

2016 AELJ SPRING SYMPOSIUM:

NEW IMPRESSIONS ON ADVERTISING LAW♦

INTRODUCTIONS.....	555
PANEL 1: FALSE ADVERTISING.....	557
PANEL 2: NATIVE ADVERTISING	580

INTRODUCTIONS

TATSUYA ADACHI*

Tatsuya Adachi: Good morning, everyone. And welcome to the 2016 AELJ Spring Symposium. My name is Tatsuya Adachi, and I am Editor-in-Chief of the thirty-fourth volume of the *Cardozo Arts and Entertainment Law Journal*.

First, it is my distinct pleasure to welcome our esteemed panelists for the day, who are some of the most influential scholars and practitioners in the field of advertising law. It is certainly a privileged opportunity for us to gain your insights into the fascinating legal challenges presented by the evolving landscape of the advertising space. Many thanks to you all for your contributions today.

I would also like to acknowledge some of the folks who are

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* Tatsuya Adachi, Editor-in-Chief, *CARDOZO ARTS & ENT. L.J.* Vol. 34, J.D., Benjamin N. Cardozo School of Law, Class of 2016.

556 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

responsible for putting together today's program. I would like to thank the Cardozo Intellectual Property and Information Law Program, as well as Cardozo's FAME Center for providing their support. And thank you to Professor Brett Frischmann, AELJ's faculty advisor, and Professor Felix Wu, who each helped develop the content for today's discussions and will be moderating our panels.

Also with us today is AELJ's staff. First, a huge thank you to Stella Silverstein, our Symposium Editor, and Katherine Dineen Smith, our Managing Editor, who have expertly overseen the planning and execution of today's event.

And finally, a big thanks is owed to the AELJ staff and editorial board in general for their contributions to AELJ throughout the year. These are some of the most dedicated and talented people I have ever had the pleasure to work with.

We are quite honored to have a broad base of support contributing to AELJ's proud legacy and it is because of that that AELJ continues to maintain its position as one of the top-ranked intellectual property law journals in the nation.

And now I would like to turn your attention to our first panel of the day, moderated by Professor Brett Frischmann. Professor Frischmann is Director of the Cardozo Intellectual Property and Information Law Program. He is a prolific author whose expertise is in intellectual property and Internet law. Professor Frischmann holds a B.A. in Astrophysics and M.S. in Earth Resources Engineering from Columbia University and a J.D. from the Georgetown University Law Center. Please welcome Brett Frischmann.

2016]

SPRING SYMPOSIUM

557

PANEL 1: FALSE ADVERTISING

ASHIMA A. DAYAL*

JEFFREY A. GREENBAUM*

JEN LAVIE*

REBECCA TUSHNET*

BRETT FRISCHMANN (MODERATOR)*

Brett Frischmann: Good morning, everyone. Welcome to Cardozo and thank you for the wonderful introduction, Tatsuya. Before we get going I would like to thank again all of the AELJ staff for putting together such an excellent symposium. This is really going to be a fantastic day I think. I am going to moderate the first panel. Here is the plan. I will give a very brief introduction to our four speakers. You would rather hear from them about false advertising than from me about them. Detailed bios are in the materials. Each of them will have about 10 to 12 minutes to give their remarks. I will ask a few general questions after that to the panel and then we will open it up to Q&A. And when we do Q&A there will be a microphone going around so just raise your hand and we will get you the microphone so everyone can hear questions.

We are going to proceed left to right. First up is Jen Lavie 2001 Cardozo graduate. Jen is a partner at Manatt, Phelps, and Phillips. Next is Jeffrey Greenbaum. Jeffrey is Managing Partner at Frankfurt Kurnit Klein & Selz. After Jeffrey we will hear from Rebecca Tushnet, a professor at Georgetown Law. And then finally we will hear from Ashima Dayal. Ashima is a partner at Davis and Gilbert. As their lengthy and incredibly impressive bios demonstrate all four of our speakers are leading experts in advertising law and so we are in for a treat because our panel happens to be about false advertising. If you listen to this entire panel your health will probably increase. To focus this discussion we decided to center the discussion on the D.C. Circuit's 2013 decision on POM Wonderful Versus the FTC. In case you missed it the AELJ has copies of the decision and some discussion of the decision and the materials if you want to take a look. And Jen is going

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to start us off by getting us into the case.

Jen Lavie: Sure. Thanks so much, Brett. I am happy to be back at Cardozo. The building looks really beautiful. I don't recognize it. It looks totally renovated so it is exciting to see. So you all know the POM Wonderful juice bottles. It contains pomegranates and this company POM Wonderful, they manufacture the POM juice and also various dietary supplements. So from 2003 to 2010 they had these ads that touted medical studies showed that daily consumption of their POM Wonderful products could treat, prevent, or reduce the risk of various ailments such as heart disease, prostate cancer, and erectile dysfunction.

In 2010, the Federal Trade Commission filed a complaint charging POM Wonderful made false misleading and unsubstantiated claims in violation of the FTC Act. The problem is that POM Wonderful—although they spent 34 million dollars on these studies to try to prove that their products would treat or prevent these diseases—their studies were not sufficient. So what was wrong with these studies? Well, the study to show that it could prevent prostate cancer, the patients who took the pomegranate juice; the study wasn't even actually done on their POM juice. It was only done on the concentrated pomegranate juice, an ingredient in POM juice. So the patients who took this concentrated pomegranate juice, they had already been treated for prostate cancer or they actually had their prostate removed. So you can't really say that their prevention of prostate cancer was from the pomegranate juice that they took. That study was insufficient. Another study was for erectile dysfunction. There are two measures that the industry uses to see if there is an improvement with erectile dysfunction, and although this study showed 75 percent likelihood of achieving some good results with the pomegranate juice, they used the measure that the industry does not accept as reliable. Another study that was insufficient.

The other studies were done for cardiovascular health. Can pomegranate juice prevent heart disease? They had to measure the thickness of the carotid artery. The thicker that this artery is, the more likelihood that blockage will occur and a heart attack can happen. They had patients take the pomegranate juice and then they measured the thickness of the artery. Although there was success with this study, the results said that there was up to 30 percent likelihood of reducing that thickness in the artery. The sample size was too small. Generally it is good to have at least 30 patients in a sample. So they did a second study. If your first study is strong and good then you should be able to do a follow up study and repeat the same results. This time they used 73 patients, a much better and larger sample size, but this showed there was no significant statistical difference between the group that consumed the pomegranate juice and the group that consumed the

placebo juice. They did another study with 289 patients, but again it did not show any difference between the group that took the pomegranate juice and the group that took the placebo juice. Because the ads touted that medical studies show that the products prevent these ailments, the FTC ordered POM to cease and desist making these misleading and unsupported claims about the health benefits of these POM products.

So POM didn't like that and they appealed to the U.S. District Court of D.C. The court agreed with the FTC. The FTC has a lot of expertise in evaluating these studies and the court did not see any reason to set aside the FTC decision that these claims were not sufficiently supported. The victory for POM Wonderful, I mean it wasn't much of a victory really. The FTC won because the District Court said that these studies are not sufficient and you do have to cease and desist from making these claims. But POM won because the FTC had said that you have to have two randomized clinical trials for each of your claims. And the court said you don't have to have two, you just have to have one very good one. And so the advertising world took a sigh of relief that they don't have to have two studies for all the disease claims. One good one is enough. Of course POM didn't have one good one for the claim so they still did have to stop but that is basically a summary of what happened with the case.

Brett Frischmann: Yes. We can pass it over to Jeff.

Jeffrey Greenbaum: Thanks. . .it is really fun to be here. I have to admit I have never been here before. I have lived two blocks away for about the last 20 years, so it is amazing to finally be inside. Tatsuya and Stella, thanks for inviting me. It is great to be here with one of my former colleagues from Frankfurt Kurnit, Tatsuya Adachi.

I am thrilled to be sitting on the panel next to Rebecca. First, if you don't read her blog, you should. It is one of the smartest advertising law blogs out there. Anything that I say really smart today is probably stolen from her blog. Second, because I am sitting next to somebody who is such an expert, I feel like I don't actually need to say anything. I can just ask a lot of questions and hope that she answers them.

One of the things about POM is that it is like a "best of" case. There is just so much in there. We could spend the entire day here just talking about POM. There are so many issues that this case raised—whether it is on the disclosure point, whether it is on the substantiation point, whether it is on the standard of review point. There are just a million different things you could talk about. I think you could spend a whole semester just talking about POM.

I'd like to start by trying to make a little bit of a connection between why it makes sense to talk about POM and native advertising

in the same symposium. Yes, they are both important developments. But I actually think there is a relevant connection between the two of them that explains a bit about what is going on with the FTC and its impact on advertising law.

To overgeneralize, what many people took away from the Committee's decision in POM is that the Commission announced a new rule that required two studies when making certain types of advertising claims. And in its recently released "Enforcement Policy Statement on Deceptively Formatted Advertisements," the FTC also sort of announced, new rules about "native advertising." Interestingly, just as the Commission's POM decision was very specific about what type of substantiation you need to support a specific type of claim, the Commission's native advertising guidance is also very specific about the type of disclosures you need in order to avoid consumer deception. So we have seen, both in adjudication and in policy-making, the FTC issuing new rules. Sort of. The problem is that they aren't actually rules.

In fact the FTC doesn't really have a practical ability to engage in rulemaking. The FTC does technically have rulemaking authority, but the rulemaking authority that it has is not the rule making authority that most federal agencies have. Other agencies have a shortened, informal rulemaking procedure that allows them, through a notice and comment process, to issue rules in a fairly efficient way. The FTC, on the other hand, is under this system which basically makes it impossible for them to effectively issue rules. So, as a result, we've got the FTC issuing rules that aren't rules. But then the question is, aren't we acting as if they are rules?

When the Commission's POM decision came down, and when the FTC released its enforcement policy statement on native advertising, it seems as if the FTC had just issued new rules. But they're not rules. So, how are we supposed to interpret them? What does it mean when the FTC takes a position in a particular enforcement policy statement? What does it mean when the FTC announces a decision or enters into a consent order with a particular party? The answers to these questions are significant, since these types of Commission actions have a great deal of impact on how advertisers determine what their obligations are under Section 5. In fact, probably most of the guidance given to the industry today practice is through non-litigated settlements or through other kinds of industry guidance the FTC issues.

And it occurs for the most without all of the protections and procedures that you would normally have when a federal agency issues rules or when a court decides a dispute. So that is issue number one.

Next, in the POM case, the court gives the FTC tremendous deference in both the findings of fact and in the FTC's interpretation of what the law is.

So, not only do we have the FTC issuing rules that are not really rules, we have courts giving great deference to the FTC's decisions. Should the courts be revisiting these decisions themselves and asking if the Commission has made the right decisions? The question is, then, what is the appropriate level of deference? That is issue number two.

So, what impact does all of this have on advertisers? One concern is certainly the chilling effect. That's issue number three.

I would argue that the FTC is making new "rules" that can take very conservative and aggressive positions about what would be a deceptive practice under Section 5. The problem is that they're not rules and it is not at all clear that in fact the FTC's reading of Section 5 is always correct.

If you are an advertiser trying to comply with the law and trying not to get on the FTC's radar screen, how do you know what the law is? You know you have to comply with Section 5. But how much do you have to worry about all of the FTC's policy statements and settlements, which appear to reflect the FTC's views about what they believe is deceptive or unfair under Section 5. Advertisers often seem to be getting the message that they do need to treat these things as rules, regardless of whether a court or Congress has determined that a practice is deceptive or unfair and regardless of whether Congress has said is unfair or that Congress is actually delegated the authority to the FTC to try to figure out whether their practice is unfair or not. So the concern that I have is that one of the things that we see and we certainly saw on POM and that we are certainly seeing in the advertising guidance which we talked about this afternoon is the FTC taking what I believe is a more restrictive position than is really required under Section 5.

One solution may be to give the FTC real rulemaking authority. That's issue number four. Is the status quo the right way to run an agency? In my view, it's time for Congress to consider this issue again.

To sum up, let me pose the question in a slightly different way. The FTC's two-study requirement in POM was clearly wrong. The FTC's concern should be whether a claim is truthful and whether, in a particular case, the substantiation was sufficient. The FTC shouldn't be in the business of dictating a specific scientific process and Section 5 doesn't authorize that, since not only could this place undue burdens on advertisers, but it also may prevent advertisers from making truthful claims (and may also deprive consumers of obtaining useful information). In POM, the FTC should simply have been asking whether those claims were false, and whether they had sufficient substantiation. The FTC shouldn't have been trying to create new "rules" for advertisers to follow about how to substantiate claims in the future. While the FTC's motives were undoubtedly good – to prevent certain types of deceptive claims by other advertisers in the future- the

562 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

FTC's new "rule" went beyond what Section 5 requires. Here in POM, and in other areas as well, we have to ask whether the FTC is pushing the boundaries of what Section 5 prohibits. And, when the FTC does that, do advertisers really have an effective and efficient remedy to address that?

My concern is that I don't think that they do. Instead, we see advertisers having to back off and be more conservative. It's much easier to say less than to litigate with the FTC. To be clear, the FTC is trying to protect consumers here, and that's a laudable goal. I think the FTC is doing great work and they are approaching things in a smart and thoughtful way. I just think that they are probably preventing a lot more speech than they need to.

Brett Frischmann: Excellent. Lots of things we will come back to I am sure in Q&A. I am sure the panelists have things to say about it, but now Rebecca.

Rebecca Tushnet: Great. Thank you all for coming. So the benefit of being an academic is that I get to take as unrealistic a position as I like, at least for purposes of argument. Although given current political events maybe unrealistic and extreme positions aren't actually the sole province of academic people. I prepared remarks about two topics, but I may say a few words in defense of the FTC in POM as well because in many ways I actually thought the D.C. circuit did some things that were unjustified. I wanted to talk in particular about the role of disclaimers and also the role of constitutional scrutiny of scientific fact finding more generally.

So one really interesting thing is that courts and the D.C. Circuit in particular have shown indifference to whether disclaimers such as "the evidence on this is not clear" actually have any effect on people. The D.C. Circuit has often mandated that instead of prohibiting something or imposing a particular disclaimer like "the evidence for this is weak," the D.C. Circuit has let advertisers kind of make up their own disclosures. There is a case called *Pearson v. Shalala*. The D.C. Circuit decided that a disclaimer requiring a lot more than college level reading comprehension was appropriate instead of a flat-out ban on a statement that on its own misleadingly indicated that selenium had to be shown to reduce cancer risk. And so the FDA actually tested the disclaimers that the D.C. Circuit wrote. The D.C. Circuit is not composed of marketers. I mean I understand why they did that. They just shouldn't have. So the FDA tested these. Copy tested them. Not only did the disclaimers fail, they backfired. The people exposed to them had increased confidence that the FDA had reviewed and agreed with the main cancer claim compared to people who were not exposed to the disclaimers and were

just exposed to the cancer claim.

So reality-based decision-making would lead to substantially fewer elaborate disclaimers. And in fact I think that courts would be more willing to uphold bans like the one the FDA tried to impose, or at least uphold FDA specified wording. And the FDA, I think, is aware of this issue of communicating complicated medical information and we are increasingly seeing copy testing in various ways to figure out what is actually being communicated to consumers. For reality-based decision-making, the reality is that most consumers don't read disclosures; most consumers have a hard time interpreting complicated disclosures, and complicated messages are simply hard to convey. This is a double-edged sword and, we are thinking very hard about it. So courts should definitely hesitate to hypothesize, as the D.C. Circuit does, that a disclaimer can substitute for a regulatory prohibition by avoiding deception. The D.C. Circuit in POM suggests that if you talk sufficiently about what it is like to have one RCT and the level of scientific support that indicates, the consumers can understand that message. That's probably not true as a general rule. Substituting the court's judgment for that of the FTC I think is a bad idea.

On the other hand, that also means that a lot of regulatory choices that involve telling people that they need complicated disclaimers may be constitutionally dubious as well. Regulators often compromise on requiring a disclaimer instead of banning an activity outright. Cigarettes are obviously a big example. But there are a lot of other things that have produced all the fine print that you know, and that some of us write for a living. But if disclosures don't work, if they don't convey information in most cases, maybe they just impose a burden on speech raising its cost without doing much good.

Now there are some important exceptions. The research is continuing to give new information every day about what actually works to communicate messages to consumers. But, in the main, if you have to bet on whether a required disclosure will communicate the intended message to consumers, if it is a verbal message you should bet against that. Regulators often try to have their cake and eat it too. They let the advertisers say a message but then force this extra disclaimer to correct any misimpression. But we can't often have our cake and eat it too. And if we are demanding lots more evidence in other aspects of commercial speech regulation, it seems odd not to do it in the case of disclaimers too, which means that the D.C. Circuit is over and under questioning. So it is over questioning by writing its own terrible disclaimers. And it is under questioning by accepting the idea that disclaimers can fix things.

This leads to a specific issue about POM, which is the remedy question. I see it very differently. The way the court of appeals handled

the two RCT trials raises the question of whether all remedy orders are now subject to First Amendment scrutiny of whether they are minimally restrictive. I think there are two sub issues there. First, generally our regulators are entitled to deference on fact finding. The POM Wonderful court reasoned that even the FDA sometimes allows a claim based on less than two randomized controlled trials. And it hypothesized and didn't have any evidence of any particular case in which this has happened, but there might be one really amazing RCT that everyone agreed was conclusive. The theoretical existence of that RCT invalidated the two RCT requirements. So some questions about that conclusion: Does that mean that the FDA's usual rule requiring two RCTs is constitutionally invalid for the same reason because there might be a hypothetical trial out there? Is it rebuttably unconstitutional? So if you show up with your one really good RCT you can force the FDA to approve your drug? Is it unconstitutional if and only if the evidence supports an exception to the usual rule? All these possibilities seem to represent substantial incursions on FDA authority.

This is related to a recent case in the southern district of New York where the court essentially struck down the ban on off-label promotions of drugs for unapproved indications based on very similar reasoning. This should be deeply troubling especially if it is the court and not the FDA that is deciding how strong the evidence is in the absence of two RCTs or whether the RTCs were in fact conducted in the proper way. It is true that POM had a bunch of trials, but they were terrible. The FTC or the FDA, I think, should have the authority to say hey, those were terrible. The FDA does make individualized determinations about whether a given drug is safe and effective and it mandates what has to be in the labeling. And it says, although this is now unconstitutional in the Southern District, that you can't promote the drug for things that aren't on the label.

Once you constitutionalize an issue, the fact finding itself demands constitutional scrutiny. It is worth noting here that the D.C. Circuit has already revealed its innumeracy in the Pearson case that I mentioned. It ruled that the existence of one positive trial plus a number of negative trials meant that it was not true to say that the positive claim was unsupported by the evidence. I don't know how many of you could remember statistics courses, but the whole concept of having statistical significance is the idea that when you run even really good experiments sometimes things just screw up so if you are confident at the .05 level that your result is right you *expect* a certain number of false positives if you run a sufficient number of trials.

The FDA understands that, because they employ people whose jobs are to look at trials. The D.C. Circuit does not, and should probably be a little more deferential in determining whether the evidence is good

or not. The second thing, and this ties into Mr. Greenbaum's fencing in point with respect to remedies specifically, is that, historically, when regulators found that an advertiser violated the law, that violation provided a justification for future prophylactic measures. The D.C. Circuit gave weight to POM's repeated extensive violation of the law and demonstrated intent to keep up with its practices in any way that it could only by allowing the imposition of one RTC requirement for all the disease claims, as if that requirement wouldn't have been justified for all disease claims anyway, despite the fact that there is all this testimony in the record that for disease claims at the very least you need an RCT and everybody agreed on that.

Why slice the salami that thinly? Similarly, in the RICO case against tobacco companies, the same court of appeals has found that the company's repeated violation of the law justifies some kind of mandatory disclosure of the lies that they have told over the past 40 years but they likewise have been allowed to litigate every word, literally speaking every word, and so years after the primary liability finding in the tobacco cases, they have yet to make the corrected disclosures ordered by the district court.

My conclusion here is that the First Amendment is strong medicine. We are probably a lot closer on the policy issues than we sound but unfortunately when policy objectives are pursued through injecting First Amendment claims they don't always stay contained. I often hear representatives in mainstream businesses say all they want is reasonable freedom: "We are a big drug company. We wouldn't abuse it because we are responsible businesses." And the record of large established businesses in the U.S. speaks for itself, but I think that is ultimately beside the point, which is the First Amendment doesn't follow the contours that respectable businesses are willing to accept. Marginal businesses will take advantage of these rules because that is what the First Amendment is for: protecting marginal speakers. That is why the lack of protection for false misleading commercial speech plus the freedom of administrative agencies with competence in the relevant field to make factual determinations about what is false and misleading is so important to preserve the regulatory state against the reimposition of *Lochner*. Now there are people who sincerely believe that *Lochner* is the right standard and we should go back there. But I would rather have that conversation on the merits rather than have the First Amendment basically do the work of eating the FTC and the FDA from the inside out.

Ashima Dayal: Following cannibalism especially. Well thank you for having me. I have been in this room before. I have attended a number of symposia that you have had before. I expect this will be the

566 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

best of the symposia that I have ever been in this room but thank you for including me. I also thank you for asking me for clean up because I can respond to everyone's comments. I will start with what I was going to speak on and then I would like to respond to some of those other comments if that is all right?

Brett Frischmann: I am going to open that up. That is the first question I will ask.

Ashima Dayal: So I want to make disclaimers as well but from a different level. Oh before doing that I would like to talk about just the ads that we are talking about. Did they end up on the screen?

Brett Frischmann: No.

Ashima Dayal: Okay. So I think it is worth noting just because it is a delicious fact that one of the ads, the central ad that is at issue in this case which involves claims of erectile dysfunction, prostate cancer and heart disease all ran in Playboy. I find it very interesting that advertising, encouraging people to drink a beverage that you don't have erectile dysfunction, prostate cancer or heart disease is deemed to target the Playboy population. I suppose in the non-new Playboy perhaps you will see - - ads but before then it is ED, prostate cancer and heart disease. I found that quite amusing.

In any case so I want to work off what Rebecca was saying about disclaimers and one of the things I found most galling when I first read this decision and I had some familiarity but not as much as Rebecca has gone into with the Pearson case. And the Pearson Versus Shalala case is cited in this decision as well as the claim - this is in the D.C. Circuit's decision and I will read from it - that the use of one or two adjectives does not alter the net impression and the adjectives had been used in the ad where the studies were promising, initial and preliminary. So what the ad had said basically is it made its claims about ED, prostate cancer and what have you, but then it had referred to those studies and had referred to them as only promising, initial or preliminary, and that was in the body of the ad, not in the footnote disclaimer. That was part of the discussion. They used those three adjectives and the court said those were insufficient. Those could not cure whatever impression that was being made by the ads about erectile dysfunction, prostate cancer and heart disease describing those studies as promising, initial or preliminary was insufficient and the court said very specifically the use of one or two adjectives does not alter the net impression, especially when the chosen adjectives promising initial preliminary provide a positive spin in the studies rather than a substantive disclaimer. So what

the court had said effectively in dictum is had you had an effective disclaimer such as the one used in Pearson where they said the statement evidence in support of this claim is inconclusive, this would have been a safe harbor. That is effectively what it had said had you had a disclaimer and they write the disclaimer that would have been enough. It is important to note Pearson was a dietary supplements case, not a food products case or beverage products case.

The point that Rebecca is making is an incredibly interesting point, but it is different from my point. The question isn't whether or not that disclaimer is effective. Is that language any good? Is anyone going to read it and understand it? What is their takeaway going to be? To me the takeaway is pretty clear. My reading of this is that these claims, or the evidence for these claims, are inconclusive. So we are saying we have studies that tell you to drink POM and effectively you won't have ED or a lower risk of ED, prostate cancer or heart disease. And then we have in a footnote according to the D.C. Circuit that it is totally okay if you just say by the way this evidence is no good. That makes no sense to me.

It goes against and I supposed most of you have either practiced advertising law or have taken a core advertising law class or at least have some common sense. How can you possibly make a claim in the body copy and say by the way the study that I am citing that supports that claim, that study doesn't say that? I find that completely baffling and the court says this twice. I am not going to cite from it again but they refer to that exact same statement again. So there is some redundancy in this decision, but they make it absolutely clear that it would be fine as long as you had that disclaimer. I find that utterly baffling. I went back and I looked at Shalala and Shalala unfortunately is not misquoted. Shalala says exactly the same thing. When you are making the product, I don't remember what kind of dietary supplement it was. Selenium, I am sorry, excuse me. So when you are advertising an ad for this mineral, vitamin. You are the astrophysicist.

Rebecca Tushnet: Mineral.

Ashima Dayal: You are the rocket scientist. All right. Whatever it is, the mineral that you are advertising if you are making the claim as long as it says by the way the studies we are citing those are no good. That cures the ad. I find that baffling. I haven't seen this cited much. I would love to see someone respond to that. I really unfortunately haven't seen other scholars respond to that perhaps you will in this or some other forum would want to. I find that just completely confusing, and then the second thing that I find really interesting is what is the difference between a claim and a footnote disclaimer, which arguably

people don't read.

Evidence in support of this claim is inconclusive which apparently is a safe harbor and what the ad actually said is that these studies are promising, initial or preliminary. I mean to me those mean the same thing and one is in body copy. I would think that if it says that in body, copy where I would be, I am not sure were I the lawyer advising POM I think at the very least that as good if not better than a disclaimer. I would like to think I said these studies are yes; you don't even want to run this ad. But in this one issue do I need this to be a disclaimer? Can I put it in the body copy? I would have felt well, body copy you know, you are way better off there.

Yet nonetheless, the Court finds fault with the actual language and says that it is much better if you put it in mice type and put it in the footnote. Not quite. I made up the mice type part, but I mean effectively that is what the court is saying. And I find those two aspects of the case really disturbing and I find it gives tremendous bad guidance to advertising lawyers because I don't think this is the right answer. I think it has to be in the body copy and I think they are elevating some kind of substance over form and are going the wrong way. I truly do not see the difference between saying a study is promising, initial or preliminary and putting in a footnote that this study is inconclusive. To me they mean the same thing, and, again, it goes back to what Rebecca was saying. Why is the court writing this copy? I don't understand and if they are writing it I think they are just writing it wrong. That is what I wanted to talk about as far as disclaimers. I suppose we will bring more into the discussion.

The other points, and I respond largely to what Jeff was saying and a bit to what Rebecca was saying as well, I saw this case as slightly different on the continuum. There is a case that came out after this called Bayer, perhaps you are familiar. Some of you may be familiar with that case. It is a dietary supplement case. In which again the FTC basically determined that you don't need two random clinical trials in order to make a dietary supplement case. And for those of you who work in this area or maybe just by the way of background and may be familiar but basically the FDA is regulating the advertising for drugs. You got dietary supplements which are governed by something called the - - dietary health supplement something act.

I don't remember what it is called, but everyone refers to it as the SHEA education act I think and that governs dietary supplements, which are different than drugs. They are very specifically different than drugs. They are again basically something you ingest and that has health benefits. They make different claims. Drugs can make disease claims. Dietary supplements can make what are called structure function claims and very specifically say these products, these dietary supplements are

not intended to treat, diagnose, prevent and cure a disease.

So you can make those claims for dietary supplements and what Bayer had said is you don't need two clinical trials for that as well because it is not a drug not, for that specific reason, but they are making a distinction. Now you have something that is ever further down the continuum away from being a drug. You have an ingestible food or beverage product and the FTC again imposing that drug standard, which Bayer subsequently had said is not necessary for dietary supplements and now they are trying to impose that same standard basically a food and beverage product. And the thing that I think was in this case that again I think deserves more attention is one of the justifications that I think the FTC gave for doing so was that this was a repeat offender. We had what they believed to be a recidivist food beverage company and basically if you don't require them to engage in a two random clinical trial they just go back to their old ways. I find that a punitive aspect of the rule that they are implying. That was really curious because obviously these decisions that the FTC engages in this rule making are effective and this goes to Jeff's point. It has some kind of effect. It may not be, it is not case law per se but to say that they are sort of existing in a vacuum is to say that the FCC's letter rulings exist in a vacuum or the IRS's letter rulings exist in a vacuum.

We as lawyers all read these things and we advise our clients that yes, the case that is in front of the FCC or that is in front of the IRS is not our case but the same way an AG decision against AOL has bearing on my representation of you know, Facebook. They have some at least for a practical effect, some effect. And it seems odd to me that FTC or at the D.C. Circuit didn't discuss that aspect. They invalidated it but it did seem wrong to me that this sort of recidivist element of the decision was not further discussed. I mean what Jeff said was correct. This is a law school exam if not an entire law school semester course. There are so many things going on but those are the elements that I found really interesting.

Brett Frischmann: Great. Well, I think the first thing we will do I have got a couple of questions for the whole group. Before I do that I will give each of you an opportunity to react to each other because you obviously have different opinions, but there are also things that spark thoughts or comments. So I guess we will start at the other end. Jen?

Jen Lavie: Yes. I agree with you on the disclaimer. You know, disclaimers are only allowed to qualify the main claim. They are not allowed to contradict. And the disclaimer that says you have a claim that says we have studies proving that this will cure heart disease and then you have a disclaimer that says we have no studies proving this

570 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

will cure heart, that contradicts the claim which violates all advertising laws and principals.

Ashima Dayal: And then just common sense frankly.

Jen Lavie: And common sense. Sure. Which is the basis I think of advertising law, really.

Ashima Dayal: In theory.

Jen Lavie: Yes. Supposed to be.

Brett Frischmann: Actually on this disclaimer part let me ask you a question for those in the audience who may not be familiar with the role that disclaimers play. What exactly is the role of disclaimers? Is it to provide additional information? To clarify meaning? Is this implausible or unintended interpretations of the claim or to dismiss plausible and intended impressions and is there a distinction among those two?

Jen Lavie: Well, the advertisers are responsible for all reasonable interpretations of a claim. So I have clients a lot that say well, that is not what we mean. What we mean is this. Well it doesn't really matter what you mean or intend to say what matters is what comes across to the reasonable consumer. And if the reasonable consumer will take something from a claim and see I think that claim means if I drink this POM juice I won't have a heart attack then you need a disclaimer saying that is not what we are saying. But it is only meant to help not to say the opposite.

Ashima Dayal: You can amplify, you can't contradict. All the things you listed to me I would have said all of the above except for the last one. I think your last one was to-

Brett Frischmann: Plausible but intended impressions.

Ashima Dayal: Yes. No. Because that is a rebuttal. You can't use your disclaimer for a rebuttal. Many of our clients would like to and do frankly because they don't always take our advice but you can't do that. That is not a permissible use of the disclaimer.

Brett Frischmann: Okay. Any other reactions to each other's comments?

Jeffrey Greenbaum: I also thought the question about the disclaimer in POM was interesting. I believe that what the court said was that an “effective disclaimer” would work. I think that the key to it is whether it is “effective.” It is not that any disclaimer would work. It is really begging the question of what would be the solution because the disclaimer itself has to be effective.

On the policy aspects of this, I do we should take a step back and ask, “what is the right standard?”

The general rule is that in order to be effective, a disclosure has to be clear and conspicuous. What does “clear and conspicuous” mean? Essentially, it means that the disclaimer has to be something that would be seen, read and understood by consumers in the context in which they are being exposed to the claim. You would look at all the factors. For example, are there distracting elements? How big is the disclaimer? Where is it located? You look at all these things and try to make a judgment. What is consumers’ net impression?

The problem with this is that our disclosure standard doesn’t match up with our advertising standard. Our advertising standard is a “reasonable consumer” standard. But we don’t seem to hold consumers to this standard when disclosures are concerned. The FTC likes to say that a consumer might “glance at the headline” and then turn the page without seeing the disclaimer. Therefore, your disclaimer is not going to be effective. But I have trouble reconciling the “glance at the headline” standard with the “reasonable consumer” standard. So, to me, if I open up *The New York Times*- to the students here, this is a paper version of what you read on your iPad. And-

Ashima Dayal: Your parents might have one.

Jeffrey Greenbaum: Right. And imagine a big piece of paper that you unfold and there is a full-page ad and you see a headline and then you see a bunch of copy on the page. Well, how can the FTC standard be that the reasonable consumer reads the headline and says I can interpret this advertisement, even if I ignore all of the rest of the information on the page? This is kind of the standard we apply and I believe that it is the wrong standard. I’m not talking about when the disclaimer that some consumer couldn’t understand or a disclaimer is not understandable or it is completely contradictory to other elements of the ad. But I do think that we are never going to be in a sensible place with disclaimers if we apply what is really an “unreasonable consumer” standard.

Ashima Dayal: Can I respond to that? I don’t know how that word effective in this context has to mean clear, conspicuous, and prominent.

All of the things we sort of talk about in time space issues because I don't know how a claim in an ad and I can pull to the tab that basically says that studies show drinking 8 ounces of POM or ingesting one POM X which I never heard of but ingesting one POM X pill can treat, prevent or reduce the risk of listing all the things. Studies show and at the bottom it says evidence in support of this claim is inconclusive. That is what the court says. That is a pure rebuttal. Studies show this. By the way, evidence is inconclusive. So I don't know how the word effective does anything there in telling you anything other than it needs to be in 12 point type and not in small type face or whatever else because there is no way that language isn't to me and I have no -- to point to. There is not way that is not a rebuttal. I hear what you are saying but I feel like if you take that to its extreme then you can have an ad that says free and then underneath in huge type by the way this is not free. Because then it is effective. I definitely read it. My pure takeaway is you are right. This isn't free but that can't be what the law allows.

Rebecca Tushnet: I have similar views. The idea of an effective disclaimer is a great idea. Now we just have to convince the courts that they can't just eyeball or imagine an effective disclaimer. I think I have some other reactions to other things. I think it is a significant point that supplements are regulated differently than drugs, but here is my issue. Wait a year or so, because if it is unconstitutional to regulate supplements in this way, it is completely unclear why it would be constitutional to regulate drugs in the way that we do. And in fact the recent case in the Southern District of New York makes that super clear. Supplements can kill you. They do kill people. And it is a significant problem and if that is not enough to justify the suppression of speech caused by the FDA drug regime then I don't see why the FDA drug regime isn't unconstitutional.

So I think on the comments on Section 5 on creating what are in effect rules through enforcement proceedings or guides.

The FTC very clearly understands it still has to prove a violation of Section 5 and you see that at the beginning of every one of these guides because they are guides and not rules. One question I ponder is, so suppose the FTC did have rule making authority, which it should. I think you are absolutely right there. Suppose it did that and it announced the native advertising guidance as a rule because they did have a bunch or they had convened all these meetings. They had hearings. They had a very similar process to notice and comment rule making knowing that they couldn't come up with a rule. People did get a chance to submit comments. I heard advertiser after advertiser make their pitch to the FTC about what they should be doing about native advertising. So suppose they announce this guidance as a rule. I've got

2016]

SPRING SYMPOSIUM

573

to ask: shouldn't the D.C. Circuit uphold it under the APA? In theory there is deference, in which case we are back to the same problem that arguably the FTC got it wrong. But that is a problem of regulation, not necessarily one that can be attributable to the process in this particular case, it seems to me.

Brett Frischmann: All right. Here is another question for you. For all of you. And it has got multiple parts so here we go. How should we draw the line between health-based claims that require randomized control clinical trials and those that don't? And to sort of approach that question, what type of question is it? Is it scientific? Policy? Legal? Market? Behavioral? How do people respond first? Second, who should decide this question? Who is the relevant expert?

Ashima Dayal: Us.

Brett Frischmann: Doctors, scientists, psychologist, marketing experts, consumers, judges? Seems to me like to be able to evaluate whether we ought to have one or more randomized in controlled and clinical trials where health based claims we need to sort of answer this preliminary question, what kind of question is that? What is the relevant decision?

Ashima Dayal: Can I answer that? It seems to me that the FTC doesn't take enough of a practical approach considering that they are supposed to be protecting consumers. If I am drinking a juice that I bought in the supermarket, I have a totally different expectation than if I am ingesting a drug that I got from a physician or an over the counter medication. I just have totally different expectations. I am not expecting that drink that says that it helps prevent erectile dysfunction. Why I would be consuming this is beyond me, but I have totally different expectations for that product than if I were ingesting a drug that is supposed to prevent that. I think my expectations are so different that I think it is appropriate that you should evaluate the claims being made as requiring less proof because I am probably not buying that POM expecting to cure all my ails, but I am definitely getting a prescription drug with a totally different set of expectations.

Rebecca Tushnet: But you may pick the POM juice over the Tropicana orange juice because you think well, if it is going to help me with all these ailments and it is going to keep me alive I am going to take the POM juice. So then the POM Wonderful company gets to pocket more money because they get to make these claims that we are going to cure all your potential diseases.

Ashima Dayal: Okay. Then is the job of the FTC to protect the consumers or to level the playing field for more businesses?

Rebecca Tushnet: Well protect consumers because my money is going, I am putting my-

Ashima Dayal: They can fight it out themselves. I assure you that Minute Maid has the money to you know sue Tropicana, I don't know who owns them, but you know what I am saying. Coca-Cola has the money to pursue whoever actually owns the other company.

Jeffrey Greenbaum: I think what the FTC would say is that it is not really a policy making body. And that, in fact, its role is very circumscribed. The FTC's role is really to enforce, among other things, Section 5, which prohibits unfair or deceptive acts and practices. The FTC's role isn't to promote a particular set of policies or a political agenda.

Ultimately, whether a claim is truthful or not has to be determined by the experts.

I will give you one example of sort of the policy versus enforcement approach. In the FTC's "Green Guides," the FTC prohibits a number of what I would argue are partially truthful claims. For example, if you make a product that is biodegradable, you likely cannot advertise that it is biodegradable because, based on the way consumers normally dispose of the product, it's not actually going to biodegrade. That's because trash doesn't biodegrade in landfills. The FTC's legitimate concern here is that, although the product is technically biodegradable, consumers may be misled, since they may believe that the specific item they use will actually biodegrade, no matter how they dispose of it. Again, the FTC is, of course, right in thinking that when consumers are done with using a paper plate, they are not going to throw it in the back yard and leave it there for nine months. So, because it's going into a landfill, it is not really going to biodegrade. The FTC feels that it is better to prevent some deception about biodegradability, than to encourage biodegradability claims, which would encourage companies essentially to develop and market environmentally preferable products. And, hopefully, these products will someday actually degrade in the landfills that we have. This is an example where the FTC is saying we are here to prevent deception; we're not here to encourage companies to develop better products for the environment. I'm just not sure that's necessarily the right choice, when looking at the big picture. What are the unintended consequences?

Rebecca Tushnet: So wow, now I have a bunch to say. In terms of the initial question: I think we have to have multiple answers so the question of what message the consumers take away is definitely a marketing, linguistic, psychological question. How does a reasonable consumer perceive this claim? And then we test that claim. We should ask whether it is correct to communicate what you are communicating. The other thing, and Richard Craswell has written extensively about this, is there is a trade off. It depends on how useful the information is to the people who understand it. So sometimes we might be able to tolerate some people being deceived if other people receive information that really is a benefit to them. And I actually just taught a case about Listerine. Listerine advertised that it was as effective as floss and the reason this is true is that most people floss terribly. So if you do a group and tell them “use Listerine every night” and you do another group and tell them “floss every night,” and you come back six months later, both of them are doing the same and that is because the floss group didn’t comply. It is true to say that Listerine is as effective as floss for people behaving in the way that they actually behave. The court enjoined this and clearly thought Listerine was being horrible because if you floss correctly Listerine is a lot worse. You really should be flossing every night. And I think this is an example of suppressing information that was useful to a bunch of people that don’t floss the way they should. Like me: I started using Listerine after this case came out. I thought: “Wow, I don’t floss very well. Maybe this will help me.” And it is that kind of determination that we should be thinking about. And this is the argument that POM made, which is “it’s not like if we are wrong you are going to be harmed.” And the FTC’s answer, and I am convinced by it, is they sell this stuff at extremely high prices and especially if you have a limited health budget this could prevent you from allocating it correctly.

So first of all, we do know from empirical research that people have no idea about the regulatory differences between supplements and pharmaceuticals. They think the FDA regulates them in the same way so if claims are on the market they must have been approved by the FDA. And you know, this has persisted for 20 years under the DSHEA. We don’t actually know a lot about what people think about food claims but my guess is in fact there are a bunch of people who think the same thing about food claims, if advertisers are making medical claims. And I think that is worth paying attention to. I do think that a problem of distortion of the market is real. We know there are lots of people who don’t take their medicine, and do other things to try and control their conditions. That is a huge social problem, but it is made worse I think by the presence of unsupported claims saying that they can treat conditions that really do require a doctor’s care.

Brett Frischmann: Before I open up, Jen, do you have a chance to respond to that question. Anything you want to-

Jen Lavie: No. I think you guys covered it.

Brett Frischmann: Covered it?

Jen Lavie: Yes.

Brett Frischmann: So I think we have about 10 minutes before we break for lunch so 10 minutes for open Q&A. Just raise your hand. Do we have someone walking around with the mike?

Brett Frischmann: Just take it with food.

Ashima Dayal: I watch these spots with my husband. He is always like did you work on that? No, I didn't work on that because there is one with a happy couple frolicking while they are talking about rectal bleeding. And he is like you worked on that one, right? I am like I did not work on the rectal bleeding ad. No.

Rebecca Tushnet: So the FDA has authority over those and the FDA and the FTC actually has this memorandum of understanding about how they are going to split the authority in regulation. And the FDA actually did go after Seasonale. So they had all the side effects listed while red dots were falling from the ceiling and music was playing and the FDA said look, you have now overwhelmed the consumer's ability to understand these important limitations, so they had to do a corrective advertising campaign.

You can see it on YouTube. They also had to do it against a white background where there weren't all these distractions going on. It is a significant problem. One thing that I do think is useful, though, is that there are some kinds of disclaimers that nobody actually reads but the presence of them does tell you that there are things you need to think about. Nobody reads all the disclaimers on the car financing ads. Right? And it is important to get the key things out really prominently, like you have to have good credit, or depending on what you are claiming you may need to say some key things out loud, but on the other hand all that may be necessary is something that will signal like this is a complicated transaction. Don't base your decisions on an ad. And that does serve some function. The same way that list of conditions serve some function like saying that this is serious medicine. It has serious effects on your body. I think that is worth having.

Ashima Dayal: I mean some of it is on the box. That SHEA disclaimer, diagnose, treat, cure, prevent. Yes. That is on the box. Some of those things the FDA requires, the FDA and FTC work together on supplements on packaging versus advertising. So some of that is on the box and you are right. No one reads the insert. No one in the history of science or shopping has ever read the Nyquil insert like how long has that product been on the market. It is like 300 pages but on TV they have done some things. They have this white coat prohibition. And some of it is done with the networks. So the networks won't take medical ads, for example that show a doctor in a white coat unless it is a drug. You won't see that for a vitamin or other kinds of products. So they have done certain things to try to demedicalize and prevent people from making claims. And they have done other things such as I think it is Nexium. What is that little purple pill? Is that Nexium, I think? Nexium has an OTC version and an RX version. They don't allow them to have the same color palette. The Nexium RX version is sort of it looks like a Vikings ad. Totally purple but the Nexium OTC version has a totally different look because they don't want to infect one with the other. They don't want someone who sees the OTC product to think it is the drug product so they have separated those things so there are efforts to but I agree with you. I mean you are overwhelmed watching it. You have no idea what you are watching but I think Rebecca's point is an excellent one. If you are going to allow people to communicate information about medicine on television and you don't have to. Right. U.K. doesn't allow that. There is no television advertising for RX for pharmaceutical products in the U.K. If you are going to allow it in the U.S. there is only so much you can allow people to do in 15 seconds. So they have to cram a lot of stuff in there and maybe some of it is just that we know this is overwhelming but this is a heads up and you need to look into this more.

Brett Frischmann: Any questions? Jeremy?

Jeremy Sheff: There is one - - .

Jeffrey Greenbaum: I really agree with that point, which was Rebecca's point, that a disclaimer does communicate something. The problem is that the FTC has research showing that many disclaimers are wildly ineffective. When the FTC revised its endorsement guides a few years ago, the FTC did a study about the effectiveness of disclosures. They tested some print ads promoting business opportunity and weight loss products, I think. The disclaimer that they tested was sort of a big, red, bold disclaimer that ran essentially across the center of the ad. And

578 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

-- I am overgeneralizing a little bit – what the FTC found was that the disclaimers tested in the study weren't all that effective. The disclaimers they tested, though, were in many cases more prominent than what many advertisers ordinarily use. If these super prominent disclosures are not going to cure all confusion, then what disclosure will? We have to ask, what should we expect of consumers here? And, if consumers ignore the plain language of the advertising, should that really be the advertisers' fault?

Brett Frischmann: All right. We have just a few minutes left so here is what I want to do. We are going to do a quick Round Robin of questions so make your questions quick and not 2 or 3 minutes long, in other words and we are going to take them all in a row. So it will give everyone a chance to get the questions out and then we have a last comment from the panel. So we are going to start over here and then move across. Go ahead.

Brett Frischmann: Okay. We got a lot of great questions on the table. Why don't we start with Jen and then down there? Anything you want to jump, take any one of them. Pick a question. On to it and if you don't you can pass. That is fine.

Jen Lavie: Oh my gosh. There were a few and I may have forgotten them, you know.

Ashima Dayal: Do you want to do the last one? That one is easy. I think it is easy. So they require double blind study. Whether it is one, two, and what not. I mean if you look at the case again I am sure you have read it and any of these other cases and they want everything to be double blind so theoretically it is irrelevant who is funding the study. Theoretically. Right.

Ashima Dayal: Often you can dig into it. Right. It will cite JAMA or whatever. I mean I hear you. I totally hear, but very few consumers even want to know. Right. Well, you are sitting in a law school setting. I am not sure you are the typical woman at Duane Reade or Walgreens. But I think the information can be found. It may be hard to find but I don't disagree with you that these studies are the finger on the scale. They are supposed to come out a certain way and there is no time to talk about it in this decision but there is an interesting discussion about cherry picking in this. Whether it is okay to have one great study and 14 bad studies and if you haven't gone back to look at that that may help to answer the question. I am sorry to cut but there really is a discussion in this case I find really interesting and that is another course in itself.

2016]

SPRING SYMPOSIUM

579

What does this case say about cherry picking? Because that sort of helps inform what you are asking.

Ashima Dayal: I don't know that you can. I mean you are either going to run against free speech problems or it is going to be, you can try to establish standards to do it. And in the end they are going to defer to what the scientists think are accurate. In the end, the FTC is still saying what the scientists think are accurate. It was a battle of the experts that went on here at the lower court level or the AELJ level that is not really reflected in this decision but it was definitely part of this decision. So some third party. The FTC is not going to say we decide what makes studies. They are going to say okay in an automotive fuel testing industry here is what the department of standards thinks in the you know, XYZ industry. In the taste study industry here is what experts think in the flavonoid, I made up that word I think, is sufficient. So some expert is going to decide and the FTC is going to say what is enough I think. That is my-

Brett Frischmann: Okay. So at that I hope you all feel a little healthier having listened to this wonderful panel. Why don't we thank our panelists for what I thought was a very wonderful conversation.

PANEL 2: NATIVE ADVERTISING

ELLEN GOODMAN^{1*}

RICK KURNIT*

SHELLY PAIOFF*

JEREMY SHEFF*

PO YI*

FELIX WU (MODERATOR)*

Stella Silverstein: My name is Stella Silverstein and I am the Symposium Editor of AELJ. I'm thrilled that you're here. I'd like to welcome you to our second and final panel of the day, which is going to focus on native advertising law. Our moderator is Felix Wu. He is a Co-director of the IP and Information Law program and a Faculty Director of the Cardozo Data Law Initiative. He teaches trademark, advertising and privacy law here at Cardozo. He holds a bachelor's degree from Harvard and a JD Ph.D. from U. C. Berkley, the Ph.D. being in computer science. His current work explores the relationship between data privacy and the first amendment. Please welcome Felix Wu.

Felix Wu: Thanks. I'm going to quickly introduce the panel and then once I do we're going to run this panel slightly different than the last one. Rather than having each one of the panelist sort of give opening remarks, we're actually going to have the remarks be part of a series of questions. So, that's how we're going to do it.

As with the previous panel, all of our panelists here are very distinguished folks whom you can read more about in the program. But I'm just going to quickly give you an idea of who we've got just going closest to me to furthest away.

So first, we have Professor Jeremy Sheff who is a professor at St. John's University, School of Law who does a lot of writing in

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* Partner, Venable LLP

* Professor and Faculty Director, Cardozo Law Initiative, Benjamin N. Cardozo School of Law

trademark, IP, patents, technology and the like.

Next, we have Shelly Paioff, Deputy General Counsel at Taboola and you'll hear more about Taboola and what it does in a moment. Shelly is a Cardozo alum from 2006, yes, okay?

Shelly Paioff: Yes, feels like just yesterday.

Felix Wu: Feels like just yesterday? Okay and then Ellen Goodman who a Professor of Law at Rutgers, who specializes in areas such as the First Amendment, media law and advertising as well.

Next, we have Rick Kurnit, Partner at Frankfurt Kurnit and a decades long expert in advertising law, as well.

And finally, Po Yi, who is a Partner at Venable and also a Cardozo alum from 1997. We've got a wonderful group of folks here to think about the problem of native advertising. I would have Shelly start us off here with just the question of thinking about, well, what is native advertising anyway? What are we talking about? To get at this question, Shelly if you could tell us a little bit more about what Taboola does as just one example and then we can think a little bit more about what some other examples might be of things we might describe as native advertising.

Shelly Paioff: Sure. So, thanks for giving me the hardest question. Everyone here probably knows native advertising is very hard to define. I know that at Taboola we're constantly struggling with figuring out what do we mean when we say native advertising? First, it will probably help to talk about what Taboola is. Taboola is a content recommendation platform. And for those of you who don't know or haven't seen us before, the easiest way for me to explain who we are is to just tell you where you've probably seen us before. So, we enter into agreement with publishers. So, some of our publishers, for instance, are NBC, Microsoft, USA Today, to place what we call our widget, but it's really a unit, on the bottom of their article pages. The widget will have certain thumbnails of images and then links to third party content that third party publishers and advertising ask us to distribute.

So, that's our content recommendation platform. Generally, you'll see us, it will say, from around the web or other content you may like and it appears below the end of the article on many publisher's sites. So, it is either us or one of our competitors. Hopefully, you see us more than you do our competitors.

We actually never really thought of ourselves as a native advertising platform until very recently. Although, I know that the IAB definition of native advertising that they came out with in their Native Advertising Playbook a few years ago includes content recommendation

platforms in their definition of what native advertising is. We always traditionally just thought of ourselves as a content discovery platform. Only more recently we now have opened what we call our native platform. So, when we think about native, we think about it as mid article or section front or home page places because it's advertisements or content that are integrated within the web page. So, it appears like or it's within the flow of what the user that's looking on the page is already reading.

I think other people may define native advertising or one other aspect of native advertising also includes custom content. It's content that a brand creates to kind of create brand awareness. So, I think the most famous examples, which everyone here has probably seen, is the Netflix, "New York Times" example, where they had a branded or sponsored article in the "New York Times", Netflix did for "Orange is the New Black."

So, I think those are, in my mind, the two main areas of native advertising. Of course, there's also paid search results and stream feeds on social media. But when I think about native advertising that's what I think about.

Felix Wu: Okay, and so I wanted to open it up for others to think. If there are other examples you'd like to give or other ideas that you have about different places where we might or might not call something native advertising or might or might not have some interest in what's going on.

Po Yi: I would add to that, the agency model where you have established news organizations but have separate departments. Often they may be separate writers or they may be the ordinary editorial writers who are especially creating content for brands. Then, you may also have the underwriting model where the brand will, it's sort of sponsored by or supported by the brand and it will support content where it's going to be made in any case. I think all of these examples sort of a range of how much participation the brand has.

Shelly Paioff: I don't want to go back and forth. I think that actually raises an interesting issue because you think about the word advertising and you're saying native advertising. When you're talking about a brand using a third party, independent news organization to create content for them, it is not necessarily about the brand. But just about something that the brand's interested in, maybe to raise awareness about the industry as a whole. Is that really advertising? I mean I think that's an issue, I know we'll probably talk about this some more, but it's a major issue in FTC guidelines is what is advertising and can content

2016]

SPRING SYMPOSIUM

583

really be considered native advertising just because a brand has touched it.

Rick Kurnit: The most unfortunate part is this terminology of “native advertising” because it begs the question. The debate, about defining native advertising is about whether or not the curation aspect is a problem. Everybody accepts the idea that influence over the content of material is a concern. The issue in the Taboola case in the NAD was whether or not we’re also going to say that merely influencing the curation of content -- pointing people to content, providing financing for content, distributing reprints -- is also advertising. And also can be thrown into the mix. That is where we are today with a huge problem facing the media.

I’ve spent years working with traditional media who wrestled with maintaining the wall between editorial and advertising, while accommodating the interest of advertisers to a hospitable environment. If anybody thinks the “New York Times” created the food section because readers couldn’t tell what articles were about food as opposed to encouraging an environment for advertising, we can talk about that. So, defining the issue as “native advertising” and then sweeping in influencing curation, is where I think we go too far.

Po Yi: I think you also have to think about native advertising versus content because content marketing is something that most brands like to engage in. Brands are no longer just doing ads. They are using content, whether it’s creating content or distributing content to target a particular audience. It’s not about their products. There may be no reference whatsoever or even no relation to the product. It may be related to cause related marketing.

But whatever it may be, content marketing I don’t see it as necessarily being native advertising or advertising at all. And I think that it’s very easy for people to think about native advertising and content marketing together and use it interchangeably. But I think that’s a mistake.

Felix Wu: Okay. We’ll come back to this question and exactly what native advertising might or might not be. But let’s think next about what does the FTC think about all of this. So, Rick if I could turn to you in describing a little bit more about what is the perspective the FTC seems to be taking on what it is and in particular why there might be a problem. Right? What is the problem they’re trying to solve and then how have they tried to solve it with their recent guidelines?

Rick Kurnit: So, I have a little bit of a bias because as I say, I

went out on a limb with the ABA on this issue of curation versus integrity. The headline from the FTC's enforcement policy statement is that curation requires disclosure: a warning before you click on a link or engage with content that you are about to be exposed to advertising. The policy statement begins in footnote one with a recognition of the First Amendment limitations on the FTC with a reference to the case that underlies this question, in which the staff brought an action against Reynolds for financing articles that basically said smoking isn't as bad for you as the government says it is. The ALJ ruled that sponsoring this wasn't advertising and the commission in a 4:0 decision reversed the ALJ.

So, that is footnote one and that is- the important question as to just what is the scope of the FTC's regulation in this area and whether the First Amendment permits the government to regulate curation. It certainly raises questions under Reed, Sorrel, and Citizens' United. If I just want to finance some other speaker, is that something the FTC could regulate? What does the Commission have to prove?

So, the headline of the FTC's recent action is that they did say that they were going to regulate whether or not consumers choose to interact with content. Whether the action of a brand affects the decision or conduct regarding the advertising, not just the product, service or brand. The problem for the industry, is how can you communicate to readers the difference between brand voice and content that is made available by or the media is influenced to present by a brand. And what Po is alluding to is a brand's decision to provide information that has nothing to do with the product or service. The commission is still wrestling with that.

The FTC staff has acknowledged that the FTC is not particularly interested or concerned, at the moment, anyway, with going after that which does not speak to product or a service or a brand or a competitor.

The other headline was the commission's notion that they would embrace disclosures. As suggested in this morning's discussion of disclosures, I am even more frustrated with my client's attempts to use disclosures, which I call transparent fig leaves. Think about it. Alternatively, the FTC suggests that the placement of the moniker that something is an advertisement should be in the focal point of the ad. You can imagine how my clients feel about giving the legal people the focal point or the key placement in the ad.

Otherwise, the policy statement follows established law that what this is about is deception. So, it is a question was the consumer reasonably in the circumstances being misled as to the nature or source, again the curation, and in the absence of disclosure of influence over curation likely to affect decisions or conduct? But the hard question is whether it goes beyond just regarding a purchasing decision as is the

deception policy of old that we all embrace within the First Amendment, but additionally likely to affect decisions or conduct about the advertising.

So, this is the question of not just whether or not the consumer would give greater credence to the content by not knowing that it was influenced. But also whether the consumer would have chosen not to interact. That is the notion of the skull and crossbones in the form of the word ad or advertisement. That, you know, this is noxious and something to be avoided that they want you to put at the front of what is communication by a company or by a brand. The commission does though note that this is in a state of flux and it's a question of disclosing that which the consumer would be surprised to learn.

So the media must try to create a context in which they can argue that their users- we don't have readers anymore, we have users- understand the difference between brand voice and something that a brand supports in order to have a context for its advertising. The battle will be between the legal departments of the brands who read these guidelines and say thou shall label as advertising, and the media that are trying to create an environment that is user friendly and a good user experience. They can still get some money as they are being driven out of business by start-ups who are financed by venture capital and don't have to monetize their content until the money runs out.

The guide basically allows that but also indicates the Commission's determination that what the industry was doing: The disclaimer that says, "sponsored content" to mean that it was curated or financed and sponsor content to mean that it was an ad or brand voice was not adequately informing the users. I never want to wholly rely on users bothering to read a disclaimer, but certainly not enough to focus on the last two letters of the word. And Guides indicated that they did not like "promoted by" unless "promoted by" was restricted to where you had no influence. So, the Guides left that open as far as the difference between the curation and the integrity.

But again, there is also the question of whether these differences are material -- likely to influence the consumer's purchasing decision. This is where we have always satisfied our First Amendment concerns. Affecting purchasing decisions is commerce. But the Guides are saying it is also material if it's likely to affect the consumer's choices regarding the advertising. That is a big step and that is a content-based regulation by the government, that I would argue goes beyond what is protecting consumers against material deception and influencing purchasing decisions. I would argue that the FTC has overstepped when it is saying that they are going to regulate just the curation, just the here's something you might like to read, where it's clear who the author is and the brand has no influence over the content. Impact on the curation

586 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

only, where there is no impact on the integrity of the content- nothing that impacts the credence to be given to the content.

Felix Wu: Okay. We'll come to this question about materiality and what kinds of things consumers care about in a bit. But first, stepping back a little bit, I mean in a way you might say what the FTC has done is just said, you shouldn't be able to fool consumers into thinking something's not an ad if it is an ad, right? And if it's going to fool them, you need to do something to not fool them, disclaimers, disclosures, whatever else you need. Doesn't that seem completely unassailable? Like, that's just obviously right, right? Well, maybe not, but let's—

Rick Kurnit: An ad is a material claim about a product or service, yes. But when you define an ad as corporate speech that's different. So, it comes back to Shelly's point. It is a question of defining what is native advertising.

Po Yi: But I think it's also what are you promoting, right? So, let's say I'm Proctor and Gamble. Are you promoting a diaper? Is that the product that you're promoting, is the advertising for that? Or is the FTC perhaps saying, it's the content that's created by Proctor and Gamble that you're promoting and, therefore, the ad is about the content and not about what maybe in the content. You made me think about whether is that what they're going for? I don't know.

I don't really know because I think what they're concerned about is if you paid somebody to distribute content, then you have to say that you paid somebody to distribute content. That's the source, that's what the FTC is really focusing on when it comes about, you need to disclose the source of the advertising.

I don't know, I guess I viewed the guidelines a little more restrictively than that. I mean, I thought that they said, first of all, if it's obvious to consumers who the speaker is, that the speaker is Proctor and Gamble, then the consumer will not be confused into thinking that it's some other independent voice. And also that if what Proctor and Gamble is supporting is not a product and it's not making product claims, that the guidelines would not require any particular disclosure.

So, it was focused, I read it to be focused on more. I do agree that the FTC in this case is going beyond where they have been before in terms of their focus on consumer confusion about them being misled in terms of their purchasing decisions. I agree with you Rick, that they are reaching farther, but I'm not sure that I agree with you that they are reaching so far as to deal with brand and content, all kinds of random content--

But it's how you deliver the brand and content. I think actually

2016]

SPRING SYMPOSIUM

587

people say branded content is a dirty word. Nobody wants to hear it anymore because more content marketing. But it's that the brand created content and the brand is then using paid media as opposed to organic.

Po Yi: To distribute the content. The FTC wants you to know that you paid money to distribute the content, similar to Taboola thing. They want you to know that Taboola was paid money to distribute this content. Not because this content, itself is advertising. But because you are paying somebody money to distribute a content in a way that you wouldn't normally do.

I think that's the whole thing about Facebook or Twitter. It's about using paid media to distribute content as opposed to the organic distribution. And I think the FTC is not focused just on the content of the advertising, but also how you distribute.

Shelly Paioff: I think they even, I mean in one of the examples, I can't remember exactly which one it was. But they talk about how a newspaper wrote an article about an advertiser. And the advertiser had no influence over the content at all, but the advertiser wanted to distribute that content, then just the distribution of the content and they had nothing to do with the writing of the article, it would be considered an advertisement.

Po Yi: That's exactly right.

Shelly Paioff: And then they have to make sure that the claims that are made in the article are accurate and that they can substantiate all the claims. I think that they are taking it, in some ways they're saying that the mere distribution of content does make it an advertisement.

Rick Kurnit: In a perfect world where consumers actually read disclaimers and you have more than one screen, it would be nice to have all of that information. But what I think the commission failed to really take into account is that it's really next to impossible to be able to make the distinction between this is content in which the integrity is complete—for example, an article from the "New York Times" which you as a reader can trust or not. Or it's an article from the "Wall Street Journal" or, Fox News, if that's what you trust, this is their content and I am simply making it available to you; and an ad. If I have to call mere curation an ad, then, what do I call an actual ad? I've got clients who are going to say, we will just put advertisement on the top of everything. How does that help the consumer?

If I create a new medium of curated independently created content,

588 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

for example, Mashable or BuzzFeed, why don't I just say, everything is advertising. Label everything advertising and users rely on our integrity as editors to curate this "advertising." Would the Federal Trade Commission deem this in compliance because we put the word, ad or advertisement on the top of everything?

Po Yi: Which is actually in and of itself misleading because it's not really advertising content. But I guess why you use the term, it's, practically speaking, using the term "sponsor" as opposed to "advertising," right because you distinguish what's in the content versus the fact that the brand are behind it. How much behind it was up for debate. But I mean that's what they were using.

But that's one of the questions that we have is what terminology do you use now that will satisfy the FTC? The FTC has always been fine with advertising. But I think from a lawyer's perspective, I don't want my clients to use advertising. It doesn't make any sense. You know, so—

Rick Kurnit: But I beg to differ, everything is advertising. When I publish an article, it is to enhance my brand and to encourage commerce. So, what content, what author is not in some way, when you look at what the FTC is saying, under some duty to disclose. Who influenced you? Who supports you? Where do you get your financial resources? What's your ulterior motive in publishing that article? I'm perfectly happy to defend the notion that all content is advertising if the notion is you need to disclose before a person clicks, before a person looks at the page, whether or not there's been some influence.

Po Yi: I think it raises, I mean I think that in the context of your writing, maybe that's advertising for you. But you don't have to deal with some of the issues that some of the brands have to deal with. 'Cause the brands then, if everything that they touch is created and it meets advertising standards, then they have to worry about release. They have to worry about SAG issues. It makes everything more expensive and they maybe wouldn't possibly release this content if it's considered to be advertising because maybe they don't want to go out and get releases for everything. Maybe they don't want to pay SAG fees for the video that they don't consider an advertisement.

Rick Kurnit: I have a person's name in my article so I've got a right of publicity problem.

Felix Wu: So, maybe we can turn here, one of the ideas that a number of you brought up is this question of, is the point then to inform

consumers about? You know, who is the one actually distributing this content and not just what kind of content it is? And if so, is that the sort of thing that anybody cares about? So, for this maybe I'll turn to Jeremy next to talk about that.

Jeremy Sheff: Yeah, well it's not clear that we should care, right. So, the FTC thinks that we should care and the FTC's position is based on a particular notion of materiality and if you read the best encapsulation of it, I think he's in the "Guide for Businesses" that issued alongside the guidelines. They say, why would it be material to consumers to know the source of the information that they're categorizing as advertising?

Because knowing that something is an ad likely will affect whether consumers choose to interact with it and the weight or credibility consumers give the information it conveys. And it's just not clear that that's true. I mean that's an empirical claim and it's just not at all clear that that's true, right.

We ask whether consumers are more skeptical of sponsored content that's identified as such than non-sponsored content. There's a fair amount of psychological and other social science research that calls that claim into at least some question. The evidence is, at best, mixed. We just tend not to be very good at monitoring the sources of our beliefs. We like to think we are better at this than we are. And we are heterogeneous in our capacity to do that, right? Some people are better at it than others and it's not clear that this kind of disclosure is going to be helpful.

In particular there's a lot of empirical and theoretical work out there that suggests that disclosures are just a bad way of getting at this increased skepticism or at this increased attention. In law professor circles we've got an article turned into a book by Omri Ben-Shahar and Carl Schneider talking about the kinds of disclosure regimes that we all run into every day. Whether it's the "I Agree" button on the terms of use for any website or consumer product that you interact with or the boilerplate that appears in most consumer contracts that Peggy Radin [phonetic] has written quite a bit about. It's just not all clear that these kinds of disclosures do the kind of work that they are ostensibly designed to do. That is, get consumer attention and focus consumers in on the import of a particular decision. In fact, there is at least some evidence that they make things worse, in at least certain contexts.

So the dietary supplement disclosures that we talked about in the morning panel is one potential example of that. And is at least some evidence that depending on the timing of the disclosure, depending upon the formatting of the disclosure, it can actually be better for brand recall, better for brand recognition to have this kind of warning, pay

attention, you're being advertised to. Not that it will make you necessarily any more or less skeptical of the factual claims that are involved in such a message. But that it will make you more likely to remember that you were, in fact, exposed to this thing. And that that can have effects on your purchasing decisions in the future irrespective of whether you believe or disbelieve any factual claim about the nature of the product or service that might be in such a communication.

Because these things are so sensitive to context, right, and because that kind of influence is something that advertisers generally want to have over their potential customers, there's a bit of a cat and mouse element involved in these kinds of regulations. Where the FTC can put together its guidelines and tell you what you have to do and when you don't have to do it. But how you do it and what timing and what context within the framework provided by the guidelines is something that can have serious effects on the effect of those disclosures on consumer reactions to the communications. It's not at all clear that those are consistent with what we think the problem of materiality would be.

So, what we end up with is kind of a normative question as to if that's true, if we're skeptical or dubious of the empirical claims regarding the materiality period that underlies these guidelines, we have to ask, what other work might they be doing, right? If Felix's question is right, that we don't want, that it seems incontestable that if consumers are fooled into thinking that something is an ad, that it's a good thing to unfool them. We have to ask, well they're not going to be any more skeptical of the ad and it's at least possible that they will be more influenced by the ad in ways that they are unable to appreciate. Then what work do we think that this kind of a disclosure requirement is doing?

So, this gets into bigger and deeper normative questions that are at least as old as Ralph Brown article in the "Yale Law Journal" about advertising. And it's not clear that these kinds of disclosures are, for example, any useful addition over false advertising law in general, right? If the claims in these kinds of disclosures that you either think or you don't think are an ad, are true and you believe them, well then that's a good thing, right? So, you're better informed.

If it's false, then it would be a bad thing for you to believe it based on the fact that it was presented to you in an advertisement. But of course if it is false and the belief was created by some explicit or implicit statement in the advertisement, well then we've got false advertising law, separate and apart from any disclosure requirement that would allow the FTC to move in and stop it. So, it's not clear that the disclosure requirement adds anything to that.

Where I think we're left is the area where we've got beliefs that consumers develop based on their exposure to these kinds of

communications that are not fairly characterized as either true or false, right? It's just maybe something that you prefer, maybe something that you like, that you might not have liked as much or been as interested in before. Not based on any factual belief, but just based on your tastes have changed, right?

And if we're talking about influencing consumer taste and preferences, with respect to things that aren't necessarily provable as true or false, well then the normative issues become very, very different, right? Then, we're dealing with a notion of autonomy that isn't necessarily captured by false or misleading advertising standards. And we're dealing with regulation of speech and the ability of people to try to persuade one another, whether they have motives that have to do with commercial transactions or not. And drawing lines in that area it becomes very, very tricky, right?

Every communication or every exposure we have to information or contact with any other person influences us in some way. And distinguishing good influences from bad influences is not something that admits itself to resolution based on the kinds of standards that we are used to finding in the advertising context, in particular, the false advertising context. It's kind of turtles all the way down once you start getting into what persuasion is permissible and what isn't, right? Everything we do persuades or at least has the potential to persuade.

So, what we need then to justify this, it seems to me, is a deeper theory of autonomy that isn't necessarily expressed in any guidelines certainly, but certainly in any other area of advertising law that I'm aware of. But, you know, what we expect of ourselves and what we want for ourselves in making our way through the world to be protected from, at least without our knowledge.

Rick Kurnit: But I think there's a question of two levels of protection. I totally embrace the notion of the concern with truth and the concern with the integrity of the content. And I don't have a problem with the notion that if a brand wants to redistribute some other content, it makes it its own and it is responsible for checking the truth of that content and being responsible for making sure it has the substantiation for any claims. But my point is that is where I believe the consumer has the greatest interest: in not being misled with respect to the truth of a claim, not being misled in making a purchasing decision based on information about a product or service.

The problem I have is when the commission tells us we also have to provide users with the same information so that they can make a choice about whether to interact with the corporation. That we're protecting the consumer from being exposed to truthful speech just because it's annoying or because someone has made a determination

that by virtue of it being corporate speech it is advertising: it is less worthwhile or less worthy of the user's time and attention. In the effort to protect users from being exposed to corporate speech, we diminish our ability to protect consumers from false information that is likely to influence the consumer's purchasing decision.

And I also take exception to the notion that just because something is a YouTube video created by a monkey, it is more useful than a commercial created by an advertising agency. Consumers need to be protected against wasting their time being exposed to content created by communications professional so they can devote themselves to YouTube videos created by children and that's protecting consumers' valuable time.

Our effort should be focused on protecting consumers against giving credence to false or biased information, identifying whether anybody influenced the material content, holding a brand responsible for substantiating the truth of any claims, influencing the purchasing decision by believing something that is not true. The effort to warn users off of content just because it's created by an advertising professional, suggesting that that in itself makes it dangerous or to be avoided makes it far more difficult to communicate what is far more important.

Excess regulation makes it impossible for the media to create the user experience that they would like to create. When a Taboola widget needs three disclosures: that it's an ad from Taboola, that somebody other than the publisher is in the right-hand column and then that somebody else, wanted you to read this article makes any important disclosure unreadable, and how important is it to know who wants you to link to the "New York Times" maybe because it provides information about the product category that they'd like you to have. A warning label "Ad" communicates it is something to be avoided and that's not serving the consumer or helping us to have truthful information about products and services made available to consumers.

Po Yi: Rick, are you assuming a very different empirical world? Because you're assuming these warning signs, skull and crossbones are effective and will turn people off, so that they won't and you're assuming that they—

Jeremy Sheff: They could, but they could not, right? You know, sometimes they do. Sometimes they don't.

Rick Kurnit: --Do I really need to be warned about it's an ad, don't read it. As opposed to only being informed if it's content that, is influenced or wrong or biased? Wouldn't I much rather just know that

2016]

SPRING SYMPOSIUM

593

it's good content? Do I really care how much somebody paid for the ecosystem? Are newspapers that survive only if billionaires are willing to finance them pure editorial as opposed to commercialized interests in the propagation of information?

Jeremy Sheff: So, it seems that we care about things other than truthful, dissemination of truthful information, right?

Rick Kurnit: The FTC does.

Jeremy Sheff: Yeah, and you know, I don't think that it's necessarily misguided to care about things other than the dissemination of truthful information. I don't think that the case has been in the guidelines for doing so, right? And I think that generally we pretend in all of our advertising law that that's what it's really about when it's clearly not, right, that there are other things at work here, other things that we think are important about the way we live our lives. And the way we interact with one another that has very little to do with what we think about in terms of truth or deception, what we think about in terms of First Amendment law, generally. If you believe in this marketplace of ideas metaphor that we just kind of received as gospel. It's just not clear that that is an accurate description of how communication works and how we want to engage with one another in our communicative interactions.

Felix Wu: So, let me see if I can get at this in a slightly different way. 'Cause there are a number of different things that intersect here and I want to see if we can disentangle them. Imagine that a brand distributes some form of content and at the top of it says, this is not an advertisement. This is not being distributed by any commercial speaker and has not been influenced in any way by a brand owner. Says all of those things, explicitly at the top of what is in fact an ad in which the content has been paid for by the advertiser and the content has been influenced by the fact that it was being paid by the advertiser. Should that be permissible?

Po Yi: I feel like we're kind of focusing on the wrong page. Talk to any content creator, content, I spend a lot of time talking to a lot of content creators, creative community, the technology platforms and if you ask all of them, they don't really care. If you ask marketers, do you care about disclosing, they say, of course, we'll disclose. It's the how that really matters to them more because what content creators don't want to do, is they don't want to create something that somehow makes what they do inauthentic. Or that it somehow impedes the message,

whatever message that they're trying to create and produce. They want to make sure that if you're working with legal, if legal can come up with some way to disclose a relationship that does not intrude on the content itself, that's a homerun.

So, I don't know that people really care so much as to whether this is an ad, this is sponsor or that some brand spent 50 million dollars producing this or some brand is distributing it. They just want to know how do we do it? How do we do it in a way that is seamless, organic and yet kind of goes to the heart of what the FTC is saying, transparency, transparency that a brand was involved in some way, shape or form.

I think no one really cares as long as you can come up with a creative solution on disclosing this. So, what you're talking about up at the top saying, this is not an ad, whatever it was, that will never fly because too many words, too many characters and it's not creative enough.

Felix Wu: No, no but that's not the point. The point is that it's a blatant lie, right, everything I just said that you put at the top of this is a blatant lie. But the only thing that's being lied about is about the source and creation of this content. None of the actual claims in the actual content itself. Assume all of that's truthful, that truthful claims are being made in the content itself. But at the top of the content, I have these blatant lies about the source and sponsorship and the like of—

Rick Kurnit: If it is material to the consumer's purchasing decision, if it enhances the credence about a claim about the product or service, then it's deceptive and it's illegal. But if that content has nothing to do with the product or service, then it doesn't matter. We don't have a perfect world of complete disclosure as to everything. Wherever content comes from, it's influenced. And curation is influenced by an editor's decision to select content that is going to encourage placements by an advertiser.

The editor has curated the content of the publication to the kinds of material that attract the advertisers they want to do. So, "Playboy Magazine" made a change to bring in more advertising. The editorial decision to do away with so-called nudity in favor of salaciousness, that's not a pure editorial decision. There are no pure editorial decisions. There are no editors who are free from publishers anymore. There's no wall up anywhere.

The effort to be pure about curation is just going to make it impossible to the mission we really want, which is to provide protection against deception. We need to stay focused on regulating the materially false claim, material in the sense of likely to influence a consumer's

purchasing decision. It would be nice to get fully informed consent before you read anything, but it is impossible.

It would be kind of great if somebody could figure out how to give you all of the relevant information about the author and the content before you spend your time, but you don't get informed consent before you read anything. You're lucky if you have some idea what the movie's going to have in it before you walk in. And I really don't want them to tell me the ending so I can see whether I'm going to like the movie before I see the movie.

Ellen Goodman: Can I offer a take on one of the things I think is going on here? I agree there's been mission creep on the FTC's part. And I want to suggest a reason why I think this is happening. There is another body of law that deals with sponsorship disclosure, which was the FCC Sponsorship Disclosure, which came out of the whole experience of the '60s. And before that there was a law in 1912 that was the Newspaper Publicity Act, which is the source of the advertorial label on top of advertorials and magazines and newspapers. And that was part of the whole second-class postage benefit that newspapers weren't going to get. So both the FCC and that newspaper regime are not applicable in the digital world.

And I think they had a very different concern, a concern that I think we see emerging in the FTC's world. They are concerned not just with the truth of a product, advertisement or promotion, but instead with a much broader set of concerns with kind of a right to know who you're being spoken to by. And it's those concerns, I think, that we see about our concerns about dark money.

So, when we're concerned about dark money or PACs, it's not so much because they think people are really sophisticated and if they knew, they would make different decisions about whom to vote for. It's because we have this sense that there ought to be certain transparency. And maybe the consumers of that transparency are not consumers in the marketplace, but sort of the broader discourse public sphere so that we know where money is flowing and who is saying what and why.

I think those broader set of concerns were what were at work in these other sponsorship disclosure regimes. What I see the FTC doing is now it's the only one standing, right? Because it is the only one with jurisdiction over the digital world and over what is now not just advertising, it's just content. It's just, you know, we can view the lines between content and advertising are completely fuzzy and it's just content the FTC is only the kind of regulator that doesn't have rule making powers standing and it's trying to deal. And I agree, it's kind of going beyond its consumer protection can and reaching out to try to deal with some of these other concerns.

Felix Wu: - -

Shelly Paioff: I think the example you gave, I mean a lot of this covered already I think in the guidelines. So, if an advertiser is already following FTC enforcement guidelines, it doesn't seem necessary to cover it also in the native advertising guidelines. Because then you're kind of conflating the two, you're saying just because a brand was there, or touched some sort of content, it makes it an advertisement. I think that's where the confusion is. We have to distinguish between content that really isn't an advertisement and maybe an advertisement in disguise. And just content that a brand happened to sponsor, one that a distributor finds interesting.

I mean a perfect example of branded content that is not an advertisement is the AMEX open forum website. Po used to work at AMEX. So, you're very familiar with it, but I mean the open forum website is a website that just distributes interesting content. It's funded by American Express. And NAD has found that you have to disclose to consumers that it's funded by American Express even though most of the content on there or even all the content on there has nothing to do with American Express or the services they provide.

I think that they're not making enough of a distinction of when it is material for consumers to understand that the content is funded by a brand.

Po Yi: Well, because the FTC is making a distinction between when a brand is a publisher, it somehow should be treated differently than a traditional medium if it's being a publisher. If a brand is a publisher, like Red Bull, for example, Red Bull TV, it's not all about Red Bull. There's some good content there.

Rick Kurnit: But that's absurd. The "Wall Street Journal" is a wine club according to the mailings that I get from the "New York Times" and the "New York Times" sells memorabilia and tchotchkes according to the insert—

Po Yi: But I think the FTC was really upset with the whole thing that happened with American Express Forum because somehow there are just different standards being applied simply because brands are now becoming publishers.

Shelly Paioff: But someone needs to pay for the content. There's always someone, I mean that's what we're trying to say is that who is paying for the "New York Times" article? The advertisers who are

2016]

SPRING SYMPOSIUM

597

advertising around the article that's in the "New York Times" in the newspaper. So, I think you have to make a distinction between the brand content that's just content that brands happen to want to distribute and something that's truly an advertisement.

Po Yi: For example, let me give you an easy one. Let's say that American Express owns, you know 100% of NBC, somehow it got into media business and you go to an NBC website, are you supposed to say it's American Express? Open Forum, even though it has some information about the small business - - it's targeted for that audience. American Express, they became a publisher. They have great content for small businesses. But in that case, you have to say, American Express Open Forum, as opposed to just Open Forum. You begin to wonder, right, where do you draw the line? I don't think anybody has a really good—

Felix Wu: So, wait, let me ask something. If this is not what you meant, then you can correct me, any of you. But different standard for the same statement depending on whether it's being made by a brand or a, quote, content provider, right or wrong?

Po Yi: Additional content provider.

Felix Wu: Yeah, to apply a different standard for the same statement depending on whether it's being made by a brand or a traditional content provider. Do you think that's a right or a wrong thing to do? Anyone?

Rick Kurnit: I think it's wrong and I think it's what the FTC is trying to do because it isn't a question of who is financing it. It's a question of whether or not there's anything that the reader should know that they wouldn't know that is likely to influence the purchasing decision. So, if you look at the endorsement guidelines, you must disclose who that speaker is if the consumer would be surprised or wouldn't know. But you don't have to disclose it if the consumer knows that it's the brand. How much credence to give any claim is covered by knowing that the speaker is trying to sell you something--so who is the speaker is relevant if it would impact how much credence the consumer is going to give to what the speaker says.

The endorsement guides are great, but the new guides assume that we're going beyond that in pursuit of this perfect world of it'd be nice to know everyone who is behind the speaking. Who is financing the platform? (It'd be nice if the PACs had to disclose their role before the election instead of six months after. But that's a whole other issue of

598 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

First Amendment speech for corporations who are allowed to, in that realm not effectively or timely disclose.)

The Guides do say context is everything. They do say the media can try to find a format to make this clear. So, it's in there for us to fight about it. And I guess my message is there's also the stuff in there that I am seeing counsel to companies read that says, we have to say ad. And that is creating a huge problem for media who are trying to comply with the FTC by creating a context and format that will be a good user experience.

And let's be clear, the word "ad," the word "advertisement" is a complete negative. It is such a strong--this is why, as the FTC has noted, my clients have done everything in their power to try to not use that word.

Felix Wu: Let me try to connect this discussion with the one that we had this morning. If the FTC wants to decide that in fact people care about the source of the content they're reading. And want to know and that it is in fact material to know about where the money flows and all the rest of that sort of thing, should the FTC have the power to just decide this?

Rick Kurnit: I would argue not. I would argue that it's a content-based regulation that is not supported as the least restrictive alternative to protect the consumer interests. And the consumer interest, the greater consumer interest is to not be deceived or misled in terms of influence on matters that influence consumers' purchasing decisions.

The consumer's interest in not clicking on something without first giving an informed consent because it might be an ad, is not equal to that interest. Before you click, it should say that it's going to be an ad. It's just how do I make that distinction? Before you click, somebody wants you to read this, but it's the "New York Times" and, you know, it's good content because you know it's a "New York Times" URL.

Felix Wu: Okay but that one's a little bit different. It wasn't so much about whether or not you're fooled into clicking on something, right? But we had previously been describing this idea that what really matters is whether or not it's material in the sense that consumers would give the content greater credence if only they knew. Right? So, assuming adopt even just that standard. Should the FTC be able to decide that basically the answer to that is yes just in pretty much all circumstances, right? In other words, you know, they're just going to decide that in fact that's how people act and that, therefore, you know the source of the content always needs to be disclosed. Because it will always affect the credence that people actually give to the statements

2016]

SPRING SYMPOSIUM

599

that are made therein.

Rick Kurnit: The old law was you had to disclose it before they make a purchasing decision. The old law was you could do teaser advertising. The old law was you could engage consumers. You just needed, before the call to action, before they purchase, to be very clear that they knew where this all came from. And this is now saying because it's digital that it's before they click or tap. And that's a big change.

Ellen Goodman: But the reason for that change, I think, is because the FTC is dealing with this new world where we're mobile and content is being disaggregated and disclosures are falling away from the mother ship, right? So, to the extent that you used to know who was talking to you, you now don't because it's in your social feed.

I respect the FTC for trying to tackle that new environment. On the question of once they've decided that its material for consumers to know who they're spoken to by, should they regulate? My answer is also, I think they probably have gone too far, but not, I think, implicit in your comment is that maybe it's not constitutional for them to do that. I don't agree with that.

I think though, I think that they're overreaching. It's maybe a little ultra-virus because much of this is not trade regulation. They're a trade regulator and this stuff, I think, goes much more to sort of our discourse environment. I think the problem is, and in addition to their being the only regulator standing, we're in a world where, you know, Rick you keep saying, everyone, all editors are influenced all the time. And of course that's true. The FCC dealt with that by having a bright line rule. That when you're getting consideration, that's different from other things that may influence you like your political beliefs or wanting to suck up to your editor or wanting to suck up to your advertisers.

Those institutions in the old media world developed codes of ethics and interestingly, I think Po you were sort of alluding to this, there's actually not that much controversy. Everyone wants disclosure, right? Like the IAB has their guidelines and the Society of Editors has theirs and the Press Association has theirs. They're all largely in agreement and it's not very far from what the FTC wants. So—

Po Yi: It's the how. So, you all shouldn't think that there's this huge gulf between what the FTC wants and what sort of industry wants. But I think that with the breakdown of that old media world and these codes of ethics and AMEX doesn't subscribe to those. So, why do I care whether the "New York Times" is speaking to me or AMEX is speaking to me, I'll judge the content on its own. You know, but I would expect

600 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

the “New York Times” not to moderate comments to jettison all the critical ones. Right? Because that’s kind of what I expect them to do and they probably somewhere have in their code of ethics, something that says that.

Does AMEX? You know, are they going to, when I read their stuff and I look at the comments, can I expect that they have left in things that are critical to what they are saying, probably not because they don’t subscribe to that. So, for that reason I think it does make a difference for me to know that it’s AMEX speaking to me and that they have a difference—

Po Yi: No, but it’s actually the when, not so much that it is AMEX because the whole thing about Taboola was that when you click on it, you’re going to see. Even before you click on it, you need to show that it is actually AMEX even though it’s so very clear when you click on the front page. It’s an ad. So I think it’s also that you help with the how, but it’s also the when. Right?

And I think the FTC did go pretty far this time on the when issue.

Jeremy Sheff: And this is actually consistent with the psychology research on this. That the how and the when matters more than the weather. It can be outcome determinative in terms of the effects on materiality. So, to get back to Felix’ point, which I think is an important one and which lines up with Ellen’s point from earlier about what’s driving all of this, right?

It’s got to be the case that something other than materiality is driving this. I think that’s true in terms of materiality in driving a consumer’s purchasing decision through the credence that they accord to a communication depending on the source. Right?

And I think Ellen’s point from earlier in our discussion is right, that that’s one set of concerns inherent in this area of regulation, but there’s a different set of concerns about the discursive environment. And that that is the set of concerns that is more likely to be motivating this. But because the FTC is the only player on the field and their brief is to deal with material influence over the consumer purchasing decision, they’re shoos warning those kinds of concerns into this type of a regulation in ways that don’t necessarily fit. Because again, these kinds of disclosures can have different effects on the consumer purchasing decision depending on the manner in which they’re made, the time with which they’re made, that don’t line up with materiality, but may nevertheless line with this other set--

Po Yi: But I think what’s implicit in all of this, this is my personal view of this, is that I think the FTC was giving credence to the fact that there is so much proliferation of content behind this and it was actually

2016]

SPRING SYMPOSIUM

601

really important. And by telling people ahead of time what content you might be clicking on, and this is why, this is going back to my earlier point about how it's no longer what is in the content, but the content itself becomes the ad, right, the product that's being advertised.

So, I think the FTC is giving lot of credence to the fact that much of the time, there is so much content and if you are going to be showing some content or want to show some content to the consumer, consumer has the right to know what it is that they're going to view even before you click on it.

Rick Kurnit: I agree. And that's where I have the problem because with all due respect, Justice Scalia, may he rest in peace, doesn't need to be warned about American Express. But if you put the "New York Times" in front of him, he said he would throw up. So, the fact that the speaker is a media, not a brand, is problematic. I find the "New York Times" to have great credence, but would want to know if the source was Fox.

Po Yi: I'm sure, but he wanted to know that it was the "New York Times" so he could throw up.

Rick Kurnit: Right, but the FTC isn't doing that. They're not protecting you from that, right, because that's a media. So, this is where the government is saying, okay media doesn't have the same regulation as other corporations. If you sell a product, you have an additional regulatory impact. And it's getting to be a content-based regulation that doesn't have a good justification.

That's my First Amendment problem, it's a content based distinction on who the speaker is. The government says, you as a speaker have to label your content as something to be avoided. That's not right. They've gone too far.

Felix Wu: I think we'll need to open it up to questions. I'm going to take my moderator's prerogative to say just in 30 second that under that view all of commercial speech is content based. Therefore, there might be a problem there. But in any event, I am going to now open up the floor to questions. I want to make sure that we get an opportunity to get some in. And we do have a wireless microphone now.

Rick Kurnit: Haven't I provoked anyone? I tried to be as provocative as I could possibly be.

Felix Wu: I mean I'll throw out some more if others don't want to.

Audience: Native advertising is not my forte, this is just a

602 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

question. What happens if you're then, you know, you should be in a content on something like Twitter, right, and you want people to click it there? I guess my question is where does it end? I mean you're going to disseminate content across platforms. With Taboola it's in kind of a concrete place or in a controlled environment. But, you know, is that the—

Po Yi: How are you distributing it? It depends on how.

Audience: Let's say you're just tweeting things out.

Po Yi: Okay, so if your Twitter handle is a brand, you know what I'm saying—

Shelly Paioff: But I think the FTC has a—

Audience: --it would be the when, so then if your concern is okay, people should know before they click something that it's an advertisement. If you're just tweeting it out, do you have a disclosure there then too? My concern is like kind of where does this end.

Shelly Paioff: The FTC seems to suggest and the example that they give is that of a brand, so for instance, the brand tweets something and they encourage their followers to retweet the content. They have to make sure that when the follower retweets the content that it's clear—

Po Yi: That's a different story.

Shelly Paioff: Right, hashtag—

Po Yi: When the brand is doing it, but if the retweet—

Shelly Paioff: Right, even if I follow Coca Cola on Twitter for instance and they distribute a piece of content that's very clear when I look on their feed that it's advertising for them. Then I find it very interesting, so I retweet it and so maybe I retweet it and I don't have to--do I have to put ad on it because I'm not, you know.

But the guidelines seem to suggest that Coca Cola has to make sure that the title of the content that they're distributing says that it's advertising content that it's clear when I retweet it or I share on Facebook it's an ad. And I think that that kind of puts an additional onus on advertisers because they have to figure out how when they encourage their followers to share the content with their friends to make sure that they know that it's advertising content.

I can't remember which example it was, but there's a specific example addressing this and the FTC seems to think that you have to go further than you did before.

Rick Kurnit: That was easy.

Shelly Paioff: That one's easy. You have to disclose that it's an ad.

Rick Kurnit: And that goes to the credence, that influencer is being paid. So they're biased and you, as a consumer want to know that they have a bias before you follow their lead. We're all good with that.

Jeremy Sheff: So the empirical evidence that I've been able to find on this is actually interesting. It's not an exact match because it comes from more of a product placement in television content, for example. But the study that I found on this, which is from a couple of years ago, suggests that given a disclosure in advance of being exposed to such a placement actually doesn't work. That it's only giving kind of a disclosure after having been exposed to that that we think back on what we have seen and discount it retroactively. It was counterintuitive to me, but that's apparently what was found in this—

Po Yi: The FTC is asking you to do both, right, so before and—

Jeremy Sheff: --right, so you know, and then, and I think it's probably a little bit different where, for example, in a digital environment, just clicking on the link to find the content in the first place, all right before you're even exposed to the content. That might influence you in a way that you might not want if you were being skeptical, right. That's a little bit different than what was being investigated by these researchers here. But it's a data point for whatever it's worth.

Felix Wu: While others are thinking of questions too, on this timing question, if in fact it's okay then to deceive consumers just long enough so they'll click on it and then disclose to them. Does this mean that bait and switch advertising should be regarded as okay?

Rick Kurnit: Bait and switch advertising has always been illegal if the consumer has given consideration or reliance- significant effort or a change in position such as you brought them to the store. So, in reliance on the false claim, the consumer relied to his or her detriment. That is deception.

Felix Wu: No, you brought them to the content, no?

Rick Kurnit: The difference is and the FTC alludes to the misleading door opener. You know, you let someone into your home. Now the question is, they are saying that is the same as they clicked on something before they landed and saw at the top of what they landed on who it was or what the page was. I guess there are those instances where somebody will grab you and you can't get back or you don't know how to get back to where you wanted to go, so, it could evolve into some serious consumer injury, but that's not what they're saying. They're saying, you just would have chosen not to engage if you knew who the speaker was. And my point is that would be great in a perfect world, but they're asking for too much from a technological and from a human standpoint.

Shelly Paioff: I don't have a problem with disclosing if the content really is an ad. I mean that's the difference. I think we have to distinguish from the contents of an advertisement when it's not. If it's an advertisement, then maybe you do need or you should disclose and I think we do. I know at Taboola we do. We disclose who the advertiser is.

But when something is not really an ad or not being used as an advertisement, why do you need to disclose where the source is coming from? And I think that's the issue around native advertising more so by virtue of calling it advertising you're already going back to the rule that you have to disclose when in fact it may not even be advertising at all.

Felix Wu: Okay, I think so here and then there.

Audience: So, this is a little more of a technical question, less about whether what the guys are writing saying what they are saying, more about, say you had a client who wanted to follow them to the letter what we think they are saying in certain situations. So, I know they draw a distinction between situations when an advertiser just put dollars behind content, so fund with the content. And then they say there's a difference between that and then when an advertiser created or influenced the content, which reading the examples seems to be saying the same thing as whether the products or services are mentioned in the content. Although I think there may be a difference, right?

So, hypothetically let's say an advertiser does a media buy and as part of that they pay to have an article written and then around that space they have paid advertising about their product or service. But the article itself is about the general theme of their product. So, let's say it's

2016]

SPRING SYMPOSIUM

605

about running or something like that. But then it doesn't mention the advertiser's services or products, but then it's surrounded by paid advertising. So, it's thematically tied in. The advertiser influenced the content, but doesn't have to advertise their product and services in it.

It's just one hypothetical. But I was having trouble reading the guides about whether that's the sponsored advertising situation or that that's the presented by, brought to you by, just funded type situation because I think there can be a gray area there.

Rick Kurnit: The bottom line is to put yourself into the position of the consumer and is there information that the consumer would be surprised to learn that would influence that consumer at least with respect to making a purchasing decision? In terms of a real life notion of is your client going to be exposed?

If the content is about running and says all kinds of things about the right kind of shoes and that choice is influenced by the brand who is running the ad because that's their kind of shoes, you kind of get that there's something wrong here and it needs to be disclosed. If the article is about just exercise and getting out and running versus other exercise and it doesn't talk about any product or product attribute and the client just makes athletic clothing. So they want a nice article that will attract people who are interested in athletic clothing, I would tell them to go ahead and take a chance.

Po Yi: I wouldn't. I think I would, if you paid for content to be written, then you don't, I wouldn't call it an ad but I would say it's presented by or it's sponsored by. There are a lot of--a digital company would be like the Onion right? You can pay money to the Onion as part of the media buy. They will create content on a topic that you tell them to write about. It's not necessarily and most of the times it's not about the product. But it is something that the brand audience might be interested in. And the fact that the Onion created the content with brand dollars based on paid media, yeah, I would tell my clients you should absolutely say something like presented by. And in fact, I mean listen, BuzzFeed does that, most of the digital platforms. Most of the digital platforms today do that correctly and I think the FTC even recognizes that they are doing it correctly.

Audience: So, what about a case where a content website has content that's not generated by an advertiser. It's generated by an independent third party. But there are links in the content to the shopping website for certain products and maybe they get a commission every time somebody clicks on the link and goes to that website. And as a consumer I kind of assume with some sites they're probably getting a

606 CARDOZO ARTS & ENTERTAINMENT [Vol. 34:555

commission, 'cause how else would they make money, but I'm not really sure. So, is that something that needs to be disclosed?

Shelly Paioff: I guess, yes.

Po Yi: It's an affiliated marketing model.

Shelly Paioff: Yes, it's affiliated marketing model and they're also covered by the endorsement guidelines. You're required to disclose that you're getting paid when you're distributing or referring to certain content or to a shopping website.

Jeremy Sheff: Just out of curiosity, would you care if the content website operator was getting commission from something that you were going to buy anyway?

Shelly Paioff: I might.

Jeremy Sheff: Would you be less likely to buy it? Would you close your browser, open up a clean browser and go find the thing elsewhere and then go buy it?

Shelly Paioff: I think it would probably just affect how I interact with the website and how much time I choose to spend there. Like if it was, let's say if one article out of every 20 had these links to shopping websites, I might not really care. I might still think of it as a website that's primarily a media site. But at some point it becomes a store and then I'm just going to interact with it differently.

Rick Kurnit: I would argue the materiality depends on the two ways that happens. My clients independently create editorial content removed entirely from anything commercial. And then allow someone to add links for revenue share if it happens to coincide. And I don't think you would care about them doing that.

The other model is they implant in the story the revenue share partners, which means that the content is influenced by certain brands. And you would care about that because then it is a biased reference and endorsement. And this is the question of integrity and the credence being the focus. You want to maximize that relevant communication to the consumer, but if disclosures also speak toll of these issues that have nothing to do with credence, information that is not material to a consumer purchase, it becomes a challenge to communicate that which is material and most relevant. Just to make the point that somebody is making money, it ends up saying it's bad content. What is left on the

2016]

SPRING SYMPOSIUM

607

internet is some 12 year old who is not making any money, and simply for that reason it is presumptively good content.

Felix Wu: Last question, anyone? All right. Please join me in thanking the panel.

Stella Silverstein: Just a reminder. We have a reception right in the lobby if anyone wants to join. And again, if you are collecting CLE credits, be sure to sign out of Panel 2 and turn in your evaluation sheets.