

## Digital advertisers need to consider disclosures for 'ordinary consumer,' FTC official says

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### IN BRIEF

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Regulators will not allow disclosures in online or mobile ads that are exclusively geared to the expectations of younger, more technically savvy people, Richard Cleland, assistant director of the FTC's Division of Advertising Practices, said at a conference\* in Washington. Rather, consumer disclosures in digital ads must be based on the FTC's long-standing standard that disclosures are clear from the "perspective of a consumer acting reasonably" in the marketplace, the FTC said in a policy statement it made in 1983.

"The reasonable consumer is the ordinary consumers who are out there, and there are a lot of people who aren't technically savvy and they use the same things we use," Cleland said. "They don't always get all this."

That means digital advertisers are going to have to design their advertising with older, less technology savvy consumers in mind "until this millennial generation becomes the ordinary consumer in the marketplace," Cleland said in a panel discussion on advertising disclosures in an online and mobile world.

As digital advertising evolves beyond static banner display ads to a form where pitches and endorsements are increasingly embedded into the text and video that people consume online, the FTC has been studying the blurring of the boundary between paid ads and content. The agency held a daylong workshop on the issue in December (see [here](#)).

The FTC is currently in litigation against DirecTV over cost disclosures in the online and television advertising shown by the satellite television company, which the FTC says were inadequate for consumers to fully understand the costs

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of the offer. “You should look at this case with the idea that FTC is willing to litigate over the adequacy of disclosures,” Cleland said.

– ‘Native advertising’ –

One area of concern has been so called “native advertising,” in which sponsored content may appear to be editorially neutral news or entertainment content unless it is clearly labeled as being sponsored.

Laura Brett, assistant director of the National Advertising Division, a self-regulatory group that covers the advertising industry, described her group’s handling of a series of consumer electronics stories on the tech blog Mashable underwritten by Qualcomm about products powered by the company’s Snapdragon processors.

NAD required a prominent label of “sponsored content” while Qualcomm’s ads were being displayed opposite the text of the stories, but said it was permissible to drop that label after Qualcomm stopped running ads opposite the content.

The rise of ads that may consist of nothing more than a Tweeted product endorsement by a celebrity with a large following on YouTube or Facebook, underscores how rapidly advertising is evolving, say lawyers who practice in the industry.

“My job is not nearly the same as it was five years ago,” said Brian Murphy, a lawyer with Frankfurt, Kurnit, Klein & Selz, who represents advertising agencies. “Many people don’t look at big screens anymore.”

With the rise of mobile and online advertising, “the humble disclosure has gotten sexy again,” said Amy Mudge, a lawyer with Venable who represents ad agencies and advertisers in dealings with regulators.

*\*American Bar Association 63rd Antitrust Spring Meeting, Washington, DC, April 15-17, 2015.*

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