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## **Ever-Blurred Lines: Why Native Advertising Should Not Be Subject to Federal Regulation\***

### INTRODUCTION

Upon logging onto Facebook every day, over 800 million users<sup>1</sup> are inundated with posts by their friends and family on their “Newsfeed.” Users see a status update from their niece who just got a new car. They scroll to see that their co-worker “likes” the new comic book hero movie and that their old friend from high school posted pictures of her newborn. After scrolling a little further down the screen they see that they can save up to \$423 on their auto insurance by switching to Liberty Mutual Insurance and that their mom and two other friends have “liked” the company. Although it may appear to be another post by the user’s friends or family, the Liberty Mutual Insurance posting is actually a paid-for advertisement, purchased by the company with the hopes that seeing the ad in this context will have a greater likelihood of influencing the user to purchase its product than a traditional advertisement appearing on the side of the screen.

The practice of formulating ads to appear as editorial content is known as “native advertising.”<sup>2</sup> Publishers and advertisers are increasingly using native advertising because it is more effective than traditional banner ads.<sup>3</sup> This effectiveness has brought with it much debate. Some see native advertising as a deceptive practice implemented to trick unknowing consumers into viewing ads and

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1. See *Company Info*, F NEWSROOM, <http://newsroom.fb.com/company-info/> (last visited Feb. 27, 2015) (stating that Facebook had “890 million daily active users on average for December 2014”).

2. 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=0](http://www.nytimes.com/2013/09/16/business/media/storytelling-ads-may-be-journalisms-new-peril.html?_r=0); see, e.g., *How Our Energy Needs Are Changing, in a Series of Interactive Charts*, N.Y. TIMES, [http://paidpost.nytimes.com/chevron/a-complex-flow-of-energy.html?\\_r=0#.VBD9Aihhn3Q](http://paidpost.nytimes.com/chevron/a-complex-flow-of-energy.html?_r=0#.VBD9Aihhn3Q) (last visited Jan. 15, 2015) (example of a native advertisement).

3. *Infographic: Native Advertising Effectiveness Study by IPG Media Lab and Sharethrough*, SHARETHROUGH (May 3, 2013), <http://www.sharethrough.com/2013/05/infographic-native-advertising-effectiveness-study-by-ipg-media-labs/> [hereinafter *Infographic*]; *The Power of Native Advertising*, DEDICATED MEDIA (Sept. 27, 2013), <http://www.dedicatedmedia.com/articles/the-power-of-native-advertising>.

spending money.<sup>4</sup> Others claim that the focus of the advertisements is to create more content that consumers actually want to read, which leads to better consumer engagement.<sup>5</sup> This debate has attracted considerable attention from the Federal Trade Commission (“FTC”), which is contemplating possible regulation of native advertisements.<sup>6</sup> This Recent Development argues that the FTC should not regulate native advertising because it is unlikely that such regulation would be meaningful or efficient. Industry self-regulation already provides adequate protection to consumers. Indeed, advertisers and publishers are in a better position to regulate this industry as the lines between content and advertising continually become less clear and technology continues to change the way consumers are exposed to content from an ever-increasing variety of sources.

Analysis proceeds in three parts. Part I of this Recent Development provides background information regarding the current state of native advertising and the significant attention it has garnered. It highlights the various ways advertisers and publishers are implementing native advertisements and discusses the debate surrounding native advertisements. Part II analyzes the FTC’s current statutory framework and examines other areas of FTC regulation to determine what FTC regulation of native advertising could potentially include. Finally, Part III explains why the FTC should not regulate native advertisements and should instead allow the industry to self-regulate.

## I. WHAT IS NATIVE ADVERTISING?

### A. *The Current State of Native Advertising*

Native advertising is “an advertisement that is created to look like an article instead of an advertisement.”<sup>7</sup> It is the “blurring” of

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4. See Carr, *supra* note 2; Bob Garfield, *If Native Advertising Is So Harmless, Why Does It Rely on Misleading Readers?*, GUARDIAN (Feb. 25, 2014), <http://www.theguardian.com/commentisfree/2014/feb/25/yahoo-opens-gemini-native-advertising>.

5. See Todd Wasserman, *Is Native Advertising Just Another Word for Good Advertising?*, MASHABLE (May 13, 2013), <http://mashable.com/2013/05/13/native-advertising-buzzword/>.

6. See Jessica Rich, Dir., Fed. Trade Comm’n, *The FTC’s Consumer Protection Program: Current Priorities in Advertising and Privacy*, Address at the Kelley Drye & Warren Privacy and Advertising Law Summit 5–6 (June 12, 2014), *available at* [http://www.ftc.gov/system/files/documents/public\\_statements/411821/140612kdwspeech.pdf](http://www.ftc.gov/system/files/documents/public_statements/411821/140612kdwspeech.pdf) (“We are considering options, such as a report including guidance on native advertising.”).

7. Nerissa Coyle McGinn, *Internet Provides More Access to Consumers, Creating Opportunities and Problems*, in RECENT TRENDS IN TRADEMARK PROTECTION:

advertisements, digitally or otherwise, with the regular content put forth by the publisher by altering the appearance or form of the advertisements to match the publisher's editorial content.<sup>8</sup> In short, native advertising is "Editorial Space for Sale" and is the print and online media's equivalent to the television's infomercial.<sup>9</sup>

While the recent rise in popularity of sites such as BuzzFeed<sup>10</sup> has brought native advertising to the forefront of American culture,<sup>11</sup> native advertising is by no means a new practice. Advertorials, newspaper ads written in the form of actual articles, have been around since the early part of the twentieth century.<sup>12</sup> In fact, the FTC first brought a case against a company using an ad disguised as editorial content in 1917.<sup>13</sup> Even the online format of native advertising—the format that consumers are most aware of today—has been around for at least seven years.<sup>14</sup>

Today, there are six main ways advertisers are "natively" injecting their advertisements into the stream of potential consumers.<sup>15</sup> These include: (1) in-feed units; (2) paid search units; (3) recommendation widgets; (4) promoted listings; (5) in-ad with native element units; and (6) "custom/can't be contained."<sup>16</sup>

In-feed units are advertisements that generally appear in a list among the site's editorial content and are commonly used by sites

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LEADING LAWYERS ON EDUCATING CLIENTS, UNDERSTANDING THE IMPACT OF TECHNOLOGY, AND NAVIGATING THE CURRENT MARKETPLACE (2014), available at 2014 WL 1234890, at \*2.

8. *Id.*

9. *Rancho Publ'ns v. Super. Ct.*, 81 Cal. Rptr. 2d 274, 276 n.1 (Cal. Ct. App. 1999).

10. Mike Isaac, *BuzzFeed Valued at About \$850 Million*, CNBC (Aug. 11, 2014, 2:21 AM), <http://www.cnbc.com/id/101909515> (noting that BuzzFeed "draws 150 million average monthly viewers").

11. *See Last Week Tonight with John Oliver: Native Advertising* (HBO television broadcast Aug. 3, 2014), available at <http://www.hbo.com/#/last-week-tonight-with-john-oliver/episodes/1/13-august-3-2014/video/ep-13-clip-native-advertising.html>.

12. *See* Adrienne LaFrance, *No, BuzzFeed Did Not Invent Native Advertising*, AWL (Jan. 14, 2014), <http://www.theawl.com/2014/01/no-buzzfeed-did-not-invent-native-advertising> (showcasing an 80-page advertorial taken out in the *Honolulu Advertiser* in 1927 to mark the opening of the Royal Hawaiian Hotel without disclosing that the "article" was sponsored by the hotel).

13. *See* Muenzen, 1 F.T.C. 30, 31–33 (1917) (noting that the Muenzen company had passed itself off in advertisements as a neutral expert on vacuum cleaners in order to promote its own vacuums and disparage competitors' products).

14. *See* Danny Wong, *29 Old School Examples of Native Advertising (2007-2012)*, SHAREAHOLIC (Apr. 5, 2014), <https://blog.shareaholic.com/old-school-native-advertising/> (highlighting various examples of native advertising, one from as early as 2007).

15. INTERACTIVE ADVER. BUREAU, *THE NATIVE ADVERTISING PLAYBOOK 4-5* (2013), <http://www.iab.net/media/file/IAB-Native-Advertising-Playbook2.pdf>.

16. *Id.*

such as Yahoo! and Facebook.<sup>17</sup> For example, postings from advertisers that appear on a Facebook user's page in the same style as postings by that user's friends are in-feed units.<sup>18</sup> A Facebook user might seamlessly scroll from a friend's posting to a posting sponsored by Wal-Mart that looks very similar. Paid search units, commonly used by Google and Bing, are sites that advertisers pay search engines to display near the top of a consumer's search results instead of allowing the search engines' formulas to determine the order of the results.<sup>19</sup> These search results generally appear at the top of the page and, because of FTC regulations, often appear in a different color box than other search results.<sup>20</sup> Recommendation widgets appear as "recommended" stories or articles at the bottom of a page.<sup>21</sup> These widgets appear as merely other related stories recommended for the consumer by the website, but in reality, they are content paid for by advertisers, frequently used by sites such as Taboola.<sup>22</sup>

The term promoted listings refers to the practice of inconspicuously placing sponsored among other, non-sponsored products—a strategy that retailers such as Amazon frequently use.<sup>23</sup> For example, consumers will go to a website and search for their desired product, like a sweater. They will instantly be presented with many different sweaters to choose from. Some of these sweaters will appear near the top of the search results because of the formula used by the seller, while others only appear there because the sweater manufacturer paid for it to be featured. In-ad with native element units do not project themselves as actual editorial content, but nonetheless have certain elements—such as color schemes or formatting—that make the advertisement appear like the publisher's editorial content on the site. These in-ad units are used by sites such as Appssavvy.<sup>24</sup> Finally, custom units, commonly used by sites such as Tumblr and Pandora Radio, are advertisements that look like all other content on the website, specifically created to appear as editorial content.<sup>25</sup>

While native advertising can take many different forms, all are designed to blur the lines between advertisements and editorial

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17. *Id.* at 4, 7–8.

18. *Id.* at 4, 7–9.

19. *Id.* at 10.

20. *Id.*

21. *Id.* at 11.

22. *Id.*

23. *Id.* at 12.

24. *See id.* at 5, 13.

25. *Id.* at 14.

content. This lack of defined lines between advertisements and editorial content allows advertisers to reach consumers in more efficient ways.

*B. Why Advertisers and Publishers Are Using Native Advertising*

Simply put, advertisers are quickly shifting their focus from traditional online advertisements, such as banners<sup>26</sup> and pop-ups, to native advertisements because native advertisements are more efficient. Native advertisements are viewed 53% more often than traditional banner ads.<sup>27</sup> Not only do consumers view native advertisements more often than traditional ads, they also take subsequent action much more often after being exposed to native ads. Studies have shown that consumers share native advertisements with friends and family more frequently than banner ads.<sup>28</sup>

Consumers also “click-through”<sup>29</sup> in-unit native ads much more often than traditional ads.<sup>30</sup> For example, General Electric recently employed a native advertising campaign that was viewed by over five million people and generated approximately 416,000 click-throughs.<sup>31</sup> This click-through rate—more than 8%—far exceeds the average click-through rate of traditional ads, which was approximately 0.2%

26. See Farhad Manjoo, *Fall of the Banner Ad: The Monster That Swallowed the Web*, N.Y. TIMES (Nov. 5, 2014), [http://www.nytimes.com/2014/11/06/technology/personaltech/banner-ads-the-monsters-that-swallowed-the-web.html?\\_r=0](http://www.nytimes.com/2014/11/06/technology/personaltech/banner-ads-the-monsters-that-swallowed-the-web.html?_r=0) (describing the original banner ads as the “rectangular ads at the top of a web page”).

27. *Infographic*, *supra* note 3.

28. *Id.* (stating that 32% of consumers reported they would share a native advertisement with friends and family as opposed to the 19% who stated they would share a banner ad); see also Rebecca Greenfield, *The Trailblazing, Candy-Colored History of the Online Banner Ad*, FAST COMPANY (Oct. 27, 2014, 6:06 AM), <http://www.fastcompany.com/3037484/most-creative-people/the-trailblazing-candy-colored-history-of-the-online-banner-ad> (outlining the history and providing examples of online banner ads).

29. “A percentage used to measure the effectiveness of an advertisement or other link on a Web page, obtained by dividing the number of clicks on the link by the number of times the link was viewed.” *Clickthrough*, DICTIONARY.COM, <http://dictionary.reference.com/browse/clickthrough> (last visited Jan. 15, 2015).

30. See Laura Montini, *Marketing Trend: Shift to Native Advertising Explained (Infographic)*, INC. (Apr. 23, 2014), <http://www.inc.com/laura-montini/infographic/the-shift-to-native-advertising-in-marketing.html> (noting that Facebook news feed ads generate a forty-nine-times greater click-through rate at a 54% lower cost-per-click than “traditional right rail sidebar placements”).

31. *Case Study: GE Sharing Healthy Ideas*, BEEBY CLARK & MEYLER, <http://www.beebyclarkmeyer.com/digital-marketing-case-studies/native-advertising-case-study> (last visited Jan. 15, 2015).

in 2012.<sup>32</sup> This increased click-through rate results in a purchase intent that is 18% higher for native advertising than banner ads.<sup>33</sup>

In addition to the increased consumer engagement, certain forms of native advertising have proven to be more cost effective than traditional banner ads. In-unit Facebook native advertisements not only offered advertisers almost 50% greater viewership than traditional banner ads, they also cost 54% less per click than the traditional ads.<sup>34</sup> Native advertisements are cost effective and help advertisers reach valuable demographics of customers. An analysis of BuzzFeed's user-numbers shows the company is essentially buying traffic to its site from social media outlets through native advertising, and the ads are reaching "18-34 year old affluent Americans" more effectively than most brands.<sup>35</sup>

Native advertising is growing as rapidly as the social media and other publishing outlets that support the practice. Surveys have reported that as many as nine out of every ten publishers have reported that they have added, or are considering adding, native advertising to their sites.<sup>36</sup> Not only are social media sites like BuzzFeed and Facebook using native advertisements, but well-known news outlets such as *The New York Times*<sup>37</sup> and *Forbes* are as well.<sup>38</sup>

Publishers have quickly embraced native advertisements because advertisers are increasingly willing to pay for them. Native advertising

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32. Giselle Abramovich, *15 Mind-Blowing Stats About Native Advertising*, CMO BY ADOBE (Oct. 23, 2013), [http://www.cmo.com/articles/2013/10/21/15\\_Stats\\_Native\\_Advertising.html](http://www.cmo.com/articles/2013/10/21/15_Stats_Native_Advertising.html).

33. Yael Grauer, *Native Advertising vs. Sponsored Content: What's the Difference?*, GO DIGITAL (July 15, 2014), <http://www.godigitalmarketing.com/native-advertising-vs-sponsored-content-difference-national-blog/>.

34. Montini, *supra* note 30.

35. Benjy Boxer, *What Buzzfeed's Data Tells About the Pricing of Native Advertisements*, FORBES (Sept. 10, 2013, 12:28 PM), <http://www.forbes.com/sites/benjaminboxer/2013/09/10/what-buzzfeeds-data-tells-about-the-pricing-of-native-advertisements/>.

36. See Montini, *supra* note 30 (stating that "3/4 of publishers offer some type of native advertising on their sites" and that "90% of publishers say they have considered and/or are considering adding native advertising to their sites"); see also *New OPA Study Reveals Native Advertising Best Practices, Marketer Goals and Metrics*, ONLINE PUBLISHERS ASS'N (July 10, 2013), [http://www.online-publishers.org/index.php/opa\\_news/press\\_release/new\\_opa\\_study\\_reveals\\_native\\_advertising\\_best\\_pra](http://www.online-publishers.org/index.php/opa_news/press_release/new_opa_study_reveals_native_advertising_best_pra) (stating that, as of July 2013, 73% of advertisers have gone native and noting the potential for that number to reach 90% by the end of 2013).

37. For example, see Kim Anderson, *Will Millennials Ever Completely Shun the Office?*, N.Y. TIMES (Jan. 8, 2014), <http://ad-assets.nytimes.com/paidpost/dell/will-millennials-ever-completely-shun-the-office.html#.Us2ZbFRDvni> (illustrating a native advertisement paid for by Dell that was run by the *New York Times*).

38. Montini, *supra* note 30.

is projected to bring in approximately \$4.57 billion by 2017.<sup>39</sup> Reports show that 41% of brands and 34% of agencies currently use native advertisements.<sup>40</sup> Based on native advertisements' reported efficiency,<sup>41</sup> this number is likely to continue to rise. Netflix, Chevron, and the Church of Scientology are just a few examples of companies that have used native advertisements.<sup>42</sup> BuzzFeed earns 100% of its revenue from native advertising in some form.<sup>43</sup> Forbes reported that 20% of its 2013 revenue came from its native advertising branch, BrandVoice.<sup>44</sup> With figures like these, it is hard to see why either advertisers or publishers would scale back their use of native advertisements in the future.<sup>45</sup>

Because of native advertising's popularity and effectiveness in reaching consumers, people have begun to take notice of the practice with conflicting sentiments. Some see native advertisements as a tool used to trick consumers into viewing advertisements,<sup>46</sup> while others see the ads as providing consumers with quality material that they enjoy viewing.<sup>47</sup>

### C. *Disagreement Over Native Advertising and Its "Deceptive" Qualities*

Many critics see native advertising as nothing more than a deceptive practice employed by advertisers to get readers to view their ads.<sup>48</sup> They believe that the average consumer "do[es] not realize [she is] being fed corporate propaganda" and does not pay

39. Boxer, *supra* note 35.

40. Montini, *supra* note 30.

41. See *supra* notes 27–28 and accompanying text.

42. See Church of Scientology, *David Miscavige Leads Scientology to Milestone Year*, ATLANTIC, available at <http://poynter.org/extra/AtlanticScientology.pdf> (last visited Feb. 27, 2015); Melanie Deziel, *Women Inmates: Why the Male Model Doesn't Work*, N.Y. TIMES, <http://paidpost.nytimes.com/netflix/women-inmates-separate-but-not-equal.html#.VBD9YShhn3Q> (last visited Feb. 27, 2015); *How Our Energy Needs Are Changing, in a Series of Interactive Charts*, *supra* note 2.

43. See Boxer, *supra* note 35.

44. Montini, *supra* note 30.

45. But 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/> (arguing that native advertising will not survive because the publishers of advertisements are not as valuable to the advertisers in a digital world as many believe).

46. Carr, *supra* note 2; Garfield, *supra* note 4.

47. See Wasserman, *supra* note 5.

48. Carr, *supra* note 2; Garfield, *supra* note 4.

attention to the sponsor or author of a given article.<sup>49</sup> Advertisements and editorial content, the argument goes, should be clearly separated. Detractors of native advertisements see any attempt to pass off an advertisement as editorial content as a scheme to deceive consumers.<sup>50</sup>

Perhaps the main criticism of native advertisements is that the advertiser deceptively uses the publisher's credibility to make consumers believe the advertisement is as credible as the publisher's own editorial content.<sup>51</sup> In fact, a recent study showed that a news site's perceived credibility created a 33% increase in the perceived credibility of the ad's content.<sup>52</sup> Both critics and courts have found this boost in credibility to be deceptively gained and therefore problematic.<sup>53</sup> Because of this potential to deceive, some critics believe that the FTC should step in to regulate native advertising.<sup>54</sup>

On the other hand, those who use native advertising techniques argue that native advertising is simply a way to create advertising content that is more enjoyable and interesting for readers.<sup>55</sup> Michael S. Perlis, the president of Forbes Media, has summarized the movement by stating, "[Native advertising] is, in fact, content . . . It's not advertising."<sup>56</sup> Native advertising is therefore much more effective in connecting with consumers.<sup>57</sup> Studies have found that 70% of Internet users would prefer to learn about products and services through content as opposed to learning about them through

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49. 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=1&](http://www.nytimes.com/2013/04/08/business/media/sponsors-now-pay-for-online-articles-not-just-ads.html?pagewanted=all&_r=1&).

50. See David Olson, *Native Advertising Only Wins with Transparency and Valuable Content*, BRANDPOINT (Aug. 26, 2014), <http://www.brandpoint.com/blog/native-ads-transparency-content/>.

51. See Garfield, *supra* note 4.

52. *Critical to Success of In-Feed Sponsored Content Are Brand Familiarity, Trust and Subject Matter Authority, As Well As Relevance, According to New Research from IAB & Edelman Berland*, IAB (July 22, 2014), [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-072214](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-072214).

53. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 693 (2d Cir. 1994) ("[A]dvertorial format was designed to enhance the seriousness and credibility of [the] advertising." (internal citations omitted)).

54. See Lucia Moses, *Who Should Regulate Native Advertising?*, ADWEEK (Oct. 23, 2013, 10:45 AM), <http://www.adweek.com/news/advertising-branding/who-should-regulate-native-advertising-153334> ("The Wonderland co-founder and creative director Joe McCambley argued that publishers can't allow advertising to mingle with content unimpeded.").

55. See Wasserman, *supra* note 5.

56. Vega, *supra* note 49.

57. See *id.*

traditional advertisements.<sup>58</sup> Studies have found that consumers even look at native advertisements more than the original editorial content of the site.<sup>59</sup> Consumers also tend to spend almost as much time viewing the native advertisements as they do the editorial content.<sup>60</sup>

Given the amount of publicity native advertising has garnered, some have called for native advertising to be regulated in order to prevent consumers from being misled or deceived by these advertisements.<sup>61</sup> No such regulation currently exists, but the FTC has left open the possibility of future regulation.<sup>62</sup>

## II. THE CURRENT STATE OF CONSUMER PROTECTION LAWS AND POSSIBLE REGULATION OF NATIVE ADVERTISING BY THE FTC

The Federal Trade Commission Act states simply, “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>63</sup> Unfortunately, courts have historically defined these terms vaguely and have not provided much guidance to advertisers navigating the waters of native advertising.<sup>64</sup> Nevertheless, even though it is not exactly clear what “unfair” or “deceptive” mean, the federal courts have applied a three-pronged test set out by the FTC to determine when an advertisement is deceptive: (1) whether a claim was made by an advertiser; (2) whether that claim was likely to

58. Montini, *supra* note 30.

59. *Native Ad Research from IPG & Sharethrough Reveals that In-Feed Beats Banners*, SHARETHROUGH, <http://www.sharethrough.com/portfolio-item/native-ad-research-from-ipg-sharethrough-reveals-that-in-feed-beats-banners/> (last visited Jan. 15, 2015) (finding that 26% of consumers viewed native ads compared to 24% of consumers who viewed editorial content).

60. *Id.* (finding that, on average, customers spent 1.0 second viewing native advertisements and 1.2 seconds viewing editorial content).

61. See Moses, *supra* note 54 (“The Wonderland co-founder and creative director Joe McCambley argued that publishers can’t allow advertising to mingle with content unimpeded.”); Tanzina Vega, *Ad-Sponsored Editorial Content Draws Regulator’s Notice*, N.Y. TIMES (Oct. 23, 2013), [http://www.nytimes.com/2013/10/24/business/media/ad-sponsored-editorial-content-draws-regulators-notice.html?\\_r=1&](http://www.nytimes.com/2013/10/24/business/media/ad-sponsored-editorial-content-draws-regulators-notice.html?_r=1&) (describing how the use of native advertising has captured the attention of advertising regulators).

62. See Rich, *supra* note 6, at 5–6.

63. 15 U.S.C. § 45 (2012). It should also be noted that North Carolina has modeled its Consumer Protection Act on the Federal Trade Commission Act and has applied the terms similarly in determining what is unfair and deceptive under North Carolina law. See N.C. GEN. STAT. § 75-1.1 (2013) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”).

64. Pfizer, Inc., 81 F.T.C. 23, 28 (1972) (stating that the FTC considers three main factors in determining whether an act is unfair (1) whether the act is within the “penumbra of some . . . established concept of unfairness”; (2) whether it is “immoral, unethical, oppressive, or unscrupulous[; and] (3) whether it causes substantial injury to consumers”).

mislead consumers; and (3) whether that claim was material.<sup>65</sup> A “material” claim “is one that involves information that is important to consumers and, hence, likely to affect their choice.”<sup>66</sup> Under this framework, the FTC could attempt to regulate native advertising if it believes the practice constitutes deceptive or unfair business practices.

Given this standard, the question remains—just what would regulation of native advertising look like? Other modes of advertising provide useful comparisons, and perhaps the most useful industry in considering potential types of regulations the FTC might impose upon native advertisements is the regulation of search engines.

With respect to search engines and their result displays, the FTC demands that any search result that is sponsored be clearly set apart from unsponsored search results.<sup>67</sup> Specifically, the FTC requires that such a disclosure must: (1) use language that explicitly and unambiguously conveys that a search result is sponsored; (2) be large and visible enough for consumers to notice it; and (3) be located near the search result and where the consumers will see it.<sup>68</sup> The FTC suggests search engines use different shading and borders around the sponsored results to meet these disclosure requirements.<sup>69</sup> Additionally, the FTC recommends putting the disclosure in the upper left-hand corner of the window or immediately in front of a sponsored result in order to increase the likelihood that consumers will see it.<sup>70</sup>

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65. *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (citing *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)).

66. *Bildstein v. MasterCard Int’l Inc.*, 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) (internal quotation marks omitted) (citing *Novartis*, 223 F.3d at 787) (stating further that it is the plaintiff’s burden to show that he relied on the “materially deceptive conduct” to his detriment).

67. Lesley Fair, *FTC Staff to Search Engines: Differentiate Ads from Natural Results*, FED. TRADE COMMISSION (June 25, 2013, 1:11 PM), <http://business.ftc.gov/blog/2013/06/ftc-staff-search-engines-differentiate-ads-natural-results>.

68. Sample Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, Fed. Trade Comm’n, to Search Engine Companies 3 (June 24, 2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf> [hereinafter Sample Letter to Search Engines]; see *FTC Consumer Protection Staff Updates Agency’s Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results*, FED. TRADE COMMISSION (June 25, 2013), <http://www.ftc.gov/news-events/press-releases/2013/06/ftc-consumer-protection-staff-updates-agencys-guidance-search>.

69. Sample Letter to Search Engines, *supra* note 68, at 3.

70. *Id.* at 4.

Based on the FTC's comments and regulations of search engine results, it appears that if the FTC did decide to specifically regulate native advertising, it would likely require publishers to use specific language to show that an advertisement is sponsored content and require some sort of visual distinction between editorial content and advertisements with the use of borders, colors, specific keywords, or conspicuous placement.<sup>71</sup> For example, a possible FTC regulation could require that all sponsored content be adorned with the words "sponsored content" or "paid advertisement" in a bold, size-ten font and that the disclosure appear in the lower right-hand corner of the content. The FTC could also provide guidance as to what level of sponsor involvement in the procurement of the advertisement would require a disclosure.

Although the exact form such regulation might take remains unclear, the FTC seems poised to enter the native advertising fray. Mary Engle, the author of the FTC search engine results guidelines, referring to the possible regulation of native advertising stated that "[r]egardless of context, consumers should be able to tell what's an advertising pitch, whether it's an advertorial, an infomercial, word-of-mouth marketing or native advertising."<sup>72</sup> Moreover, in December 2013, the FTC held a day-long workshop entitled "Blurred Lines: Advertising or Content?" where a main topic of discussion was whether additional guidelines or regulations specific to native advertising would be necessary in the future.<sup>73</sup> The conference adjourned with no new regulations being set forth and no real guidance on what action, if any, the FTC would take towards native advertisements in the future.<sup>74</sup> Attendees were all in agreement that transparency and disclosure were both very important in handling native advertisements, but they did not settle upon a singular solution through labels, colors, borders, or other means of differentiation.<sup>75</sup>

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71. See You Mon Tsang, *The FTC May Bark at Native Ads, but It Won't Bite*, VENTUREBEAT (Feb. 20, 2014, 3:30 PM), <http://venturebeat.com/2014/02/20/the-ftc-may-bark-at-native-ads-but-it-wont-bite/>.

72. Katy Bachman, *If Publishers Fail to Self-Regulate Native Ads, FTC May Step In: Problem of How to Define*, ADWEEK (July 10, 2013, 7:08 AM), <http://www.adweek.com/news/advertising-branding/if-publishers-fail-self-regulate-native-ads-ftc-may-step-150973>.

73. *Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising*, FED. TRADE COMMISSION (Dec. 4, 2013), <http://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native>.

74. Katy Bachman, *Native Ad Workshop Leaves FTC Perplexed: Next Enforcement Steps Unclear*, ADWEEK (Dec. 4, 2013, 9:09 PM), <http://www.adweek.com/news/advertising-branding/native-ad-workshop-leaves-ftc-perplexed-154303>.

75. *Id.*

III. THE FTC SHOULD NOT REGULATE NATIVE ADVERTISING  
BECAUSE INDUSTRY SELF-REGULATION IS MORE EFFECTIVE THAN  
ANY POTENTIAL FTC REGULATION

While the FTC potentially has the interest and formula for regulating native advertising, actual regulation would be unwise. The advertising industry is both motivated and well equipped to do so itself. Furthermore, any regulation the FTC would undertake would be less effective than self-regulation and would not protect consumers from viewing camouflaged advertisements.

A. *Any FTC Regulation of Native Advertising Would Unnecessarily Increase Costs and Fail to Shield Consumers from All Forms of Masked Advertisements*

Those in favor of regulating native advertisements may argue that the FTC has effectively regulated other types of advertising and has helped to keep deceptive advertisements from reaching consumers.<sup>76</sup> By promulgating a series of guidelines and requirements for publishers to follow, proponents of FTC intervention believe the FTC will protect consumers by ensuring that consumers know when they are viewing sponsored content.<sup>77</sup> However, even if the FTC did choose to formally regulate native advertising, it is unlikely that such regulation would solve the problem the FTC wishes to address.

Forcing publishers to clearly disclose when content is sponsored would not prevent the advertisements from enticing consumers to purchase the advertised products or services, and therefore such disclosure would have no significant value. Professor David Franklyn at the University of San Francisco School of Law determined that 50% of consumers do not even know what the word “sponsor” means and that many consumers do not care one way or the other if the content is paid for.<sup>78</sup> It is noted that including the word “sponsored” on the advertisement would possibly still benefit a great number of consumers. However, just because some consumers understand the meaning of the word “sponsored” does not mean that they cannot still be deceived by the advertisement or attribute false credibility to the advertisement. In fact, studies have found that consumers are more likely to trust sponsored business and entertainment content than

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76. See *supra* Part II.

77. See *supra* note 72 and accompanying text.

78. Bachman, *supra* note 74 (stating that this acquiescence to the blurred lines between paid and editorial content has evolved because consumers see it as the price they pay to allow their free use of the Internet).

news content.<sup>79</sup> If including a disclosure on the advertisement would not change the advertisement's effectiveness to lure customers, and if the increased credibility of the advertisements would be the main concern in regulation, the regulation should not be undertaken because its main purpose would not be achieved.

Perhaps the most powerful argument against regulating native advertising is that there is no working definition to distinguish "native advertising" from strictly editorial content. The lines are blurred between the two in contexts outside of Internet and traditional print media. It is unfair to single out traditional advertisers and subject them to regulation while simultaneously allowing others to continue masking advertisements behind various veils. For example, it is not a surprise that each of Disney's movies and numerous types of merchandise have been designed to entice consumers to visit its theme parks and other ventures that bring Disney billions of dollars annually.<sup>80</sup> Furthermore, every time a certain car or soft drink appears in a movie or on television, this product placement can be seen as deceptively inducing consumers to buy the product. The Hershey Company paid to have Reese's Pieces featured in the movie *E.T. the Extra Terrestrial*, and as a result saw increased sales of over 65%.<sup>81</sup> While Hershey did not have to disclose their sponsorship in any way, the aim and propensity of the product placement to persuade consumers is undeniable.<sup>82</sup>

This ability to persuade and entice consumers is the objective of every single advertisement. It is unjust to regulate only certain companies, such as BuzzFeed and *The New York Times*, for their attempts to create advertisements that consumers prefer to view<sup>83</sup>

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79. Jim Dougherty, *Is Native Advertising a Threat to PR? It's Actually a Weapon*, CISION (Aug. 25, 2014), <http://www.cision.com/us/2014/08/is-native-advertising-a-threat-to-pr-its-actually-a-weapon/> (stating that a survey found that around 60% of consumers were likely to trust sponsored business and entertainment content while only around 40% of consumers were likely to trust news content).

80. Cheyfitz, *supra* note 45.

81. Ian Zimmerman, *Product Placement Can Be a Lot More Powerful Than We Realize*, PSYCHOL. TODAY (Mar. 25, 2013), <http://www.psychologytoday.com/blog/sold/201303/product-placement-can-be-lot-more-powerful-we-realize>.

82. *See id.*

83. *See* Lin Pophal, *Consumers Coming to Accept Native Advertising Done Right*, ECONTENT (July 28, 2014), <http://www.econtentmag.com/Articles/News/News-Feature/Consumers-Coming-to-Accept-Native-Advertising-Done-Right-97907.htm> ("66% of internet users presented with sponsored articles and banner ads said they prefer clicking on sponsored articles over banner ads."); *see also* *Premium Content Brands Are Native Naturals*, ONLINE PUBLISHERS ASS'N 9 (July 10, 2013), <http://digitalcontentnext.org/wp-content/uploads/2014/09/2.pdf> (stating that 71% of publishers claim to have received no major complaints from readers for featuring native advertisements).

while allowing other companies to continue using similar persuasive practices, such as sponsored product placements, without regulation. If there were a way to ensure that no consumer was ever misled by an advertisement, disclosed as such or not, then perhaps that route could be taken. However, this degree of transparency is simply impossible. If every advertisement were to be regulated due to its propensity to persuade, an all-consuming, unworkable system would develop and all forms of media would need to be overhauled dramatically in order to comply. As technology develops, the advertising industry will continue to develop as well. Advertisers should be able to craft their messages in ways that will reach the greatest number of consumers and do so in ways that consumers will actually be responsive towards.

In addition to being ineffective and inequitable, FTC regulation of native advertising would be inefficient because of the cost associated with regulation<sup>84</sup> and the limited extra value FTC regulation would provide over self-regulation. Regulation would likely lead to lawsuits for alleged infractions. These lawsuits would require the hiring of attorneys and would cost the advertisers enormous amounts of money. By participating in self-regulation organizations, such as the National Advertising Division (the “NAD”), an advertising-specific alternative dispute resolution provider, advertisers save money that would have otherwise been spent managing lawsuits.<sup>85</sup> Some could argue that an increase in lawsuits would offer a higher level of consumer protection—that the costs of litigation would be an effective deterrent of deceptive advertising practices. While increased litigation could serve as a possible deterrent, it could also prohibit growth in the industry as well as prevent publishers from conveying their messages in their desired ways and consumers from obtaining the content they want. Rather than allocate funds for future compliance issues, both advertisers and publishers could more efficiently use their resources and could quickly resolve their disputes through self-regulation.

Also, based on the FTC’s past regulation of search engine results, it is unlikely that any regulation promulgated by the FTC would provide anything further than what industry self-regulation already

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84. See, e.g., *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business (Executive Summary)*, NAT’L ASS’N MANUFACTURERS, <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Executive-Summary.pdf> (showing that the total cost of federal regulations in 2012 was \$2.028 trillion and that the average U.S. firm spent \$233,182 on compliance annually).

85. See *About NAD*, ADVER. SELF-REGULATION COUNCIL, <http://www.ascreviews.org/2011/08/how-nad-works/> (last visited Jan. 19, 2015) (stating that companies using NAD save “hundreds of thousands of dollars typically spent seeking reparation through the courts”).

mandates. If the FTC chose to regulate native advertising, in all likelihood it would require clear, conspicuous disclosure of all sponsored content.<sup>86</sup> Self-regulatory groups and individual publishers have already put these disclosure requirements into place effectively.<sup>87</sup> It would be wasteful to spend money promulgating a set of regulations and subsequently enforcing those regulations through the courts, when they would not provide anything more than the cost-effective regulations that are already in place.

FTC regulation would not be effective because it would not prevent consumers from being potentially misled by advertisers; it would only make the advertising industry resort to other measures to reach consumers. If native advertisements are heavily regulated, advertisers will simply turn to strategic product placements or other integrated forms of advertisements. If the goal is to prevent consumers from being unduly influenced by masked advertisements, the FTC should work towards regulating all forms of advertisements because any advertisement has the potential to mislead consumers. This is obviously not a route the FTC should or could take in the future.

Even if the FTC does force advertisers and publishers to adorn all native advertisements with specific labels (e.g., “sponsored content”), it has been suggested that this only increases the credibility of the content in the eyes of the consumer.<sup>88</sup> If labels do increase the credibility of the advertisement, it seems that the industry has significant motivation to be forthcoming with consumers regarding their use of native advertising, rendering FTC regulation unnecessary.

*B. Significant Motivations Exist for the Advertising Industry to Regulate its Use of Native Advertising*

It is undeniable that native advertisements have the capacity to deceive consumers and that some type of disclosure for sponsored content is wise.<sup>89</sup> Generally, advertisers’ main goals are to reach consumers and to induce them to purchase their goods or services.<sup>90</sup>

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86. See Tsang, *supra* note 71.

87. See, e.g., INTERACTIVE ADVER. BUREAU, *supra* note 15 (containing the Interactive Advertising Bureau’s guidelines for native advertisements).

88. Cheyfitz, *supra* note 45.

89. See Bachman, *supra* note 72. INTERACTIVE ADVER. BUREAU, *supra* note 15, at 3 (“As it relates to advertising disclosure there was no disagreement amongst members that regardless of context, a reasonable consumer should be able to distinguish between what is a paid native advertising unit vs. what is publisher editorial content.”).

90. See Rick Suttle, *Goals & Objectives of Advertising*, CHRON, <http://smallbusiness.chron.com/goals-objectives-advertising-25273.html> (last visited Jan. 19, 2015).

These goals provide the industry with two very important motivations for self-regulation of native advertising: consumer goodwill and search engine compliance. Subsection 1 of this section will discuss the consumer backlash that advertisers will encounter if their ads are seen as deceptive. Subsection 2 then highlights how search engines are already acting as watchdogs over deceptive ad campaigns.

### 1. Consumer Backlash over Advertisements Seen by the Public as Deceptive

The first, and possibly most influential, incentive for advertisers and publishers to self-regulate native advertising is the potential consumer backlash the parties will receive if the public recognizes deceptive ads and exposes the companies.<sup>91</sup>

For example, in perhaps the most well known story of native advertising gone awry, *The Atlantic* published a controversial native advertisement for the Church of Scientology.<sup>92</sup> The advertisement appeared as if it were a regular news article, with the headline “David Miscavige Leads Scientology to Milestone Year.”<sup>93</sup> Readers were outraged that the publisher would try to pass off an advertisement in the form of editorial content and voiced their opinions in the comments section of the article.<sup>94</sup> *The Atlantic* quickly pulled the advertisement just eleven hours after it was first published.<sup>95</sup> Later the same day, *The Atlantic* issued a statement saying, “[W]e screwed up,” and explained that publishing the advertisement was a mistake of both “concept and execution” because the advertisement did not match the intellectual tradition of the publisher.<sup>96</sup> This advertisement, although pulled within one day of its publication,<sup>97</sup> gained much attention and demonstrates that it is not in a publisher’s best interest

91. Lucia Moses, *After Scientology Debacle, The Atlantic Tightens Native Ad Guidelines: Sponsored Content Will Become More Prominent on the Site*, ADWEEK (Jan. 30, 2013, 12:44 PM), <http://www.adweek.com/news/advertising-branding/after-scientology-debacle-atlantic-tightens-native-ad-guidelines-146890>.

92. Church of Scientology, *supra* note 42.

93. *Id.*

94. Moses, *supra* note 91.

95. Julie Moos, *The Atlantic Publishes Then Pulls Sponsored Content from Church of Scientology*, POYNTER (Jan. 15, 2013, 1:09 PM), <http://www.poynter.org/latest-news/mediawire/200593/the-atlantic-pulls-sponsored-content-from-church-of-scientology/> (noting that *The Atlantic* also decided to censor users’ comments about the article prior to removing it altogether).

96. James Fallows, *On The Atlantic’s Scientology Ad (and Aftermath)*, ATLANTIC (Feb. 22, 2013, 11:52 PM), <http://www.theatlantic.com/national/archive/2013/02/on-the-atlantics-scientology-ad-and-aftermath/273447/>.

97. *Id.*

to try to deceive consumers because of the cost associated with the possible public backlash.<sup>98</sup>

While staying in the good graces of the viewing public is vital to advertisers, it is not the only motivation advertisers have to be transparent about their use of native advertisements. Popular Internet search engines also provide such motivation by serving as watchdogs over advertisements to ensure that advertisers are not being deceptive.

## 2. Search Engines Such as Google Acting as Watch Dogs Serve as a Stronger Incentive to Not Use Native Advertising in Deceptive Ways Than Would FTC Regulations

Another powerful incentive to self-regulate comes from search engines, like Google, who serve as watchdogs for consumers against deceptive advertisements. For example, Google stepped in and punished a flower delivery company, Interflora, which had attempted to skew search results by placing approximately 150 advertorials designed to look like editorial content in various newspapers.<sup>99</sup> Google's punishment included removing Interflora from all search results for eleven days prior to Valentine's Day.<sup>100</sup> Google also penalized newspapers that published Interflora's advertorials by decreasing their page rank in search results as well.<sup>101</sup> Matt Cutts, the Head of Webspam for Google, announced that Google would monitor native advertising and allocate native advertisements different weight than true editorial content for search result purposes.<sup>102</sup> Google, therefore, serves as a watchdog over potentially deceptive uses of native advertisements and provides publishers and advertisers with a strong incentive not to employ deceptive tactics.

98. See, e.g., Moses, *supra* note 91 ("The issue—according to the outraged digerati but also by the *Atlantic's* own admission—was that the *Atlantic* violated the spirit of native advertising by giving a platform to a controversial institution that didn't jibe with its intellectual tradition."); Ian Schafer, *Atlantic's Scientology Ad Crossed the Line*, CNN (Jan. 16, 2013, 8:45 PM), <http://www.cnn.com/2013/01/16/opinion/schafer-atlantic-scientology-ad/> ("[M]any [readers] took umbrage with The Atlantic in this particular case; so many that The Atlantic responded by pulling the story from the site . . . and apologizing.").

99. Tsang, *supra* note 71; see also Danny Goodwin, *UK Flower Site Banned from Google for Advertorial Links Sees Rankings Restored*, SEARCH ENGINE WATCH (Mar. 4, 2013), <http://searchenginewatch.com/sew/news/2252233/uk-flower-site-banned-from-google-for-advertorial-links-sees-rankings-restored> (describing Interflora's aggressive advertorial campaign).

100. Tsang, *supra* note 71.

101. *Id.*

102. See Google Webmasters, *Advertorials and Native Advertising*, YOUTUBE (May 29, 2013), <http://www.youtube.com/watch?v=1SmlsfSqmOw>.

If advertisers and publishers know that deceptive native advertising practices may lead to negative consequences in a search engine's results, or to removal from the results altogether, it is very unlikely that advertisers and publishers will engage in such activities. Studies have shown that the further down a link appears on a search engine's result page, the fewer visits the page gets.<sup>103</sup> In a digital age where much commerce is conducted over the Internet, businesses need traffic to their websites in order to survive. Search engines hold great power over the businesses and websites depending on web traffic. If search engines continue to act as watchdogs and banish businesses using deceptive native advertisements to the bottom of the search results, there is no need for FTC regulations. Publishers and advertisers alike would make sure to stay within the bounds set forth by the search engines.

Both advertisers and publishers are aware of the harmful effects of public backlash and undesirable search engine results.<sup>104</sup> Even though the industry would prefer the FTC not step in, many are in agreement that some standards are necessary.<sup>105</sup> Jonathan Perelman, the Vice President of Agency Strategy and Industry Development for BuzzFeed, said, "I think some standards around how you call out [native advertising is] vital for the industry, because transparency is so important from the user's point of view."<sup>106</sup> Recognizing the need for guidance and standards in native advertising, the advertising industry has taken steps to regulate itself, rendering FTC regulation unnecessary.<sup>107</sup>

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103. See Jessica Lee, *No. 1 Position in Google Gets 33% of Search Traffic [Study]*, SEARCH ENGINE WATCH (June 20, 2013), <http://searchenginewatch.com/article/2276184/No.-1-Position-in-Google-Gets-33-of-Search-Traffic-Study> (noting that a new study found that, on average, the first link that appears in the search results for a search engine such as Google receives 32.5% of the traffic from that page, the second link receives 17.6% of the traffic, the third link receives 11.4%, etc.). While the exact position of the link has a huge impact on the amount of traffic a site receives, the page of the search results that link appears on is even more important for sites. *Id.* (reporting that, on average, links found on Page 1 of the search results received 91.5% of all traffic from consumers).

104. See, e.g., Moses, *supra* note 91 (discussing *The Atlantic's* tightened native advertising guidelines after facing public backlash for its use of native advertising).

105. See INTERACTIVE ADVER. BUREAU, *supra* note 15, at 3 ("As it relates to advertising disclosure there was no disagreement amongst members that regardless of context, a reasonable consumer should be able to distinguish between what is a paid native advertising unit vs. what is publisher editorial content.")

106. Bachman, *supra* note 74.

107. See *infra* Part III.C.

C. *Self-Regulation by the Advertising Industry Is Effective to Combat Possible Deceptive Native Advertising*

Native advertising has gained the attention of the FTC, which has identified the practice as a possible area to regulate in the future.<sup>108</sup> It has also, through its regulation of other specific areas of advertising, laid the groundwork for widespread regulation of the industry should it choose to do so. As explained above, native advertising's power and frequency will only continue to grow; therefore, many believe that if the marketing industry does not effectively self-regulate, the FTC will soon step in and regulate the industry for them.<sup>109</sup>

This section identifies three sources of current self-regulation by the advertising industry. Subsection 1 highlights the efforts of the NAD. Subsection 2 focuses on the Interactive Advertising Bureau and the guidelines it has promulgated. Finally, subsection 3 looks at self-imposed regulations set forth by publishers.

1. The National Advertising Division Is an Effective Self-Regulator of the Advertising Industry

Over the past year the NAD, a division of the Advertising Self-Regulatory Council administered by the Council of Better Business Bureaus, has investigated print and digital native advertisements and has released its findings.<sup>110</sup> The NAD provides advertisers with a "low-cost alternative to litigation."<sup>111</sup> The NAD reviews advertising in all types of media in order to "hold[] advertisers responsible for their claims and practices," and to "track[] emerging issues and trends" in the world of advertising.<sup>112</sup> The NAD's alternative dispute resolution experts work with in-house counsel, members of the marketing and research departments, and outside consultants to decide whether claims of fraudulent or deceptive advertisements are substantiated.<sup>113</sup> After hearing both sides of the dispute, the NAD will publish a

108. See *supra* note 73 and accompanying text.

109. See Bachman, *supra* note 72.

110. See, e.g., Press Release, Adver. Self-Regulatory Council, Native Advertising Review: NAD Examines Qualcomm/Mashable Sponsored Series (Sept. 30, 2013), available at <http://www.ascreviews.org/2013/10/native-advertising-review-nad-examines-qualcomm-mashable-sponsored-series/> (discussing the NAD's investigation of a series of Qualcomm, Inc. native advertisements that were published on Mashable.com).

111. *About NAD*, *supra* note 85 (stating that companies using NAD save "hundreds of thousands of dollars typically spent seeking reparation through the courts").

112. *NAD Challenges, Complaints*, ASRC, <http://www.ascreviews.org/category/nad/challenges-and-complaints/> (last visited Apr. 10, 2015).

113. *About NAD*, *supra* note 85.

decision regarding the advertisement in question and will make it available to the public.<sup>114</sup> Advertisers participating in NAD proceedings, while not legally bound by the NAD's decisions, "voluntarily adhere to [the NAD's] decisions" in order to help "ensure an honest and open playing field in advertising."<sup>115</sup>

In September 2013, the NAD released its findings on a series of articles about various technologies sponsored by Qualcomm<sup>116</sup> on the popular website Mashable<sup>117</sup> that appeared as non-sponsored editorial content.<sup>118</sup> The NAD determined that, because Qualcomm did not direct the subject matter of the articles and because the articles did not feature information on Qualcomm products, the sponsored advertisements were not native advertisements designed to look like content, but were more like advertisements shown alongside the articles.<sup>119</sup> Therefore, the NAD determined that it was appropriate for Qualcomm to disclose itself as the series' sponsor for as long as the sponsorship period lasted but no longer.<sup>120</sup>

In another case, the NAD ordered eSalon, a maker of hair color products, to either modify its social media practices or discontinue its advertising practices altogether.<sup>121</sup> The NAD took issue with content on eSalon's website that appeared to be editorial or user-generated content but was actually generated by eSalon.<sup>122</sup> The NAD, without any specific guidance from the FTC, ordered that eSalon clearly and conspicuously disclose every instance where it generated content.<sup>123</sup>

Perhaps the most powerful example of the NAD's power and influence over advertisers is the NAD's recent recommendations to

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114. *Id.* For examples of NAD press releases, see *NAD Press Releases*, ASRC, <http://www.asrcreviews.org/category/nad/nad-press-releases/> (last visited Apr. 10, 2015).

115. *About NAD*, *supra* note 85.

116. Qualcomm manufactures processors used in many devices such as cell phones, tablets, and computers. *Products*, QUALCOMM, <https://www.qualcomm.com/products> (last visited Apr. 16, 2015).

117. *See About*, MASHABLE, [mashable.com/about](http://mashable.com/about) (last visited Apr. 16, 2015). ("Mashable is a leading source for news, information & resources for the Connected Generation. Mashable reports on the importance of digital innovation and how it empowers and inspires people around the world. Mashable's 40 million monthly unique visitors and 20 million social media followers have become one of the most engaged digital networks in the world.")

118. *See* Press Release, Adver. Self-Regulatory Council, *supra* note 110.

119. *Id.*

120. *Id.*

121. *Native Advertising: The Blurred Line Between Editorial and Sponsored Claims*, INFO. L. GROUP (Nov. 6, 2013), <http://www.infolawgroup.com/2013/11/articles/advertising-law/native-advertising-the-blurred-line-between-editorial-and-sponsored-claims/>.

122. *Id.*

123. *Id.*

Taboola.<sup>124</sup> Taboola describes its business model as linking consumers “to content [they] may like.”<sup>125</sup> The company makes these recommendations, which are often sponsored, via recommendation widgets.<sup>126</sup> Each of these widgets is labeled, the link is accredited to its sponsor, and there is a pop-up window that explained that each link was a paid advertisement.<sup>127</sup> Despite all of these attempts to notify consumers that the links were sponsored content, the NAD recommended that Taboola modify its widgets to ensure that consumers would understand that clicking on the links at the bottom of the page would take them to sponsored content.<sup>128</sup>

Specifically, the NAD took issue with the fact that the disclosure was in a smaller, lighter font than the other text in the box.<sup>129</sup> The placement of the disclosure in the upper right-hand corner of the box was also a problem, as the FTC identified that area as one less noticed by the consumers.<sup>130</sup> In order to make the sponsorship more apparent to consumers, the NAD recommended that Taboola increase the visibility of the disclosure by changing the font size, font color, boldness, and placement on the page.<sup>131</sup>

Taboola, even though it believed that its disclosure methods far surpassed those used by other recommendation companies, agreed to modify the appearance of its disclosures.<sup>132</sup> Taboola, like many other users of native advertising, sees value in self-regulation and, therefore, abides by the NAD’s recommendations, even if it disagrees with them and is not technically bound by such recommendations.<sup>133</sup>

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124. “Taboola recommends editorial and sponsored content across many of the world’s most highly-trafficked sites. We help publishers monetize their content and drive higher engagement. We enable brands to surface their content to the right audience at-scale.” TABOOLA, <http://www.taboola.com> (last visited Jan. 19, 2015).

125. Press Release, Adver. Self-Regulation Council, NAD Reviews Taboola’s Native Ad Widget, Recommends Clearer Disclosures (May 20, 2014), *available at* <http://www.asrcreviews.org/2014/05/nad-reviews-taboolas-native-ad-widget-recommends-clearer-disclosures/>.

126. *See id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* (showing Taboola’s ready acceptance of NAD’s guidelines and support of advertising self-regulation to give disclosure to readers).

## 2. The Native Advertising Playbook Published by the Interactive Advertising Bureau Provides Native Advertisers with Guidelines to Follow in Order to Prevent Native Ads from Becoming Deceptive

Another source of self-regulation is The Native Advertising Playbook (the “Playbook”), recently published by the Interactive Advertising Bureau (the “IAB”).<sup>134</sup> The IAB consists of more than 650 media and technology companies that account for more than 86% of all online advertising in the United States.<sup>135</sup> The IAB performs research on the effectiveness and issues of advertising and recommends standards and practices for advertisers to use.<sup>136</sup> The Playbook emphasizes that native advertisement hosts must clearly disclose when content has been paid for: “A reasonable consumer should be able to distinguish between what is a paid native advertising unit vs. what is publisher editorial content.”<sup>137</sup> While the Playbook does not offer complete guidance on how a publisher should disclose that an ad is paid for, it does provide suggested disclosure language for some types of native advertising.<sup>138</sup> The main emphasis of these standards has been to provide advertisers with guidance to ensure that their native advertisements are not deceptive.<sup>139</sup> These guiding standards can be built into more specific policies by individual publishers.<sup>140</sup>

## 3. Publishers Have Already Taken Affirmative Steps Towards Regulating Their Own Practices Regarding Native Advertisements

Individual publishers are also publishing their own native advertising policies in an attempt to let advertisers and consumers know what forms of advertisements the publisher is willing to publish.

134. *Id.*

135. *About the IAB*, IAB, [http://www.iab.net/about\\_the\\_iab](http://www.iab.net/about_the_iab) (last visited Jan. 19, 2015).

136. *Id.*

137. INTERACTIVE ADVERTISING BUREAU, *supra* note 15, at 2.

138. *Id.* at 9 (listing suggested words to be used for in-feed ads disclosures including “advertisement,” “AD,” “Promoted by [brand],” “Sponsored by [brand],” “Presented by [brand],” “Featured Partner,” and “Suggested Post”).

139. *See id.* at 2, 15.

140. *See, e.g., Advertising Guidelines*, ATLANTIC, <http://advertising.theatlantic.com/static/img/upload/pdfs/TheAtlanticAdvertisingGuidelines.pdf> (last visited Jan. 19, 2015) (containing policies specifically for *The Atlantic*’s use of native advertisements); Margaret Sullivan, *Pledging Clarity*, *The Times Plunges into Native Advertising*, N.Y. TIMES (Dec. 19, 2013, 4:17 PM), [http://publiceditor.blogs.nytimes.com/2013/12/19/pledging-clarity-the-times-plunges-into-native-advertising/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_r=1](http://publiceditor.blogs.nytimes.com/2013/12/19/pledging-clarity-the-times-plunges-into-native-advertising/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1) (discussing the *New York Times*’s approach to native advertisements).

In response to *The Atlantic's* Scientology debacle,<sup>141</sup> *The Atlantic* published its advertising guidelines, which state that “*The Atlantic* will not allow any relationship with an advertiser to compromise *The Atlantic's* editorial integrity,” and “[a]ll advertising content must be clearly distinguishable from editorial content. To that end, *The Atlantic* will label an advertisement with the word ‘Advertisement’ when [editors determine the label] is necessary to make clear the distinction between editorial material and advertising.”<sup>142</sup> Admittedly, this vests the editors with considerable discretion in determining when it is necessary to disclose that content is sponsored.<sup>143</sup> Allowing advertisers and publishers to craft their message in the way they desire, while requiring disclosure in some way that the content is sponsored, seems to be a workable, beneficial source of regulation.

Seeing the disruptive potential of native advertisements, *The New York Times* also pledged to use clear labels, design differences, and disclaimers to prevent sponsored content from deceiving its readers.<sup>144</sup> These publisher-specific policies,<sup>145</sup> together with the efforts of the NAD and the IAB, provide the industry with a level of effective regulation the FTC could never match and do so in a much more efficient manner.

The key to a successful advertising campaign is to reach consumers and gain their trust. Consumers do not have a problem with native advertisements, generally;<sup>146</sup> however, they do take issue when they believe they are being deceived.<sup>147</sup> Native advertising presents a fine line between advertisers and publishers providing desirable content and being deceptive; therefore, publishers and advertisers would be well advised to be cautious when using native advertisements. In order to reach consumers, the advertisements must not be deemed deceptive by search engines. Once they reach

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141. Church of Scientology, *supra* note 42.

142. *Advertising Guidelines*, *supra* note 140.

143. This is an area where the FTC could potentially regulate without being too burdensome, identifying when some sort of label is necessary based on the advertiser's involvement in the production of the content.

144. Sullivan, *supra* note 140.

145. Other examples of companies that have implemented their own native advertising policies are the American Society of Magazine Editors, see *ASME Guidelines for Editors and Publishers*, AM. SOC'Y MAG. EDITORS (May 2014), <http://www.magazine.org/asme/editorial-guidelines>, and Conde Nast, the publisher of *Vogue* and *Vanity Fair*, see Michael Sebastian, *Conde Nast Drafts an Internal 'Magna Carta' for Native Advertising: Publisher of Vogue and Vanity Fair Seeks to Codify Tactic*, ADVER. AGE (May 28, 2014), <http://adage.com/article/media/conde-nast-drafts-magna-carta-native-advertising/293430/>.

146. See *Infographic*, *supra* note 3.

147. See Moses, *supra* note 91.

consumers, the advertisers must both engage the reader and gain their trust, or the advertisement will not have its desired effect.

#### CONCLUSION

Because of their ability to reach consumers efficiently, many publishers and advertisers have begun to use native advertisements in order to disguise advertisements as editorial content. This conscious blurring of the line between advertisements and actual editorial content has been called deceptive and unfair by those who believe such advertising is nothing more than a ruse employed to trick consumers into viewing ads they otherwise would not have viewed. This potential deceptiveness has caused the FTC to identify native advertising for possible future regulation.

Although the FTC has regulated similar advertising practices, the FTC should not pursue regulation of native advertising because it would be both under inclusive and ineffective. Targeting only certain types of advertisers like newspapers and online publishers will not solve the problem of misleading advertisements because other, less obvious forms of advertising exist without any regulation. The advertising industry already has in place a series of standards and dispute resolution practices that are more efficient than those they would be forced to employ under FTC regulations. It would be inefficient and wasteful to subject only certain advertisers to bear the cost of complying to regulations, especially given that such regulations would not solve the problem of deceptive advertisements any more effectively than do the current industry practices.

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