Podcast Transcript

AD Nauseam: A Different Type of Imposter Syndrome

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel talk about the FTC's new imposter rule and why everyone should be paying attention. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back, dear listeners, to AD Nauseam. So, today is all about claiming to be something you're not. We're going to focus on the FTC's new impostor, or sometimes called impersonator, rule. We're going to talk about why it was enacted, why it is significant and more importantly, where this could end up. And as always, of course, I'm delighted to be here with my co-host Daniel, who actually is charming and delightful with no impersonation necessary.

Kaufman: Well, thank you, Amy. I'm not quite sure why I deserve such a wonderful intro today, but I appreciate it and…

Mudge: It is spring, Daniel. It is spring. I'm just happy.

Kaufman: It is lovely outside, and I am always eager to nerd out and talk about FTC rulemaking. It is a pretty big deal that the FTC has, in a pretty short time relatively speaking, completed this rule. But before we start talking about the rule and what it means for businesses and all that stuff, it is a rule about impersonation, about imposters and I think, subterfuge, spies, mysteries. When we think of the genre of spies and intrigue, Amy, what are some of your favorites?

Mudge: Well, I'm a child of the 80s and we grew up with the Cold War. So I will say one of my favorite 80s movies, No Way Out with Kevin Costner and Sean Young, so much intrigue and a fabulous ending. I love 80s inspired. I really loved The Americans; I was devastated when that series ended. I love a good spy comedy, Austin Powers or really kicking it back with Get Smart. I always really wanted a shoe phone, and I think probably best spy theme song would be Mission Impossible.

Kaufman: Okay, lots of good choices there and I hadn't even thought about song, but got to go for a Spy Who Loved Me. I think it was…

Mudge: Ooh.

Kaufman: …Carly Simon, right?

Mudge: Okay.

Kaufman: I think it was Carly Simon.

Mudge: Okay, you do you. Alright.

Kaufman: Love that song. Look, I was going to go for Casino Royale because I really love that movie and Daniel Craig was fantastic in it. But I'm going to go slightly obscure, not really obscure, Charlize Theron was in this fabulous movie Atomic Blonde.

Mudge: Yes, she was.

Kaufman: Yes, and I think the second time we've talked about Charlize Theron on this podcast because she is so awesome and Atomic Blonde was this great movie, and it takes place in the 80s, and it has an amazing soundtrack. So, anything with Charlize Theron, I would gladly see.

Mudge: I thought you were going to go Manchurian Candidate, but you did that last podcast for something else, so.

Kaufman: Yeah. I mean, I also, look, I also love Agatha Christie. Any Agatha Christie book, I read them when I was a kid. Well, not all of them, but a lot of them.

Mudge: Me too, and I love all the movies. I love the old movies, and I love the new movies. All right, let's get back to the FTC. We'll set the stage at the outset before we dive into the content of the rule. I know you love to talk about rulemaking, Daniel. So why is this rule a big deal? I mean, are you just being a drama queen there? That is usually my specialty, but the way you keep talking about rule, rule, rule, rule, rules.

Kaufman: There is a little bit of drama queen, but look, historically, the FTC shied away from what we call Mag-Moss rulemaking because it takes years and years and years. They took a few procedural steps to shorten it. But the reality is, after the AMG decision came out in 2021, the FTC wanted their strategies to deal with their inability to get money in most federal cases was to do rulemaking because rulemaking is a path for the FTC to get money. But there was this historical notion that rulemaking takes a long time, many, many, many years. So, it is significant that one of the first rulemakings they've initiated took about three years to get done and for a Mag-Moss rulemaking, and it is supposed to be a cumbersome rulemaking process, that is pretty quick. So, it is kind of a big deal that they've gotten this one out the door. It is probably, at the moment or up until recently, the least controversial of the rulemakings they're doing. So that certainly helped to expedite it, but it is a big deal. It is important for the agency to do this in order to make it easier to get money and they're moving forward.

Mudge: They love their money. Money, money, money.

Kaufman: Yes, but Amy, why don't you tell us a little bit more about the rule, what it does and what is in there?

Mudge: Okay. Well Daniel, this is a pretty easy one. I mean it is short and sweet. It focuses on government and corporate impersonation is the focus. So again, called the impersonator rule, it was finalized in February of this year, so just last month. And of course, as you said, it allows the FTC to seek penalties for violation and the text, as I said, is short and sweet. I might even read it to you.

For government, it is deceptive to materially and falsely pose as, directly or by implication, a government entity or government officer, or to misrepresent affiliation with including endorsement or sponsorship by, a government entity or officer.

And then there is a similar provision that prohibits posing as a corporate business or a corporate officer, and then a mirror provision that prohibits falsely promoting an endorsement or sponsorship by a business or an officer. More generally, the FTC separately has explained that the rule can be violated through things like using government seals or business logos when communicating with customers unless you have a right to do so. Or, certainly, spoofing government and business emails and web addresses, including using .gov e-mail addresses or maybe using look alike e-mail addresses or websites that rely on misspellings of a company's name. We've certainly seen that. And also, to falsely imply that government or business affiliation by using terms that are known to be affiliated with a government agency or business. So, something like, I'm calling from the clerk's office. These are just some easy examples.

Kaufman: So, it is interesting, Amy. The rule covers impersonating businesses and the government and at some point recently, the FTC was like, yeah, we're missing something here. How about impersonations of specific individuals? We've heard a lot about AI deep fakes, particularly over the last few months and it is interesting. So, the FTC finalizes the rule and while finalized the rule, for the first time, they also propose modifications to this rule already. They issued an NPRM along with the final rule.

Mudge: So, I knew it was really tightly together. I didn't realize, was it the same day?

Kaufman: It was the same press release. Yeah. Rule is final…

Mudge: Okay.

Kaufman: …and we're going to issue an NPRM to expand the rule.

Mudge: Isn't that a little embarrassing? Here is our rule, but oops, it wasn't good enough. Have you seen anything like that before?

Kaufman: I mean, we're seeing that in some contexts when they finalized the GLB safeguards rule. They also issued an NPRM for an additional proposal. So, rulemakings take time and where they start isn't always necessarily where they end, and the world changes. And I think that is what's happened here. The world has changed a lot and the notion of AI deep fakes has become a huge issue, particularly over the last few months.

Mudge: Why didn't they just stop and say hey, wait a minute, we need to go back and redo this rule. Why issue a rule and then say, oh, wait, we want to update it? Is it really just the pressure to get rules out before the election cycle or just to get rules out there?

Kaufman: Yes, I absolutely think that is the case. They could have said, hey, let's step back and not finalize it and try to add this. But there is clearly a goal at the FTC to get rules done, to get them done as quickly as possible and this is how you do it.

Mudge: What is the idea behind it? Are they just going to have another mirror provision like they have with government and the corporate impersonators? Is that how we think the individual provisions will play out or will it be something different?

Kaufman: It'll be pretty similar. Prohibiting the impersonation of individuals in connection with commercial activities, of course.

Mudge: There is also another part of that. It is not just individuals, but it is expanded to parties who are hanging out with impersonators, right?

Kaufman: Yes, and this, to me, is probably the biggest deal of this new proposal. It would also provide that it is a rule violation if parties who provide goods and services with knowledge or reason to know that those services are being used for these impersonations would also be unlawful under the rule. So, there is a lot of talk about what would that mean for AI platforms if an AI tool is being used to engage in some of this impersonation behavior, whether it be companies, individuals. The FTC is saying that this proposal would have those companies on the hook as well if they had knowledge or reason to know that this was happening.

Mudge: Okay, you're right. There is a lot to unpack here, and then, so we know the rule as far as government and corporations is final. There is this proposal for this kind of me too or add-on part. And I know that comments for that are due April 30th. So, word from your sponsor, if folks are hearing this and they think there is something that they want to comment on, that is going to be your due date. But let's get back to the unpacking. So, this would be a huge expansion of a brand-new rule and as far as the individuals go, I mean, we see lots of ads using celebrity endorsers. I mean, could that actually be actionable?

Kaufman: In theory. Look, if you had an ad that was running with, let's say a celebrity impersonator, and it wasn't clear that it was an impersonator, that would potentially be a rule violation. I mean, it is sort of interesting. I know in most of those contexts, it is pretty clear in the ad that they're using an impersonator, but it introduces the FTC as an elements here as well that businesses would need to think about in this context.

Mudge: So, a celebrity impersonator that wasn't clear, you could have, the celebrity could have a right of publicity violation, but the FTC might get involved.

Kaufman: Yeah, it is a possibility.

Mudge: Alright. So, talk to me about what you mean by the extension of this liability to AI platforms. I mean that seems to be like everything that AI is.

Kaufman: Yeah. Look, I mean, there is a lot of discussion about AI platforms and these tools and the FTC has certainly been out there flagging that they're very concerned about these new tools being used to supercharge fraud. That is the phrase they've been using, and they are pushing to have these platforms do more to monitor and take steps to prevent their platforms from being used for bad purposes. So, I think that is the undercurrent we're seeing here, but it is challenging.

Look, there is no aiding and abetting liability under the FTC Act. But that said, you can have multiple parties who basically, through the same course of conduct, violate the FTC Act together. You think with data security case, well, yeah, the company had poor security. The hacker, of course, is also participating in the bad conduct by getting into the network and stealing data. Multiple parties can be at issue in an FTC Act, and that is part of what they're saying here. That, yeah, you've got the person who is doing the actual fraud with the impersonation. But if a platform is allowing this to happen with knowledge, then the FTC is saying you can also potentially be on the hook for this rule. And look, I'm anticipating that there is going to be a lot of comments filed on this specific issue because it is potentially a real big expansion of the FTC.

Mudge: Now, to be clear, there is no aiding and abetting liability under the FTC Act. It is there in the telephone sales rule which it expressly lists as that, but that is pretty rare. So how do we get here?

Kaufman: Yeah. Look, I mean, part of it is the FTC rulemaking is premised on unfairness and a lot of parties can be involved in the same transaction and that is part of what you're having here. I think back of the old Qchex case, where there is a platform where you could write checks and they allegedly did not have enough procedures and checks in place to prevent bad things from happening. And the court noted multiple parties can be involved in an FTC Act violation. It is the company that allowed this process to happen as well as the bad actor who is using checks for bad purposes. So, that is what they're trying to get at. But now here expressly, they would put aiding and abetting. So that is a different thing, and it would be an expansion of where the FTC traditionally lands.

Mudge: In the notice, they talked about how payment processors are really critical here. When you have this type of impersonator fraud, money changes hands and somebody is doing that. And this is probably an easier way not to have to show knowledge on the part of, say, payment processors or other intermediaries. I would think maybe easy to get more of the parties in the ecosystem into an investigation and maybe get penalties from multiple party.

Kaufman: Yeah. And I would say, Amy, also, when you think about, comments are being filed, they're due April 30th. I do think another issue that is going to come up a lot from the platforms particularly is the Communications Decency Act Section 230 and how that would interact with this kind of rule, where it generally absolves some of a lot of liability in a lot of these contexts. So, it is a very interesting issue of how 230 would play against a rule like this.

Mudge: And I'm going to bet the FTC will ignore that completely in whatever they pass, and we'll leave that to courts to decide. But yes, it is fascinating. I know the rule also specifically is predicated on having an effect on commerce, which of course, is what the FTC Act is predicated on as well. What does commerce mean in this context?

Kaufman: It is really broad. It is pretty rare that you see allegations that don't deal with commerce in some fashion. So, I wouldn't find too much solace in that. Any commercial transaction, interstate commerce, of course.

Mudge: All right. Well, that is terrifying. Well, let's talk about the areas where we think the FTC will most likely use this rule. Some, I guess that come to mind is where the FTC is, has already acted previously without this rule. Things like tech support scams, the government affiliation cases, like where a party puts itself out there as being related to the government somehow or maybe markets a government product. We certainly saw this in the COVID area with entities holding themselves out as being able to get COVID loan. It is not new news.

Kaufman: Yeah, you're right. A few years ago, there was an interesting case, *American Immigration Center*, where the FTC alleged the defendants there were selling immigration services in a way that created the impression that you were dealing with the government. From the URL that they were using, to the imagery of flags and presidential portraits, the FTC noted that small disclaimers that we used here indicating there was no affiliation with the government did not, of course, undo the misimpression of all those government kind of images.

Mudge: Yeah. And going back to that, that tech support is definitely a big area here. That is one that causes all of us, Ojeda, the scammers' claims to be affiliated with well-known companies that sell tech support services to less than tech savvy consumers. The calls in the middle of the night that your software has been hacked. But I know just recently the FTC announced a tech support case with a pretty big judgment. I think it was 25, 26 million dollars against a company that claimed a false affiliation with Microsoft and sold those computer repair services. So, I guess the question for you, Daniel, is, does the FTC really need this rule in order to get money especially in these kinds of really more classically fraud like cases?

Kaufman: Oh, Amy, that is the question. So, look, in 2021 when AMG happened, there was really hitting the red alarm button. The FTC's not going to be able to get money, but we've seen in the last three years, case after case, getting lots of money. So, there are some really valid questions to ask on do they really need a lot of these rules given their ability to get money through other means?

Now, I will say, as a former enforcer, it is a lot easier to get money when you've got a rule. When you've got a rule that is specific and you can easily point to it and not have to show unfairness or deception, you've got this simple rule. But I think the reality is in a lot of these areas, the FTC doesn't need these new rules and they're doing pretty well without it. Impersonation, much more of an FTC issue, but Amy, are there any NAD issues that come to mind for you in this context?

Mudge: Oh, Daniel, I so appreciate you asking me about the NAD because I know we tried to cover both. It would be a shoehorn fit here. The NAD really focuses on advertising cases. I mean, never say never, but not on really fraudulent cases. And then we've also seen some other cases where there are review websites that are set up to look like they're independent, but they're really run by a company. That sort of gets at the margins. But Daniel, we really want to give some takeaways for our audience on this one and in particular, give takeaways for our audience that we know aren't going to engage in tech support scams or

COVID scams but are really trying to figure out how to put this rule into context for doing the right thing.

Kaufman: Yeah. Look, I think in some ways it can be a bit of a trap. You see a rule like this, you're like, yeah, that is for scammers and fraud artists. I don't need to worry about it. But you kind of do. Look, a few messages to keep in mind, be really careful using government imagery. You want to make sure that by including photos of whether it is the Capitol or the White House or the President, you aren't somehow creating a false impression of affiliation. It is really important to keep that in mind.

Second thing, being creative in ads is awesome. But you want to make sure that whatever creative reaches you're doing aren't somehow going too far and suggesting some affiliation with another company. Of course, we're also getting into or are fully in the campaign season now, God help us all, but you want to be careful about spoofs and candidates in ads. You want to make sure the humor element is clear, but just look, be mindful this rule exists. It comes with penalties and the FTC will be looking for targets.

One other interesting thing I'll flag as we start to wrap it up, no one has challenged this rule yet. Once the FTC finalizes a rule, they can be challenged in a Federal Court of Appeals within, I think it is about 60 days or so. So far, no one has challenged it, we'll keep watching and see if that happens.

Mudge: And also, as a reminder, if anyone is interested in commenting, April 30th. April 30th, if we can help you out at all, please reach out and let us know. But with that we've reached the end of another episode of AD Nauseam.

Kaufman: Nauseam.

Mudge: Thank you so much for joining us.

Kaufman: Thank you for joining us, everybody.

Brave: Thank you, Amy and Daniel. If you have questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our ADventures in Law blog at www.adventures-in-law.com, and check out AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.