



CAN ADVERTISERS STILL BE CONTENT CREATORS?

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Even in a world of big data, advertising is, and always has been, focused on creative story telling. From account executives to brand managers, the key players in the advertising world have always sought to push the envelope with clever television ads, compelling print visuals, and catchy banner ad slogans. But in the digital age, the consumer has evolved and so has the manner in which they consume content. They are less likely to flip a page in a print magazine or tune in to a commercial, but rather they consume content through various social platforms and digital apps. Now, audiences expect more than advertising from brands; they are looking for brands to inform, educate, and surprise them in order for them to interact or spend time with the brand's advertising.

Cue the rise of the "content lab," where advertisers and their agencies become the content creators and the storytellers. "Content strategists" are the new account executives — and mini-films, social influencer interviews, and interactive shorts that weave a story around the advertiser products are the new TV spots. At some publishers, more brand and sales marketing teams are working with their editorial partners more than ever before. From digital magazines to branded videos seeded via influencer networks, advertisers are adopting native practices and developing more engaging and more editorial content that may be formatted to mimic the look, theme, and format of the publisher site or application so the consumer can easily interact with all of the content in an organic and seamless manner.

But there's more to the story when advertisers and their agencies embrace native advertising. It may be intuitive to think that good, valuable, relevant, consumer-facing content shouldn't be treated any differently simply because it was created in an advertiser or agency content lab, as opposed to being created by a newspaper or magazine. But the Federal Trade Commission (FTC) may disagree in many instances.

In recent native guidelines published in December — as well as a follow-up enforcement action against retailer Lord & Taylor — the FTC has made it very clear that the source of advertising content — in cases where it is not obvious to the consumer that they are engaging with advertising content — typically needs to be disclosed to consumers; that advertising content should not be misrepresented as editorial content; and that where consumers may be misled or confused about this, clear and conspicuous disclosures need to be included. In determining whether (and what) disclosures are necessary with respect to native content, the FTC will look at whether an advertiser paid for content, whether a claim is conveyed about the benefits or attributes of advertiser products or services, and the level of advertiser influence and control over the content, as well as the format of the ad itself. That means that your latest docuseries video featuring today's most popular Vine star talking about your products needs to be disclosed or distinguishable as advertising content before consumers decide to view it and are exposed to the advertising message — for example, through a clear and conspicuous label like "Sponsored Advertising Content."

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Moreover, as highlighted by the Lord & Taylor case, where disclosures are required, advertisers should be requiring publisher and influencer partners to include them. In particular, the FTC is (and has long been) particularly focused on campaigns that feature paid online endorsements — whether via celebrity spokespeople or teen influencers — must disclose their “material connection” to the sponsoring advertiser — i.e., the fact that they received something of value from the advertiser to post about certain products or services — in all their communications. So, if that same Vine star then shares out social posts about your products in connection with the video, those posts also need disclosures such as #sponsored or #ad or #paid.

If you’re a shoe company sponsoring an article about great running trails that doesn’t mention the brand’s shoes or other attributes of the brand products, maybe a disclosure isn’t necessary — though a “Presented by” or “Sponsored by” disclosure may be helpful not only in tying the content to the brand from a business standpoint, but also in accurately describing the relationship from a legal and regulatory view. Advertisers in conjunction with their counsel will have to determine when and if disclosures are appropriate under the native guidelines when an advertiser funds editorial content.

Ultimately, the FTC has stated in the native guidelines that disclosures will depend on the “net impression” of the content, which includes its theme, headline, and formatting (the more similar to surrounding content, the more crucial the disclosure), and will also depend on the degree to which the advertiser created or influenced the content (which may include heavy involvement in curating the content).

Agencies, publishers and advertisers alike should all take heed of the principles of transparency, monitoring, and enforcement when creating and placing native advertising content. Advertisers can be content labs — as long as consumers know where the content came from and, of course, as long as the content is engaging.

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