

A Call for Radical Transparency: The Regulation of Camouflaged Online Advertising

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Abstract

The modern digital advertising landscape is one where advertisements are camouflaged into consumers' entertainment, news and social media experience in a way that many of us are unable to detect. This lack of transparency has many drawbacks ranging from a degradation of regular media content, a decreased ability to make informed decisions about the use of our time and attention, the exacerbation of mass consumerism and its attendant pressure on the planet. However, the biggest drawback is that it relies on unethical deception in order to more effectively persuade us to make purchases. This article examines the ways in which this deception is inadequately regulated. It suggests how the law could be developed to encourage radical global transparency. The final part of the article confronts the concern that the current funding model that underpins many of the services available on the internet might be destroyed if advertisements were obvious and therefore avoidable and ineffective. Consideration is given to whether, and in what form, alternative funding models may begin to emerge.

1 Introduction

Advertisements in the pre-internet age usually stood out clearly from media content. It was obvious to us that we were watching a television advertisement, listening to a radio advertisement or reading an advertisement in a print newspaper. When the digital world emerged, the first type of online advertisements were also relatively easy to spot. They took the form of banner ads or video ads. People generally try to avoid advertisements and our methods of escaping them have evolved. We used to mute the TV ads, now we can fast-forward them or watch TV on demand, we ignore online banner ads and skip video ads. We install Adblock software which gives further scope to avoid advertising.¹ The old style of 'easy to spot' advertisements have therefore gradually begun to lose their power. In response to this modern reality, a different model of marketing has developed.

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¹ See Part 6 below for further discussion about Adblock software.

This marketing model engages the consumer's attention by subjecting the consumer to advertising *during*, and often seamlessly intertwined with, the consumer's online entertainment, news gathering, or social media experience. The persuasion needs to appear to be as non-commercial as possible. Interestingly, the marketing gurus call the old way of advertising 'interruptive' and this new way of marketing 'integrated'. It might be more accurate to call traditional advertising 'transparent' and the new marketing 'deceptively blurred', 'stealth-like' or 'camouflaged'.

These dramatic shifts in advertising come with a host of downsides and pose challenges for regulators. This article discusses these downsides and challenges. Its main focus is the problem of deception. It explores three main questions. First, why is it a problem when we cannot tell that something is an advertisement? Second, do the current laws adequately regulate this form of deception? Third, what alternative forms of regulation should be considered? Lastly, the article recognises that if advertisements are made radically transparent, consumers might stop engaging with them. Consequently, the current funding model that underpins most of the content and media platforms on the internet might reach breaking point. The final part of the article considers whether, and in what form, alternative funding models may begin to emerge.

2 What Is Happening

Advertisements are now seeping into our online experiences in a way that many of us are unable to detect. The old ethical rule of maintaining a church-state divide between editorial and advertising has been radically eroded. Even Joseph Ripp, the CEO of Time Inc, has said he no longer considers this church-state separation as sacrosanct.²

Of course, this hiding of advertising within regular content is not entirely new. Advertisers sought to embed advertising within non-sponsored content long before the internet age. Product placement in films and television were one of the first examples of this genre of advertising.³ Advertisers have also in the past

² Kara Bloomgarden-Smoke, 'Time Inc. Editors Happier Without Wall Between Church and State, Says Time Inc CEO', *Observer* (online, 20 June 2014) <<http://observer.com/2014/06/time-inc-editors-happier-without-wall-between-church-and-state-says-time-inc-ceo/>>.

³ For discussion about the regulation of this kind of advertising in the US see Jacob Strain, 'Finding a Place for Embedded Advertising Without Eroding the First Amendment: An Analysis of the Blurring Line between Verisimilar Programming and Commercial Speech' (2013) 24(1) *Birmingham Young University Journal of Public Law* 167. In most jurisdictions there is a longstanding exemption from sponsorship identification rules for films. See also Alex Suskind, '16 Shameless Product Placements in TV and Movies', *Vulture* (Web Page, 11 September 2014) <<http://www.vulture.com/2014/09/product-placements-tv-movie-shameless.html>>.

sought to covertly insert paid content into radio and TV. The ‘payola’ promotions on radio in the 1950s are an example of this.⁴ The law in most countries responded to this type of non-disclosed sponsorship by requiring transparency of sponsored material aired over broadcast radio and TV stations.⁵

However, in this age of digital advertising, where the primary business model of many content producers and platform providers is advertising, there has been a substantial increase in the scope and scale of this blurring of lines. As James Williams explains in his book *Stand Out of Our Light: Freedom and Resistance in the Attention Economy*:

In previous media, advertising had largely been an *exception* to the rule of information delivery – but in digital media, it seemed to have broken down some essential boundary; it seemed now to have *become* the rule. ... It wasn’t just that the line between advertising and non-advertising was getting blurry ... Rather, it seemed that *everything* was now becoming an ad.⁶

The nature of the deception is the same as it was pre-internet but the scale and success of the deception has dramatically increased. Viewing embedded advertising as an acceptable, even necessary, business strategy is now widespread. This section of the article describes some of the main ways in which the advertising landscape is changing.

2.1 Blending In

One approach that advertisers are increasingly relying on is to creatively blend their advertisements in with the non-commercial content on a publishing platform. In the online world this ‘blending in’ approach is sometimes called ‘native’ advertising. The human attention in this case has already been garnered by the platform company that is producing the entertainment, news or social media content (YouTube, Twitter, Instagram, Facebook, newspapers, blogs, etc). This media content is in most cases available free of charge to the consumer. The platform company then sells space on the platform to the advertiser. In essence,

⁴ ‘Payola’ was the practice of taking bribe money to play specific songs on commercial radio.

⁵ The United States Federal Communications Commission rules on sponsorship transparency are named after the payola scandal. These rules require sponsored material on TV and radio to be explicitly identified as having been paid for: ‘Payola Rules’, *Federal Communications Commission* (Web Page, 8 December 2017) <<https://www.fcc.gov/consumers/guides/fccs-payola-rules>>. See also *Communications Act of 1934*, 47 USC §§ 317, 507 (2009). Similarly, an Australian scandal that broke in 1999 called ‘cash for comment’ concerned advertisements on radio that were presented by well-known radio hosts in such a style as to sound like editorial commentary. This scandal influenced the development of Australian broadcasting regulation.

⁶ James Williams, *Stand Out of Our Light: Freedom and Resistance in the Attention Economy* (Cambridge University Press, 2018) 32–3.

the platform company is re-selling the human attention that it has already attracted.⁷

The advertiser attempts to retain attention by merging the advertisement in with the regular content. Thus, advertisements appear in consumers' feed on Facebook or Instagram, blend seamlessly into blogs and websites such as BuzzFeed,⁸ or masquerade as independent articles in newspapers or magazines.⁹ Online newspapers like the *New York Times* have introduced a scroll news feed which allows these advertisements to become further embedded in the platform. Sponsored content appears on the scroll in the identical format to editorial content.

An infamous example of this blending-in style of advertising occurred in 2013 when *The Atlantic* online newspaper ran an article about the Church of Scientology.¹⁰ The article, which celebrated the church's past year of worldwide expansion and praised the church's leader, was marked with a small banner that identified it as 'sponsored content'. However, in all other respects the article looked identical to any other article on the site. *The Atlantic* received a series of complaints about the article and later removed it, apologising for the deception.

The content of 'blended in' advertisements is usually produced either solely by the advertising agency or in collaboration with the journalists who work for the media platform. However, in more recent times there has been a new, and arguably shocking, development in the category of 'blending in' whereby the advertising agency is dropped from the equation altogether. Instead, the media companies are forming permanent in-house creative divisions to make branded content for the sellers. Under this model the media publishing company sells both the space and the creation of the branded content. In effect, the publisher is telling brands 'pay us money and we will camouflage your advertisement for you'.

⁷ Tim Wu discusses 'harvesting attention' in order to resell it like a crop: Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (Vintage Books, 2016). His book explores the dark side of the sale of human attention.

⁸ BuzzFeed is an American internet news and entertainment website that specialises in creating viral content. It is saturated with promoted posts that are presented in the same manner as the news and entertainment posts.

⁹ The incorporation of native format advertising is now even easier than ever with the introduction from a Google service called 'AdSense Native ads' in July 2017: see 'Introducing AdSense Native Ads', *Inside AdSense* (Blog Post, 5 July 2017) <<https://adsense.googleblog.com/2017/07/introducing-adsense-native-ads.html>>. This service is available to all publishers, allows in-feed ads to slot neatly inside a person's created feeds. The ads are highly customisable to match the look and feel of the feed content.

¹⁰ See Dan Gillmor, 'The Lessons of *The Atlantic's* Scientology "Sponsor Content" Blunder', *The Guardian* (online, 17 January 2013) <<https://www.theguardian.com/commentisfree/2013/jan/16/atlantic-scientology-sponsor-content-blunder>>.

The CNN Courageous Studio, established in 2015, is an example of this in-house model.¹¹ This division of CNN employs top journalists and award-winning videographers to create sponsored stories or programs that are video-led for brands. Similarly, Condé Nast, a mass media company that owns *Vogue*, *GQ*, *GQ Vanity Fair* and *Condé Nast Traveler*, also have their own in-house advertising agency (or as they call it, 'branded content studio').¹² In a recent series of articles and videos on their *Vanity Fair* platform, various celebrities were interviewed about their lives and their philosophies on aging.¹³ The content looked identical to the regular content on the platform. The interviewees did not talk about Olay beauty products. There was a picture of Olay beauty products on a split screen for a few seconds of a video and in small writing the words 'produced for *Vanity Fair* with Olay' appeared at the start of the article. The aim was to induce consumers to believe that they were engaging in regular non-commercial magazine content. Unlike sponsorship, the idea for these articles and videos did not emerge independently, with a beauty brand subsequently offering to sponsor them. On the contrary, the entire project, from start to finish, was designed as an advertising campaign for Proctor and Gamble.

2.2 Becoming the Publisher

Another new development in the marketing landscape involves brand owners developing their own publishing enterprise that produces information on topics related to their product. Thus, instead of buying human attention from outside publishers, they set up their own publishing enterprises to garner the human attention themselves. Once the attention is gathered, the art of persuasion can begin.

Brands such as the online fashion retailer NET-A-PORTER publish their own magazine.¹⁴ The Marriott hotel chain has its own movie making enterprise. It has produced several movies featuring the Marriott hotels as backdrops.¹⁵ The

¹¹ See 'Courageous', *Courageous Studio* (Web Page) <<https://www.courageousstudio.com>>.

¹² Many other publications have in-house teams of editorial staff employed to create advertisements. For example, *Time Inc*, *Wall Street Journal* and *New York Times* all have 'branded content studios'.

¹³ See, eg, Sunhee Grinnell, 'Ageless Encounters: Growing up in Front of - and behind - the Camera', *Vanity Fair* (online, 27 April 2016) <https://www.vanityfair.com/partners/23_stories/olay/ageless-amanda-de-cadenet/>.

¹⁴ 'PORTER Magazine', *NET-A-PORTER* (Web Page) <<https://www.net-a-porter.com/Content/portermagazine>>.

¹⁵ Three movies are about two hotel Bellmen. Another movie, called *French Kiss*, is about a surreal travel experience in Paris. See Barry Levine, 'Marriott's Adventure in Online Content Marketing Continues with Premiere of Latest Film', *Marketing Land* (Web Page, 11 January 2016) <<https://marketingland.com/marriotts-adventure-in-online-content-marketing-continues-with-premiere-of-latest-film-158848>>.

company that sell the energy drink Red Bull has its own online TV channel which features inspirational extreme sports stories.¹⁶ The target audience begins to associate the Red Bull drink with ideas of energy and adventure. These forms of advertising are subtle and act by way of a psychological mechanism called ‘non-conscious brand priming’. Research has shown that the personality of a brand can non-consciously ‘push’ or ‘nudge’ a consumer to make purchasing decisions based on the brand imagery.¹⁷

2.3 Paying a Social Influencer to Recommend the Product

In the pre-digital world, only those who achieved something remarkable attracted enough human attention to be famous. Famous people have always been influencers and have long been seen as an advertising opportunity for brands. In the new digital age, truly remarkable achievement is not a prerequisite for presenting yourself to the wider world via social media platforms. Some ‘ordinary’ people have realised that if they can cultivate a successful self-brand that gathers enough human attention (measured by followers, likes, shares, etc), they can then commercialise this attention. The term ‘social influencer’ has been coined to describe these self-branded micro celebrities who make money from being able to attract attention.¹⁸ The social influencer makes marketing easy and cost-effective for the brand. They bring everything to the brand – the creative content, the platform presence and the audience.

The agreements between brands and influencers are many and varied. At one end of the spectrum are tightly controlled exclusive agreements where the influencer is trained up to be a brand ambassador and paid for the work. At the other end of the spectrum is the scenario whereby social media influencers are sent unsolicited free products in anticipation that they will be incentivised to speak positively about the products to their followers in the hopes of receiving more free merchandise. This latter model is employed by many fashion and beauty product brands.¹⁹ The world of marketing is now saturated with advice

¹⁶ ‘Red Bull TV’, *Red Bull* (Web Page) <<https://www.redbull.tv>>.

¹⁷ See Gaëlle Bustin et al, ‘Who Does Red Bull Give Wings To? Sensation Seeking Moderates Sensitivity to Subliminal Advertisements’ (2015) 6 *Frontiers in Psychology* 825; Johan Karremans, Wolfgang Stroebe and Jasper Claus, ‘Beyond Vicary’s Fantasies: The Impact of Subliminal Priming and Brand Choice’ (2006) 42 *Journal of Experimental Social Psychology* 792.

¹⁸ For discussion about the rise of social media influencers and the notion of self-branding see Susie Khamis, Lawrence Ang and Raymond Welling, ‘Self-Branding, “Micro-Celebrity” and the Rise of Social Media Influencers’ (2017) 8(2) *Celebrity Studies* 191; Wu (n 7) 215–50.

¹⁹ See Iris Mohr, ‘The Impact of Social Media on the Fashion Industry’ (2013) 15(2) *Journal of Applied Business and Economics* 17. See also Alexandria McCulloch, ‘How Influencer Content Has Put Fashion and Beauty Brands Ahead on Instagram’, *Social Media Today* (Web Page, 18 January 2018) <<https://www.socialmediatoday.com/>>

for both brands and individual influencers to take advantage of this highly effective kind of product promotion.²⁰

3 Justifying Legal Intervention

The question that arises when contemplating these new marketing strategies is whether they are causing any real problems. If no one sees them as a problem, then there will be little appetite for legal reform. From a marketer's point of view there is certainly no problem. The new marketing strategies are very effective at persuading people to buy more products. There is an emerging body of evidence that they are better at engaging consumers than the old 'easy to spot' style of advertisements.²¹ In a recent study 40 percent of respondents said that they had purchased an item online after seeing it recommended or used by an influencer on social media.²² Other research has shown that consumers spend twice the amount of time visually focused on native advertising than on banner ads.²³

From the perspective of journalists, artists, micro-celebrities and publishing houses (who are all in the business of gathering human attention) these

news/how-influencer-content-has-put-fashion-and-beauty-brands-ahead-on-instagram/514871/>.

- ²⁰ A quick search on Google uncovers a plethora of advice on the topic of social media marketing. When I typed the key words 'social media marketing' into an Amazon book search in March 2018 there were over 150 results of books with titles such as *Influencer Marketing for Dummies*, *500 Social Media Tips*, *Social Media Made Me Rich: Here's How It Can Do the Same for You*, and *The Zen of Social Media Marketing: An Easier Way to Build Credibility, Generate Buzz and Increase Revenue*.
- ²¹ Studies have found that users spend 40 percent more time interacting with native ads than with standard ones and that native ad headlines strengthen positive associations with the brand. See Mobile Marketing Association, *Mobile Native Advertising: It's Fit and Effective* (Report, August 2015) 8 <<http://www.mmaglobal.com/documents/mobile-native-advertising-its-fit-and-effective?rt=1>>. A study conducted in March 2016 by IHS technology predicts that by 2020, 63.2 percent of mobile display advertising will be in native advertising; Eleni Marouli and Jack Kent, *The Future of Mobile Advertising Is Native* (Report, March 2016) 8 <<http://recursos.anuncios.com/files/782/40.pdf>>.
- ²² See research conducted by Twitter and the data analytics firm Annalect: @katieaka, 'New Research: The Value of Influencers on Twitter', *Twitter* (Blog Post, 10 May 2016) <https://blog.twitter.com/marketing/en_us/a/2016/new-research-the-value-of-influencers-on-twitter.html>.
- ²³ The software company Sharethrough commissioned a study from Nielsen to investigate how the subconscious brain responds to mobile native advertising. The study was carried out in 2014 and 2015. See 'A Neuroscience Perspective', *Sharethrough* (Web Page, 2015) <<http://sharethrough.com/neuroscience/>>.

advertisements are also not an obvious problem. All of these people want to make money, and making money by selling human attention to advertisers is lucrative.

For consumers there may also, at first glance, appear to be no problem. Consumers voluntarily digest this advertising content and they seem to be freely making purchasing choices. The advertisements enable consumers to use many of the services on the internet for free. At times the advertisements may enable us to conveniently find a product that we are wanting in an engaging and entertaining way. However, the current trend toward a heavy reliance on the merging of marketing and media content also has some significant downsides. The following sections of the article consider some of these disadvantages. Consideration is then given to whether these disadvantages provide sufficient justification for legal intervention that effectively prohibits this kind of advertising.

3.1 Some General Problems That Flow from the Blurring of Media and Marketing

3.1.1 Our Time

One consequence of the blurring of media and marketing is that it ultimately limits our ability to control our time. If we cannot tell when content has crossed from one form to another, then we are being conned. We are not truly free to make informed decisions about how we spend our time. Moreover, the business model of sneakily feeding us advertisements is front-ended by regular media content that has as its main goal the procurement of our attention. Thus, the media content almost becomes 'an ad for an ad'. It does this by techniques such as quick shallow content with tempting seductive headlines amplified by notifications, rewarding 'like' buttons, and infinite feeds. Inevitably fake news also acts as a form of clickbait.²⁴

All these forms of distraction operate on us in similar ways to the 'slot machine effect' of addictive gambling games. The algorithms that design these distractions are not created to help us to carry out our deepest life goals. They are created to gain our attention in order to deliver advertisements to us.²⁵ Google, Facebook, and Twitter are, at their core, advertising companies. It is troubling to realise that

²⁴ The Facebook News Feed is now the chief source of traffic for news websites. See Timothy Lee, 'Mark Zuckerberg Is in Denial about How Facebook Is Harming Our Politic', *Vox* (online, 10 November 2016) <www.vox.com/new-money/2016/11/6/13509854/facebook-politics-news-bad>.

²⁵ See James Williams, *Stand Out of Our Light: Freedom and Resistance in the Attention Economy* (Cambridge University Press, 2018) 33, where he explains that billions of dollars are spent on working out how to gain our attention and make us buy one thing over another.

we are living in a world where we are relentlessly side-tracked from pursuing what really matters to us.²⁶

3.1.2 *A Degradation of Regular Media Content*

The second danger of modern marketing is that the media content itself can become tainted by the commercial content and we will remain oblivious to the contamination.²⁷ We are sliding into a world where there is less room for truly objective investigative journalism partly because so many talented journalists and videographers are putting their energy into creating storytelling for brands. Moreover, if an advertiser has paid for the marketing content to be merged into the media content, then there is pressure on the publisher to pick and choose angles in the editorial content that are aligned with the advertiser's interests. In addition, consumers are directed to advertisements via regular media content that stoops to appealing to low-level base instincts of outrage and titillation in order to gather attention.

3.1.3 *Consumerism, Consumer Welfare and the Health of the Planet*

Ironically, one problem with these new marketing strategies is simply that they are effective. Effective marketing increases sales. The effectiveness of the camouflaged advertisements is further enhanced by big data and the ability of new technology to micro-target the ad so that it reaches the right people, at precisely the right time, with precisely the right message.²⁸ One of the downsides of the success of this form of marketing is that it is arguably contributing to rising levels of consumption.

Overconsumption is the key cause of the worsening levels of ecological destruction and a key contributor to climate change.²⁹ The fashion industry is an example of how out of control our consumption has become. The explosion in

²⁶ Several scholars have explored this aspect of technology: *ibid*; Tristan Harris, 'How a Handful of Tech Companies Control Billions of Minds Every Day' (TED Talk, 26 July 2017). For an in-depth and engaging analysis of the frightening effects of the advertising industry's constant striving to commercialise our time and attention, see Wu (n 7). Wu argues that '[w]e are at risk, without quite fully realising it, of living lives that are less our own than we imagine': at 7.

²⁷ So long as we live in a world where people are reluctant to pay directly for news and entertainment this will be inevitable. One academic has described this bargain of free consumer content paid for by marketers as a 'Faustian pact': Lili Levi, 'A "Faustian Pact"? Native Advertising and the Future of the Press' (2015) 57 *Arizona Law Review* 647, 702-4.

²⁸ See Cathy O'Neil, *Weapons of Math Destruction* (Penguin Random House, 2017) ch 4; See also Dipayan Ghosh and Ben Scott, *Digital Deceit: The Technologies behind Precision Propaganda on the Internet* (Report, 23 January 2018) <<https://www.newamerica.org/public-interest-technology/policy-papers/digitaldeceit/>>.

²⁹ Diana Ivanova et al, 'Environmental Impact Assessment of Household Consumption' (2016) 20(3) *Journal of Industrial Ecology* 526.

global expenditure on clothing and footwear is staggering.³⁰ Today, consumers spend over USD\$3 trillion per annum on clothes and footwear.³¹ Eventually all these shoes and clothes will be discarded and find their way to landfill.

Excessive consumerism is not only bad for the planet, it has also been shown to undermine consumer wellbeing. Research suggests that when a person's value system is orientated around materialistic goals (that relate to status and external validation), rather than intrinsic goals (that focus on personal psychological growth and connection), they report lower levels of well-being and distress.³² The decrease in well-being may arise from a sense of being continuously dissatisfied relative to individuals who own more, and from decreased social engagement leading to a diminishment of one's sense of belonging.³³

Part of the problem is that advertising operates by creating problems for which a product can solve. If a consumer believes it is a problem to wear last year's fashion, then they are more likely to buy more clothes. Advertising has never merely provided consumers with objective, factual information about products on the market. Behavioural economists have long recognised that most advertising is not just about providing information, it instead has the goal of altering consumers' preferences.³⁴ Successful advertising creates consumers who want to shop.

³⁰ Esben Pedersen and Kirsti Andersen, 'Sustainability Innovators and Anchor Draggers: A Global Expert Study on Sustainable Fashion' (2015) 19(3) *Journal of Fashion Marketing and Management* 315, 315–17.

³¹ See 'Global Fashion Industry Statistics', *Fashion United* (Web Page, 2018) <<https://fashionunited.com/global-fashion-industry-statistics>>. See also the growing evidence that is currently being gathered by the UK Environmental Audit Committee who are investigating the environmental impact of the Fashion Industry. The inquiry is still open at the time of writing this article. See 'Sustainability of the Fashion Industry Inquiry', *UK Parliament* (Web Page, 2017) <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/inquiries/parliament-2017/sustainability-of-the-fashion-industry-17-19/>>.

³² See Monika Bauer et al, 'Cuing Consumerism: Situational Materialism Undermines Personal and Social Well-Being' (2012) 23(5) *Psychological Science* 517, 517–23. See also Tim Kasser, *The High Price of Materialism* (MIT Press, 2002). For a discussion on the difficulties in defining well-being, see Sandra Carlisle and Phil Hanlon, 'Well-Being and Consumer Culture: A Different Kind of Public Health Problem?' (2007) 22(3) *Health Promotion International* 261.

³³ See Bauer et al (n 32).

³⁴ See Dan Ariely et al, "'Coherent Arbitrariness': Stable Demand Curves without Stable Preferences' (2003) 118(1) *Quarterly Journal of Economics* 73, 103. Ariely shows that consumer preferences can be deliberately manipulated. See also Kyle Bagwell, 'The Economic Analysis of Advertising' in Mark Armstrong and Rob Porter (eds), *Handbook of Industrial Organization* (North-Holland, 2007) 1701, 1724; Oren Bar-Gill, *Seduction by*

3.2 Do These Problems, on Their Own, Justify Legal Intervention?

The success of modern camouflaged advertisements creeping into all aspects of our digital lives undoubtedly uses up our time, increases consumption, puts pressure on the planet and degrades the quality of media. However, it is not clear that these problems justify legal intervention. Such problems have to some extent always been side effects of all forms of advertising.

What has changed is the magnitude of the problem. We now all have a digital device with us in the form of a smartphone at almost all times of the day.³⁵ The claim for our attention in order to persuade and manipulate us has reached unprecedented levels. It forms the business model of most of the content and platform providers on the internet, and the internet is now where we spend a good portion of our lives. Nevertheless, a degree of consumer persuasion and manipulation by way of advertising is arguably an inescapable part of capitalism. It is possible the world would be a better place if all advertising provided only impartial, objective information. However, it would be difficult to argue for, and enforce, draconian laws that forbid advertisements from engaging in persuasion and manipulation. Advertising regulatory systems have always had to navigate the tension between giving corporations the freedom to encourage consumption and protecting consumers from being excessively manipulated or misled.

This article does not therefore argue against modern marketing simply by decrying that the manipulation is 'too effective' or that it 'is making us buy too much stuff' or that it is 'stealing our time'. Instead, the argument for legal intervention rests on the claim that it is unethical to deceive and manipulate consumers into believing that they are viewing non-commercial content when in fact the purpose of the content is to market a product. This kind of deception goes well beyond the usual manipulation of consumers' perception of their problems in order to make a profit. Nevertheless, if lawmakers *do* successfully regulate this marketing deception, then it is certainly possible that the effectiveness (and downsides) of modern marketing will decrease. After all, it is the element of deception and stealth-like persuasion in modern marketing that is central to

Contract: Law, Economics, and Psychology in Consumer Markets (Oxford University Press, 2013).

³⁵ Research in 2013 showed that users check their phones an average of 150 times per day (and *touch* them over 2,600 times per day): see Tomi Ahonen, 'The Annual Mobile Industry Numbers and Stats Blog', *Communities Dominate Brands* (Blog Post, 6 March 2013) <<https://communities-dominate.blogs.com/brands/2013/03/the-annual-mobile-industry-numbers-and-stats-blog-yep-this-year-we-will-hit-the-mobile-moment.html>>. A small study in 2015 found that young adults used their phones an average of five hours a day – that's roughly one-third of their total waking hours: see Sally Andrew et al, 'Beyond Self-Report: Tools to Compare Estimated and Real-World Smartphone Use' (2015) 10(10) *PLOS ONE* e0139004:1–9.

gaining consumer engagement (which uses our time) and pushing up purchasing (which increases both consumerism and its attendant pressure on the planet).

The following section explores the justification for legal intervention based on consumer deception.

3.3 Consumer Deception as a Justification for Legal Intervention

The potential for consumer deception is a major downside of blurring the line between marketing and media. It is this downside that most easily justifies some kind of legal intervention. Indeed, protecting consumers from being deceived has long been considered a legitimate goal of legal intervention in the marketplace. This is, of course, the goal of rules that prohibit false advertising and ensure truthful product information. The advantages of these rules are well-established under classical economic theory.³⁶ Under this theory, once consumers are fully informed about products on the marketplace, they will make rational choices to maximise their own utility.³⁷ While behavioural economists have more recently questioned the assumption of consumer rationality, there is no disagreement about the importance of consumers not being deceived or misled about the characteristics of a product.³⁸ In addition to rules about misleading product information, there is a long history of disclosure rules around identifying sponsorship on broadcast radio and TV. These rules are justified more broadly by the idea that it is unacceptable to deceive people. For example, when the US Federal Trade Commission adopted changes to TV and radio disclosure rules in response to the 'payola' scandals of the late 1950s, the rationale given was simply that public is entitled to know when and by whom it is being persuaded.³⁹

³⁶ See, eg, Gillian Hadfield, Robert Howse, and Michael Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21(2) *Journal of Consumer Policy* 131.

³⁷ See Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 7th ed, 2007) 17. See also Richard Epstein, 'The Neoclassical Economics of Consumer Contracts' (2007) 92 *Minnesota Law Review* 803.

³⁸ Behavioural economists, while not disagreeing with the need for honesty, are less convinced that consumers are rational actors and instead view consumers as irrational actors who are prone to make systemic mistakes: see Airley et al (n 34).

³⁹ For a full and fascinating discussion on the history of the disclosure rules for advertising on radio and television in the United States, see Richard Kielbowicz and Linda Lawson, 'Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963' (2004) 56(2) *Federal Communications Law Journal*, 329. 'Payola' was the practice of taking bribe money to play specific songs on commercial radio. The FCC rules on sponsorship transparency are named after the payola scandal. These rules require sponsored material on TV and radio to be explicitly identified as having been paid for: see 'Payola Rules' *Federal Communications Commission* (Web Page, 8 December 2017) <<https://www.fcc.gov/consumers/guides/fccs-payola-rules>>.

In the digital world there are a vast array of new ways to engage the consumer, and an increasing reliance on unobtrusively embedding paid marketing within regular content. This marketing strategy inevitably employs disguise and deception. In one study 11 per cent of the publishers admitted that they do not label native ads at all.⁴⁰ Among those that attempt to label their ads as ads, they do so with varying degrees of clarity and conspicuousness. A recent survey suggests that in the current marketing climate, consumers experience great difficulty differentiating between advertising and independent content.⁴¹ Over half of the consumers surveyed reported that they had felt actively deceived by native advertising.⁴² Over three quarters of them were unable to detect that native advertising was advertising.⁴³ Other studies show similar results.⁴⁴

A 2016 report from the International Consumer Protection and Enforcement Network concluded that this kind of deception is a problem worthy of the attention of regulators. It recommended that all traders, advertisers and social media influencers should follow the principle that where content is paid for, or when a commercial relationship exists, this should be disclosed clearly and prominently.⁴⁵

Deceiving consumers so that they do not realise they are consuming content that is paid for by a brand has the potential to distort consumer behaviour and reduce consumer welfare. The findings in the field of behavioural economics have shown that it is difficult for consumers to process rationally commercial messages and this is without the added burden of being unable to detect whether or not what they are reading or watching is in fact a commercial message.⁴⁶ If consumers

⁴⁰ See Jesper Lausen, *Native Advertising Trends in Media* (Report, December 2017).

⁴¹ See Joe Lazauskas, *Fixing Native Advertising: What Consumers Want from Brands, Publishers, and the FTC* (Report, 2016) <<https://the-content-strategist-13.docs.contently.com/v/fixing-sponsored-content-what-consumers-want-from-brands-publishers-and-the-ftc>>.

⁴² Ibid 74.

⁴³ Ibid 34.

⁴⁴ See, eg, David Hyman et al, 'Going Native: Can Consumers Recognize Native Advertising? Does It Matter?' (2017) 19(1) *Yale Journal of Law & Technology* 77.

⁴⁵ The International Consumer Protection and Enforcement Network are an organisation representing consumer protection authorities from around 60 countries. In 2016 it published several guidelines about disclosure in respect of advertising.

⁴⁶ See, eg, Colin F Camerer and George Loewenstein, 'Behavioural Economics: Past, Present, Future' in Colin F Camerer, George Loewenstein and Matthew Rabin (eds), *Advances in Behavioral Economics* (Princeton University Press, 2004); Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioural Economics' (2003) 93(5) *American Economic Review*, 1449; Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2009); and Lucia A Reisch and Min Zhao, 'Behavioural Economics, Consumer Behaviour and Consumer Policy: State of the Art' (2017) 1(2) *Behavioural Public Policy* 190.

are unaware that what they are reading is a 'sales pitch', they are unable to make an informed decision about the genuineness of the content. Poor purchasing decisions are likely to result from this advertising behaviour. A degree of marketing manipulation is acceptable, but not when it results in the consumer failing to notice that they are being subjected to such manipulation.

It is not enough, however, to rely only on this consumer welfare/consumer behaviour argument. Advertisers may rebut the argument by saying that there may well be many cases when a consumer makes a purchasing decision on the basis of a hidden advertisement and the purchase brings an increase in welfare. In other words, no harm is done – the consumer may have made a purchase without knowing they have been advertised to, but are very happy with that purchase. In response to this contention it is necessary to make an additional argument for transparency on the grounds of autonomy and dignity. In essence, this argument maintains that hiding the true motive and nature of marketing content is unethical per se simply because it offends basic principles of honesty and respect. To trick consumers in this way is an affront to their autonomy and dignity.

There is one additional problem created by blurring media and marketing that is likely to have legal implications, but a full examination of this problem is beyond the scope of this article. I will mention it very briefly at this juncture. This problem relates to the legal rules surrounding puffery. In general terms puffery can be described as vague exaggerated marketing claims that consumers do not take seriously. In most legal systems around the world, claims that are considered 'mere puffs' will not attract liability. The problem with the new marketing landscape is that the puffery is arguably far more powerful than in old style ads. When a consumer hears a radio jingle or a paid actor in a TV advert tell them something is 'the best product ever' they might not believe it. However, consumers are far more likely to subconsciously believe the puffery when it comes not directly from the seller, but from a journalist working for their favourite newspaper, or their favourite travel blogger raving about her new hiking boots, or a glowing Instagram star recommending a special detox tea to lose weight. The justifications for allowing puffery begin to break down if consumers do not even realise that the puffs are a form of 'sales talk'. More research needs to be done in this area and the rules around puffery might need to be updated. For the purposes of this article the puffery problem is simply mentioned as an aside.

4 Do Current Laws Adequately Deal with this Deception?

At this stage some readers may be thinking 'but don't most jurisdictions already have laws that prohibit misleading commercial representations and so this kind of deception must already be adequately dealt with under the law?'

It only takes a quick look around the internet to realise that much of this deception is not being prevented by the force of the law. Much of the commercial content on the internet currently has either no label at all identifying it as advertising or has a variety of vague phrases in very pale font attached to it, much like the following labels for an imaginary face cream by a fictitious company called Pretty & Young:

- Recommended for you
- Brought to you by Pretty&Young
- Sponsored content
- Presented by Pretty&Young
- #pretty&young
- #sp
- #liveyourbestlife#feelbadabouthowyoulook#payustofixyourproblem#ad
#weknowyouwillnotreadthisfar

What you are unlikely to see is bold capital letters: THIS IS AN ADVERTISEMENT FOR A FACE CREAM MADE BY PRETTY&YOUNG LTD.

Part of the problem lies in the scope of current laws, the penalties available, the reliance on self-regulatory models, the limited resources available to enforce the rules and the lack of a globally consistent unambiguous disclosure system.

4.1 Problems with Scope

Let us turn first to the problem of scope. In most jurisdictions, specific consumer protection legislation was drafted in a time when it was reasonable to assume that advertising and content were two quite separate things, so that one was easily distinguishable from the other. The phraseology of the rules prohibiting misleading and deceptive representations were therefore written with the *content* of the advertising in mind, not the *identification* that any given content is an advertisement. Thus, the heavy hitting criminal provisions with harsh penalties in countries such as New Zealand, Australia, and Canada, make it an offence to mislead consumers about specific matters in the content of the advertising. These matters include price, nature, place of origin, characteristics, suitability for a

purpose, and the quantity of goods or services.⁴⁷ None of these categories cover the kind of deception involved in disguising an advert as regular media content. So long as the content of the commercial message is not false or misleading there is no offence. The marketer only needs to accurately describe the product that they are promoting.

The United States also does not have a specific legislative provision wide enough to prohibit businesses from deceiving consumers about the commercial purpose of content. The *Communications Act* forbids the undisclosed acceptance of payment for promotion of a product, but this only applies to on-air TV and radio.⁴⁸ Section 5 of the *Federal Trade Commission Act* ('*FTC Act*') more generally prohibits 'unfair or deceptive acts or practices in or affecting commerce' and the Federal Trade Commission ('FTC') is responsible for enforcing this prohibition.⁴⁹ While s 5 arguably covers deception as to the commercial nature of content, this is by no means certain. The federal courts have interpreted s 5 as requiring an advertiser to make a *claim* likely to mislead consumers so that it *materially* influences their purchasing decisions.⁵⁰ There is no definitive research as to whether consumers' purchasing decisions are necessarily altered if they are deceived about the source of product information, where the information is in itself accurate. Thus, it is unclear whether s 5 would extend to regulate this kind of deception in all cases. Nevertheless, the FTC has made it clear in a policy statement and guidelines about native advertising that deception about the commercial nature of content is, in its view, a breach of s 5 of the *FTC Act*.⁵¹ In addition, another guideline makes it clear that any material connection between

⁴⁷ See *Fair Trading Act 1986* (NZ) ss 10–14; *Competition and Consumer Act 2010* (Cth) sch 2 ss 151, 155, 156 ('*Australian Consumer Law*').

⁴⁸ *Communications Act*, 47 USC § 151 (1934) ss 317, 507.

⁴⁹ *Federal Trade Commission Act*, 15 USC § 45 (1914).

⁵⁰ *Novartis Corp v Federal Trade Commission*, 223 F 3d 783, 786 (DC Cir, 2000), citing *Cliffdale Associates Inc*, 103 FTC 110, 165 (1984).

⁵¹ See Federal Trade Commission, 'Enforcement Policy Statement on Deceptively Formatted Advertisements' (Policy Statement, 18 April 2016) <https://www.ftc.gov/system/files/documents/public_statements/896923/151222_deceptiveenforcement.pdf>. In this statement the FTC notes that 'The Commission has long held the view that advertising and promotional messages that are not identifiable as advertising to consumers are deceptive if they mislead consumers into believing they are independent, impartial, or not from the sponsoring advertiser itself': at 1. See also 'Native Advertising: A Guide for Businesses', *Federal Trade Commission* (Web Page, December 2015) <<https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>>.

an endorser and an advertiser must be disclosed.⁵² The FTC guidelines are certainly useful but they do not have the same force as unequivocal laws.⁵³

In many jurisdictions there is also a statutory civil remedy for misleading conduct in trade.⁵⁴ In some legal systems the relevant provision is worded broadly so that it could theoretically cover the deception of hiding advertising within regular media content. However, relying on civil liability in this arena has limited impact. Consumers are unlikely to complain about an advertisement that they did not realise was an advertisement. Public enforcement by way of independent investigation and the imposition of a penalty is a far more effective way of regulating this deception. Civil action can also be limited by a requirement for proof of consumer harm. In the United States a civil claim against a defendant for misleading a consumer would not succeed if there is no proof that the consumer suffered 'concrete harm'.⁵⁵ Such harm will often be difficult to prove in a case where consumers have been misled about the nature of commercial content.

The European Union has been the first to move towards trying to tackle directly the deception of embedded marketing rather than relying on outdated pre-internet advertising laws. The E-Commerce Directive specifically requires 'commercial communications' to be clearly identifiable as such and the person on whose behalf the commercial communication is made to be also identifiable.⁵⁶ The United Kingdom has developed regulations based on the EU model. The *Consumer Protection from Unfair Trading Regulations 2008* (UK) prohibit unfair commercial practices, such as misleading omissions.⁵⁷ The regulations

⁵² Federal Trade Commission, 'Guides Concerning Use of Endorsements and Testimonials in Advertising' (15 October 2009) 16 CFR § 255 <<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>>.

⁵³ For general discussion about the reluctance of the FTC to pursue litigation resulting in uncertainty about the true reach of s 5, see James Cooper, 'The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the *FTC Act*' (2015) 3(1) *Journal of Antitrust Enforcement* 87, 95.

⁵⁴ See *Fair Trading Act 1986* (NZ) ss 9, 40(1); *Australian Consumer Law* (n 47) ss 18, 217. All of the states in the USA have what are known as 'Unfair and Deceptive Acts and Practices' legislation (or 'UDAP statutes').

⁵⁵ See *Spokeo Inc v Robins*, 136 S Ct 1540, 1550 (2016) ('*Spokeo II*'). In order to have the constitutional standing to sue for statutory damages the plaintiff must allege an injury that is both 'concrete and particularized'.

⁵⁶ *Parliament and Council Directive 2000/31/EC of 8 June 2000 on Electronic Commerce* [2000] OJ L 178/1, art 6 ('*EU Directive*').

⁵⁷ The general prohibitions are contained under regs 3 and 6. Denmark is another country with an express prohibition in law. See LOV nr 426 af 3 Maj 2017 (*Markedsføringsloven*) [*Marketing Practices Act*] (Denmark) 3 May 2017, § 6. See also 'Covert Advertising' *Danish Consumer Ombudsman* (Web Page, 25 April 2007)

specifically include failing to identify the commercial intent of a commercial practice as a category of misleading omission.⁵⁸ Commercial practice is defined widely and includes any omission by a trader, or someone acting on behalf of a trader, which is directly connected with the promotion.⁵⁹ In addition, sch 1 contains a list of practices which are automatically unfair and this includes using editorial content in the media to promote a product where a trader has paid for promotion without making that clear to consumers.⁶⁰ In the case of these blacklisted practices it is enough simply to demonstrate wrongdoing, and there is no need to show that it influenced the consumer's decision in any way. A breach of the *Consumer Protection from Unfair Trading Regulations 2008* is a criminal offence with the potential for fines to be imposed. These laws are much firmer than in other countries, but there remains uncertainty about what is sufficient to 'make it clear' to consumers and it appears no enforcement action for failing to identify commercial intent has yet been taken.

4.2 Poor Enforcement and a Reliance on Self-Regulatory Bodies

While many jurisdictions do not have an express law that covers embedded advertising, the issue is increasingly being added to advertising codes of conduct that are published by advertising industry self-regulatory bodies around the world. Australia provides an example of this approach. A new provision was added to the Australian advertising industry Code of Ethics in March 2017. It states that 'Advertising or Marketing Communication must be clearly distinguishable as such to the relevant audience'.⁶¹ At first glance this appears to provide a general rule of reasonable scope. However, the rule only applies to 'advertising' which is defined narrowly as communication that the advertiser or marketer has a reasonable degree of control over.⁶² This means, for example, that a social influencer who is paid to promote a product, but given free rein over how they present the material, is unlikely to be within the scope of the rule.

An even more significant drawback is that the rule is not law. It is part of a set of self-regulatory set of 'rules'. Breaching the Code will not lead to a huge penalty and since the association is a self-regulating body, membership is voluntary. Industry self-regulation is certainly better than no regulation but it does not have

<<https://www.consumerombudsman.dk/marketing-practices-act/covert-advertising/>>.

⁵⁸ *Consumer Protection from Unfair Trading Regulations 2008* (UK) reg 6(1)(d).

⁵⁹ *Ibid* reg 2(1).

⁶⁰ *Ibid* sch 1, para 11.

⁶¹ Australian Association of National Advertisers, 'Code of Ethics' (March 2017) r 2.7 <<http://aana.com.au/content/uploads/2017/02/AANA-Code-of-Ethics.pdf>>.

⁶² *Ibid*. See also Australian Association of National Advertisers 'Clearly Distinguishable Advertising' (Best Practice Guideline, November 2016) <http://aana.com.au/content/uploads/2017/01/AANA_Distinguishable-Advertising-Best-Practice-Guideline_Final.pdf>.

the teeth of the law. Breaching the *Australian Consumer Law* ('ACL') carries a maximum penalty of AUD\$220,000 for individuals and AUD\$1.1 million for corporations.⁶³ In comparison, breaking the Australian Code of Ethics leads to far more lenient consequences, such as a warning letter, or a request to remove the promotional content. Canada and New Zealand also employ a soft, industry-led self-regulatory approach to the issue.⁶⁴ Any industry self-regulation scheme is in danger of being compromised by a lack of independence. For example, a study that looked at industry regulation of alcohol advertising found that self-regulation delays statutory regulation, is often vaguely worded, and can suffer from routine violation.⁶⁵ The advertising industry has little incentive to impose serious and damaging restrictions on its own business model.

The United States FTC's powers to penalise deception are, likewise, relatively limited. The basic administrative remedy for a breach of s 5 is a cease and desist order. The FTC does not have the authority to impose a fine for a violation of the *FTC Act*. In 2017, the Commission, after receiving numerous complaints about failure to disclose commercial content on Instagram used the muted strategy of simply sending warning letters to social media influencers reminding them to change their behaviour and disclose commercial connections in the future.⁶⁶ In 2016 the FTC claimed that the fashion retailer, Lord and Taylor, had paid Instagram influencers to post images of themselves wearing a dress without requiring them to disclose the connection. The penalty was merely a direction from the FTC to disclose such connections in the future.⁶⁷ Similar approaches were taken by the FTC in response to other influencer campaigns later that year.⁶⁸

⁶³ The ACL is enforced by the Australian Competition and Consumer Commission.

⁶⁴ See Advertising Standards Canada, 'Canadian Code of Advertising Standards 1963', *Ad Standards* (October 2016) rule 2 <<http://www.adstandards.com/en/standards/canCodeOfAdStandards.pdf>>; New Zealand Advertising Standards Authority, 'Advertising Standards Code (NZ)', *Advertising Standards Authority* (June 2018) rule 2(a) <<http://www.asa.co.nz/wp-content/uploads/2018/06/Advertising-Standards-Code-2018.pdf>>.

⁶⁵ See Jonathan Noel et al, 'Alcohol Industry Self-Regulation: Who Is It Really Protecting?' (2017) 112(1) *Addiction* 57. A study on industry self-regulation of advertisements of junk food to children showed similar problems: see Jennifer Abbasi, 'Junk Food Ads Reach Children Despite Food Industry Self-Regulation' (2017) 317(23) *Journal of the American Medical Association* 2359.

⁶⁶ The FTC sent notices to 90 Instagram users in April 2017 to remind them to clearly disclose any 'material connection' they may have with a brand or company: see Federal Trade Commission, 'FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship' (Press Release, 19 April 2017).

⁶⁷ Federal Trade Commission, 'Lord & Taylor Settles FTC Charges It Deceived Consumers through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers"' (Press Release, 15 March 2016).

⁶⁸ Federal Trade Commission, 'FTC Approves Final Order Prohibiting Machinima, Inc from Misrepresenting That Paid Endorsers in Influencer Campaigns Are Independent Reviewers' (Press Release, 2017 March 2016). See also Federal Trade Commission,

The US advertising self-regulatory agency has fallen in line with the FTC by adding a new provision to its code of advertising in 2016 that reflects the FTC guidelines.⁶⁹ Nevertheless, the level of enforcement activity has understandably been relatively low.

Despite the relatively strong legislation in the UK (mentioned above) there remain problems with enforcement.⁷⁰ Many instances of a lack of transparency in relation to native advertising and influencer promotion in the UK persist. Alongside the legal requirements, the UK advertising industry has its own Code enforced by the Advertising Standards Authority ('ASA') stating that marketing communications must be obviously identifiable as such.⁷¹ Nevertheless, as with all self-regulatory systems, the consequences of breaching the Code are often minor or non-existent. Many cases are likely to slip through the cracks and those that are investigated merely result in demands to remove the content and not repeat the breach. For example, in 2014 the ASA received a complaint about a promotion of Oreo cookies by way of vloggers entering an Oreo 'lick race challenge'. The ASA found that the Code had been breached by the failure to identify the content as marketing communications. The breach would probably not have been identified without the complaint, and the response from ASA was simply to rule that the advertisement must not appear again in its current form and to tell the company to ensure that future ads make their commercial intent clear prior to consumer engagement.⁷² The Oreo company had by that stage reached millions of viewers with this successful advertising campaign.

5 *Developing Radical Transparency with Global Consistency*

Currently any specific rules and guidelines requiring transparency about advertising are globally diverse and are frequently created either by advertising self-regulatory bodies or, in the case of the United States, by a public enforcement agency. While any efforts to eradicate this deception and formulate disclosure guidelines are desirable, it is arguable that there is a need to elevate the

'Warner Bros Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos' (Press Release, 11 July 2016).

⁶⁹ See Better Business Bureau, 'Code of Advertising' (25 October 2016) s 39 <<https://www.bbb.org/code-of-advertising>>.

⁷⁰ Local authorities and the Competition and Markets Authority ('CMA') are responsible for enforcing the regulations.

⁷¹ See Committee of Advertising Practice ('CAP'), 'The CAP Code Edition 12' (September 2010) rules 2.1 and 2.4 <www.cap.org.uk/Advertising-Codes/Non-broadcast-HTML.aspx>.

⁷² See Advertising Standards Authority (UK), *ASA Adjudication on Mondelez UK Ltd* (A14-275018, 16 November 2014). See also Grace Caffyn, 'UK Influencers Flout Disclosure Rules on Branded Posts', *Digiday* (online, 19 October 2016) <<https://digiday.com/uk/uk-influencers-flout-disclosure-rules-branded-posts/>>.

requirements around this marketing disclosure to the level of law, and to aim for global consistency with effective enforcement mechanisms. This part of the article examines some options for reform that would improve transparency.

5.1 Developing a Globally Recognised Disclosure Standard

If we are serious about defeating the current lack of transparency in advertising then all countries should be aiming for a uniform disclosure expectation. The internet means that the world is now one global marketplace. It is therefore critical that consumer law becomes more internationalised.⁷³ Social media influencers by nature post to the whole world and online newspaper articles are similarly uploaded to a global audience. If the legal expectations about disclosure are fragmented with different expectations in different countries, then confusion abounds. Achieving global regulatory consistency is of course very difficult. Nevertheless, it is a worthy and important goal to pursue. As the writer Yuval Noah Harari argues in his latest book, '[g]lobal problems need global solutions'.⁷⁴

For some time there has been a trend towards aiming for more globally consistent law in the area of commerce. For example, in 2007 OECD countries agreed to a framework for cooperation and consistency of privacy law enforcement.⁷⁵ More pertinently, an OECD report on e-commerce released in 2016 recommended the principle that all advertising and marketing should be clearly identifiable as such and that, where appropriate, there should be development and enforcement of joint initiatives at the international level among governments.⁷⁶ This principle is something that could be incorporated into an international treaty on transparency in advertising.

Ideally, any legislation that tackles the transparency of advertising problem should begin by stating the purpose of the requirements. This purpose could be stated simply as ensuring that the recipients of any commercial communication clearly understand it for what it really is and are able to judge its contents

⁷³ Mateja Durovic and Hans Micklitz, *Internationalization of Consumer Law: A Game Changer* (Springer International Publishing, 2017).

⁷⁴ Yuval Noah Harari, *21 Lessons for the 21st Century* (Spiegel & Grau, 2018) ch 7. Harari makes the point that we now live in a global economy where nations are no longer the right framework to manage the challenges of the age. He argues that we need to globalise our politics: at 125–6.

⁷⁵ See Organisation for Economic Co-operation and Development, *Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy* (Report, 16 January 2007) <<http://www.oecd.org/internet/ieconomy/38770483.pdf>>.

⁷⁶ Organisation for Economic Co-operation and Development, *Consumer Protection in E-Commerce – OECD Recommendation* (Report, 24 March 2016) part 1, para B(13) and part 3, para 54(i) <<http://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf>>.

accordingly.⁷⁷ However, if the law then goes on to frame the disclosure requirements simply as a restatement of this purpose – in other words ‘advertisements must be clearly communicated as such so that consumers are able to judge the contents accordingly’, there is room for a hugely diverse range of opinion about what is sufficient to ‘communicate clearly’ to consumers. Some might say such a broad requirement for clear communication is ideal as it is flexible enough to allow for different approaches to be taken dependent on the context. Flexibility sounds positive but the trouble is that it inevitably leads to confusing and inconsistent expectations. Since the purpose of much modern advertising is to trick consumers into thinking that they are engaging in something other than marketing material, the incentive for advertisers is to do the minimal amount required by the law. There is a strong argument for making the requirements clear and consistent around the globe.

Before coming to a conclusion about what might work as a clear requirement it is useful to examine empirical evidence about disclosure that doesn’t work. Recent studies suggest that there are unrealistic expectations in the advertising industry as to what the consumer will understand. A recent United States study showed that many of the labels currently used to identify native advertising are unclear and that consumers consistently show a preference for more explicit language than is presently employed.⁷⁸ Another recent study showed that over three quarters of consumers surveyed had no idea that #sp stood for sponsored content and almost half were not sure what #ad meant.⁷⁹ It is also unlikely that the phrase ‘promoted by’ is clearly understood by consumers. When the FTC sent notices to 90 Instagram users in April 2017, to remind them to disclose clearly any ‘material connection’ with a brand, some of the letters referenced vague hashtags, saying that consumers are not likely to understand inclusions like ‘#sp’ as indicating paid sponsorship.⁸⁰ They also noted that consumers are likely to skip over sponsorship hashtags when they were included in a group of more standard tags. One study has found that top-placed disclosure (a common practice used by the industry) is a relatively ineffective way of gaining the attention of consumers and that, as a result, a middle-positioned disclosure or a disclosure within the content could be a more effective means of increasing consumer

⁷⁷ This is the kind of wording used in Denmark in the *Danish Marketing Practices Act* (Act No 428 of June 1, 1994) s 4; see Danish Consumer Ombudsman, ‘Covert Advertising’ (Web Page) <<https://www.consumerombudsman.dk/marketing-practices-act/covert-advertising/>>.

⁷⁸ Hyman et al (n 44).

⁷⁹ The FTC recommend that advertisers should not use terms such as ‘Promoted’ or ‘Promoted Stories’, which in this context are at best ambiguous and could potentially mislead consumers that advertising content is endorsed by a publisher site: see ‘Native Advertising: A Guide for Businesses’ (n 52).

⁸⁰ See Federal Trade Commission, ‘FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship’ (n 66).

awareness.⁸¹ Some of the current standards set by the advertising industry are probably set at too low a level to achieve the goal of ensuring that consumers are not misled. For example, the Australian guidelines suggest that ‘#ad’ would be adequate disclosure in some scenarios and yet, as discussed, studies have shown that this will not be effective disclosure for many consumers.⁸²

The failure of current attempts to clearly identify content as advertising is perplexing. The information to be disclosed is not complicated. This is in contrast to the complexity of the information required to be disclosed in the area of financial products or credit contracts. If content had ‘THIS IS AN ADVERTISEMENT’ written in bright red capital letters at various points throughout the communication then it is hard to imagine that consumers would not understand this. Advertisers would undoubtedly resist this kind of approach. Writing a full sentence also takes up space and probably ruins the aesthetics of the advertising content. Whether we should be concerned about this is debatable. However, if being more succinct is considered important then perhaps the easiest and most transparent approach to identifying advertising material is to develop a globally recognisable symbol.

International symbols are used in many other aspects of life and can be highly successful at communicating concepts with minimal space and high recognition. For example, a skull and cross bones is internationally recognised as a sign for danger. A black or white flame on a red background is recognisable as a flammable liquid symbol. A red cross is recognised as indicating medical services. The copyright symbol is recognised around the world as representing that the article you are viewing is copyrighted.

Ironically, the most successful use of international symbols is found in the world of commerce. Iconic brand logos are powerful internationally recognised symbols. Most people instantly recognise the symbols used by Nike, McDonalds and Mercedes Benz. A symbol for advertising content could be developed that would have an equal recognition power. Imagine for a moment a red coloured circle with the white or black letter ‘A’ inside and the word ‘advertisement’ underneath the ‘A’. If this symbol was liberally stamped on all content that was paid for by a brand as part of a marketing strategy, then consumers would soon come to recognise what the symbol meant.

If some kind of symbol was required by legal systems around the world we might begin to have some meaningful transparency. Statutory requirements could also cover factors such as middle-positioned disclosure placement, the use of repetition and the size of the logo. In addition, consideration could be given to

⁸¹ See Bartosz W Wojdyski and Nathaniel J Evans, ‘Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising’ (2016) 45(2) *Journal of Advertising* 157.

⁸² See Australian Association of National Advertisers, ‘Clearly Distinguishable Advertising’ (n 62) 4.

the insertion of a sound alert as well as merely text. The ultimate goal would be to move toward the implementation of a standardised method of disclosure (a globally recognisable language, placement, symbols or sounds etc) that effectively communicates the true nature of content.

There will no doubt be some scenarios where an advertiser is so confident that a particular communication is so obviously an advertisement that they should not have to use the standardised disclosure. In order to accommodate these cases perhaps the best approach is to frame the law so that there is a presumption that non-standard disclosure is insufficient, but that there will be an exception if the advertiser can prove beyond a reasonable doubt that there is no possibility of confusion.

5.2 Freedom of Speech and Definition of Advertisement

One of the fears that might arise when trying to impose rules about transparency around advertising is that the rule will overshoot and impinge on the right to freedom of speech. Governments in modern democracies are generally reluctant to tell people what they should or should not say.⁸³ Nevertheless, legal systems have for many decades restricted commercial expression more than they have restricted non-commercial expression. In non-commercial speech people are free to mislead other people. Commercial speech is different because for the market to work fairly and efficiently, consumers need to be provided with accurate and full information so that they can make informed purchasing choices aimed at optimising their own welfare. The regulation of commercial speech stems from an understandable distrust about the authenticity of the commercial speakers' message.

It is important to recognise that any law that requires meaningful transparency in respect of marketing communication is not in fact prohibiting speech but simply requiring additional speech in order to not mislead. Compelling speech is not a new concept. It is clear that governments in democratic societies already compel certain kinds of speech. Some examples are the required health and safety warnings on many consumer products.⁸⁴

One obvious problem with regulating any aspect of advertising is defining what kind of communication should be considered an 'advertisement' and thus be subject to the regulation. In the early days of advertising, this was not a difficult task. Advertisements were a very distinct type of communication where a

⁸³ This reluctance is enshrined in constitutions and bills of rights around the globe. See, eg, *United States Constitution* amend I; *Bill of Rights Act 1990* (NZ) s 14; *Human Rights Act 1998* (UK) art 10; *Canada Act 1982* (UK) c 11, sch B pt I, s 2(b) ('*Canadian Charter of Rights and Freedoms*').

⁸⁴ Bianca Nunes, 'The Future of Government-Mandated Health Warnings After RJ Reynolds and America Meat Institute' (2014) 163(1) *University of Pennsylvania Law Review Online* 177.

producer said something good about their product to the public at large in an attempt to sell more of that product. Advertising soon moved beyond this to involve more subconscious forms of persuasion and brand association. As the digital world expanded, the art and science of persuasion ramped up again to regularly include disguising the advertisement as a form of genuine media content.

For a meaningful transparency rule to be effective it is important that it covers a wide range of marketing activity. If the concept of advertising or promotion is defined too narrowly the rule will miss large sectors of marketing activity and consumers will be vulnerable to deception.⁸⁵ The EU directive provides an example of a wide definition of 'commercial communication'. It includes any form of communication designed to promote, directly or indirectly, goods, services or the image of any organisation or person pursuing a commercial activity.⁸⁶

Likewise the New Zealand definition of advertising in the *Fair Trading Act 1986* (a statute that, among other things, prohibits misleading conduct in trade) is reasonably broad. It defines an advertisement as 'any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services or the sale or granting of an interest in land'.⁸⁷ The addition of the words 'to the public or section of the public' is interesting. The information about products that is provided in an online store is not presented in an unsolicited manner to the public but is discovered via a user-directed search. This information is undoubtedly commercial speech; however, it is debatable whether or not it should be considered an advertisement even though it often involves elements of promotion. Similarly, we do not generally consider labels, packaging and signage inside a High Street store to be advertisements.

Although the EU and NZ definitions of advertising noted above seem relatively straightforward, in their real-world application there are likely to be several grey areas which need further thought. Clearly promotional communication that is presented in a regular Facebook post or an editorial post in a newspaper news feed, or in an Instagram feed, is an advertisement and should be disclosed as such. A slightly greyer area will be where the advertiser has paid journalists to write an article that gives a positive story about a brand, or paid social influencers to promote a product in their own words. While this kind of content might not be considered advertising in the traditional sense it should still be covered by any disclosure rules because the content has a commercial purpose of which consumers should be informed. In the case of the social influencer, the advertiser might not have full control over the content of the communication, nevertheless the purpose of the communication is to influence consumers to make purchases.

⁸⁵ See the discussion on what relationships should be disclosed in Part 5.3 below.

⁸⁶ *EU Directive* (n 56) art 2(f).

⁸⁷ *Ibid* s 2(1).

In the case of the journalist, there may be parts of the article that are not directly about the product, nevertheless the purpose of the article is to help the advertiser to influence the purchasing decisions of consumers. These communications are the new method of advertising.

Another area of promotion to consider is that where a business sends free products to an influencer without any stipulations that they post about them on social media, and thus the business has no control over any statements the influencer may make. The current Australian advertising industry guidelines state that this kind of relationship does not need to be disclosed because the brand has no control over any statements made by the influencer and therefore any communication that the influencer makes should not be considered to be advertising or marketing communication.⁸⁸ However, this form of communication is essentially an advertisement and disclosure allows consumers to assess effectively the degree of trust that they are prepared to put on any review or recommendations made by the influencer.

There is one other modern marketing strategy that requires careful consideration. This strategy involves the brand operating a platform on which they produce general content in order to improve brand awareness but not specifically plugging its products. For example, when Red Bull makes a series of adventure videos on its website, the videos do not have the tone of an advertisement. Nevertheless, the company is spending money on this content with the purpose of subtly manipulating consumers into having a positive feeling about their brand and ultimately buying the product. Therefore, in that sense the content is a form of advertising and there should be sufficient disclosure to enable consumers to recognise that marketing manipulation is the purpose of the platform and the content. Perhaps for this kind of content there needs to be a variation of the universal symbol that communicates clearly these marketing objectives.

Extending the rules to cover general content paid for and created by a brand may not be easy in countries where there is a strong reluctance to impinge on freedom of speech. In the United States, for example, a case about the promotion of the Atkins diet illustrates the potential difficulties. In 2006 a New York Federal Court had to consider whether misleading and dangerous diet information contained in a book and website created by the inventor of the diet was commercial speech.⁸⁹ The book and website were clearly created for the purpose of inducing people to buy Atkins diet-related products. The Court, however, found that while the book contained many mentions of the Atkin products it was fully protected

⁸⁸ The AANA Best Practice Guidelines give the example of a company sending a celebrity a free set of make-up brushes: Australian Association of National Advertisers, 'Clearly Distinguishable Advertising' (n 62) 4.

⁸⁹ See *Gorran v Atkins Nutritionals Inc*, 464 F Supp 2d 315 (SD NY, 2006).

non-commercial speech.⁹⁰ The website was held to contain a mixture of commercial and non-commercial speech.⁹¹

According to the policy behind requiring transparency, the ideal solution requires that legislation apply to a broad category of promotion activities, not just some old-fashioned view of an advertisement. Indeed, the entire reason that this area needs regulating is that the traditional advertisement is being replaced by more insidious, integrated marketing strategies where the aim is to look as little like a traditional advertisement as possible.

5.3 Who Should the Transparency Apply to?

Lawmakers will also need to consider who should be subject to the transparency obligations. In other words, who is liable if an advertisement fails to be identified as an advertisement? The advertising agency and the brands should obviously be subject to the requirements. But in the new world of marketing there are many more people who could be subject to the requirements. For example, if the publisher takes on the in-house work of creating advertising content then this means the publisher should also be held to the same standards. Similarly, it makes sense that social media influencers who are paid to promote a product are also subject to the requirements and must not mislead their followers. The disclosure rules should apply to anyone who is participating in the communication or creation of commercial content. The difficulty for some publishers, journalists and social influencers is that they may be operating under the false assumption that they are fully protected by the same free speech principles that are generally afforded to editorial content.⁹²

It may also be worth considering whether the creators of the platforms and the technology tools for formatting native styles of adverts should be under an obligation to make disclosure easier for those posting commercial content.⁹³ The designers of platforms and technological tools could introduce a strong set of features for creating advertising spaces that make it clear to consumers that they are receiving advertising content. If an international advertising symbol is

⁹⁰ Nunes (n 84) 16.

⁹¹ Ibid 18.

⁹² In the United States the First Amendment affords protection to editorial content. In other countries the freedom of editorial content is found in specific provisions of legislation that prohibits misleading representations. For example, the rules apply specifically on to those 'in trade' or 'in trade or commerce'. There are also often specific exemptions for newspaper and broadcasters. See, eg, *Fair Trading Act 1986* (NZ) s 15. See also *Competition and Consumer Act 2010* (Cth) sch 2 s 19(1).

⁹³ There are a growing number of companies in the business of selling the tools to create native advertisements, connecting the publishers and brands and creating algorithms to constantly modify the ads to increase effectiveness. For a list of 22 such companies see Amanda-Anna-Caroline, 'Native Ad Platforms', *Give it a Nudge* (Web Page, 26 February 2016) <<https://giveitanudge.com/native-ad-platforms/>>.

developed, then there could be an obligation on the platforms to provide an easy way for advertisers to insert this symbol into their advertising material. If effective disclosure is made more uniform and more easily put in place, this might be the best way to ensure that consumers are no longer in danger of being deceived.

5.4 Effective Enforcement

In order for this new vision of transparency to have a real prospect of success there also needs to be an effective enforcement regime in place. Currently many of the rules around transparency lack the full force of the law and are not accompanied by serious attempts at enforcement. National regimes are poorly equipped to regulate the camouflaged advertising that pervades the internet.

An effective enforcement regime would need to be made up of several strands. The first is that sufficient resources need to be given to each country's public enforcement agency that is responsible for implementing the regime. It is unsatisfactory if the agency has so little funding that the main way in which a case receives attention is because of a consumer complaint. Let us recall the Oreo cookie campaign mentioned above. The only reason that this campaign was investigated by the ASA was that one journalist made a complaint. If we are to have a system in place that only picks up on breaches haphazardly, there will be repeated violations. Relying on complaints to set in motion the enforcement procedures is particularly unsatisfactory in this area because the very nature of the offence means that the worse the deception the less likely it is that anyone will ever realise that they were deceived and thus be capable of complaining. Ideally, the enforcement agency will have active, independent methods of investigation to pick up on breaches of the law.

A further vital strand of an effective enforcement regime is the imposition of strong penalties on those who breach the law. As discussed above, the current approach to penalties is fairly lax. In most cases the consequences for failing to distinguish advertising as such will merely be a warning or an order to change future actions. The rules around transparency need more teeth. Provision should be made for the imposition of large fines in order to increase the deterrent effect. Finally, an effective enforcement regime will need an engaged and sustained effort to educate consumers and advertisers about the new laws.

6 *A New Funding Model for Content Creators and Media Platforms?*

People often say that the internet is free. But it is not free. We pay for it by being subjected to the thing we hate: advertisements. Advertisements form the basis of the current funding model of most of the businesses providing content and social media platforms on the internet. If we move to a world where the advertising is

radically transparent then we will once again be able to more easily identify and avoid the advertisements.

Increasingly popular ad blocking (or 'Adblock') software programs provide added support for those wanting to avoid advertisements⁹⁴ However, the technology of Adblock software is only able to block content that the software can readily identify as advertising. Since the aim of much modern marketing is to camouflage the advertisement within native content, the Adblock software is limited in its ability to identify much of the current day advertising. If the law forces advertisers to make their advertisements easy to identify as such, then the Adblock software will inevitably be more effective. The obvious flipside of dramatically reducing the power to advertise is that this puts the future of the free services available on the internet under threat. An extreme view is that it is actually unethical to block or avoid advertisements because this deprives the content creators and platform operators of their revenue source.⁹⁵ In other words it is our moral duty to tolerate a constant barrage of ads as the alternative is to steal the content. James Williams sharply disagrees with this argument:

[T]he practice currently called 'ad blocking' is one of the only ways people have to cast a vote against the attention economy. It's one of the few tools users have if they want to push back against the perverse design logic that has cannibalized the soul of the web. Some will object and say that ad blocking is 'stealing', but this is

⁹⁴ See Mimi An, 'Why People Block Ads (and What It Means for Advertisers and Marketers)', *Hubspot* (Web Page, 13 July 2016) <<https://research.hubspot.com/why-people-block-ads-and-what-it-means-for-marketers-and-advertisers>>. This report states that '[t]he issues caused by online ads have culminated in the widespread adoption of ad blocking tools globally. The effect ad blockers have had on publishers has been tremendous, with advertising organizations estimating that by 2020, \$35 billion per year will be lost as a result of blocked ads.' A 2018 survey showed that over 40% of respondents used an adblocker: see, 'Usage of Ad Blocking Software in the United Kingdom (UK) In 2018', *Statista* (Web Page, 1 February 2019) <<https://www.statista.com/statistics/874736/ad-blocker-usage-in-united-kingdom/>>.

⁹⁵ See, eg, Kevin Maney, 'Ad Blockers Will Kill the Internet, but Help Is on the Way', *News Week* (online, 30 January 2016) <<http://www.newsweek.com/2016/02/12/ad-blockers-will-kill-internet-421333.html>>. Some sites such as the newspaper *Bild* in Germany have taken the hard-line approach of banning anyone running an ad blocker from accessing their site: see Luncinda Southern, 'Bild's Hardline Take On Ad Blocking: 'We Will Not Be Blackmailed'', *Digiday* (online, 25 January 2016) <<https://digiday.com/uk/bild-ad-blocking-software-will-not-blackmailed/>>. See also Matthias Streitz and Richard Tynan, 'Are Ad-Blockers Killing the Media? Spiegel Online's Matthias Streitz in a Head-to-Head Debate with Privacy International's Richard Tynan' (2016) 45(2) *Index on Censorship* 78.

nonsense: it's no more stealing than walking out of the room when the television commercials come on.⁹⁶

The Supreme Court in Germany agreed with this view when it held that ad blocking is in no way illegal.⁹⁷

As a society we need to consider whether the current advertising funding model is worth it in the long run. Much of this article has discussed the many downsides of a funding model that is driven by technologies designed to capture our attention and then serve up advertisements. It is important that we face up to these downsides and that we do not assume that this economic model is the only option.

Before looking at alternative models it is important to point out that reducing our exposure to advertising does not need to impinge on our ability to discover information about products. We live in an age of information abundance. Without uncontrolled advertising we will still have the traditional word of mouth recommendations (as opposed to paid-for 'word of mouth'). Moreover, we will still be able to make the relevant google searches at the time we want to be directed to product information. Of course, this product information will sometimes be in the form of an advertisement but in many instances, consumers will simply be directed to an online store. Much of the content of the online store will be promoting the products at the store. However, as has already been pointed out, this should not be considered advertising as such. It is more akin to the signage and labelling one encounters when in a bricks and mortar store. Advertisements are unsolicited commercial communications that happen outside of the shop.

Ultimately, the Adblock software of the future may need to be fine-tuned so as to not inadvertently block us when we deliberately choose to engage with advertisements in the process of conducting research to inform a purchasing decision. Perhaps it could be pre-programmed to switch off when the user makes particular kinds of searches or uses pre-defined terms within a search engine indicating that advertisements are acceptable to the user. It is at the search engine stage that a consumer should be able to choose to engage with advertisements. This is in contrast to the embedded advertisements that are more like the door-to-door salesperson turning up uninvited at your home.

⁹⁶ Williams (n 6) 111–12. See also James Williams, 'Why It's Ok to Block Ads', *Practical Ethics* (Blog Post, 16 October 2015) <<http://blog.practicaethics.ox.ac.uk/2015/10/why-its-ok-to-block-ads/>>.

⁹⁷ Media firms in Germany failed in their attempts to have ad blocking ruled illegal: David Meyer, 'Adblock Plus Wins Again: New Court Ruling Backs Ad Blocker Against Media Firms', *Zd Net* (online, 18 August 2017) <<https://www.zdnet.com/article/adblock-plus-wins-again-new-court-ruling-backs-ad-blocker-against-media-firms/>>.

An innovative new model of ad blocking has emerged recently and is worth mentioning here. This model addresses both the users' desire to be free from ads and the publishers' need to be funded for their editorial content. Under this model the consumer pays money for a service that both blocks the ads and passes on a micro amount of money to the publishers to help them for the loss of revenue from blocked ads.⁹⁸

There is probably no ad blocking software that is, on its own, going to provide the final solution to the advertising problem. In some ways the Adblock software might be more like the TV remote control, in that it is the first step. The invention of the TV remote control allowed us first to mute the ads, and eventually to fast-forward through them. However, the TV remote control was not the end of our quest to flee TV advertisements. Eventually an increasing number have voted for ad-free content with our wallets. Many consumers are prepared to pay a subscription to Netflix, or the like, in order to watch TV series and movies completely free of advertising.

The success of the Netflix subscription model suggests that consumers are increasingly prepared to pay for content that is typically available for free. Paid subscription models are slowly on the rise in other areas of media too. One interesting example is podcasts. Podcasts are generally available for free. So, one would not expect listeners to suddenly agree to pay. However, a true crime podcast has demonstrated that a substantial number of listeners do have some willingness to pay. On June 12, 2017, the podcast, *True Crime Garage* released a bonus episode that cost \$1.99. The episode quickly rose to the number 1 album on the iTunes charts, surpassing both Katy Perry's new album and the *Dear Evan Hansen* soundtrack (that had just won a Tony for Best Musical).

In the area of online news content, *The New York Times* provides a good example of the user-pays trend. It has made an impressive growth in its paid subscriptions in recent times. In the second quarter of 2018 revenue from digital subscriptions rose to USD\$99 million in the second quarter, a jump of nearly 20 percent compared with the same period in 2017.⁹⁹ This increase in revenue has offset a decline in revenue from advertising. In the music industry the hugely popular ad-free subscription model offered by Spotify illustrates the willingness of consumers to pay for ad-free content. On the other hand, social media platforms are currently still locked into the advertising business model. Facebook, for example is entirely funded by advertising. It is interesting to consider whether many users would be prepared to pay a small subscription to avoid the ads if that

⁹⁸ See Alex Hern, 'From Nasty to Nice: How Adblockers Are Trying to Pivot', *The Guardian* (online, 12 April 2017) <<https://www.theguardian.com/media/2017/apr/12/adblockers-trying-pivot-nasty-nice>>.

⁹⁹ Jaclyn Peiser, 'New York Times Co Reports \$24 Million Profit, Thanks to Digital Subscribers', *New York Times* (online, 8 August 2018) <<https://www.nytimes.com/2018/08/08/business/media/new-york-times-earnings-subscriptions.html>>.

option was available. Facebook would only need every user to pay 50 cents (USD) a month to gather as much money as it currently makes from advertising.¹⁰⁰

Another version of the user-pays model is one based on donations. *The Guardian* online news site and several popular podcasts such as Sam Harris's *Waking Up* podcast work on this business model. Donations can be one-off or set up on a recurring basis via a payment platform such as Patreon.

The willingness of people to pay might further increase as we become more aware of the downsides of a business model based on manipulating us to give up our time and attention. There may, however, be some fear that moving toward a user-pays model is undesirable as it might result in only the relatively rich being able to access online content, leaving low income users locked out. However, a fully user-paid model might never eventuate. What we might end up with are funding models where companies will give their customers a choice about how to 'pay' for content online – that is, with their money or with their attention being sold to advertisers. Those who opt out of the user-pays model would have to agree to disable any Adblock software. The online market might develop in a similar way to how the food market has developed over the years. In earlier decades the free-market aimed to provide food that was cheap and tasted good (it did so by using pesticides, flavour enhancers, etc). Eventually some people got fed up and demanded more natural healthy food. Thus, the market responded by providing those who cared and could afford it with an alternative product. But the cheaper, tasty foods were still available.

7 Conclusion

The current state of digital publishing is being distorted by the advertising funding model. Instead of publishers selling their content to the consumer they are selling the consumers' attention to the advertisers. Consumers are adept at turning their attention away from 'easy to spot' advertising so the new approach to gaining attention is to merge the advertising deceptively into the media content. This approach has many drawbacks ranging from a degradation of regular media content, the appropriation of our time and attention, the exacerbation of mass consumerism and its attendant pressure on the planet. However, the biggest drawback is that it relies on unethical deception in order to more effectively persuade us to make purchases.

Law makers around the world need to ask whether it would be a better world if it was easy to identify commercial communication and the economic goal behind the supply of content. The current laws do not effectively regulate this deception.

¹⁰⁰ The average annual revenue that Facebook makes from each user per year is just short of USD\$6: see Facebook, *Facebook Q1 2018 Results* (Financial Report, 2018) <[https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q1/Q1-2018-Earnings-Presentation-\(1\).pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2018/Q1/Q1-2018-Earnings-Presentation-(1).pdf)>.

There are problems with scope, an over-reliance on industry self-regulation, weak and under-resourced enforcement and a lack of global consistency. It might seem unrealistic to aim for a well-developed global approach that uses the full force of the law to ensure meaningful transparency. Nevertheless, any improvements that head in this direction will help to lift the cloak on this consumer manipulation.

Transparency inevitably reduces the effectiveness of advertising. This is especially so when it is employed in tandem with Adblock software. If the power of advertising declines, it is likely that new business models for funding the content and platform-providers on the internet will begin to emerge. These new models would bring an expansion of trustworthy, independent content, free from commercial interference. More importantly, in a world of radical transparency consumers will always know when they are being subjected to an advertisement.

