

# Blurring the Line Between Advertising and Content: An Updated Framework

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# My thesis

To address the problem of hidden, unconventional, or unrecognized advertising, regulators and policymakers must properly understand it.

That requires a new understanding of content production practices, the media landscape, and the consumer.

# Goals for My Talk

- Understand the range of kinds of sponsored content, including “native advertising”
- Understand the purported harms
- Understand the legal regimes around it
- Understand how the law is out of date and misaligned with the media landscape, content production, and consumers
- Understand my ideas for changing the framework

# Kinds of Sponsored Content

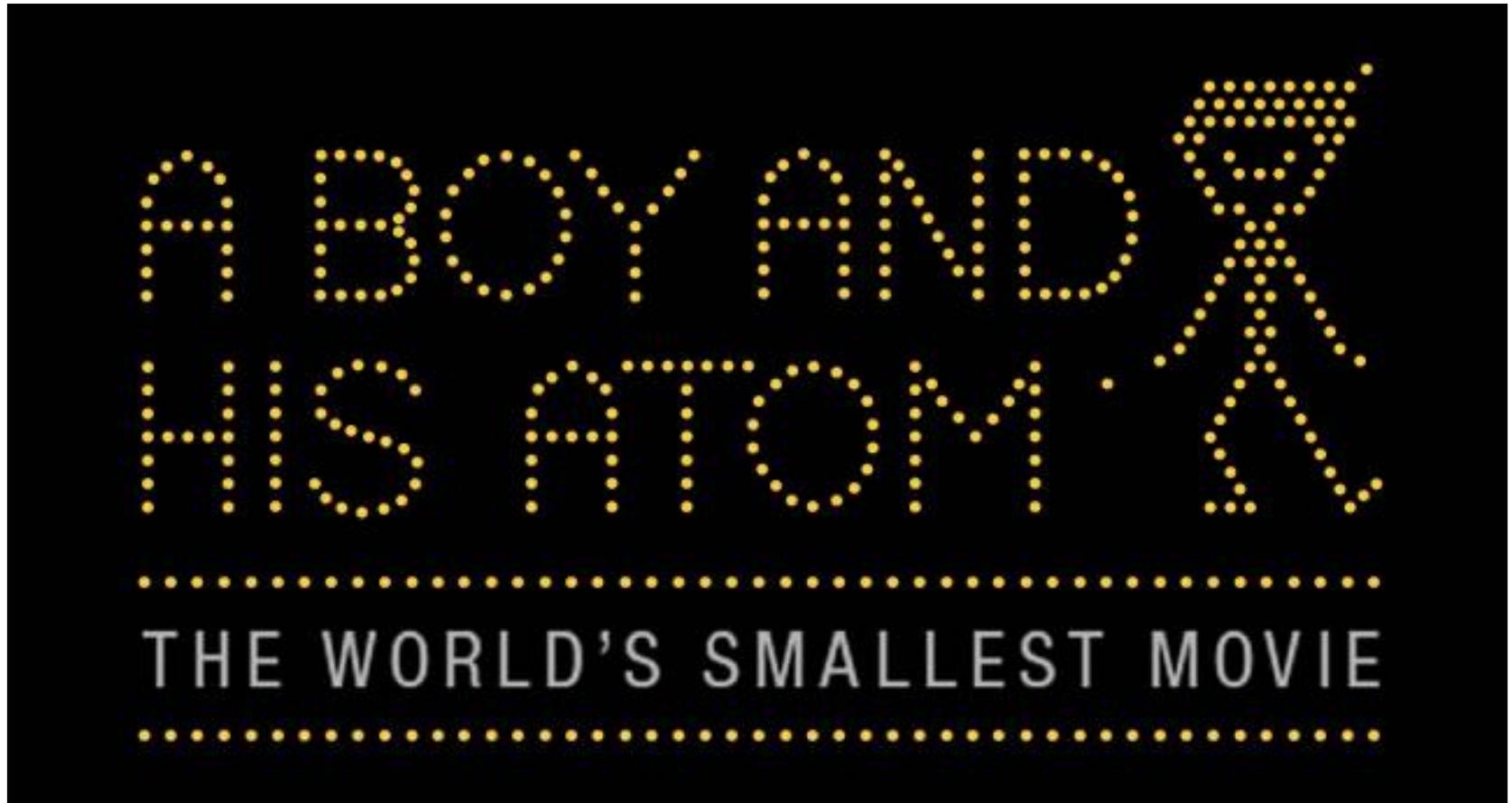
- **Outright Sponsorship**
  - Masters; US Open
  - This evening brought to you by Tropicana. The Texaco Theater Hour
- **Sponsor-generated content**
  - A Boy and His Atom
  - BMW Films
  - Chanel biopic of Coco Chanel
- **Product Placement, Tie-Ins, Integration**
  - Category includes Advergaming
  - Watson on Jeopardy
- **Native Advertising**
  - Advertorials; sponsored search; content farms, e.g. buzzfeed, gizmodo, sploid
  - How it looks depends on where it's placed; camouflage
  - A Boy and His Atom

# Outright Sponsorship (IBM → U.S. Open)

IBM Business Partner Program



# Sponsor-Generated Content



## Product Placement



## Characteristics of Product Placement

- *May not be consciously noticed*
- *+ Or if so, may be stilted or hyperbolic*
- *+ Increasingly, occurs in ironic form*
- *+ Often, not very well done*
- *+ May be annoying to consumers*
- *+ ROI unclear*
- *= On the decline*





## Product Integration



# Lara Croft in the Jeep Wrangler Tomb Raider Ltd Edition (2003)



# Jeopardy! IBM Challenge (2011)



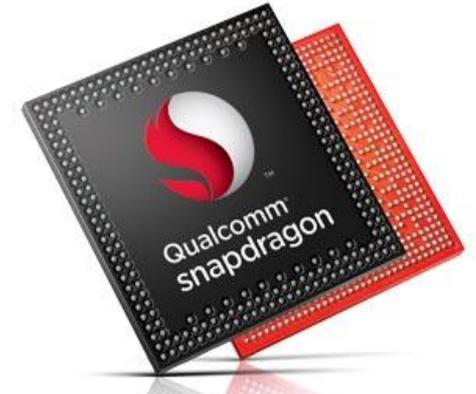
# Native Advertising



One of Mashable's Writers



The Sponsor of the Series



The product

# Qualcomm's Sponsored Series

## What's Inside

At the heart of devices you love



The What's Inside Series explores the hardware that powers many of our favorite devices. We use these gadgets every day, but never knew they actually worked. The technology that makes each device able to complete the tasks it is designed to do is often unique, always fascinating and uncovered for you here by the Mashable

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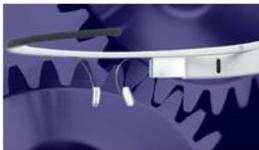


#### How 3D Printing Actually Works

MATT PETRONZIO / Mar 28, 2013

Now that 3D printing -- the process of making three-dimensional solid objects from digital designs -- is available and affordable to individual consumers, it's piqued a lot of interest across the tech space in the past few years. From scale models, g...

 6.6K SHARES



#### Google Glass and the Future of Head-Mounted Displays

PETE PACHAL / Mar 21, 2013

Google Glass is arguably the most exciting innovation in mobile technology since the iPhone -- and not just because Google hyped it with a spectacular skydiving stunt. Certainly, the field of wearable technology has been around for decades (remember ...



# Six Broad Types of Native Ads

- In-feed (Facebook, Yahoo)
- Search
- Promoted listings (Yelp, Amazon)
- Recommended content (Outbrain, Taboola)
- Custom (Hearst, BuzzFeed); and
- Native ads inserted into standard ad positions

## Most Engaging Mashables Native Advertisements

- [10+ Must-Have Tools for the Connected Professional](#), sponsored by American Express Open
- [4 Ways Entrepreneurs Can Amplify Content On LinkedIn](#), sponsored by American Express
- [12 Reasons to Stay Home on Black Friday](#), sponsored by AIO Wireless
- [Startup Light Aims to Give You a Digital Record of Your Life](#), sponsored by Rackspace
- [This 15-Year-Old's Science Project Will Light Up Your World](#), sponsored by Lenovo
- [5 Heartwarming Stories That Prove Dog Is Man's Best Friend](#), sponsored by Purina
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- [How GoPro Created a Billion Dollar Empire](#), sponsored by Lenovo
- [9 Tips for a Better Company Culture](#), sponsored by American Express Open Forum
- [We're One Step Closer to Bringing Holograms Home](#), sponsored by IBM

# Huffington Post

The screenshot shows a web browser window with the URL [www.huffingtonpost.com/news/sponsored-content/](http://www.huffingtonpost.com/news/sponsored-content/). The page features the 'HUFFPOST PARTNER STUDIO' logo at the top. Below the logo is a navigation bar with categories: FRONT PAGE, POLITICS, BUSINESS, ENTERTAINMENT, TECH, TV, ARTS, BOOKS, COMEDY, STYLE, TASTE, HUFFPOST LIVE, and ALL SECTIONS. A search bar and social media buttons (Like 276k, Follow) are also present. The main headline reads 'Why You Need To Go To Puerto Rico TODAY' in large red text. Below the headline is a photograph of a coastal town with colorful buildings and a blue sky. The page also includes a 'HUFFPOST LIVE' section with various article titles and an email subscription form.

# Atlantic's "Scientology" Debacle

*the Atlantic*



How to Protect  
Workers From  
the Rise of  
Robots

'Sons o  
and F  
Where  
React

Politics | Business | Tech | National | Global | Health | Sexes | Entertainment

Special Reports | Video | Photo | Ebook | Newsletters | **JUST IN** | Speak, Clarence, Speak! Andrew Cohen

SPONSOR CONTENT [What's This?](#)

## David Miscavige Leads Scientology to Milestone Year

*Under ecclesiastical leader David Miscavige, the Scientology religion expanded more in 2012 than in any 12 months of its 60-year history.*

[Recommend](#) 1.5k [Share](#) 5 [Tweet](#) 2,024

12:25 PM ET



# Legal Regimes around Sponsored Content

- FTC (Federal Trade Commission)
  - Section 5(a)(1) of the Federal Trade Commission Act (the FTC Act), 15 U.S.C. § 45(a)(1), prohibits, among other offenses, “unfair or deceptive acts or practices.”
  - “little FTC” acts (state law: unfair trade & deceptive practices acts)
- FCC (Federal Communications Commission)
- NAD (National Advertising Division)
  - Lanham Act (federal trademark and advertising law)
  - Industry-specific regimes (pharma, alcohol)
  - Audience-specific regimes (marketing to kids)

## N.Y. GBS. LAW § 349:

NY Code - Section 349: Deceptive acts and practices unlawful –

Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

## FTC defines deception as:

- “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”
- The representation, omission, or practice must be a “material” one.
- Material = whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service.

# FTC Regulation

## Yes

- Deception
- Unfair Trade Practices
- Endorsement and Testimonials
- Paid Search

## So far, no

- Product Placement
- Native Advertising

# FCC Regulation: Section 317 of the Communications Act of 1934

(1) All matter broadcast by any radio station [or broadcaster] for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person:

*Provided, That 'service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast."*

Translation: props are ok—no disclosure required SO LONG AS:  
they are used in a way reasonably related to their use on the show

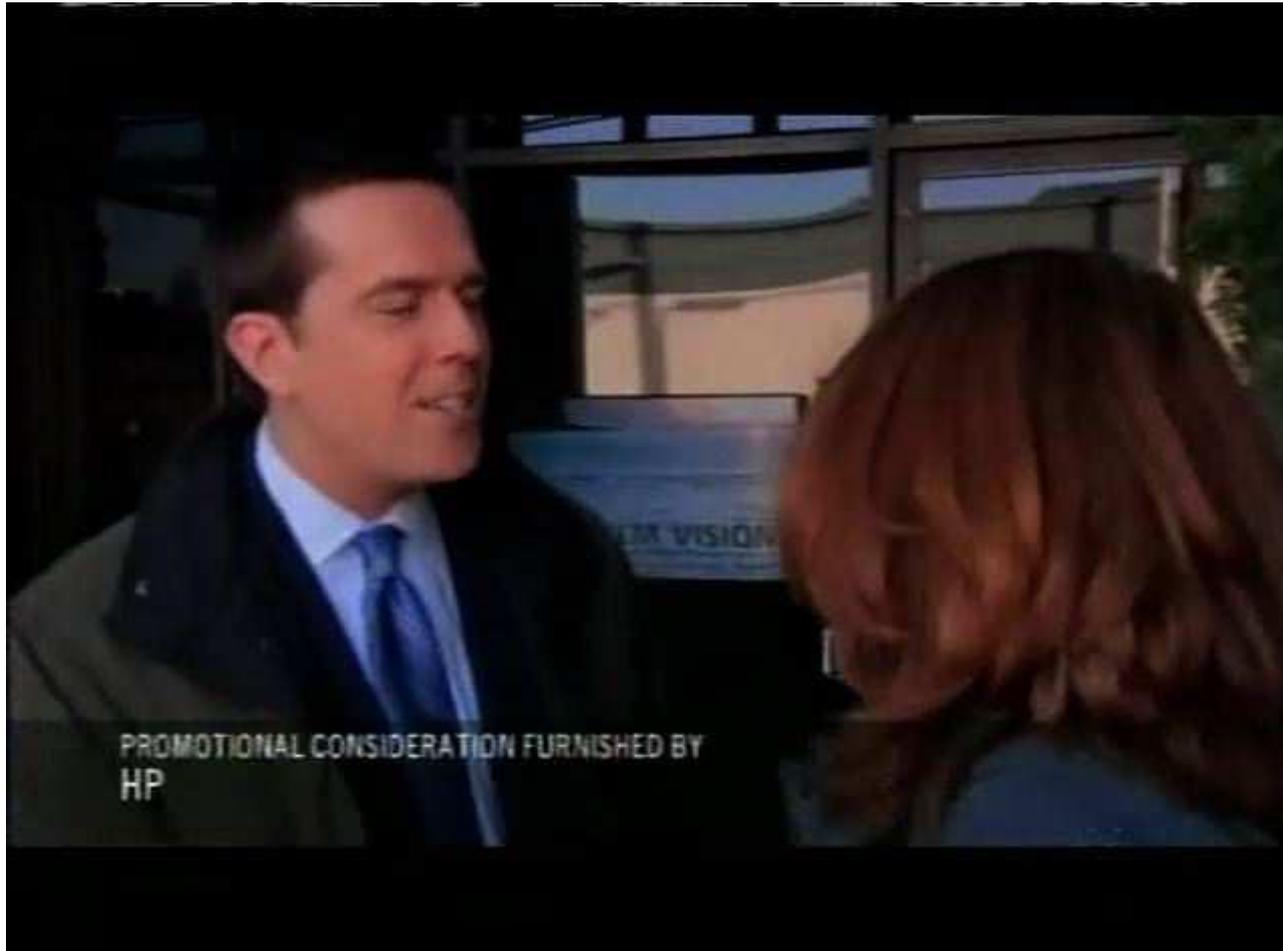
## FCC Regulation is Ancient and Flawed

- In 2008, the FCC admitted as much and called for reform proposals
- They were so terrible, the reforms proposed, they launched my legal career (thanks, FCC)
- But they were never implemented

## FCC's and WGA(W)'s Proposed Reforms

- WGA(W) Proposed reforms included:
  - Crawls at the time of airing ad
  - Popups
- Disclosures subject to new requirements
  - Reasonable speed
  - Reasonable length of time (>5 seconds)
  - Reasonable (legible) size
  - Color contrast
  - No logos or other product-related graphics in disclosure
  - Plus aural disclosure for news with embedded ads
- Disclosure of corporate identities in full
- Disclosure of corporate relationships

## Considered Inadequate Disclosure by WGA(W)



Why not add more text to the bottom third of the screen, asks WGA(W)



## The FCC's Legal Regime is Outdated

- Not media-neutral—different rules for broadcast tv, cable, internet, and mobile
- Doesn't account for changes in
  - Content production
    - Earlier and earlier advertiser participation
    - Much more unscripted programming ('reality tv')
    - Greater collaboration between brands and producers to create “pull” rather than “push” engagement
  - Corporate structures and practices
    - e.g. mergers, consolidation
  - Nature of the placement
    - Increasingly ironic, self-referential
    - Assumes awareness by consumers
  - Viewing practices
    - Viewer's engagement; different viewing practices (multiple screens)
    - Proliferation of medium choices and devices
    - Proliferation of channels; audience fragmentation

# Changed Media Landscape



# “Put Down that Remote” (2009)



# Changed Content Creation & Production Practices

- More sponsor-creative collaboration
  - Unscripted programming
  - Updated branding strategies
  - Shift to a “pull” not “push” model

# Sponsors Invited into R & D



# Rise of Unscripted Programming



got milk?

Biggest winner.

Sure I lost the most, but I gained even more. Like realizing how important drinking milk is. Some studies suggest that drinking 24 ounces of lowfat or fat free milk every 24 hours as part of a balanced, reduced-calorie diet can be a healthy and effective way to lose weight. You can learn a lot from a loser.

milk your diet Lose weight!  
24 24  
oz oz

visit 2424milk.com

Erik (before)  
\*Results not typical

THE BIGGEST LOSER

# GE Trivection Oven: *Cooks a turkey in 22 minutes*

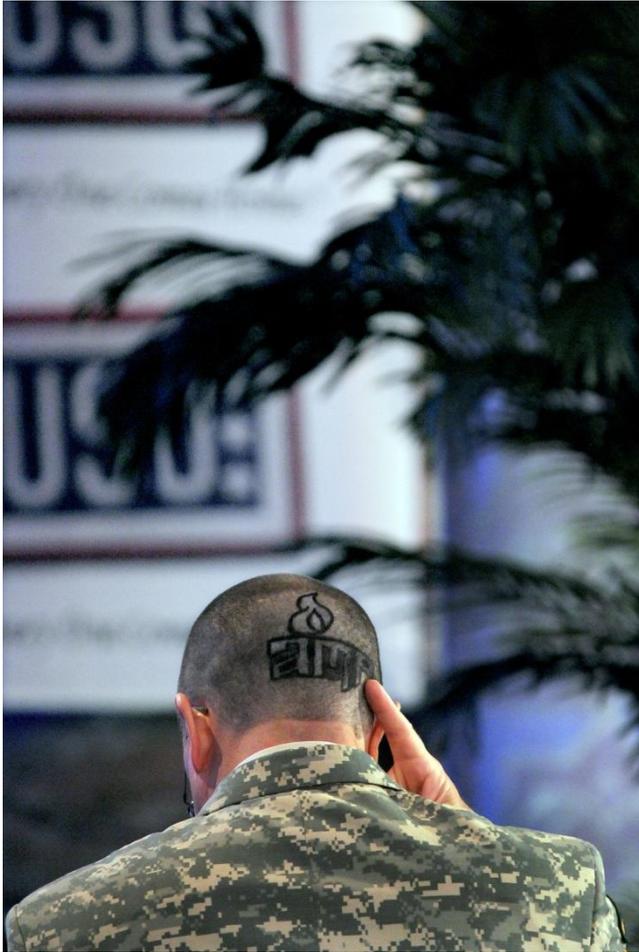


**Trivection®**  
GE Profile™ and GE Monogram®  
Ovens with Trivection Technology

## GE's Response

- “We at GE Consumer & Industrial had nothing to do with the inclusion of the product on the show,” said Allison Eckelkamp, a spokesperson for the division. “We did however choose to run Trivection ads during the show to let viewers know the product is, in fact, real.”
- At the time, GE *owned* NBC

# Changed tenor of ads: ironic or Hyperbolic Placements

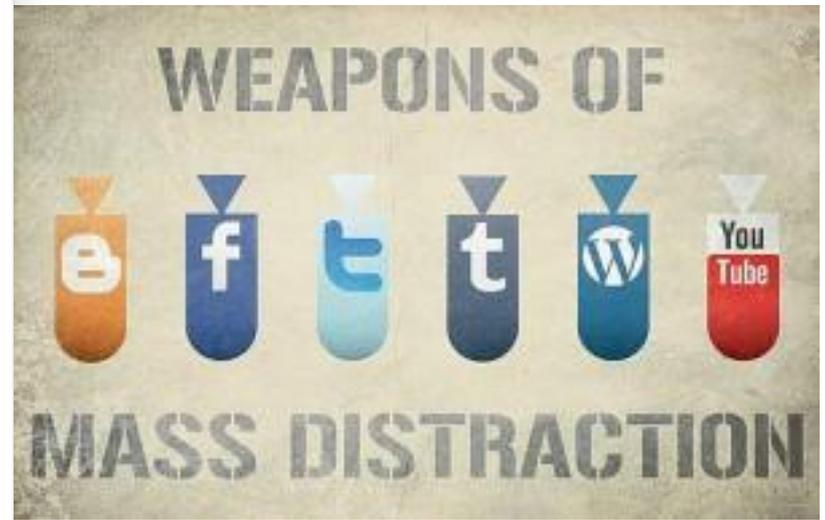


# Changed Consumer: Who is the FCC's Consumer?

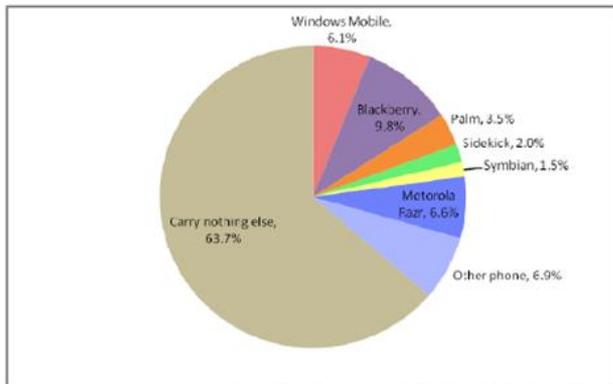


# Not the Venture Consumer





A third of iPhone users carry two phones



Do you carry another mobile phone on a regular basis in addition to your iPhone?  
If so, what model?



# FCC regulation misaligns with... everything

- Media landscape
  - Content creation
  - Tenor of ads
  - Consumer
- 
- But FTC regulation doesn't reach these practices most of the time either

# So what's the harm, again?

- Theories of harm
  - Deception/Unfairness (FTC)
  - Fraud/Corruption (FCC/(NAD)
  - Harm to public discourse/Hypercommercialism
  - ...other?

## What would consumer deception look like?

- Consumers are **influenced**, **without their knowledge**, to make **different choices** than the ones they otherwise would have made

Translation: Consumers may

1. Not know content was sponsored, but they may be influenced by it [= deception?]
2. Know content was sponsored, and be influenced by it anyway [=influence, but not deception]
3. Not know but it doesn't influence them
4. Know and it doesn't influence them

# Legal vs. business concerns

- If consumers do

1. Not know content was sponsored, but they may be influenced by it
2. Know and it doesn't influence them
3. Not know but it doesn't influence them
4. Know and it does influence them anyway

- Legal

1. May care
2. Does not care
3. Does not care
4. Does not (should not) care

- Business

1. May not care
2. Cares
3. Cares
4. Does not care; it's a win!

## First Conclusion:

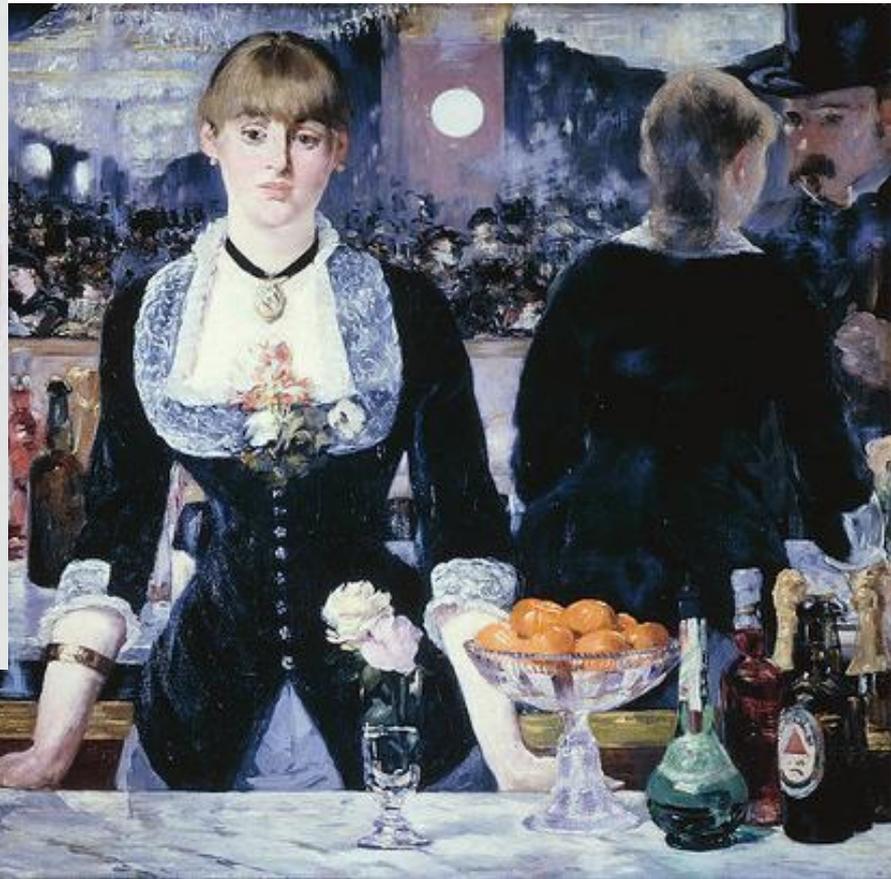
Legal theories of harm don't track consumer interests very well

- Deception too high a standard
  - Claims aren't typically made (but ad law intervenes if they are)
- But no meaningful alternative exists

# Updating the Framework

- Static push model → dynamic “pull” media landscape
- Credulous consumer → sophisticated consumer
- Deception → Influence
- Legal solutions → voluntary changes in industry practices; consumer education
- Embedded advertising’s evils? → benefits

# Long History to Brands in Art



Edouard Manet, *Un Bar aux Folies Bergères*, 1882

# Brand Sponsorships Accompany New Media Adoption—May Spur?



## Embedded Advertising's Benefits

- Lowers costs of production; improves content
  - Transfers risks and costs
  - Supports innovation
  - May improve marketing content
- Diversifies the market
  - May increase smaller players' access to large markets
  - Enables different pricing strategies
  - Creates powerful partnerships
- Efficiency arguments
  - Maximize synergies; aligns incentives of brands and producers
  - Represents efforts to improve accuracy of marketing methods
  - Minimizes 'waste' (money left on table)
  - Recoups revenues lost due to piracy

# Harms and Tools to Minimize Them

- Deception vs. Influence
- Best practices statements
- A trustmark?
- Consumer education

# Thank you for your attention!

Please email suggestions and questions  
to [zahr@uw.edu](mailto:zahr@uw.edu)

