Native Advertising in Social Media: Is the FTC's "Reasonable Consumer" Reasonable?

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INTRODUCTION

An undeniable truth about contemporary society in the United States is that the use of social media has become so prevalent that it now spans across generations. The reliance on and frequent use of this social media has revolutionized the advertisement of products. Advertisement agencies and companies have recognized this shift. Anyone with an Instagram account is no stranger to the rampant product endorsements by celebrities, bloggers, and other Instagram "influencers." The companies marketing the products understand the casual and seemingly organic celebrity endorsements don't appear so forced as compared to traditional advertising, and therefore the consumer is more receptive to the product being advertised.

This use of social media is the latest innovation in the long history of native advertising. Native advertising made its debut at the turn of the twentieth century[1] and since then its use has evolved with society and technology. Although there is no universally accepted definition for native advertising,[2] native advertising is generally defined as the "practice of formulating ads to appear as editorial content."[3]

Despite the prevalence of native advertising since its emergence in the early 1900s, a debate concerning the ethical implications of its use still rages today. The proponents of native advertising claim that this method more successfully engages the consumer by providing an enhanced experience.[4] However, this experience is a double-edged sword. As the opponents to this practice have noted,[5] there is a danger to this "subliminal

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1. Brandon R. Einstein, *Reading Between the Lines: The Rise of Native Advertising and the FTC's Inability to Regulate It*, 10 BROOK. J. CORP. FIN. & COM. L. 225, 232 (2015).

2. *Id.* at 227. The author states there is no universal definition because "native [advertising] is in the eye of the beholder, depending on where one sits in the ecosystem and the strategic and media objectives of the marketer." *Id.* (internal quotations omitted).

3. Anthony B. Ponikvar, *Ever-Blurred Lines: Why Native Advertising Should Not Be Subject to Federal Regulation*, 93 N.C.L. REV. 1187 (2015).

4. *Id.* at 1188.

5. Einstein, *supra* note 1, at 226. The parties arguing against the use of native advertising have

form of advertising."[6] The very reason advertisers revere native advertising is also its downfall. Arguably, the advertiser is deceptively utilizing the publisher's credibility to communicate to the consumer the impression that "the advertisement is as credible as the publisher's own content."[7]

Since its inception, the Federal Trade Commission ("FTC") has recognized these dangers and tirelessly endeavored to remedy them. As technology and native advertising have developed over the past century, so too have the FTC's policies. However, at the apex of the social media era, the agency is struggling to accommodate this unprecedented and instantaneous method of native advertising.

This Note will argue that the standard historically used by the FTC in the "reasonable consumer" test in the context of social media is too broad and outdated. Rather, it will argue that the "reasonable consumer" in the context of social media has a unique perspective that makes them different from a consumer of other types of native advertising. Accordingly, this note proposes that the FTC should tailor the "reasonable consumer" test applied to disclosures of material connections in social media to fit the expectations of the typical user of that specific application.

Part II of the Note will trace the development of native advertising and celebrity endorsements throughout the past century in the United States. This section will address the birth of the FTC and how it has reacted to the evolution and innovations in native advertising, starting with newspaper and radio advertisements and ending with the social media we are all familiar with today. Part III will address the flaws in the FTC's current "reasonable person standard" and present a start to solving the never-ending problem of ensuring disclosures are effective to consumers.

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labeled it as a "deceptive practice implemented to trick unknowing consumers into viewing ads and spending money." Ponikvar, *supra* note 3, at 1187-88.

6. Einstein, *supra* note 1, at 225. In fact, studies about native advertising within websites have shown that consumers cannot recognize the subliminal nature of the advertisement. *Id.* In fact, consumers "constantly struggle to distinguish native ads from the 'organic' (or native) content of a website." *Id.* at 226.

7. Ponikvar, *supra* note 3, at 1194.

I. HISTORY

A. The Birth of Native Advertising and Celebrity Endorsements

Native advertising first came on the scene in the United States at the turn of the twentieth century. Throughout most of the 1800s, advertisements rarely depicted real human beings and instead were limited to "artistic interpretations."[8] By "the close of the nineteenth century, advances in lithographic technology stimulated the use of pictorial advertising."[9] Pictorial advertising marked the end of an era where artistic interpretations dominated the advertising scene, and signaled the beginning of a new type of native advertising.

While the consumer may have been more receptive to the pictorial advertisements, the subjects of these pictures were not as receptive.[10] In stark contrast to the twenty-first century where endorsements are second nature to celebrities, celebrities in the early twentieth century were adversaries of the enterprise.[11] Nevertheless, as consumer preference for their favorite celebrities appearing in advertisements increased, "even well-known personalities began to change their tune" with the enticement of a higher earning potential.[12]

Beginning in the 1920s, the public obsession with celebrities we are all familiar with today increased with the growing popularity of radio shows and motion pictures.[13] This fascination with celebrities influenced the

8. Leah W. Feinman, *Celebrity Endorsements in Non-Traditional Advertising: How the FTC Regulations Fail to Keep Up with the Kardashians*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 97, 104 (2011).

9. *Id.* (internal quotations omitted).

10. *Id.* at 103. At this time, the subjects of the pictures were not voluntarily depicted. Rather, to be exploited in this manner was "cause for humiliation and embarrassment" because the "instantaneous photographs" violated the "sacred precincts of private and domestic life." *Id.* at 104. For example, in *Roberson v. Rochester Folding Box Co.*, a woman sued a flour company for appropriating her likeness. She stated that she had been "greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on [the] advertisement . . . causing her great distress and suffering, both in body and mind . . . ." Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

11. For example, President Theodore Roosevelt vehemently opposed an advertisement promoting the Lewis and Clark trail with his portrait. Feinman, *supra* note 8, at 106.

12. Feinman, *supra* note 8, at 106.

13. Feinman, *supra* note 8, at 106.

advertising world, because the entertainment and advertisement industries often exhibit a symbiotic relationship. Thus, as the entertainment industry boomed during this era, advertisement agencies took advantage of the public's obsession with celebrity culture to "garner further business . . . [by] attach[ing] their involvement in a given project."[14] The primary arena for this marriage of native advertisements and celebrity endorsements was the radio show. After negotiating an endorsement deal with companies through ad agencies, radio stars began to use "product names in their signature sign-off lines."[15] Soon thereafter, celebrities of all types began to follow suit. The ingenious practice of native advertising in celebrity endorsements that would take over business and pop culture was born.

B. The Creation of the FTC: The First Limitations Set

The use of native advertising in the early twentieth century was not limited to radio. Other media such as newspapers simultaneously took advantage of this new innovation. However, as native advertising became more prevalent throughout American society, so did government skepticism. In recognition of the undue advantages gained by newspapers incorporating native advertisements, Congress enacted the Newspaper Publicity Act in 1912.[16] Signifying the first governmental regulation of disclosures in advertising practices, the Act "required publishers to [affirmatively] label advertisements that could be easily mistaken for legitimate editorial content."[17]

The Newspaper Publicity Act became the framework through which Congress would develop future regulations of native advertisements in other media as well.[18] In response to the rise of radio broadcasting "by way of commercial sponsorship" in the 1920s, Congress enacted the Radio Act of 1927.[19] "Section 19 of the Act required broadcasters to disclose the

14. Einstein, *supra* note 1, at 232.
15. Feinman, *supra* note 8, at 107.
16. Einstein, *supra* note 1, at 232.
17. Einstein, *supra* note 1, at 232.
18. Einstein, *supra* note 1, at 232-33.
19. The Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (now codified as 47 U.S.C. § 317(a)(1) (2016)), and is entitled "Announcement of payment for broadcast." The section states, "[a]ll matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid . . . shall, at the time the same is so broadcast, be announced as paid for or

role of sponsors within programming" itself in order to completely and effectively communicate to the consumer the true nature of the advertisement.[20] Although "instances of consumer deception involving advertising could have been reviewed on a case-by-case basis or through other forms of regulation, regulators found that sponsorship identification or disclosures proved to be the most effective in safeguarding consumer protection."[21] Thus, the Radio Act of 1927 further paved the way for the FTC's modern-day disclosure requirements.

By the 1930s, skepticism about native advertising in celebrity endorsements became even more widespread and was no longer limited to the government.[22] Calling into question the authenticity of the commonplace celebrity endorsement of cigarettes, newspapers began reporting that the celebrities endorsing the tobacco companies were not in fact smokers.[23] Thus, the illusion was shattered, and advertisers worried the consumers would able to distinguish between the reality of a celebrity's preferences and the fraudulent endorsement.

In 1914, Congress created the FTC[24] to regulate consumer industries following a series of Supreme Court decisions cracking down on monopolies and anti-competition efforts by big business.[25] Congress stated that the agency would be "a bipartisan federal agency with a unique dual mission to protect consumers and promote competition[.]"[26]

In response to the skepticism of the 1930s, Congress amended the FTCA in 1938[27] to address these concerns by prohibiting unfair and

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furnished, as the case may be, by such person." 47 U.S.C. § 317(a)(1) (2016).

20. Einstein, *supra* note 1, at 232-33.

21. Einstein, *supra* note 1, at 233.

22. George M. Armstrong, Jr., *The Reification of Celebrity: Persons as Property*, 51 LA. L. REV. 443, 460 (1991). *See also* Feinman, *supra* note 8, at 107 (stating that "[a]long with the rising popularity of [celebrity] endorsements, however, came the rise of consumer skepticism.").

23. Armstrong, *supra* note 22, at 460.

24. 15 U.S.C. § 45 (2016).

25. After Supreme Court decisions in *Standard Oil v. U.S.* and *U.S. v. American Tobacco*, Woodrow Wilson signed the FTC Act on September 26, 1914 and formally established the FTC. Pursuant to the Act, "the FTC became authorized to prevent individuals, partners and corporations from using unfair or deceptive trade practices in or affecting commerce." Einstein, *supra* note 1, at 233-34.

26. FED. TRADE COMM'N, *About the F.T.C.*, https://www.ftc.gov/about-ftc/what-we-do (last visited Sept. 20, 2016).

27. 16 C.F.R. § 255 (2009). The modern version of this amendment entitled "Guides Concerning Use of Endorsements and Testimonials in Advertising," states "[t]he Guides provide the basis for

deceptive acts in the industry of advertising specifically.[28] With this newly granted power, the FTC announced an investigation into the business of celebrity endorsements, and required merchants to disclose those payments to the celebrities in the advertisements.[29] Thus, this pivotal amendment signified the commencement of the FTC's enduring battle with native advertisement.

C. Native Advertising and Celebrity Endorsements Mid-Century through the Turn of the 21st Century

The late 1960s and the early 1970s witnessed the emergence of a new and dangerous type of native advertising: print advertisement appearing in a news format.[30] The FTC addressed this issue for the first time in 1967 when an advertisement for local restaurants in a newspaper column was formatted to appear to consumers as a restaurant review.[31] The column was severely deceptive, as it "was written in narrative form, with each write-up discussing such details as how a meal was prepared, the name of the chef and/or head waiter, cocktail service offered, whether dancing was permitted, hours and price range of the meal."[32] The FTC claimed the deceptively formatted advertisement constituted an unfair trade practice by "purport[ing] to give an independent, impartial, and unbiased view" of the restaurant.[33] Setting the precedent for the deceptive advertisement

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voluntary compliance with the law by advertisers and endorsers." 16 C.F.R. § 255.0(a); Shannon Byrne, *The Age of the Human Billboard: Endorsement Disclosures in New Millennia Media Marketing*, 10 J. BUS. & TECH. L. 393, 398 (2015).

28. Einstein, *supra* note 1, at 234.

29. Armstrong, *supra* note 22, at 460. The athletic community in particular was targeted and "in response manufacturers adopted a code of conduct stating that they would no longer claim that athletes whose names appeared on products had designed them and they would disclose the existence of any arrangement under which a team, league, or player used their product for pay." Armstrong, *supra* note 22, at 460.

30. Fed. Trade Comm'n, *Enforcement Policy Statement on Deceptively Formatted Advertisements* (Dec. 22, 2015) (addressing "advertising and promotional messages integrated into and presented as non-commercial content").

31. *Id.* (citing *Statement in Regard to Advertisements That Appear in Feature Article Format*, FTC Release, (Nov. 28, 1967)).

32. Fed. Trade Comm'n, *supra* note 30.

33. Fed. Trade Comm'n, *supra* note 30. Further, "[t]he Commission also explained that the inclusion of the exact price of the meal advertised or listing a range of prices for other meals would not alter this impression." *Id*.

guidelines that would follow and continues today, the FTC concluded the advertiser was required to provide a "clear and conspicuous disclosure that the column was an advertisement. . . ."[34]

In the 1980s with the birth of the infomercial, the FTC was once again confronted with a new type of native advertisement that misrepresented its source and nature. After the Federal Communications Commission removed a ban on infomercials, advertisers took advantage of this new method of showing a product to consumers.[35] As infomercials began to dominate television and radio, the FTC strove to place limitations on them by bringing cases that claimed, "deception occurs when infomercials are presented as regular television or radio programming, such as a news report or talk show."[36]

The first case of this kind was against JS&A Group in 1989.[37] A television infomercial was formatted as a "Consumer Challenge" where the host described the program as one that "examines popular new products for you" with the help of investigative reporters.[38] The FTC alleged that the format of this infomercial was likely to deceive consumers into thinking it was an "independent consumer program . . . that conducts independent and objective investigations of consumer products. . . ."[39] In this case, and the many others that followed, the FTC required "a clear and prominent disclosure, at the beginning of an infomercial and again each time ordering instructions are given, informing consumers that the program is a 'PAID ADVERTISEMENT' for the particular product or

34. Fed. Trade Comm'n, *supra* note 30. The Commission specifically recommended "placing 'ADVERTISEMENT,' in clear type, sufficiently large to be readily noticed, in close proximity to the ad." However, the Commission also noted that it is possible for the advertisement to so closely resemble a news article that the "caption 'ADVERTISEMENT' [would be rendered] meaningless and incapable of curing the deception," but provided no further guidance on the issue or any alternative methods. Fed. Trade Comm'n, *supra* note 30.

35. Fed. Trade Comm'n, *supra* note 30. (citing *Deregulation of Radio*, 84 F.C.C.2d 968, 1007 (1981) (rescinding the FCC's policy banning program-length radio commercials)); Revision of Programming and Commercialization, Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1075 (1984) (rescinding the FCC's policy banning program-length television commercials).

36. Fed. Trade Comm'n, *supra* note 30.

37. Complaint, JS&A Grp. Inc., 111 F.T.C. 522 (1989)(No. C-3248), 1989 WL 1126729.

38. *Id.* at 523-24.

39. *Id.* at 522.

service advertised."[40]

Alongside infomercials during the latter half of the twentieth century, color television ushered in a previously unprecedented use of modern-day celebrity endorsements by 1965.[41] By the mid 1970s, celebrities were in fifteen percent of television commercials.[42] Just as infomercials tested the bounds of deceptive advertising, by the 1980s and 1990s celebrity endorsements expanded beyond the unambiguous commercials of the 1960s and 1970s where the consumer was aware the company of the product had solicited the celebrity for the advertisement.[43] In contrast, the last two decades of the twentieth century witnessed the first modern collision of celebrity endorsements and native advertising: celebrity product integration.[44]

The first prominent example of celebrity product integration came with Michael Jordan and Nike's "Air Jordan" shoe.[45] Nike "hoped to capitalize on the charisma and appeal of rookie National Basketball Association player Michael Jordan" through naming a newly designed shoe after the budding star.[46] However, it was not so much the naming of the shoe after Jordan that was the true innovation in native advertising of celebrity endorsements. Rather, it was the fact that Jordan's contract with Nike required him to wear the shoe during his games.[47] Thus, as admiring fans cheered on their idol, they inevitably took notice of his shoes. The impression the shoes would leave was far more powerful when communicated in this subtle way, because the fan could be under the impression that Michael Jordan donned the shoes of his own volition. The FTC's concern about the danger of this new mode of celebrity-product

40. Fed. Trade Comm'n, *supra* note 30.
41. Feinman, *supra* note 8, at 108.
42. Feinman, *supra* note 8, at 108.
43. Feinman, *supra* note 8, at 108.
44. Feinman, *supra* note 8, at 108-09.
45. Feinman, *supra* note 8, at 108-09.
46. Feinman, *supra* note 8, at 108-09. "Jordan was paid $2.5 million dollars for a five-year contract . . . Nike's investment paid off. Jordan's success on the court made the shoe instantly popular with consumers . . . ." Feinman, *supra* note 8, at 108-09.
47. Feinman, *supra* note 8, at 108-09. The NBA eventually prohibited the Air Jordans and required all players to sport white sneakers. Demonstrating the extent of the value of Jordan's endorsement, Nike paid all of Jordan's fines for not adhering to the uniform, and "Jordan's refusal to acknowledge the ban transformed Air Jordans from ordinary sneakers to an illicit status symbol and one of the best-selling pairs of sneakers on the market." Feinman, *supra* note 8, at 108-09.

integration continued throughout the end of the twentieth century and carried over into the new millennium.

D. Twenty-First Century: Celebrity Product Integration and Social Media

By the twenty-first century, native advertising reached unprecedented heights in the digital age. Studies conducted within the past sixteen years demonstrate the effectiveness of native advertising. These studies have shown that consumers view native advertisements fifty-three percent more than traditional internet? banner ads.[48] Additionally, consumers are more likely to subsequently purchase the product and share these ads with friends and family, dispersing the content to more viewers.[49]

Further, the click-through rate for native advertisements greatly exceeds that of non-native advertisements.[50] Companies strive to increase their click-through rate on advertisements because studies have shown that "increased click-through rate[s] result[] in a purchase intent that is 18% higher for native advertising than banner ads."[51] Due to these results, surveys indicate 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."[52]

Native advertisements also began disguising their true source and nature while taking on new and concerning forms. For example, in the 2011 case of *FTC v. Circa Direct*, an advertisement for weight-loss pills was disguised as a news report where a journalist tested the product.[53] This

48. Ponikvar, *supra* note 3, at 1191.

49. Ponikvar, *supra* note 3, at 1191.

50. Ponikvar, *supra* note 3, at 1191. For example, a native advertising campaign promoted by General Electric was viewed by over five million people and resulted in roughly 416,000 click-through ads. Ponikvar, *supra* note 3, at 1191.

51. Ponikvar, *supra* note 3, at 1192.

52. Ponikvar, *supra* note 3, at 1192.

53 . Fed. Trade Comm'n, *supra* note 30 (citing Complaint at 4-5, 8-9, FTC v. Circa Direct LLC, No. 11-cv-2172 (D.N.J. Apr. 18, 2011) (stipulated order)). Beginning in 2008, Defendants Circa Direct disseminated their false banner ads on many popular websites, including weather.com, thefreedictionary.com, and msnbc.com. Complaint at 4-5, FTC v. Circa Direct LLC, No. 11-cv-2172 (D.N.J. Apr. 18, 2011). These banner ads would "induce consumers to click on them with claims that consumers can learn, among other things, the 'shocking truth'" about a product. *Id.* at 5-6. The consumer would then view a false news segment reviewing the product. *Id.* at 4.

case and other similar cases involved advertisements that "used such devices as news-related names and headlines suggestive of a local television station, trademarks of established news companies, reporter by-lines, and reader comment sections to create that false impression."[54] In the 2015 case of *FTC v. NourishLife*,[55] a website advertising dietary supplements was represented to consumers as originating from an "independent scientific organization."[56] Even more concerning, the FTC has recently filed complaints against advertisements masquerading as government agency endorsements.[57]

The history of native advertising and celebrity endorsements has revealed an undeniable truth. As technology develops and is refined, advertisers sell products in increasingly innovative yet deceptive ways. In an attempt to match the rapid evolution of this industry, the FTC has taken steps to refine and clarify what constitutes a deceptive advertisement.

The FTC *Endorsement Guides* ("*Guides*") have been in effect since the 1980s.[58] According to the *Guides*, an advertisement is deceptive if it leads the consumer to believe the advertisement, in the form of a review, commercial, etc., is unbiased.[59] The *Guides* state that when there is a "connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."[60]

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54. Fed. Trade Comm'n, *supra* note 30. Demonstrating how seriously the FTC took these deceptive advertisements, the Commission held in one case that the "presence of a small-print disclaimer 'Advertorial' in the top border of some websites" was not sufficient. *Id.*

55. Complaint at 3-4, 28-29, FTC v. NourishLife*, LLC*, No. 15-cv-00093 (N.D. Ill. Jan 7, 2015).

56. Fed. Trade Comm'n, *supra* note 30. The Commission asserted "that dietary supplement marketers misrepresented that their website promoting the health benefits of their children's supplements was an independent, objective resource for scientific and other information on treating a specific health condition, and that they failed to disclose their relationship to the website." *Id.*

57. Fed. Trade Comm'n, *supra* note 30. For example, in one case a radio advertisement was "formatted to appear as public service announcements from the United States government, which began, 'Please stay tuned for this important public announcement for those in danger of losing their home' and prominently featured the word 'federal.'" *Id.*

58. Stephanie Sheridan, *The High Price of Social Media Endorsements: Potential Risks That Retailers Should Consider Before Soliciting Positive Reviews*, *in* NAVIGATING FASHION L. 2 (2016).

59. *Id.*

60. 16 C.F.R. § 255.5 (2017). The policy behind this rule is that "consumers regularly rely on other users' reviews when deciding whether to buy certain products or services. When the reviewer has an ulterior motive for posting the review, the review risks being deceptive if that connection is not

Adapting to the ever-changing world of technology, the *Guides* were revised in 2009 to explicitly address and include examples of how this basic rule applies to consumer-generated media, including blogs, online message boards, and social media.[61] The revision includes frequently asked questions explaining an endorsement should always disclose a material connection, regardless of whether or not there is limited space in the advertisement itself if "knowing about that gift or incentive would affect the weight or credibility" of the "commendation."[62] The frequently asked questions state that "[a]t a minimum, sponsored posts on Twitter, Instagram, Facebook, and Pinterest should be accompanied by #ad or #sponsored."[63] To adhere to the requirements established by the *Guides*, the disclosure of a material connection must be "clear and conspicuous."[64] Thus, "consumers must be able to see and understand the disclosure easily—it cannot be necessary to look for it."[65]

After the 2009 revisions to the *Guides*, the FTC nevertheless continued to confront deceptive advertisements that failed to adhere to its specific disclosure requirements. For example, the first investigation pursuant to these revised guides occurred in 2010 when the FTC investigated Ann Taylor.[66] As part of their new promotional strategy, Ann Taylor sent gifts to bloggers in exchange for promotional posts about its store.[67] Despite these seemingly deceitful practices, the FTC ultimately decided against pursuing a claim against Ann Taylor.[68] Although there were a variety of factors that dissuaded the FTC from taking action against the company,

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disclosed." Sheridan, *supra* note 58, at 2.

61. Sheridan, *supra* note 58, at 2 (citing FED. TRADE COMM'N, *The FTC's Endorsement Guides: What People Are Asking* (2015), https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf).

62. Sheridan, *supra* note 58, at 2.

63. Sheridan, *supra* note 58, at 2.

64. 16 C.F.R. § 255.5 (stating "[t]he advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reason to know or to believe that if the endorsement favored the advertised product some benefit, such as an appearance on television, would be extended to the endorser.").

65. Sheridan, *supra* note 58, at 3. Demonstrating the stringency of this requirement, the author further noted, for example, that a blogger will not "satisfy this requirement by posting a single disclosure on their home page stating many of the products they review are given to them for free by advertisers." Sheridan, *supra* note 58, at 3.

66. Sheridan, *supra* note 58, at 4.

67. Sheridan, *supra* note 58, at 4.

68. Sheridan, *supra* note 58, at 4.

one crucial factor was that "the retailer responded to the FTC investigation by creating a policy to notify bloggers that they must disclose any material connection to the company in the future."[69]

The 2009 revision to the *Guides* signified substantial progress after years of ambiguity concerning disclosing a material connection in native advertisements. However, legal practitioners demanded still more clarity from the FTC. Despite the enunciation and introduction of the clear and conspicuous test for advertising disclosures[70], practitioners remained concerned "that the FTC did not provide examples of how to make 'clear and conspicuous' disclosures on each specific medium when advertising in the online realm."[71] Thus, the problem was both the specificity within the rules, and the ambiguity that inevitably results when applying outdated rules to new technology.[72] In an effort to address these concerns and clarify the "clear and conspicuous" requirement, in 2013 the FTC issued "Dot Com Disclosures" and specifically addressed "disclosures for advertisements on social media platforms."[73]

The "Dot Com Disclosures" recommended advertisers "consider certain factors to determine whether a particular disclosure is clear and conspicuous."[74] Among these factors are the placement of the disclosure in the advertisement, the prominence of the disclosure, whether the disclosure is unavoidable, and the extent to which items in other parts of the advertisement might distract attention from the disclosure.[75] These

69. Sheridan, *supra* note 58, at 4. Other factors included "the small size of the promotion, [and] the fact that it was the first of its kind from Ann Taylor . . ." Sheridan, *supra* note 58, at 4. Similarly, The FTC halted investigations against Hyundai Motor America for providing gift certificates to bloggers promoting the company's Super Bowl advertisements because "Hyundai had a policy calling upon the bloggers to disclose the compensation they received." Sheridan, *supra* note 58, at 5.

70. The "clear and conspicuous" test was originally introduced in the 2009 Guides. The FTC later refined and elaborated on this test in the Dot Com Disclosures.

71. Shannon Byrne, *The Age of the Human Billboard: Endorsement Disclosures in New Millennia Media Marketing*, 10 J. BUS. & TECH. L. 393, 401 (2015).

72. *Id.* Although "practitioners have noted that the two guides are helpful because they acknowledge the application of the rules to online advertising, there were still growing concerns with the lack of specificity in the rules." *Id.*

73. *Id.* at 402.

74. *Id.* The Commission further stated these factors should be considered in light of "the information that must be provided in any given disclosure, the nature of the advertisement, and the medium it is being viewed on . . . ." *Id.*

75. FED. TRADE COMM'N, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING (2000), http://ftc.gov/os/2000/05/0005dotcomstaffreport.pdf.

factors present a common issue among advertisers advertising in an online forum: where do we have the space for this?[76] Luckily for the advertisers, the FTC "provided direction on how best to make disclosures of material connections on such [space-constrained] platforms."[77] Specifically, proximity and placement are "even more crucial for an effective disclosure" in this context.[78]

For example, a celebrity blatantly stating that they have been paid to endorse a product in a social media product endorsement "is not a sufficient disclosure."[79] Although the information about the material connection exists and the consumer *could* find it, the FTC considers it to be dispositive if the consumer "would need to scroll in order to discover" the disclosure.[80] Further, the FTC continued to endorse a strict disclosure standard by requiring that a disclosure must appear "within *each* endorsement post in order for it not to be considered deceptive."[81]

Although the 2009 revised *Guides* and the 2013 *Dot Com Disclosures* provided advertisers with more insight into the standards for adequately disclosing the true source of native advertisements, in 2015 the FTC

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76. Byrne, *supra* note 71, at 403. (stating this question is one left "unanswered" by the Guides). Unfortunately for advertisers, the FTC "is not sympathetic to space constraints, and requires that disclosures of material connections . . . still be made in space-constrained advertisements." Byrne, *supra* note 71, at 403.

77. Byrne, *supra* note 71, at 403.

78. Byrne, *supra* note 71, at 403 (stating the underlying rule guiding the Commission's recommendations for effective disclosure is that proximity and placement are "crucial for an effective disclosure on a space-constrained platform.").

79. Byrne, *supra* note 71, at 403. The author is discussing this hypothetical in the context of Twitter specifically.

80. Byrne, *supra* note 71, at 403. Further, the Commission stated hyperlinks on social media pages that link to a disclosure are also insufficient. Byrne, *supra* note 71, at 403.

81. Byrne, *supra* note 71, at 403 (emphasis added). For example, in May 2013 the Commission held that comedian Michael Black failed to effectively disclose a material connection with a paid sponsor when he wrote, "I just turned myself into a Most Interesting Person with the new @DosEquis Legend of You app," and then provided a link. Byrne, *supra* note 71, at 403. It was not until days later that Black stated in the comments to the tweet that he was paid by a sponsor to tweet. Byrne, *supra* note 71, at 403.

> According to the guides, this post is deceptive because the original advertising post did not disclose that it was a paid endorsement (i.e. that there was a material connection between Black and Dos Equis). The fact that Black eventually disclosed the material connection . . . is still insufficient because consumers would have to read through a full-day's worth of comments to find the delayed disclosure.

Byrne, *supra* note 71, at 404.

issued its "Enforcement Policy Statement on Deceptively Formatted Advertisements."[82] In the 2015 policy statement, the FTC articulates the test as laid out by the 1983 policy statement: "a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it would likely affect the consumer's conduct or decision with regard to a product or service."[83] The test can therefore be broken down in to two parts. Deception occurs when (1) an ad misleads *reasonable consumers* as to its true nature or source, and (2) if the misleading representation is *material*.[84] Thus, in order to fully understand the requirements of this test and the mindset of the FTC when implementing it, it is essential to understand the nature of the "reasonable consumer" and what a "material" misleading representation entails.[85]

In the 2015 Enforcement Policy Statement, the FTC elaborates on the nature of the "reasonable consumer."[86] To be reasonable, "an interpretation or response of consumers to a particular ad need not be the only one nor shared by a majority of consumers."[87] Rather, "[i]nterpretations that advertisers intend to convey about an advertisement's nature or source are presumed reasonable."[88] Thus, when "evaluating whether reasonable consumers would recognize ads . . . the Commission will consider the particular circumstances in which the ad was disseminated, including customary expectations based on consumers' prior experience with the media in which it appears and the impression communicated by the ad's format."[89] To illustrate this point, the FTC gave the example that if a native advertisement appears as a news story on a website that normally publishes the news, reasonable consumers are likely

82. Fed. Trade Comm'n, *supra* note 30.
83. Fed. Trade Comm'n, *supra* note 30.
84. Fed. Trade Comm'n, *supra* note 30 (emphasis added). An advertisement's format can mislead consumers about its true source if the net impression of the consumer is that the post is not a native advertisement, the "overall appearance [of the post], the similarity of its written, spoken, or visual style to non-advertising content offered on a publisher's site, and the degree to which it is distinguishable from such other content." *Id.* at 11.
85. Fed. Trade Comm'n, *supra* note 30.
86. Fed. Trade Comm'n, *supra* note 30, at 11.
87. Fed. Trade Comm'n, *supra* note 30, at 11.
88. Fed. Trade Comm'n, *supra* note 30, at 11.
89. Fed. Trade Comm'n, *supra* note 30, at 11.

to be deceived by this native advertisement.[90]

The FTC next addresses the "reasonable consumer" in the context of advertisements directed toward a target audience.[91] The FTC stated "[i]ncreasingly, in digital media, advertisers can target natively formatted ads to individual consumers and even tailor the ad's messaging to appeal to the known preferences of these consumers."[92] Using the example of advertisements aimed toward children,[93] the FTC concludes "[t]o the extent that an advertisement is targeted to a specific audience, the Commission will consider the effect of the ad's format on reasonable or ordinary members of that targeted group."[94]

This brief historical overview of the development of native advertising and celebrity endorsements illuminates the constant struggle of the advertisers over the past century to comport with government regulation: how can native advertisements be formatted so that its strengths are still being utilized without violating the FTC's guidelines?

II. ANALYSIS & PROPOSAL

This struggle in native advertising runs parallel to that of the FTC's. The FTC has labored over the question of how to establish clear guidelines for advertisers to follow so that the "reasonable consumer" is aware of the material connection between the advertiser and the endorser.

As illustrated by the 2009 *Guides*, the 2015 Enforcement Policy Statement, and the various claims brought by the FTC in recent years against advertisers, the issues of making an effective disclosure of a material connection and the "reasonable consumer" are synonymous. Whether or not the advertisement's disclosure of a material connection is sufficient necessarily depends on who the "reasonable consumer" is.

As previously evidenced,[95] the "reasonable consumer" evolves with the

90. Fed. Trade Comm'n, *supra* note 30, at 12.

91. Fed. Trade Comm'n, *supra* note 30, at 12. (stating "[t]he target audience of an ad also may affect whether it is likely to mislead reasonable consumers about its nature or source").

92. Fed. Trade Comm'n, *supra* note 30, at 12.

93. Fed. Trade Comm'n, *supra* note 30, at 12 (stating "[f]or example, special considerations may be relevant in determining whether a natively formatted ad directed to children would be misleading").

94. Fed. Trade Comm'n, *supra* note 30, at 12.

95. This Note has traced the evolution of native advertisement through different media, beginning with pictures in newspapers, the radio show, the infomercial, and finally, social media.

differing type of media. Consumers before the era of social media were similar because they could be *any* American citizen, regardless of age, socio-economic status, and social preferences. The Newspaper Publicity Act of 1922 concerned disclosing a material connection to the average consumer who purchased a newspaper. Similarly, the Radio Act of 1927 dictated disclosure requirements to the habitual radio-listener.[96] Finally, the FTC confronted the average television viewer with the cases regulating infomercials such as the claim against JS&A Group.[97] An activity as universal as reading the newspaper, listening to the radio, or watching television is not limited to a particular category or class of consumer. As such, the "reasonable consumer" standard applied in the FTC's analysis of the accompanying disclosure requirements for these types of media did not need particular attention or alteration.

In stark contrast to the consumers of the past, the consumers of social media are undoubtedly unique. There are many defining characteristics of the social media consumer that separate them from the consumers of print, radio, or television media. For example, consumers using social media, particularly users of "Instagram," tend to be younger generations. Such users were raised in an era of technology, and thus necessarily have different expectations due to how younger generations make use of social media. For example, while the viewers of a radio show or television are characterized as passive consumers, the users of social media are active. This is evidenced by the fact that the users must go through the effort of downloading and signing up for the media and creating user accounts. Going one step further, social media users are active with options such as the "like" feature and the ability to comment on and interact with friend *and* celebrity posts.

Thus, it is undeniable that the "reasonable consumer" of social media advertisements is not an "average consumer." This discrepancy was not sufficiently addressed in the FTC's 2015 Enforcement Policy Statement.[98] While the FTC stated the "customary expectations based on consumers' prior experience with the media" will be considered in assessing the

96. 47 U.S.C. § 317(a)(1) (2016).
97. See *JS&A Grp. Inc., supra* note 37.
98. Fed. Trade Comm'n, *supra* note 30.

effectiveness of a disclosure,[99] the FTC does not go far enough in this regard. The example the FTC provided of an ad formatted as a news story on a news website addressed the nature of the ad's relationship with the *source*.[100] The FTC crucially did not consider *who* specifically the consumer reading the online news was.[101] While this example does not apply to social media necessarily, it nevertheless illustrates how the FTC has approached the issue of the "reasonable consumer."

After the publication of the *Guides* in 2009, a practitioner of fashion law posed questions left unresolved by the *Guides*: "How will the FTC decide whether a customer would care that the reviewer was given something for his or her review?" And, "what kind of 'endorsement' is material to consumers in the first place?"[102] Although not specifically tailored to the issue of effective disclosure of a material connection, these questions similarly require a better understanding of who is the "reasonable consumer." Further, the fact that these questions were posed by practitioners who operate within the FTC's guidelines on a daily basis is highly concerning. They illustrate the inadequacy of the FTC's guidance thus far. These questions were left unanswered yet again in the Enforcement Policy Statement of 2015 because, as previously established, the FTC still has not appropriately adjusted its view of the "reasonable consumer."

I propose that the most effective way to resolve these issues is for the FTC to tailor its understanding and analysis of the "reasonable consumer" to the habitual user of social media, and not to the average citizen. While others have proposed the FTC should "tailor [the reasonable consumer test] specifically to native advertising,"[103] it is necessary for the FTC to go one step further. The FTC should tailor its understanding of the "reasonable consumer" to social media within native advertising because the "reasonable consumer" of celebrity endorsements disguised as social media posts has different expectations.

It has been acknowledged that "[i]n today's world we increasingly see

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99. Fed. Trade Comm'n, *supra* note 30, at 11.
100. Fed. Trade Comm'n, *supra* note 30, at 12
101. Fed. Trade Comm'n, *supra* note 30.
102. Sheridan, *supra* note 58, at 3-4.
103. A.J. Castle, *Going Native: The Rise of Online Native Advertising and a Recommended Regulatory Approach*, 65 CATH. U. L. REV. 129, 152 (2015).

celebrities in their natural habitats. When a celebrity is seen in her professional capacity, for example at a press junket, in a film or television show, or on the red carpet, it can safely be assumed that a consumer will realize that the celebrity is being compensated to wear or use a particular brand."[104] The FTC itself has confirmed this outlook.[105] Part 255 of the *Guides* provides the example of a movie star endorsing a food product.[106] The example goes on to state,

> [t]he endorsement regards only points of taste and individual preference . . . regardless of whether the star's compensation for the commercial is a $1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.[107]

A basic (yet faulty) assumption underlies these two examples: the consumer of social media in 2018 does not realize social media applications such as Instagram have become a new form of the commercial or infomercial—that the consumer is not "in on" the secret. However, one could argue that at this point in the long history of native advertising and celebrity endorsements in social media that these assumptions are false. Instead, social media consumers arguably *expect* that Instagram posts from celebrities raving about a product are paid endorsements, even without a disclosure. The Instagram post has therefore become an additional arena for celebrities to behave in their professional capacities. The social media post is the new red carpet. While a newcomer to social media may not understand the truth behind celebrities' posts, it is entirely possible that the habitual user of social media does.

One cannot deny the importance of protecting the consumer and having disclosure requirements to resolve any potential ambiguity about whether

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104. Feinman, *supra* note 8, at 135 (stating: "These Guidelines impose an obligation on the endorser to disclose their connection to the advertiser if the consumer would not reasonably expect such a connection from watching the advertisement. This means that a celebrity who advertises a product or service on television is not required to disclose the fact that he or she has been compensated because viewers are likely to expect such celebrities to be paid for their endorsement.").

105. *See* 16 C.F.R. § 255.5 (2009).

106. *Id.*

107. *Id.*

a post is a paid endorsement. However, the FTC should nevertheless make further adjustments to the "reasonable consumer" test where social media is involved. By doing so, advertisers and consumers will have the best of both worlds. The advertisers will still benefit from the brilliant innovation that is native advertising, and the reasonable consumer will remain protected.

CONCLUSION

The business of advertising and celebrity endorsements have come a long way since the turn of the twentieth century. Beginning with product integration in radio show sign-offs and culminating in paid Instagram posts by "fashion influencers," celebrity endorsements and native advertising have developed and adjusted to popular culture. This continual evolution in response to new trends is simultaneously seen in the growth of the FTC and its regulation of the advertising industry. Just as native advertisers have continued to develop new ways to reach consumers, the FTC likewise responds in kind to these innovations with new enforcement policies.

However, the FTC's standards for disclosure of material connections in social media in recent years have not been sufficient. The FTC underestimates the expectations and knowledge of the average consumer of social media. As a result, the criteria advertisers must follow are inadequate. To solve this issue, the FTC should adjust the "reasonable consumer" test applied to native advertisements in social media to reflect the understanding of a habitual user of that particular application.

The typical user of social media brings a unique perspective to celebrity endorsements on social media because the understanding of consumers experiencing native advertising in the past has evolved with the use of technology. For example, after the introduction of infomercials and eventually adding the layer of a celebrity endorsement to television in the 1980s, the average consumer by the twenty-first century was extremely familiar with celebrity endorsements in commercials. As a result, the FTC's "reasonable consumer" in this context understood a celebrity in a commercial on television or on the red carpet endorsing a product was doing so for compensation. This same logic can be applied to celebrity

endorsements in social media because the expectations of the "reasonable consumer" have changed over time.