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Native Advertising Won't Provide Camouflage From The FTC

Law360, New York (March 31, 2016, 12:02 PM ET) -- As the internet grows, so do the opportunities for businesses to reach potential customers in new and innovative ways. In contrast to television, radio and even print periodical advertising, online advertising does not necessarily require a break or disruption from the content to reach consumers. Now, advertisers are reaching potential customers through "native advertising" and online "influencers." This advertising creates a seamless experience for the consumer, allowing them to view content and advertisements nearly simultaneously. More than this, some online advertising gives companies an opportunity to actively engage with online consumers.



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However, the Federal Trade Commission is starting to focus on deceptive advertising practices in native advertising. As the FTC turns to enforcing deceptive advertising rules in the native advertising and online influencer spheres, it is critical that content producers, advertisers and marketing strategists know what to do — and what not to do — when creating online advertising campaigns.



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What is Native Advertising and Who are Online Influencers?

Native advertising, also known as sponsored content, is designed to fit in with original online content in a seamless, nonintrusive manner. It allows advertisers to directly reach online consumers, without severely interrupting the original content on the publishing website, video game or mobile app. In the past few years, this advertising has reached all corners of the internet. Most internet users have become accustomed to seeing the offset blocks of text or pictures with the label "sponsored content." However, native advertising now encompasses other forms of advertising such as advertiser paid-for videos or blog posts that mimic the advertorial features found in print newspapers or magazines. To consumers, it is not always clear that such content is a paid-for advertisement. In fact, one study from Grady College at University of Georgia found that fewer than one in five internet users were able to identify sponsored content as advertising.

In addition to native advertising, companies are using online influencers to promote their products. Online influencers are a new version of celebrity endorsements. While companies have used celebrity endorsements on television and in print for decades, now brands seek out social media mavens to advocate for their brand. These online influencers may have professional notoriety within an industry, or they may have crafted an online image through videos, blogs or social media posts, which has garnered them thousands or even hundreds of thousands of online followers. Influencers are often compensated to promote a brand on

their social media accounts. The influencer's audience is already primed to be interested in the brand because they are already interested in the influencer's lifestyle and preferences. While some online influencers disclose the companies asking them to promote products, not all do, which creates a deceptive advertising problem in the FTC's eyes.

FTC Concerns With Native Advertising

Like traditional media advertising, online advertising is subject to regulation under the Federal Trade Commission Act. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." According to the FTC's December 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements, an advertisement is deceptive when it "misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional material and such misleading representation is material." A misrepresentation is material if it would be likely to affect a consumer's choice about the advertised product.

As native advertising has grown, so have the FTC's concerns about the possibility of deceiving consumers. Therefore, at the close of 2015, in addition to the Enforcement Policy Statement, the FTC also released a guidance memorandum titled Native Advertising: A Guide for Businesses. This memorandum provides details and illustrative examples for businesses that use native advertising as part of their online marketing campaigns.

Most of the memorandum focuses on 17 examples of native advertising, such as sponsored posts on news sites, sponsored videos on do-it-yourself sites, content recommendation widgets on blogs or product placement in video games. These examples illustrate how and why consumers might be confused by certain native advertising tactics. Most of the examples show how a native advertisement might bear too much similarity to the original content, which means the consumer might not understand that what they are viewing is, in fact paid-for, sponsored content. For example, an advertisement for running shoes on a news website asking consumers to try out the new shoe, even if it is formatted like the news content, is likely not deceiving because the content of the advertisement is significantly different from the content of the news site. In contrast, if an advertisement for a running shoe appears on a site dedicated to running, the advertiser and publishing site need to ensure that the advertisement is differentiated from the original content or clearly disclosed as sponsored content.

Yet, just because an advertising campaign utilizes native formatting, does not mean it will necessarily be marked as deceptive. If sponsors and content producers provide necessary disclosures and appropriately identify native advertising as sponsored content, companies will not run afoul of the FTC guidelines and rules. The guidance memorandum provides a variety of tips on how to appropriately disclose native advertising. The disclosures should be three things: (1) placed near the advertising; (2) prominent; and (3) clear. By ensuring that native advertising follows these disclosure guidelines, companies will avoid misleading consumers into thinking their native advertisement is nonsponsored, publisher content.

Finally, the memorandum specifically notes who is affected by these disclosure rules. The enforcement is not limited to just the sponsoring advertiser. Advertising agencies and operators of affiliate advertising networks are also obligated to adhere to the FTC's disclosure requirements.

FTC Enforcement Against Native Advertising

National retailer Lord & Taylor LLC has found out the hard way that the FTC is scrutinizing the use of native advertising and online influencers.

On March 15, 2016, Lord & Taylor agreed to settle FTC charges that it "deceived consumers by paying for native advertisements." The settlement is the first of its kind following the

December 2015 guidance memorandum. Under the terms of the settlement, Lord & Taylor is prohibited from “misrepresenting that paid ads are from an independent source and is required to ensure that its influencers clearly disclose when they have been compensated in exchange for their endorsements.”

On the day the settlement was announced, the FTC also published a copy of the underlying complaint and exhibits of the offending advertisements. The complaint alleges that Lord & Taylor developed plans to promote the “Design Lab” clothing line for women through a comprehensive social media campaign of blog posts, photos, native-advertising editorials in online fashion magazines and a team of “influencers” recruited for their fashion sense and audience on social media.

The FTC took issue with two main components of Lord & Taylor’s online strategy. First, was an undisclosed native advertising campaign that appeared in Nylon, a fashion magazine. The FTC alleged that Lord & Taylor edited, preapproved and paid for a favorable post on the Instagram account of the fashion magazine. The regulatory agency further alleged that Lord & Taylor reviewed, preapproved and paid for a favorable article in Nylon. In both instances, Lord & Taylor and the magazine failed to disclose commercial arrangement between the companies.

Second, the FTC alleged that Lord & Taylor gifted a paisley dress from the Design Lab clothing line to 50 “influencers” in addition to payments of between \$1,000 and \$4,000 to post favorable photos and comments about the dress on social media. Again, Lord & Taylor did not disclose or require influencers to disclose that they had been paid for their posts featuring the dress. Based on Lord & Taylor’s alleged misrepresentations and failure to disclose, the FTC accused Lord & Taylor of engaging in unfair or deceptive acts or practices in violation of the FTC Act.

To resolve this case, Lord & Taylor is required to cease the deceptive marketing practices, conspicuously disclose all material connections between the endorser and Lord & Taylor, comply with monitoring obligations and maintain copies of advertising materials and documentation that demonstrates compliance with the FTC rules.

Other FTC Enforcement Actions for Failure to Disclose Paid-for Online Influencer Content

On March 17, 2016, following a public comment period, the FTC approved a final consent order with Machinima Inc., for its allegedly deceptive use of online influencers in promoting Microsoft Xbox One and several games. During the marketing campaign, online influencers were given prerelease access to Xbox One and games and then asked to post YouTube videos promoting the system. As part of this campaign, Machinima paid two online influencers \$15,000 and \$30,000 to create YouTube endorsements that were then viewed hundreds of thousands of times. The videos never disclosed that the influencer was given the gaming system or paid to create the video.

The final order settling the complaint prohibits Machinima from misrepresenting in any influencer campaign that the endorser is an independent user of the product or service being promoted. It also requires Machinima to ensure that all of its influencers are aware of their responsibility to make required disclosures, requires Machinima to monitor its influencers’ representations and disclosures, and prohibits Machinima from compensating influencers who make misrepresentations or fail to make the required disclosures.

How Can Advertisers Create a Compelling — and Compliant — Native Advertising Campaign?

Companies would not be pushing the limits of online advertising if it did not work. In the case of the dress central to the Lord & Taylor advertising campaign, the posts from online

influencers were viewed an estimated 11.4 million times over the weekend of the campaign and generated more than 300,000 instances of engagement with potential customers. The dress sold out.

How can advertisers, marketers and publishers ensure compliance without sacrificing the benefits of their online advertising campaign? Here are a few tips to consider while developing your next online marketing strategy:

- **Embrace the publisher's format and the ability to actively engage consumers.** Online native advertising gives advertisers something that television and print media never could: a way for consumers to actively engage with the product, rather than just passively viewing it. For example, mega-content site BuzzFeed is known for its listicles — and sole reliance on native advertising. Advertisers on the site have embraced the format, creating clever quizzes and listicles on topics in which readers have a genuine interest. So, while such an advertisement needs clear and prominent notification that it is sponsored content, advertisers are more likely to receive meaningful consumer engagement if they embrace the interactive format of the hosting website.
- **Publishers need to pick the right advertisers and advertisers need to pick the right publishers.** Readers, viewers or gamers are less likely to ignore clearly marked sponsored content if that content is actually targeted to their interests. For example, in 2013, The Atlantic magazine ran a native advertising campaign for the Church of Scientology that left readers in an uproar. The advertising looked exactly like a magazine article, but was delineated with a yellow "sponsored content" label. While the magazine did not violate the advertising rules, they did alienate their readers. When taking advantage of the native advertising format, the "know your audience" rule still applies.
- **Design a creative "sponsored content" label.** Sometimes, clearly stating that a piece is sponsored content is unavoidable. However, it does not have to be dull. There are no magic words for a disclosure label, so advertisers can create satirical or insider-lingo headers that will tip off readers to the upcoming sponsored content, without sacrificing the tone of the advertisement.

Online advertising gives advertisers and publishers unprecedented consumer access and engagement. Advertising is no longer a passive interruption the viewer waits through. Companies are wise to embrace this, yet they must remain vigilant of their obligations to consumer protection. However, the FTC rules do not say that native advertising or its disclosures must be boring. Allow some of the creative efforts focused at the marketing campaign itself to spill over into the disclosure element and ensure that consumers are aware of the advertising and eager to engage with it.

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