techniques such as blogging and word-of-mouth advertising.

Id.

⁴⁰ *Id.*

The Endorsement Guides begin by defining the term “endorsement” as any advertising message that consumers are likely to believe reflect the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser.⁴¹ In that relationship, the “endorser” is the individual, group, or institution whose opinions, beliefs, etc., are what the advertisement appears to reflect.⁴²

The Endorsement Guides include a specific provision for endorsements by organizations.⁴³ Organizational endorsement has the greatest potential for consumer influence; an organization is, ideally, free from the subjective opinion-making that can vary from individual to individual. Consequentially, it is especially important that an organization’s endorsement of or affiliation with another entity, product, or service, be fully disclosed—failure to do so may affect the weight or credibility of the endorsement, especially if the connection between two entities is not reasonably expected by an advertisement’s intended audience.⁴⁴ The FTC provides the example of a false poster on a message board. The FTC asks the reader to consider an online message board that is designed for discussing new music download technology, and to imagine a poster who begins promoting a popular MP3 player and who, unbeknownst to other posters or site visitors, is an employee of the MP3 player’s manufacturer.⁴⁵ The Endorsement Guides require a “clear and conspicuous” disclosure of the relationship between the poster and the manufacturer in that scenario.⁴⁶ This way, a consumer has all the information necessary to evaluate the credibility of the poster’s claims and to make an informed decision. Whether an advertisement meets this “clear and conspicuous” requirement depends on the performance of that disclosure: that is, whether consumers actually perceive and understand what the disclosure means within the context of the entire ad.⁴⁷

⁴¹ 16 C.F.R. § 255.0(b) (2009).

⁴² *Id.*

⁴³ 16 C.F.R. § 255.4 (2009).

⁴⁴ 16 C.F.R. § 255.5 (2009).

⁴⁵ *Id.* at Example 8.

⁴⁶ *Id.*

⁴⁷ FED. TRADE COMM’N, *supra* note 37, at 6.

In an attempt to apply its rules to the astoundingly profitable⁴⁸ and amorphous world of internet advertising, the FTC created a staff guidance document entitled “Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising” (“Dot Com Disclosures”). While it is not considered a “guide” under the definition in 16 C.F.R. § 1.5,⁴⁹ it serves to clarify and apply current FTC rules and guides governing disclosure requirements to digital and online advertisement. Dot Com Disclosures reiterates consumer need for truthful, material information in order to facilitate better-informed decision-making.⁵⁰ To that end, clear and conspicuous disclosure is required—a reasonable consumer must have the “net impression” that the content is an advertisement.⁵¹ Dot Com Disclosures recommends placing disclosures prominently and as close as possible to the claim or content needing to be qualified in order to increase the possibility that the disclosure and advertisement will be viewed together, thus increasing its efficacy.⁵²

C. The IAB’s Native Advertising Playbook

The IAB was founded in 1996 to promote the growth of the online and interactive advertising industry.⁵³ Its core objectives include “fend[ing] off adverse legislation and regulation,” “shar[ing] best practices that foster industry-wide growth,” and “coalesc[ing] around market-making . . . creative standards.”⁵⁴ Over 500 leading

⁴⁸ In a report released by the IAB, the first six months of 2014 saw internet advertising revenues in the United States reach \$23.1 billion dollars. PWC & INTERACTIVE ADVER. BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT: 2014 FIRST SIX MONTHS RESULTS 4 (2014), available at http://www.iab.net/media/file/PwC_IAB_Webinar_Presentation_HY2014.pdf.

Revenues were traced from eight different types of advertisement, with search engine advertising accounting for 39% of revenue, and sponsored content accounting for 2% of revenue. *Id.* at 13, 21.

⁴⁹ 16 C.F.R. § 1.5

⁵⁰ FED. TRADE COMM’N, *supra* note 37, at n.5.

⁵¹ *Id.* at 6.

⁵² *Id.* at n.8, 17; *see id.* at 1 (“The ultimate test is not the size of the font or the location of the disclosure, although they are important considerations; the ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.”).

⁵³ NATIVE ADVER. TASK FORCE, *supra* note 3, at 19.

⁵⁴ *Id.*

companies call themselves IAB members, including industry giants like *The New York Times Company*, *The Chicago Tribune*, Facebook, BuzzFeed, and many other traditional media, social media, and web-based institutions.⁵⁵ The IAB frequently publishes guidelines, standards, and best practices for many different areas of digital media and marketing, including native advertisement.⁵⁶

In July 2013, the IAB formed the Native Advertising Task Force (“Task Force”), and charged it with establishing frameworks for today’s native advertisement landscape and with developing recommended disclosure principles.⁵⁷ To that end, the Task Force developed the *Native Advertising Playbook* (the “*Playbook*”), which not only described six categories of native advertisement as they currently exist online, but also included common disclosure language for each specified category of advertisement.⁵⁸ The *Playbook* is firm in its declaration that “clarity and prominence of the disclosure is paramount.”⁵⁹ It recommends disclosures include language that conveys that the advertisement has been paid for, even if the advertisement does not contain traditional promotional messages.⁶⁰ Further, the *Playbook* advises that disclosures should be large and visible enough that, regardless of context, a reasonable consumer could distinguish between what is paid advertising, and what is publisher content.⁶¹

The IAB stopped short, however, of recommending bright-line disclosure rules, stating that the rapidly changing native advertisement environment made “one-size-fits-all” disclosures all but impossible to create. Instead, it broadly advised that individual disclosures should adhere to the central principle that advertisement should be clearly distinguishable from surrounding editorial content.⁶² Interestingly, the *Playbook*’s examples of common

⁵⁵ *Id.* Together, the IAB’s member organizations constitute 86% of all online advertisement in the United States. See *General Members*, INTERACTIVE ADVER. BUREAU, http://www.iab.net/member_center/1521/1534 (last visited Sept. 8, 2014).

⁵⁶ *Guidelines, Standards and Best Practices*, INTERACTIVE ADVER. BUREAU, <http://www.iab.net/guidelines> (last visited Sept. 8, 2014).

⁵⁷ NATIVE ADVER. TASK FORCE, *supra* note 3, at 19.

⁵⁸ See generally *id.* at 8-13.

⁵⁹ *Id.* at 15.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

disclosure language highlight the main concerns advanced by the FTC.⁶³ The *Playbook* promotes the use of disclosure language such as “Presented by [brand],” “Featured Partner,” and “Sponsored by [brand]” for in-feed advertisements, but this language alone is not enough to assuage fears that consumers could still reasonably believe a piece is host-site created editorial, rather than advertisement.⁶⁴ This mistaken belief is the reason why undisclosed or poorly disclosed native advertisement is so dangerous.

IV. THE DANGERS OF UNREGULATED NATIVE ADVERTISEMENT

Society spends more and more time interacting with social media websites every year,⁶⁵ and our increasing presence on the Internet creates opportunities for advertisers and content hosts to communicate and interact with consumers like never before. While this constructs a marketplace that is better able to tailor its products to the needs and preferences of the market, increased interaction can also induce brashly upfront and interactive consumer deception. False advertisement abounds on the Internet, and when left unregulated, the effect on consumers is palpable.⁶⁶

Consumers need unbiased and complete information in order to make well-informed decisions. To achieve this goal, native advertisements must disclose the relationship between the advertiser purchasing custom branded content and the business providing access to consumers. Nondisclosure of a material relationship between content host and advertiser can affect consumer decision-making by altering a consumer’s perception of the credibility or authenticity of

⁶³ Sophia Cope, *FTC Explores Native Advertising*, NEWSPAPER ASS’N AM. BLOG (Dec. 17, 2013), <http://www.naa.org/News-and-Media/Blog/FTC-explores-native-advertising.aspx>.

⁶⁴ See *id.* (noting that readers, upon seeing these terms, may believe that an advertiser has simply underwritten certain content that was independently created by the publisher, but may not understand that the advertiser actually created the content).

⁶⁵ Helen A.S. Popkin, *We Spent 230,060 Years on Social Media in One Month*, CNBC (Dec. 4, 2012, 12:08 PM), <http://www.cnn.com/id/100275798#>.

⁶⁶ See DOT COM DISCLOSURES, *supra* note 37, at iii (“Negative consumer experiences can result in lost consumer goodwill and erode consumer confidence.”).

the information provided.⁶⁷ Undisclosed advertisement that influences decision-making in a reasonable consumer is, by its nature, deceptive when a consumer cannot tell the difference between what is unbiased information and what is carefully-worded and disguised advertisement.⁶⁸ Good native advertising may not be intended to be trickery,⁶⁹ but media consumption's ability to affect and alter consumer taste necessitates stricter regulation of native advertising practices in order to avoid the potentially harmful effects of carefully-crafted, yet poorly-disclosed, native content.⁷⁰ Clear guidelines on disclosure and how best to clarify the nature of native content is key to creating an informed public conscious of the decisions it makes and the information it absorbs. At its most integrated level, native advertisement is indistinguishable from editorial content—effective and full disclosure is the only way to ensure that consumers are truthfully and accurately informed.

Non-disclosure does more than deceive consumers as to the nature of the information presented to them; it also erodes trust in the institutions that provide consumers with that information. The United States has a storied tradition of freedom of press, and with that tradition comes the idea that journalism should be separated from

⁶⁷ Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009); FED. TRADE COMM'N, *supra* note 2; *see* Letter from the Fed. Trade Comm'n to Gary Ruskin, Executive Director, Commercial Alert (Feb. 10, 2005), *available at* <http://www.commercialalert.org/FTCletter2.10.05.pdf>. (responding to Commercial Alert's complaint to require advertisers to disclose product placements in a clear and conspicuous fashion).

⁶⁸ *See* 15 U.S.C. § 45 (2013) (stating that unfair methods of competition in or affecting commerce are unlawful and laying out that the Commission is empowered and directed to prevent that from happening).

⁶⁹ Interactive Adver. Bureau, *Meredith Levien, The New York Times, on Good Native Advertising with Terry Kawaja, LUMA Partners*, YOUTUBE (Feb. 11, 2014), <https://www.youtube.com/watch?v=cwbUdJSQXEc> (the Executive Vice President of Advertising at the *New York Times* remarking at the IAB's annual leadership meeting).

⁷⁰ Content consumption can influence consumer taste when the consumer accumulates knowledge of and appreciation for the product. *See* COLIN HOSKINS, ET. AL., *MEDIA ECONOMICS: APPLYING ECONOMICS TO NEW AND TRADITIONAL MEDIA*, Consumption of Media Goods May Be Habit-Forming (2004). As consumer taste changes in favor of the content consumed, demand for similar content, and consequentially for the product being advertiser, can increase as well. *See id.*

business—the journalistic wall between “church and state.”⁷¹ Unregulated and undisclosed native advertisement has the power to tear down that wall as the practice becomes more sophisticated and increasingly difficult for consumers to distinguish journalism from advertisement. Native advertisement has been described as journalists sharing their storytelling tools with marketers;⁷² the problem arises when consumers can neither distinguish whose tools are whose nor tell whose story is being told.⁷³ Consider *The Atlantic* and its recent attempt at native advertisement. In January 2013, *The Atlantic* published a native advertisement produced by the Church of Scientology on its website.⁷⁴ Strong negative reaction to the advertisement prompted *The Atlantic* to pull the post.⁷⁵ *The Atlantic* isn’t the only publication that has tried its hand at native advertisement—*Forbes*,⁷⁶ *The New York Times*,⁷⁷ and *The Los*

⁷¹ Robert Safian, *The Separation of Church and State*, FASTCOMPANY.COM (Mar. 23, 2011, 12:40 AM), <http://www.fastcompany.com/1739778/separation-church-and-state>. Safian describes it as a line that exists in the magazine business, but this line is a defining concept throughout journalism as a whole. See, e.g., Jason Kint, *We Need a New ‘Church and State’ in Digital Publishing*, PBS.ORG (Nov. 6, 2014), <http://www.pbs.org/mediashift/2014/11/we-need-a-new-church-and-state-in-digital-publishing/> (applying the concept to the digital content industry).

⁷² Levien, *supra* note 69.

⁷³ See David Carr, *Storytelling Ads May be Journalism’s New Peril*, N.Y. TIMES (Sept. 15, 2013), http://www.nytimes.com/2013/09/16/business/media/storytelling-ads-may-be-journalisms-new-peril.html?_r=1 (noting that once consumers click on a native advertisement, it is very difficult to know what motives lie between the lines of what the consumer is reading).

⁷⁴ Nerissa Coyle McGinn, *Internet Provides More Access to Consumers, Creating Opportunities and Problems in* RECENT TRENDS IN TRADEMARK PROTECTION, 2014 EDITION: LEADING LAWYERS ON EDUCATING CLIENTS, UNDERSTANDING THE IMPACT OF TECHNOLOGY, AND NAVIGATING THE CURRENT MARKETPLACE *2 (2014), available at Westlaw 2014 WL 1234890; Carr, *supra* note 73.

⁷⁵ Julie Moos, *The Atlantic Publishes then Pulls Sponsored Content from Church of Scientology*, POYNTER (Jan. 15, 2013, 5:08 AM), <http://www.poynter.org/news/mediawire/200593/the-atlantic-pulls-sponsored-content-from-church-of-scientology/>.

⁷⁶ Molly Soat, *Forbes’ Native Ad Cover Sparks Ethics Discussion*, AM. MARKETING ASS’N (Feb. 24, 2015), <http://www.ama.org/publications/eNewsletters/Marketing-News-Weekly/Pages/forbes-native-ad.aspx>.

Angeles Times,⁷⁸ along with countless other online content providers have also published native advertisement, with varying degrees of success. Placing undisclosed or poorly disclosed native content in close proximity to actual journalism affects the credibility consumers afford the sponsored piece, and may ultimately influence consumer choice when the information presented is not accurately disclosed as sponsored content.⁷⁹ Further, the delineation of journalism “church and state” is necessary to promote the freedom of press and uphold the tradition of truthful, unbiased, and free journalism valued so highly in the United States.⁸⁰ We need bold, protective disclosure law designed to help consumers identify sponsored content before they even engage with the content.⁸¹ Existing FTC rules and IAB guidelines are a good place to start, but businesses and regulatory agencies must be proactive and develop new guidelines specifically tailored to native advertisement in order to best protect consumers.

V. EXISTING REGULATIONS, PROBLEMS THEREIN, AND A CALL FOR CLARIFICATION

Native advertisement does not always classify as deceptive under existing law. However, if it is left unregulated by a company, marketer, or host’s internal social media policies, the FTC has the authority to bring action when a dearth of checks and balances creates advertisement that classifies as deceptive according to FTC rules and guides.⁸² The FTC’s Endorsement Guides, Dot Com

⁷⁷ Meyer, *supra* note 14; see Last Week Tonight with John Oliver, *Native Advertising*, YOUTUBE (Aug. 3, 2014), https://www.youtube.com/watch?v=E_F5GxCwizc (segment on native advertising on John Oliver’s HBO show).

⁷⁸ Natalie Pompilio, *A Porous Wall*, AM. JOURNALISM REV., <http://ajrarchive.org/Article.asp?id=4775> (last visited Apr. 7, 2015).

⁷⁹ See Carr, *supra* note 73.

⁸⁰ See Rice, *supra* note 1 (blogger Andrew Sullivan positing that “[i]f journalism is not understood to be separate from advertising, then it has lost something incredibly important in a democratic society”).

⁸¹ See Levien, *supra* note 69.

⁸² See *supra* Part II; (defining native advertisement); see also Cope, *supra* note 63 (describing a 2013 FTC workshop on native advertising practices). The FTC continues to proceed with the understanding that it can use its existing Section 5 authority to bring enforcement actions against companies that participate in or create native advertisement that is unfair or deceptive. *Id.*

Disclosures, and Policy Statement on Deception are where businesses, marketers, and content providers should initially look for guidance.

A. Applying FTC Rules and Guides to the Current Native Landscape

Nondisclosure of the relationship between content host and marketer is material when it is likely to affect consumer choice, and when the disclosure would be information important to consumers in their decision-making.⁸³ Further, proof of consumer injury does not require an explicit measure of economic harm, but rather occurs when a consumer would have chosen differently but for the deception—in our case, the non-disclosure. If a consumer's choice is affected in that they choose to engage with content believing it to be content created by the host website rather than by an advertiser, there is consumer injury, and the content could come under scrutiny by the FTC if the relationship between content host and advertiser is not disclosed or is done so poorly.⁸⁴

The FTC generally advises online advertisers to focus on the advertisement as a whole and not just its individual parts when determining whether or not an advertisement is misleading.⁸⁵ The FTC requires inclusion of a clear and conspicuous disclosure when an advertisement makes claims or omissions that are likely to mislead without qualification.⁸⁶ Carefully crafted and undisclosed native advertisement, especially endemic in-feed advertisement,⁸⁷ creates the potential for the elemental *nature* of such advertisement—that it is *intentionally* disguised as editorial content—to be unreasonably misunderstood by and, thus, misleading and deceptive to, the advertisement's intended audience.⁸⁸ For example, in evaluating a radio and television infomercial that implicitly claimed to be an independent program and *not* an advertisement, the FTC found that such claims were deceptive in violation of Section 5(a).⁸⁹ The FTC

⁸³ See FED. TRADE COMM'N, *supra* note 2; *supra* Part IV.

⁸⁴ FED. TRADE COMM'N, *supra* note 2.

⁸⁵ FED. TRADE COMM'N, *supra* note 37.

⁸⁶ *Id.*

⁸⁷ NATIVE ADVER. TASK FORCE, *supra* note 3, at 8.

⁸⁸ See Heinz, *supra* note 30, at 1287.

⁸⁹ *In re Vital Basics, Inc.*, 137 F.T.C. 254, 274 (2004).

required the advertiser in that case to make clear and prominent disclosures within the ad that announced the piece as paid advertisement, holding that the lack of such disclosures caused deception in violation of Section 5.⁹⁰

In the context of native advertisement, the disclosure of such a relationship between content host and advertiser is imperative to prevent consumer confusion as to the nature of the content as advertisement rather than editorial. Simple disclosure labels such as “Sponsored Content,” “Sponsored By,” and “Presented By,” may not go far enough to disclose this material relationship, and may mislead a reader into simply believing that the content is underwritten by an advertiser yet still independently created by the publisher, rather than the true nature of such content: that it was created specifically to function *as* an advertisement.⁹¹ Thus, advertisers and content hosts need to ensure that the disclosures on each native advertisement meet FTC standards to avoid the potential for action under claims of deception.

Native advertisement should be regulated as endorsement under existing FTC policy and guidance. An endorsement is “any advertising message that a consumer is likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring party.”⁹² Because native advertisement is designed to fit in with the host website’s content so that it becomes organic to the user’s experience and consumption, a reasonable⁹³ consumer is likely to believe that the advertisement—carefully disguised as it is—reflects the opinions or beliefs of the host, simply by nature of appearing and functioning exactly like the host’s content. Under the FTC’s definition, such an advertisement would be considered an endorsement.⁹⁴ If the perceived credibility of this advertisement influences a consumer to use the products or services it lauds, and no clear and conspicuous disclosure of the material relationship between

⁹⁰ *See id.* at 340.

⁹¹ Cope, *supra* note 63.

⁹² Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0(b) (2009).

⁹³ FED. TRADE COMM’N, *supra* note 37, at 6 (explaining that the advertisement must always be analyzed from the point of view of the reasonable consumer).

⁹⁴ 16 C.F.R. §255.0(b).

the advertiser and host is present, the native advertisement is deceptive.⁹⁵

The FTC's Policy Statement on Deception requires that disclosures be legible and understandable as well as clear and conspicuous.⁹⁶ Further, the disclosure must qualify the advertisement in order to avoid creating a misleading impression.⁹⁷ The Dot Com Disclosures guidance document tells advertisers to "draw attention to the disclosure," positing that consumers may not be looking for or even expect to find a disclosure.⁹⁸ Statements disclosing the native content as an advertisement must appear prominently, in a place where consumers will be able to see it before they choose to interact with the content. Making the disclosure large enough to read is a necessity,⁹⁹ and offsetting the disclosure in a different color to make it even more noticeable to consumers is a good way to draw attention to the disclosure.¹⁰⁰ Repetition of the sponsored nature of the post is also effective at ensuring consumers will understand the content as advertisement.¹⁰¹ Each of these disclosure techniques is necessary, but not independently sufficient. The examples given are not an exhaustive list of available disclosure tools.

B. The Need for Greater Clarification of Disclosure Requirements

Evaluating examples of native advertisement sheds light on good practices in disclosure, and also allows a closer look at what could be done to make disclosure even more effective. Consider *The New York Times*' piece entitled "Women Inmates: Why the Male Model Doesn't Work."¹⁰² What appears—and, with respect, is—a quality piece of journalism is actually a brilliant piece of native

⁹⁵ 16 C.F.R. §255.5.

⁹⁶ FED. TRADE COMM'N, *supra* note 2.

⁹⁷ See FED. TRADE COMM'N, *supra* note 37, at 5.

⁹⁸ *Id.* at 6.

⁹⁹ See *id.* at 17; see also UTAH CODE ANN. § 13-11a-2 (West 2014) (explaining that the State of Utah clearly defines what it considers "clear and conspicuous" disclosure, right down to the font size required for such disclosure).

¹⁰⁰ See FED. TRADE COMM'N, *supra* note 37, at 17.

¹⁰¹ *Id.* at 19.

¹⁰² See Melanie Deziel, *Women Inmates: Why the Male Model Doesn't Work*, N.Y. TIMES (June 13, 2014), http://paidpost.nytimes.com/netflix/women-inmates-separate-but-not-equal.html?_r=0#.VRshKPnF-os.

advertisement for Netflix and its show “Orange is the New Black,” created by T Brand Studio, the native advertising unit at *The New York Times*.¹⁰³ The piece itself contains four potential disclosures. Atop the content is a thin, blue bar containing the words “Paid Post” in small typeface.¹⁰⁴ The Netflix and T Brand Studio logos appear below this bar.¹⁰⁵ These elements stay present on the screen as the reader scrolls through the content.¹⁰⁶ At the bottom of the page, a large box containing the words “Season 2 Now Streaming” and the “Orange is the New Black” logo appears above links to other *New York Times* articles selected by Netflix to accompany the piece.¹⁰⁷ Below that, within another thin, blue bar, the following phrase appears in small typeface: “This page was produced by the T Brand Studio, a unit of the advertising department of *The New York Times*, in collaboration with Netflix. The news and editorial staffs of *The New York Times* had no role in its preparation.”¹⁰⁸

This content is expertly crafted, and meets the FTC Guides on its face in order to ostensibly preclude Section 5 action by the FTC, but are the included disclosures conspicuous enough to be sufficient? The answer is yes—and no. While the Netflix logo is present throughout the article, there is only one instance where the relationship between *The New York Times* and Netflix is explicitly disclosed.¹⁰⁹ The language in the disclosure at the bottom of the page conveys to the reader that it was developed specifically by the advertising department, and not by the news and editorial staffs.¹¹⁰ Content creators must adopt this language, or a version thereof, as it works to maintain the delineation between journalistic church and

¹⁰³ See Michelle Castillo, *Netflix Looking to Pursue More Native Advertising*, ADWEEK (June 16, 2014, 6:43 PM), <http://www.adweek.com/news/technology/netflix-looking-pursue-more-native-advertising-158367>; see also Lucia Moses, *Inside T Brand Studio, The New York Times' Native Ad Unit*, DIGIDAY (Dec. 2, 2014), <http://digiday.com/publishers/new-york-times-native-ad-unit/> (detailing the *New York Times*' in-house native ad unit).

¹⁰⁴ Deziel, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (the words “Selected By” accompany the Netflix logo).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

state.¹¹¹ However, this disclosure must be prominently displayed—placing it in small font at the bottom of the page is not conspicuous enough to ensure that the disclosure is accurately conveyed to consumers. The announcement of the content as a “Paid Post” at the top of the page creates similar concerns. The required language is there, but it may not be conspicuous enough to meet the FTC’s threshold.

This issue, how to conspicuously disclose, exists because there is no industry standard nor are there clear guidelines from a regulatory or advisory agency that define how to make a disclosure adequately conspicuous. The IAB proposes vague principles that provide little to no guidance as to how to make sure a consumer notices a disclosure, noting that the rapidly evolving landscape of native advertising prohibits the recommendation of a “single, one-size-fits-all disclosure mechanism.”¹¹² However, such mechanisms are exactly what the industry needs: clear rules that delineate how to effectively make disclosures so that the possibility of an enforcement action brought on claims of deception is effectively foreclosed. Simply conveying that the post is “paid for” or “sponsored by” an advertiser is insufficient. The disclosure must stand out prominently so that consumers are immediately aware they are consuming advertisement rather than editorial.

At its most basic level, the potential for deception is easily avoidable by the construction of strict, internal social media and online advertising policies, serving as a gatekeeper before content has the chance to run afoul of the FTC. As native advertisement grows in momentum and prevalence, the onus may be on content hosts to work with their advertising and marketing departments to establish clear guidelines for native advertisement creation.¹¹³ However, such action should go one step further: regulatory and advisory agencies should develop clear and easy-to-implement guidelines to provide more authoritative, explicit guidance to marketers and content hosts looking to capitalize on this form of advertisement. Combined with effective and specific corporate policies, strategies can be developed that are both workable in a competitive marketing industry while

¹¹¹ See *supra* Part IV.

¹¹² See NATIVE ADVER. TASK FORCE, *supra* note 3, at 15.

¹¹³ See *id.*; see also Moos, *supra* note 75.

being effective at protecting consumers from confusion and deception.

C. Native Advertisement within the Confines of the First Amendment and the Commercial Speech Doctrine

The First Amendment prohibits the establishment of a law that abridges the freedom of speech or the freedom of the press.¹¹⁴ The Supreme Court has extended this protection to commercial speech, or speech that merely proposes a commercial transaction.¹¹⁵ The Supreme Court analyzes three factors to determine whether speech qualifies as commercial: (1) whether the speech is an advertisement, (2) whether the speech references a specific product, and (3) whether there is economic motivation for the speech; while none of these are sufficient on their own to render speech commercial, a combination of the three provides the Supreme Court with “strong support” for a conclusion that speech is properly characterized as commercial.¹¹⁶

The Supreme Court also noted that commercial speech can be afforded less protection than other types of constitutionally guaranteed expression, turning on the nature of the expression itself and any governmental interest served in its regulation.¹¹⁷ Commercial speech is necessary for the dissemination of information in a free market, and thus the Supreme Court recognized that there can be no constitutional objection to State suppression of commercial speech that inaccurately or deceptively presents information, or speech that proposes unlawful activity.¹¹⁸ Therefore, the Supreme Court turns to a four-point intermediate scrutiny analysis to determine whether commercial speech can be controlled under a

¹¹⁴ U.S. CONST. amend. I.

¹¹⁵ *Harris v. Quinn*, 134 U.S. 2618, 2639 (2014); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (“Our question is whether speech which does no more than propose a commercial transaction . . . is so removed from any exposition of ideas, . . . and from truth, science, morality, and arts in general . . . that it lacks all protection. Our answer is that it is not.”)

¹¹⁶ *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983).

¹¹⁷ *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980).

¹¹⁸ *Id.* at 563.

proposed government regulation: (1) the expression must be protected by the First Amendment—i.e. concern lawful activity and not be misleading; (2) the government must have a substantial interest in its regulation; (3) the regulation proposed must advance the government's interest; and (4) the regulation must be narrowly tailored.¹¹⁹

Native advertisement may not qualify as commercial speech, especially when presented in endemic in-feed format. For example, it is unlikely any court would consider the *New York Times*' "Orange is the New Black" advertisement to be commercial speech, because the editorial content far outweighs its status as advertisement or as a proposal of a transaction between Netflix and the reader.¹²⁰ Native advertisement is likely not considered advertisement when the editorial content outweighs the commercial qualities.¹²¹ Therefore, if the FTC makes any rules regulating native advertisement, it must do so with the understanding that its rules must be narrowly tailored to protect the government's interest in protecting consumers from deception¹²² while at the same time recognizing that such guidelines may not apply to an advertisement that is not commercial speech within the confines of the law and the First Amendment.

VI. CONCLUSION

Native advertisement is undoubtedly one of the most effective ways of reaching consumers. For years in the form of infomercials, full-page advertisements, and radio spots, it has been an exciting and creative way of generating word-of-mouth. Online, this combines with the potential to generate high levels of awareness of brands for all sizes, leveling the playing field while simultaneously introducing consumers to a wealth of options. However, these gifts must not be

¹¹⁹ *Id.* at 564.

¹²⁰ *See supra* Part V.

¹²¹ *See* Fernando A. Bohorquez, Jr. & Alan Pate, *All Native Advertising is Not Equal: Why that Matters Under the First Amendment and Why it Should Matter to the FTC*, DATA PRIVACY MONITOR (Sept. 29, 2014), <http://www.dataprivacymonitor.com/behavioral-advertising/all-native-advertising-is-not-equal-why-that-matters-under-the-first-amendment-and-why-it-should-matter-to-the-ftc-part-v/#Part5>.

¹²² *Central Hudson*, 447 U.S. at 564.

overshadowed by the potential dangers native advertisement creates if left unregulated and undisclosed.

Native advertisements that do not meet FTC guidelines for disclosures run the risk of violating deceptive trade practice, leaving both content hosts and advertisers subject to sanctions. Lack of clear disclosure guidelines substantially affect a consumer's ability to access truthful, credible information, and can mislead consumers into making choices they otherwise would have avoided. This ultimately leads to an unconfident consumer population that is distrustful of advertisement and the marketplace.

The current regulations and guidance in place provide a good starting point for native advertisement creators, but clearly-defined and specific disclosure requirements are necessary to ensure that consumers understand the union between advertising and journalism that birthed the native content they consume. The entities that deal in native advertisement must carefully craft and closely monitor content to ensure delineation of the line between journalistic "church and state"—the separation between business and journalism. Only then can we balance the traditions of a free and open press with the benefits of a marketing strategy that serves both as revenue-generator and truthful informer.