

ARE YOUR LEGAL TERMS READY FOR DIGITAL ADVERTISING? FIVE WAYS TO DIGITIZE YOUR COMMERCIAL AGREEMENTS IN RESPONSE TO THE LORD & TAYLOR FTC ACTION

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The advertising and digital marketplace are evolving almost daily; however, two things remain the same: (i) the Federal Trade Commission's ("FTC") Policy Statement and Business Guides on Native Advertising (the "Policy Statement") reinforces tried and true advertising principles and (ii) negotiating strong commercial terms in advertising services and promotional agreements remains the cornerstone of protection in the digital arena.

At the end of December 2015, the FTC issued its Policy Statement to provide guidance and examples of how to avoid deceptive advertising in native ad placements. The FTC defines native advertising as digital advertising or promotional content "that bears a similarity to the news, feature articles, product reviews, and entertainment that surrounds it online." In other words, "native advertising" is that which is similar to and often indistinguishable from independent editorial material and other online content that is not advertising. The Policy Statement also states that advertisements or promotional messages are deceptive and likely to violate Section 5 of the FTC Act, if they convey to consumers expressly or by implication that they're independent, impartial, or from a source other than the sponsoring advertiser, suggesting, in other words, that the promotional content is something other than ads.

The FTC leads us to three overarching principles to avoid deceptive advertising and misleading consumers:

- (i) Transparency is paramount, and an advertisement or promotional message should not suggest or imply to consumers that it is anything other than an ad.
- (ii) Some native ads may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure. In other instances, a disclosure may be necessary to ensure that consumers understand that the content is advertising.
- (iii) If a disclosure is necessary to prevent deception, the disclosure must be clear and prominent.

These principles are not new considerations, rather, they serve to provide existing parameters around newer forms of advertising. The Policy Statement reminds advertisers that as always, the FTC will look at the "net impression" of the ad to determine whether the commercial nature of the content is clear to the "reasonable" consumer. In determining this, the FTC will consider the overall appearance of the ad itself, and the verbal/audio content of the ad in the case of multimedia, as well as the similarity of the ad's style/formatting to the surrounding non-advertising content and whether the substantive content is distinguishable from the surrounding non-advertising content. Thus, the more similar the ad is to the publisher's site content, the more likely it is that a disclosure is necessary. Like the 2013 FTC Dot. Com Disclosure Statement, the Policy Statement sets forth factors the FTC will consider in evaluating whether the consumer will recognize the content as an advertisement:

- (i) On what media is the content featured? The FTC acknowledges that consumers have different expectations depending on the media being consumed (*e.g.* social media versus a news website).
- (ii) Who is the target audience? If children are the target audience, they are unlikely to recognize something as an ad.
- (iii) Does the substantive content of the ad differ from the surrounding content? An ad inviting a consumer to shop for dresses in a news stream is likely recognizable as an advertisement.
- (iv) Is the format of the ad similar in written, spoken or visual style to the non-advertising content? Does the content look like an editorial article on a news site? Conversely, is the content set apart using background shading or other visual cues to indicate that it is an ad?

In the FTC's first action since issuing the Policy Statement, advertisers, marketers and brands are again reminded that the Policy Statement is truly a restatement of basic advertising principles applied to digital advertising. In addition, the action reinforces the importance of including legal terms in the agreements obligating advertisers to act in accordance with the Policy Statement. These two principles are at the center of the FTC's action against the department store chain, Lord & Taylor, for its allegedly deceptive use of native advertising.

Lord & Taylor developed a multilayered advertising campaign, including native advertising, a large social media photo bomb push on Instagram and the use of influencers, to launch Design Lab, its own apparel line aimed at young women. For the native advertising portion of the campaign, Lord & Taylor executed a contract to engage and pay Nylon, an on-line fashion magazine, to run an article about the Design Lab collection featuring a photo of an asymmetrical paisley dress, which was the focus of the entire advertising campaign. According to the FTC, Lord & Taylor reviewed and approved the sponsored Nylon article. Unfortunately, Lord & Taylor did not: (i) require Nylon to state that the article it wrote about the paisley dress was "sponsored content", (ii) require Nylon to disclose its commercial relationship in the Instagram photo bomb and (iii) require the 50 influencers to disclose that the influencers were paid by Lord & Taylor to endorse their product.

Although Lord & Taylor ultimately settled the FTC charges, Lord & Taylor is in the future 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 endorsements.

The Lord & Taylor action certainly will not be the FTC's last of this kind, so it is critical that in-house counsel and their outside counsel include protective legal requirements such as tightly drafted obligations of the parties, warranties directly tied to FTC guidance, indemnification obligations referencing those warranties and proper exclusions from waiver of consequential damages, if a limitation of liability is included. Counsel who represent brands engaging in digital advertising should consider the following:

- (i) Ensuring that agreements clearly state each parties' responsibilities. Describe who is responsible for reviewing and approving advertising content.
- (ii) Clearly state in the agreement that all advertising must disclose the commercial arrangement by including such terms as "Sponsored Content", "#sponsored", "Paid Advertising" or "#paidadvertising", as applicable.
- (iii) Include warranties that the advertising, promotional content or work product will comply in all respects with the Policy Statement and Business Guides on Native Advertising and, as applicable, the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising.
- (iv) Require that the publisher of content indemnify the brand for all claims (including third party claims) arising from (i) a breach of the publisher/advertiser's breach of representation and warranties, (ii) any government-imposed penalties or fines and (iii) any amounts paid to a government agency or unit (including State Attorney General offices).
- (v) Consider excluding damages arising from the publisher's indemnification obligations from any waiver of consequential damages.

From the FTC's perspective, ensuring that advertising principles do not mislead or deceive consumers remains their focus regardless of the form of advertising, as seen in the FTC's action against Lord & Taylor. While it is the marketer's role to ensure that the advertising content is not deceptive, lawyers also play a role in protecting their clients from FTC scrutiny and associated expenses by appropriately allocating responsibilities and duties, and mitigating risks through tightly drafted warranty, indemnity and limitation of liability provisions.