



Podcast Transcript

AD Nauseam: Native New Yorkers and Native Advertising

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Rubenking: 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 Randall Rubenking, 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 how the FTC has approached native advertising and what you need to know. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Kaufman: Thank you so much for joining us for another episode of AD Nauseum. Every other week, we turn off all our devices, our notifications, and we talk to you about some of the pressing advertising issues of the day. And today, Amy and I are going to shoot the breeze about the perennial issue of native advertising.

Mudge: Well, Daniel, I hope not everybody is turning off their devices or notifications because then, I guess, nobody is listening to us. But yes, for you and I for a few moments.

But native advertising, is it content? Is it an ad? How is one to tell, and who is going to protect consumers who might be confused as to what in the world they're looking at? Well, it is the FTC and the NAD, of course. Now when I think of native, what automatically pops into my head is, Daniel, I believe one of your favorite disco songs, the 1977 Native New Yorker by Odyssey.

Kaufman: It is a pretty amazing song if you know the score by now, you're a native New Yorker. I'm not going to sing it. I just can't sing it, but go on.

Mudge: Oh, please. Oh, Daniel, please, sing some more. Please sing some more.

Kaufman: I'm a native New Yorker. It is an old song I like. I was just a kid when it came out. It is a great tune.

Mudge: Yes, you were a mere 10-year-old child.

Kaufman: Oh, you're giving away my secrets. Oh no.

Mudge: Alright. Well, mine is Ring My Bell. I will also spare the world from singing it. But Daniel, you are a native New Yorker. You were raised, born, raised in Brooklyn no less. So, tell us, what do you love most about your hometown?

Kaufman: So, I love the fact that I grew up in New York. Like you just don't realize that that is not normal for the rest of the country to spend time in Manhattan and go to museums and the theater and all that stuff. So, I really loved growing up in New York. It is near and dear to me. I haven't lived in New York for many years, and I still consider myself to be a native New Yorker. So, I love the theater, and I'm not a food snob generally, but the pizza and the bagels. You cannot beat that. And every time I go back to New York, it is time for pizza. It is time for bagels. And how about you, Amy? I know you love the city also.

Mudge: You know what is interesting? Well, I do love the city, but I was not born and raised there. And I do feel like Eloise when I go there, just very small and not sure if I, but it is fun, but I love the same things too. Theater, pizza, bagels, and I love this time of year. I'm actually headed to New York tomorrow. It is that short period of time where it is not freezing, but it doesn't smell like garbage everywhere yet.

Kaufman: Yeah. The summertime odors in New York. That is just terrible.

Mudge: Absolutely.

Kaufman: Okay, so as much as I would love to spend the next 20 minutes talking about the joys and traumas of growing up in New York, and there is a lot of that. I think that is another podcast. But today, we're going to focus on the native advertising and it is one of those topics. It's been around for a long time.

Back in the 60s, the FTC raised concerns in an advisory opinion about print ads that were appearing in newspapers that resembled an article written about a local restaurant. It highlighted the food, the service, the prices, and the Commission decided that what was missing here was some clear indication that this was an ad. And they said it was okay to use formats like this, but the FTC specifically suggested using the word advertisement in clear type and sufficiently large to be readily noticeable.

And we started to see that for many decades, those magazine ads that have the word advertisement top center. The Commission did note, however, that there are some situations where the format of an ad may so exactly duplicate a news or feature article as to render such a caption meaningless and incapable of curing the deception.

Mudge: Yes. Advertisement or advertorial have been here for a long time. But Daniel, I think we need to be clear here that many times it is obvious when something is advertising. Alright? In the print ad, if there was an ad for the restaurant on the side, we don't need a badge to make that clear. But here we're really talking about when that content is created based on some kind of commercial relationship, and then it is just inherently interwoven with what people would consider to be the editorial content.

And the ads, and the next big development, though, because this has been a process with the FTC, I think, is the Georgetown publishing case from the mid-90s. Another fabulous decade, maybe not as good as the 70s or the 80s, but it is up there. When the FTC brought an action against a publisher that it alleged sent consumers what appeared to be an independent book review and it looked like it was torn out of a magazine. And then attached to the review there was a sticky note, a self-adhesive yellow note, with a handwritten, personalized message saying, try this, it works.

Kaufman: I mean, it was a pretty cool ad. It was a pretty cool ad when you think about it.

Mudge: Yeah. And in the FTC's press release, and this was a case brought during the legendary Jodie Bernstein days when she was the BCP Bureau director. Look, it said, look. This case highlights the growing trend of marketers to disguise their advertising as something other than a commercial pitch. And then went on to say it is a well-established principle that advertising may not deceptively mimic the format of editorial or news content so that an endorsement represented as being independent must truly be so. And the FTC noted, look, consumers rely on these independent reviews and endorsements when they're making their purchasing decisions, and then the, so what, the FTC said their decisions may be distorted if the information they're receiving is, unbeknownst to them, an advertiser's message.

Kaufman: So, I was lucky enough when I joined the FTC in 1998, Jodie Bernstein was the Bureau director, and it was really great. I was a staff attorney then. I got to meet her a few times, and got to see Jodie in action. And that quote really well summarizes why this is an important issue and why the FTC has literally focused on it for decades. But the next building block in the 90s was the blue blockers case where the FTC went after program length commercials after the FCC changed its rules and cleared the way for such things. The FTC stepped in and made it clear that in a 30-minute commercial, looked like a talk show, there had to be some sort of clear disclosure throughout that what was being watched was an ad.

Mudge: Yeah, talk show or news programs. Those were big when this stuff moved to video. But it really did take a new life of its own in the last decade or so when online publishers began accepting pieces that were written by brands, or they started writing content that the brands paid for. And that was the time the FTC expressed concern over whether that sponsored content, which is so ubiquitous now, but was kind of a new thing at the time, was sufficiently distinct from editorial content. Very similar to the concerns that were expressed distinguishing between sponsored and native search results with search engines.

But I will tell you, as an aside, the first time I was asked to speak about this was probably in the early 2010s. I got the speaking invite to talk about native advertising and legal implications, and I literally for a moment thought I was being asked to address Indigenous people appearing in ads, okay? This was very new at the time. Alright? I'm not as dim as this makes me sound, I hope. But I had done a fair amount of speaking then about how women were portrayed in ads and the legal issues that those things raised. So, I thought this was connected and related, but thankfully I figured it out before I had to give this speech. I didn't show up talking about the Indian on the Land O' Lakes butter but, which has since been removed. But it, we could talk about stereotypes in advertising another day. That is something, I'm not sure if it is as lengthy a discussion as your traumatic upbringing in Brooklyn, but we'll put it on the list.

But back to my speech. I did what we all do then, which is I said, alright. This is a new advertising technique. It is growing in popularity. It is a thing, and we're trying to figure out what the legal issues are. So, we look at what we know and really looking back to this history of how the FTC treated these advertorials and infomercials, and about what the potential consumer harms were when not realizing something is an ad is exactly how we start unpacking something new going back and looking at what we already know.

Kaufman: So, a lot of this line of thinking is described in the FTC's 2015 Enforcement Policy statement on deceptively formatted ads. And I actually really like that a lot of times these statements do go into the history and why things developed the way they did. And that statement, to be clear, covers native advertising but also influencers, endorsements, things of that nature. The report followed a 2013 workshop that had the very unfortunate name of Blurred Lines. We're not going to talk about that, but the main point of the policy statement was that the time-tested truth in advertising principles were driving the train here, and people online

and using social media needed to understand if they were seeing editorial content or an ad.

In short, the policy statement makes it clear that at its core, an ad's format can be deceptive if it is materially misleading consumers about the ad's commercial nature. The concept, pretty straightforward. But as you and I can both attest, it is a lot more complicated than it might seem. Now I know, Amy, I know we're focusing today about all of your speaking engagements. I think you spoke at the Blurred Lines workshop, didn't you?

Mudge: I did. And actually, though, I know you said we're not going to speak of it. I had actually heard the FTC staff lawyer named it Blurred Lines, was not aware that that was a song, let alone aware that that was a huge controversy at the at the MTV VMAs with Miley Cyrus and Robin Thicke. And was completely and blissfully ignorant to this entire thing that was unfolding around the workshop.

But yes, I did speak at that workshop, and it was absolutely terrifying. And why did I speak at that workshop? The FTC actually really wanted industry reps to speak, and P&G was there. But they had a really hard time finding other brands who were going to show up and talk to the FTC about this new thing. It seems a little bit like, we'll call it, breaking in the jail to share with the FTC what you're doing at the same time that the FTC is formatting their thinking about whether there might be a problem about some of this emerging sponsored content.

Now, as an aside, but I think it is related here, I, at the time when I was doing this, I called a bunch of clients, a bunch of friends, we're a small bar and said, hey, what are you doing? Are you guys involved in native advertising? And I was largely told, oh, no, we don't do that. In so many cases, a couple of days after I made this call, I got some sheepish calls back saying, oh, actually we do that, but I wasn't aware of it because it was being run out of the communications or PR group and not being routed through legal.

And I think one challenge that may be unique to native advertising, and I do think it still exists today, is that some of these sponsor placements feel like traditional PR and not like advertising. But connecting the dots here to make sure that paid placement is run through legal like any other ad, right? Because the FTC says these are advertising, this is advertising, regardless if the form is native. But there can be a real challenge to make sure that internally in companies that PR folks understand that paid placement product claims, they need to be substantiated, and things like that. So, you need to walk over and talk to legal when you have these opportunities for placing native.

Kaufman: And out of the workshop came the policy statement and business guidance from the FTC for native advertising. And we are always going to be cheerleaders for FTC guidance, whether it is business, whether it is consumer, and there is also a lot of useful FTC guidance in this area, although it is not quite as extensive as what we see regarding endorsements and testimonials. But there's some really helpful examples, and it really is a must-read if you are trying to develop a framework about how to avoid the potential sins of native advertising.

Mudge: Yeah, we do. I mean, it is good government for the FTC to put out this business guidance. And there's been so much attention, goodness knows we've talked a lot about the updated testimonial endorsement guides. The native advertising business guidance came out in 2013, and it is just, I don't know if it's stood the test of time, or it just hasn't been a particular focus, but there are some really interesting examples. And one I think is particularly relevant today is in the context of video games, right? And there is a lot here.

I'm going to read this example. It is a video game, immerses a player in a virtual world. While exploring part of the virtual world, a player sees billboards advertising actual products. The marketers of the advertised products paid the game designers to include the ads in the game. That billboards are advertising in this case is apparent to consumers, to the extent that the billboards are for actual products. Consumers are likely to attribute the ads to the sponsoring advertiser, and so no disclosures are necessary. However, the sponsoring advertisers would be liable for any deceptive product claims in the billboards. So, this example, in addition to being incredibly relevant today, ties together some key themes. If something is an ad, and it is clear that it is an ad, it doesn't need disclosure. But whether or not it is going to need disclosure, these things are all ads, and the content in the ads needs to be supported or substantiated like any other ad. It is also going to trigger some other IP considerations, but that is, I don't know if it is for another day, but well beyond what we're going to be able to cover.

Kaufman: And we continue to see FTC cases that touch upon the issue of native advertising. I thought the 2018 *Creaxion* case, which is, oddly has an X in the middle of the name. But it was really...

Mudge: Oh, I thought it was cree-aks-ee-yohn. Isn't it?

Kaufman: No, it took me a while to figure out. I think it was pronounced creation.

Mudge: Creation.

Kaufman: But a lot of the different players were involved in that case. There were influencers, there was a PR firm, there was a publisher all discussed in the case, and it was about promotions for a new insect repellent during the 2016 Zika outbreak. They had two gold medalists engaged as endorsers by a PR firm and a publisher, and the athletes were posting social media posts or testimonials and advertorials without disclosing that they were getting paid. The publisher then reposted the endorsements again without disclosure, and the publication also ran paid ads for the product that were also disguised as articles or features of interest to the readers.

So, there is a lot to digest in this *Creaxion* case. We had content disguised as editorial that was actually advertising, and the FTC order, among many other things, prohibit these guys from misrepresenting, that paid commercial advertising is a statement of opinion from an independent or objective publisher or source. The goal, of course, is to prevent the dissemination of deceptively formatted advertising.

Mudge: Alright. Well, but a few years later, then, the FTC, I don't think it is as sexy as Creaxion. But they brought a case involving infrared light therapy device that was supposed to alleviate pain. And, make no mistake, the FTC was very focused on those pain relief claims, which they said were not supported. But they also took issue with some native ads specifically that the company used or commercial content that was disguised as independent journalistic content. There was an exhibit to the complaint that showed an article, and it looked a lot like an article that you'd see about treating sports injuries. But it was a paid ad, and the complaint said, look, these articles that resemble the non-advertising content around them are just not identifiable as commercial advertising.

So, I think we've kicked those tires, but what was really interesting here is the FTC's order also said, if consumers or other people share these articles on social media, there is also no disclosure that will travel with the ad. So, not only do we have to think about is a piece of content itself advertising and have the appropriate disclosures. But we have to think because a lot of this stuff is, almost all this stuff is on social media, we have to think about that sharing aspect, and does any disclosure travel with the article?

Kaufman: So, Amy, we've been focused a lot on what the FTC has been doing in this space, and I know we're seeing more and more out of the NAD on these issues. So, what are some of the recent NAD matters that you think are worth highlighting?

Mudge: Yeah, there's been a bunch this year, actually. Now, NAD did have a lot of early cases before the FTC put out its guidance. And there was a lot of talk at that time, about 10 plus years ago, about native advertising, and I thought it was a really good use of the self-regulatory forum that the NAD said, look, we're more nimble. We can move more quickly than the FTC in terms of getting out guidance or certainly our policy statement. So, we're going to give some guidance while the FTC kind of figures this out. And this was something Laura Brett did when she was the staff attorney at NAD before she became director, and those cases are still, they pretty much stood the test of time.

But more recently, the NAD's brought a bunch of monitoring cases in the past year that focused on lists or recommendations where there are affiliate links. And we've talked about these in a few other podcasts. But I think it is, the idea is setting up an editorial wall, and figuring out what goes on either side is not always black and white. You can have an editor that is writing product reviews without any commercial engagement, but later a businessperson comes on in the back end and adds affiliate links so the publisher can get some revenue when there are sales made based on their reviews. And that's been something the NAD has really been trying to parse through.

I think one of the really interesting things and something that is just a little bit different is just in the last month, the FTC had a case involving amplifying content. So, we talked a little bit about the FTC's case about sharing content. This is when you try to get more eyeballs onto the piece. And the case was about, I hope I'm saying this right, Cariuma sneakers where there was content

about the shoes, alright. And on the publisher site, it was labeled as sponsored. In that context it was clear it was an article reviewing Cariuma sneakers. It was very clear that Cariuma was the sponsor.

But then when the publisher reposted or posted on social media about the articles to try to drive eyeballs back to its site, those social posts were also labeled as sponsored. But there, NAD said, you know, it is not clear here who the sponsor is, and that is important. It is not clear whether the publisher was sponsoring the social media post, or the sneaker brand was sponsoring the social media post. So, something also important even in the native advertising content like we've been talking about in the influencer side, sometimes saying sponsored or advertorial is not enough. Sometimes you have to say who is sponsoring or advertising the piece.

Kaufman: There are few guarantees in life, Amy, but I can guarantee we'll be seeing a lot more from both the FTC and NAD on the issue of native advertising. But let's not forget the kiddos because I am always one to remind us about the children audience. The FTC's recent report on self-advertising really highlighted that everything we've been talking about today goes double for kids and teens who may have an even harder time distinguishing between advertising and content. And one thing I really enjoyed about this FTC report, there were recommendations about how to avoid stealth advertising to kids and recommendation number one, do not blur your advertising. I appreciate guidance that is blunt and clear. Bottom line, if you are targeting kids, you have got to be especially cautious. And the FTC also emphasized that language and words that you use to disclose things to adults often will not work for kids. So the disclosure has to be something a lot clearer like, this is paid advertising that is designed to convince you to buy something. Kind of wordy. The FTC report is expecting much more rigorous disclosures to kids.

Mudge: Yes. We said that. There is a lot of issues here that mirror some of what we've said and what we'll continue to say about testimonials and the importance of these unavoidable, very clear disclosures. But let's leave you with a few takeaways to help you think through how you might process this native advertising issues a little bit differently, maybe, from how we think about testimonials. So...

Kaufman: Take it away, Amy. Take it away.

Mudge: Alright. So first, you really have to think, is there some blurring going on? Alright, and if there is, take some real steps to unblur that content. And it doesn't have to be disclosure. It could also involve changing the formatting or the presentation to make clearer that the commercial content is what it is and wouldn't be reasonably mistaken for nearby editorial content. So, a lot of different ways to fix this, fix the formatting or add a clear disclosure.

Number two, if you are using disclosures to indicate that your content is commercial, got to be that clear and conspicuous, got to be that unavoidable, and that is visual highlighting online in addition to a well-placed sponsored by

brand at the top is going to be best. And then number three, if your content is shareable, make sure you're thinking through when something goes viral, taking steps to make sure you're preventing blurring when the content travels, when the content is shared.

Fourth, similarly with amplification, consider if the disclosure needs to be more than, this is an ad, but if it has to be, this is an ad from X brand. So, I think in other words here, the disclosures might not be one-size-fits-all, set it and forget it. Different disclosures might be needed depending on where the content starts and then depending on where the content moves. Or where the content is placed versus who is placing it.

And last but not least, take a look at those agreements. There should be agreements in place between publishers, agencies, and the brands to make sure that any commercial content needs to be clearly labeled when necessary, and if the disclosures aren't clear and conspicuous, or if there are product claims that go beyond what the brand can support, that the brand has the ability to update and improve that content.

Kaufman: And with that, thank you so much for joining us for another episode of AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any 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 all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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