

Defining Native Advertising

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Advertising generally is a paid insertion of a brand's message into content published by another party. Any paid media insertion has to conform to the physical limits and requirements of the medium into which it is placed. Good advertising is compatible with the medium and adjacent content, and it engages and serves the relevant audience. New technologies and the need for traditional media to compete for

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advertising dollars with online media and new consumer touch points has opened up new and more efficient ways for brands to seamlessly place their messages into the flow of information and content. Software is available to convert advertising into the look and feel of the editorial content of particular online media. This has resulted in concerns over whether consumers are being confused or misled about the nature of the messages conveyed.

The Federal Trade Commission (FTC) convened a workshop on the

subject of brand integration of messages into content, but prejudged the issues by calling the workshop "Native Advertising." In calling it "advertising," the FTC implies that it is lesser content—content that readers are trained to avoid as less valuable and reliable and perhaps misleading and untruthful. The FTC also described the new developments in media accommodating brands as "the blending of advertisements with news, entertainment, and other editorial content in digital media," and noted that it may also be known by the names "custom content," "brand journalism," or "advertorials," among others. But by favoring "native advertising" as the label, the FTC telegraphed its desire to regulate and require disclosures. A major problem for brands seeking to bend to the FTC's inclination for labeling this content as "advertising" is that the label may be all that is required to strip the content of First Amendment protection against claims of copyright and other infringement, and especially right of publicity claims.

Much of the discussion of native advertising has been muddled by two distinct issues: (1) curation—the degree to which the apparent editor or author was influenced to select the content (commonly disclaimed as "sponsored content"), and (2) integrity—the degree to which the content itself was influenced by anyone other than the apparent editor or author (commonly disclaimed as "sponsor content"). The law requires adequate communication of the information necessary to consumers' understanding of any material connection between the author of the content and someone seeking to influence consumers' purchasing decisions. This required communication is often hampered by the attempt to meet the less important (and perhaps impossible) task of also communicating influences over curation. The mission is to achieve the best user experience and most effective communication and acceptance of the message, while at the same time

communicating all information about the genesis of the content that is material to consumers and not already understood by them. The challenge is that consumers' understanding of the curation process of various new and digital media offerings is evolving at a rapid pace.

The only thing that is clear about native advertising is that myriad ways in which advertisers may influence the selection and integrity of content in digital media is far too complicated to effectively be communicated simply by disclaimers. Publishers and advertisers will have to change the ways they accommodate these concerns and legal requirements as the media and technology evolve and consumers' comprehension of the sources and influences over publishers' offerings develop over time.

Curation and Sponsorship of Content

In the modern age, there are a near infinite number of sources of news and information. Trusted media offer tremendous value as curators of the flood of available content, and they understandably want to preserve a distinction between what they choose on the merits and what they publish for other reasons, e.g., "sponsored." Conversely, many readers would like to know whether the editor of a publication or website was influenced by something other than pure editorial judgment in selecting specific content, but the fact is that virtually all content is sponsored (or supported) on some level by either (1) a patron, (2) advertisers, or (3) subscribers. Thus, the editor's selection is subject to some degree of influence. Pressure to monetize content while competing with venture-backed content sites that have no such need (patron-supported content creators) has driven publishers who cannot survive on subscription revenue to further accommodate native advertising.

New digital media are also developing and publishing content without promising independence from the

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influence of sponsors or patrons on their curation choices. The law does not yet require a warning to readers to protect their interest in not wasting their time on content that has not been curated by a trusted source, at least where there is no likelihood of influencing a purchasing decision. However, trustworthy curation significantly contributes to audience loyalty, size, time of engagement, and successful communication. Thus, quality publications have a substantial interest in effectively communicating the degree of sponsor or patron influence as part of positioning the medium in an extremely competitive marketplace. The degree of influence may vary from a sponsor purchasing advertising to providing financial support without conditions. The consumer needs to know whether to trust in the information, but requiring specific communication about the degree of sponsor influence over the curation of the content may be asking too much.

It must be possible for brands to communicate valuable information and brand-building content that is not burdened with a signal or disclaimer that more or less communicates that the consumer should avoid or distrust the content. Given the rapidly expanding variety of native advertising vehicles, better and more “native” communication of sponsorship (as opposed to ineffective disclosures) will be required. As consumers become more sophisticated about the different connections between brands and content, it will become increasingly valuable to be able to identify an author or source of the content rather than simply labeling everything as “sponsored content.” Recognizable sources of content that can be communicated by a byline or as an integral aspect of the content, as opposed to a generic disclaimer, will be a valuable means of providing the consumer with the necessary context, including the degree of independence of the author or source. Given the opportunity to experiment with means of communicating the integrity of the source, the authenticity of the expertise, and the degree to which the source is independent or invested in its own reputation, advertisers should find ways to effectively communicate necessary information without relying on stock disclaimers.

Liability Concerns

There are two conflicting liabilities that advertisers and media face in handling native advertising: (1) liability for failure to disclose a material connection between the author and someone seeking to influence consumers’ purchasing decisions, and (2) additional liability that may be imposed when editorial content is labeled advertising so that it becomes “commercial speech” with less First Amendment protections—e.g., the fair use defense in copyright, and protection against right of publicity claims. Overzealous labeling of content as commercial in an effort to communicate even immaterial influences on curation and content may trivialize the label but still create the additional exposure to liability that attaches to commercial speech.

The definition of commercial speech begins with speech whose sole purpose is to propose a commercial transaction,¹ but it may extend to include any speech by a company that sells products or services and seeks to influence how consumers view the company “for the purpose of promoting sales of its products.”² The “commercialization” of content affects the application of First Amendment defenses.³ It can provide the basis for a right of publicity claim,⁴ and it may impact the fair use defense against copyright infringement claims⁵ and trademark infringement or “dilution” claims.⁶ Even allowing commercial content to merely reference editorial content in a publication that includes both can give rise to a right of publicity claim by anyone whose name, biographical information, or even “persona” is included in the content.⁷ Both the media catering to advertisers who seek to influence the content of otherwise “editorial” speech and the advertisers who seek to influence the consuming public may incur significant liability from crossing over from editorial to commercial speech.

The problem of these competing liabilities is illustrated by the longstanding practice of media selling the placement of advertising adjacent to editorial content especially compatible with the brand’s message. For example, *Rolling Stone* magazine faced litigation by rock musicians,

who argued that the editorial content in which they were mentioned should be considered “advertising” because *Rolling Stone* sold the adjacent advertising space based on the nature of the content.⁸ In that case, the advertiser purchased a “butterfly” gatefold, where the editorial content can be viewed only by opening up the surrounding advertising pages to reveal the four-page fold-out of the content spread inside. In the context of the defendants’ anti-SLAPP motion, the court held that the content was not advertising and the magazine was not subject to a right of publicity claim by the musicians so long as the editorial content was in no way influenced by someone “engaged in the sale or hire of products or services.”⁹ The court noted the magazine editor’s description of the wall between the editorial and advertising staff, the purity of its editorial writing and functions, and the court’s own conclusion that the advertising was entirely different in look and feel. The specific facts that the court relied on in dismissing the claim that the content was advertising in disguise are rather dramatic and, if viewed as essential, would set a high bar for avoiding these types of right of publicity claims in the future:

1. Although informed of the subject of the feature, the advertiser was not told of the specific content;
2. There was no evidence that anyone at *Rolling Stone* (or the advertiser) had any concerns that the advertisement and the feature would be perceived as an integrated whole;
3. The advertiser had no input into the content, design, or look of the feature;
4. The advertiser did not review or approve the feature; and
5. The editorial staff who created the feature at the time of creating it was unaware of the advertiser who would appear on the surrounding pages.¹⁰

In short, the court embraced the “industry practice” of a “wall” between editorial and advertising staff “to ensure that there is no advertiser influence or

pressure on editorial independence.”¹¹ This is not to say that all of these standards must be met to avoid liability for a similar commercial appropriation claim, but one can expect plaintiffs will likely argue this very high standard.

The “wall” between editorial and advertising is crumbling. Advertisers increasingly have knowledge of the editorial material in which their content will be placed. Virtually all media are now creating and accepting some type of native advertising. Digital media are monetizing content with links and revenue share arrangements. New technologies increase the risk of claims based on the commercialization of editorial content. When “advertising” was created exclusively by advertising agencies, the advertisers and the media were indemnified by the agencies with errors and omissions insurance covering this liability. Now, native advertising is often created by the media in which

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it appears or by the advertiser on its own. Advertisers must consider that they are now publishers of content, and they may be solely responsible for the clearance of rights. Media, accustomed to the First Amendment protections afforded to editorial content, face similar potential liability in connection with creating advertising. Thus, using the term “native advertising” in presupposing that brand influence equals “advertising” is not a good solution for media or for brands.

“Native Advertising”

The monetization of content necessary to publishers’ survival in the digital

space is relentlessly driving the media to take into account the needs of advertisers. Revenue sharing for digital media referring consumers to commerce sites may be essential to being competitive. Some instruction or at least sharing of data between the staff responsible for creating “digital advertising” and the editorial staff who understand the audience and the tolerance of the entity for native advertising is inevitable. While it is a short hop from creating content that generates a hospitable environment for the advertising of a particular product or category to creating actual advertising for that product, media companies’ producers, authors, and editors (unlike advertising professionals) have been accustomed to the warm embrace of First Amendment protection against claims from people who see themselves in the editorial material created for advertisers.¹² Advertisers’ bolder efforts to make advertising compatible with the look and feel of the editorial content, make it function in tandem with the editorial content, and tie it into web links and interactive content all create additional causes for concern.¹³ Even an agreement by a magazine to feature a product in its editorial content in exchange for purchasing advertising space could create a right of publicity claim by someone featured in the editorial content.¹⁴ The *Rolling Stone* case suggested that even e-mails expressing caution about editorial content being perceived as part of the adjacent advertising might be grounds to question whether there was sufficient separation between content creation and the influence of advertisers.

Online media that integrate brand messaging and facilitate online purchasing need to effectively communicate whatever information is material to a consumer’s understanding of the relationship between the content and the commerce. New and developing technology and interactivity create challenges to this effective communication. Brands must be sensitive to their potential liability when media are willing to experiment with new technology for integration of brand content, including the ability to digitally match the look and feel and even colors and fonts of online media. Publishers can communicate the overall context in which sponsored content is presented.

This context may be the most effective means of communicating both the influences on curation and on the author of the content.

Corporate Communications

In an increasingly distant past, corporate counsel could rely on the professional expertise (and indemnification) provided by advertising agencies that were the exclusive source of the brand’s advertising. In the past, it was typically assumed that whatever was financed out of the marketing department budget was advertising, and some other lawyers were responsible for identifying the risks and liabilities. It is dangerous to rely on this assumption or even the indemnification contained in form “vendor” agreements that are favored by procurement departments. Today, these “vendors” are often small creative or digital boutiques that have no lawyers or insurance, and simply sign forms as required. In addition to the “advertising” created by a variety of sources as well as the media, brands internally generate substantial content that may increasingly fall under FTC scrutiny as advertising. The simplistic solution of slapping an “advertisement” label on everything may cost the brand dearly in increasing exposure to liability for corporate communications.

The content of brand websites generally is entitled to the same First Amendment protection as any other editorial content.¹⁵ Even a website that includes opportunities to purchase products may contain “editorial” content fully protected by First Amendment principles alongside commercial content that sells products.¹⁶ It may be possible to enrich a brand’s website with content that does not have to be labeled “advertising” even where it is supported by an entity that seeks to influence how consumers view the brand. Any connection between the author and the brand must not be material to consumers’ purchasing decisions, and the editorial content must be separate from the commercial content so that a person whose name or picture is in the editorial content cannot successfully claim that he or she has been used for a commercial purpose.¹⁷ The independence, integrity, and trustworthiness of the author or organization responsible for the content are what

provide the value of the content, and presumably the ability to retain First Amendment defenses. However, public relations professionals accustomed to supplying content to First Amendment-protected media may be surprised by a claim that brand website content is deemed to give rise to publicity rights claims.¹⁸

One major problem facing brands is the presentation of consumer endorsements. The FTC's recent revision to its "Guides Concerning the Use of Endorsements and Testimonials in Advertising"¹⁹ requires advertisers to ensure disclosure of their influence over any otherwise seemingly independent media or blogger who writes about their products. Bloggers and loyal customers may provide compelling support for brands, but they often have no sensitivity to copyright principles and rights of celebrities. Inviting or allowing consumers to create or manipulate content may result in content that is the basis for claims against the publisher or brand, including claims that it constitutes advertising.²⁰ Both advertisers and publishers need to be wary of the extensive use of interactive advertising and promotion. User-generated content may itself be a form of native advertising. Once this content is deemed to be advertising, there is the additional risk that a person or entity who is referenced in the content may claim under the Lanham Act that there is a likelihood of confusion over whether they approved any association with the content.²¹ Media may also be held accountable for failure to disclose a material relationship, not otherwise apparent, between the brand and a review or endorsement contained in an article or other content.²² This obligation is not met merely by labeling the content as "sponsor content" or even as "advertising."

Disclosure

The ability of brands to integrate their messages into online and social media prompted the FTC to revise its endorsement guidelines to emphasize that they apply to all digital media.²³ The cardinal principle of these guidelines is that any connection between the apparent speaker and a brand material to a consumer's purchasing decision must be clearly and conspicuously disclosed.²⁴ However, the reliance

on blanket disclaimers is inadequate to the task, and imposing a legal requirement to disclose all influence over the selection of content merely to protect consumers from giving their attention to native advertising may unjustifiably interrupt the "user experience." A potentially negative sounding label that implies that the content is unworthy of consideration (i.e., that it is tainted by advertiser involvement) may not be necessary where there is no claim or information that is likely to influence consumers' purchasing decisions. Advertiser and brand influence is flowing over and around editorial content in an effort to create engaging and interesting online content that can support the costs of content creation. Whatever information is necessary to protect consumers is best communicated as an integral part of the content. Disclaimers should be relied on only as truly necessary.²⁵ They should not be required in every instance of influence over selection of subject matter. The independence of curation may be best left to the publishers' marketing strategy and contextual choice.

Disclosure of Material Connections

Any connection between an endorser and the endorsed brand or product, at least where it is likely to effect the weight or credibility of the content, must be disclosed. "Astroturfing," or phony grass roots advertising where employees or persons hired to do so pose as consumers and post positive reviews about a company, is deceptive.²⁶ Paying an otherwise independent author to publish content pertaining to a product or service may trigger a need to disclose the consideration. In a letter closing an investigation into gifts provided to bloggers, the FTC said that it was "concerned that bloggers . . . failed to disclose that they received gifts for posting blog content."²⁷ The FTC also suggests that a blogger's future expectation of support or consideration, including the continuing supply of valuable samples or other free items or perks, may be sufficient influence over the blogger to constitute a "material connection" to a company that should be disclosed.²⁸

The FTC endorsement guides include various examples of when a connection between an advertiser and

an endorser need not be disclosed. A material connection between a brand and the content is one that might influence the consumers' purchasing decisions or the weight that they would give to any information or recommendation. No disclosure is necessary where the consumer understands the connection. For example, compensation to a celebrity for an endorsement, regardless of whether

No disclosure is necessary where the consumer understands the connection.

the payment is in the form of an upfront cash payment or royalties based on sales, ordinarily does not need to be disclosed, because such compensation likely is expected by viewers.²⁹ However, the celebrity should still disclose the connection when posting content related to the product if there are a significant number of readers who are not aware of the connection.³⁰ An athlete who appears on a television talk show wearing obviously branded clothing does not need to disclose a connection to the brand if there is no claim about it. However, if he or she endorses a product, disclosure may be necessary if the connection to the brand is not well known—on Twitter, for example, disclosures such as "#paid ad," or "#ad" may be sufficient. Experts are generally understood to be compensated for appearing in advertising, and their interest in maintaining their own credibility and integrity is what informs consumers' reliance so that disclosure is not necessary. However, if a royalty is payable to an expert endorser, unless it is otherwise obvious, it must be disclosed.³¹

The consumers' comprehension of a brand's role generally determines whether any disclosure is necessary. Thus, not every instance of native advertising may require a disclosure. Most significantly, for example, product placements in films do not trigger an obligation to disclose the connection, at least where there is no claim about the product.³² In a recent case decided

by the National Advertising Division (NAD) of the Council of Better Business Bureaus (the leading advertising self-regulatory agency), Mashable.com disclosed that an article was “sponsored content” while an advertiser paid for the content to be up on the site, but took down the disclosure when its editors chose to continue to post the content after the sponsorship ended.³³ The NAD said this was proper as long as the content was no longer sponsored. The fact that the editors were influenced to create the content they were now including without being paid to present did not require a disclosure.

While brand integration into content can be encouraged in many ways that do not require the content being denigrated as “advertising,” there will be substantial regulation and liability risks when done without attention to how the content is presented. The positive review of a product selected by the writers, producers, and editors of content, even where there has been communication with the brand’s representatives, has long been viewed as permissible. However, brands insisting on dictating specific claims may incur significant risks and liabilities, and may need to consider effective disclosure of their involvement when the advertiser influence over the content is not clear from the context. But, if that disclosure is simply to label the content “advertising,” it may solve one problem but create liability and undermine various First Amendment protections for the content.

Best Practices

The current stock disclosures do not convey the many degrees of advertiser involvement that are possible, and simply adding simplistic disclaimers that are often not perceived does not accomplish what is necessary or preserve the brand’s relationship with its customers. The first question is: What connection is significant enough to be considered material to the consumers’ willingness to rely on the information in connection with making a purchasing decision? The more the necessary information is communicated without reliance on confusing or stock disclosure, the better. Making disclosure “native” to the piece will make its communication that much better and more effective. A byline can include the author’s title, employer,

and credentials. It may be necessary to disclose that the content was commissioned by an advertiser, but this may be avoided where an author is regularly supplying content that readers know is sponsored.

Just using “sponsored content” as a disclaimer is probably not sufficient to cover everything from placement of advertiser-created content about a product or service (an advertisement) to an advertiser merely subsidizing a regular feature in a publication that is wholly controlled by the publication’s editors with the only stricture that the content be relevant to a particular subject. (The sponsor will want credit for providing a service to readers, but that should not become a label communicating that the content is not worthy of consideration.)

The industry over time will develop better insight into consumers’ expectations and understanding of native advertising, and consequently the best means to communicate relevant information as to the differing degrees of brand involvement. Because there is hardly any media left where editorial content is completely walled off from the influence of the “publisher” and ad sales, a rule that any content influenced by the other departments must be labeled as “advertising” or “sponsored” could ultimately result in these labels being attached to all content and thus becoming meaningless. In addition, the public interest would be ill-served if regulation disadvantaged legacy media dependent on brand support that are struggling to compete with “startups” that do not have to monetize their content as they burn through investor cash.

The consumer is king, and the ecosystem will evolve in response to the different consumers’ value propositions. Regulation that is inconsistent with this reality will ultimately be irrelevant. Rather than blanket labels, advertisers will need to let consumers decide what is material and therefore what information needs to be provided. In this ecosystem, brands will strive to provide consumers relevant, truthful, valuable information and content without negative disclaimers. The curators of content will strive to assemble this content in a context that provides consumers with any information that is material to their purchasing decisions, without sacrificing the

curation role of the media and without the need for a “disclaimer” that undermines the value of the content. The consumer (“user”) will decide whose curation and user experience has value. Disclaimers like “sponsored content” and “sponsor content” may be an adequate stopgap, but they are inadequate to meaningfully communicate the context and relevant information appropriate to the rapidly evolving content and distribution platforms in the digital world. **■**

Endnotes

1. *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986).
2. *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002); *see* CAL. CIV. CODE § 3344(d).
3. *See* *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 352–53 (N.Y. 1985).
4. *See* *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580 (N.Y. 1984).
5. *See* 17 U.S.C. § 107(1); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
6. *See* *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39 (2d Cir. 1994).
7. *See* *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001).
8. *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98 (Ct. App. 2010).
9. *Id.* at 115.
10. *Id.* at 118.
11. *Id.* (internal quotation marks omitted).
12. *See* *Robinson v. Snapple Beverage Corp.*, 55 U.S.P.Q.2d 1501 (S.D.N.Y. 2000) (content promotion becomes a commercial).
13. *See* *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007 (3d Cir. 2008) (sponsored documentary becomes a commercial).
14. *See* *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580 (N.Y. 1984).
15. *See* *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694 (Sup. Ct. 1995) (holding advertising of website content entitled to the exception to right of publicity claims for truthful advertising of media content).
16. *See* *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315 (S.D.N.Y. 2006), *aff’d*, 279 F. App’x 40 (2d Cir. 2008).
17. *See* *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001) (holding defendant not entitled to First Amendment protection for publishing 30-year-old surfing competition photograph in its surf-themed catalog). The case may be limited to its facts in that the catalog not only offered

for sale clothes like the clothes worn by the surfer in the picture, but also arguably lost its First Amendment protection because the statement about the surfer being part of the early California surfing scene—what was relevant about the picture—was false. Thus, the surfer could claim that the picture of him was both commercialized and “false,” yielding two strikes against First Amendment protection.

18. *See* Yeager v. Cingular Wireless LLC, 627 F. Supp. 2d 1170 (E.D. Cal. 2008).

19. 16 C.F.R. pt. 255.

20. *See* Doctor’s Assocs., Inc. v. QIP Holder LLC, No. 3:06-cv-1710, 2010 WL 669870 (D. Conn. 2010) (recognizing that user-generated content may become the advertiser’s content).

21. *See* Burck v. Mars, Inc., 571 F. Supp. 2d 446 (S.D.N.Y. 2008).

22. *The FTC’s Revised Endorsement Guides: What People Are Asking*, BUREAU OF CONSUMER PROT. BUS. CTR. (June 2010), <http://www.business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guides-what-people-are-asking>.

23. Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials

(Oct. 5, 2009), <http://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>; *see* 16 C.F.R. pt. 255.

24. The FTC has also indicated that it is only permissible to use an endorser’s statement when the endorser holds the opinion and the endorser’s experience is typical of what the average consumer can expect. If the endorser’s experience is not typical of the average consumer, there likewise must be disclosure. 16 C.F.R. § 255.1(c).

25. *See* Letter from Mary K. Engle, Assoc. Dir. for Adver. Practices, Fed. Trade Comm’n, to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005), http://www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf [hereinafter Commercial Alert Closing Letter].

26. *E.g.*, *In re Lifestyle Lift*, Op. N.Y. Att’y Gen. (June 5, 2009), *available at* http://i.usatoday.net/money/_pdfs/cosmetic/lifestyle-settlementpdf.pdf; *see* 16 C.F.R. § 255.5.

27. Letter from Mary K. Engle, Assoc.

Dir., Fed. Trade Comm’n, to Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom LLP (Apr. 20, 2010), http://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf.

28. *The FTC’s Revised Endorsement Guides*, *supra* note 22; *see* 16 C.F.R. § 255.5 ex. 7.

29. 16 C.F.R. § 255.5 ex. 2.

30. *Id.* § 255.2 ex. 2.

31. *Id.* § 255.5 ex. 4. An advertiser may commission research on a product by an outside organization which then publishes its findings. However, even if the project is controlled by the organization, if the weight that consumers place on the results could be materially affected by knowing that the advertiser had funded the project, the funding should be disclosed.

32. *See* Commercial Alert Closing Letter, *supra* note 25.

33. Qualcomm, Inc. (Snapdragon Processors), NAD Report No. 5633 (Sept. 20, 2013); *see also* eSalon (Custom Formulated Hair Color), NAD Report No. 5645 (Oct. 17, 2013), *available at* [http://op.bna.com/sml.nsf/id/mlon-9cwjs9/\\$File/Custom_Formulated_Hair_Color.pdf](http://op.bna.com/sml.nsf/id/mlon-9cwjs9/$File/Custom_Formulated_Hair_Color.pdf).