

**A Rose By Any Other Name . . . Would Probably Violate the FTC Act:
Shakespeare, the FTC, and Advertising
Remarks of FTC Chairwoman Edith Ramirez
Before the American Advertising Federation
April 17, 2013
Washington, DC**

It is a pleasure to be here today to talk about the FTC's approach to advertising; how we are adapting to our increasingly digital world; green marketing; and the efforts to develop a Do Not Track system. Because these topics are vitally important, I will try to cover them heeding the counsel of Hamlet's mother: "More matter with less art."

I call on Shakespeare this morning because next week is the 449th anniversary of his birth. If any point is worth making, he has made it, and as succinctly and eloquently as it can be made.

As I considered my remarks today, the famous Shakespearean phrase that struck me was "spotless reputation," which comes from *Richard II*. Bolingbrook, the future Henry the Fourth, accuses Mowbray, a fellow duke, of treason (among other crimes) in front of the king, who would very much like the spat to blow over. But Mowbray will have none of it, explaining that he cannot let the attacks on his character stand. He says:

The purest treasure mortal times afford
Is spotless reputation—that away,
Men are but gilded loam, or painted clay.

Of course, you already know this. As advertisers, your reputation – your brand – is everything. And, in fact, you know it better than most, because you pursue a spotless reputation for yourself and for the clients whose reputations you broadcast out into the wide world.

At the FTC, our work to promote truthful advertising and protect consumer privacy dovetails with your mission to promote the spotless reputations of your clients and your own firms. We aim to provide consumers with the information they need to make informed decisions about their purchases and exercise control over their personal data. It is self-evident that this is good for consumers. But it also benefits honest competitors, well-functioning markets, and commercial growth. Honesty and transparency are essential to maintaining a positive brand. Sooner or later, deceptive and opaque practices damage a firm's most important asset – its reputation. And from that, a business may never recover, no matter how clever its ad copy or eye-catching its graphics.

Further, deceptive practices do more than harm the spotless reputation of the offending company. Consumers may lose faith in an entire industry or sales medium if advertising frequently misleads or companies hide information about their products or business practices. By encouraging businesses to be above-board in their advertising and privacy practices, the FTC promotes the consumer trust and confidence that are essential to a thriving, growing marketplace.

We do this proactively and devote substantial resources to educating businesses on how to comply with the law and on best practices that may go beyond what the law requires. This year, the FTC has turned its focus to the mobile environment.

It has been aptly said that “the future of mobile is the future of everything.”¹ Today, there are twice as many mobile devices sold as personal computers.² Spending on mobile

¹ Dan Frommer, “*The Future of Mobile is the Future of Everything*,” BUSINESS INSIDER, June 6, 2011, available at <http://www.businessinsider.com/future-of-mobile-experts-2011-6?op=1>.

² Henry Blodget & Alex Cocotas, *The Future of Mobile*, BUSINESS INSIDER, Mar. 27, 2013, available at <http://www.businessinsider.com/the-future-of-mobile-slide-deck-2013-3?op=1>.

advertising is projected to rise by 77 percent to roughly \$7.3 billion this year,³ and an expected \$27.13 billion by 2017, just shy of 45 percent of all digital ad revenue.⁴ Finally, there are over one million mobile apps available today, and consumers spend more time on them than they do on the mobile web.⁵

In light of this, the FTC recently issued a report on best practices in the realm of privacy disclosures by mobile operating systems, apps and ad networks, and analytics companies – all of which get access to consumer data through devices that are always with us and always on.⁶ We stress the importance of platforms, which are the gatekeepers to the mobile marketplace. For example, we encourage platforms to ensure that apps give just-in-time notice and get express affirmative consent before they access location data, health and financial information, contacts, address books, calendars, photos, and videos.

We hope our report will inform the current efforts of a wide spectrum of stakeholders, led by the Department of Commerce, to develop a self-regulatory code of conduct on mobile transparency. The FTC strongly supports meaningful self-regulation in general and the Department of Commerce process in particular. That undertaking has already made substantial progress in a short period, and we encourage stakeholders to move towards finalizing a code of conduct.

³ Amy Gesenhues, *EMarketer: Google Still Owns Mobile Ad Market, But Facebook Has Largest Share Of Mobile Display Ad Dollars*, MARKETINGLAND, Apr. 4, 2013, available at <http://marketingland.com/emarketer-google-to-take-more-than-half-of-mobile-advertising-dollars-but-facebook-will-win-majority-of-mobile-display-market-38937>.

⁴ *Id.*

⁵ The Future of Mobile, *supra* note 2.

⁶ FTC Staff, *Mobile Privacy Disclosures: Building Trust Through Transparency* (Feb. 1, 2013), available at <http://www.ftc.gov/os/2013/02/130201mobileprivacyreport.pdf>.

Soon after the FTC issued its report on mobile privacy disclosures, we updated our Dot Com Disclosures, which provide guidance on how to reveal key information in digital advertising.⁷ The original Dot Com Disclosures were released in 2000 – back when we were just grateful that our phones were cordless and “facebook” referred to the printed guide to your freshman class. It was time for a refresh.

The new guidance makes clear that consumer protection laws apply to ads on a PC, a mobile phone, Twitter, or a social network in the same way those laws apply to ads in print, radio, or TV. As before, our guidance comes down to common sense. If you were a consumer, what would it take for you to notice and understand a disclaimer? Would you click through multiple links just to find information?

If information is needed to prevent an ad from being deceptive, the information must be included, and it must be clear and conspicuous. This applies to the small screen of a mobile device or the 140 characters in a tweet. If a platform does not let you make a clear and conspicuous disclosure when one is required, then the platform should not be used. Period.

When disclosures can be made, they should be “as close as possible” to the claims they qualify – not relegated to the “terms of use” and other contractual agreements. When practical, advertisers should incorporate qualifying information into the underlying claim rather than having a separate disclosure. The screen design should alert consumers that there is more information available, and advertisers should consider how the page will display on different devices. We caution against making consumers scroll down or over to see a disclosure. But if

⁷ FTC Staff, *.Com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 12, 2013), available at <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

scrolling is necessary, it should, at minimum, be unavoidable, meaning consumers can't go forward with a transaction without viewing the disclosure.

As in the original guidance, we call on advertisers to avoid using hyperlinks for disclosures of product cost or certain health and safety issues. The new guidelines also ask advertisers to label hyperlinks as specifically as possible, and they caution advertisers to consider how their hyperlinks will function on various programs and devices.

“What's in a name?” asks Juliet, in *Romeo and Juliet*'s famous balcony scene, “that which we call a rose by any other name would smell as sweet.” At the FTC, we don't mind what you call that rose, as long as you use easy-to-find, easy-to-understand disclosures to document claims and provide essential information about its sweet smell.

Of course, if Juliet were to deliver her soliloquy today, she might amend it to talk about a rose that not only smells sweet but is also grown organically with no petroleum-based inputs, free of pesticides, and with the tiniest of carbon footprints. These days, green roses trump red roses every time. As a native of California – where the environmental movement first took hold – I have been seeing green marketing claims for years. But such advertising is now truly mainstream.

Last fall, in response to this trend, the FTC updated its Green Guides, which help marketers ensure that their environmental claims are not deceptive.⁸ In preparation for that, we researched the impact of broad green advertising claims. We found that consumers hear general assertions about a product's eco-friendliness as statements that an item has no negative impact on

⁸ See FTC Press Release, *FTC Issues Revised “Green Guides,”* Oct. 1, 2012, available at <http://www.ftc.gov/opa/2012/10/greenguides.shtm>; Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62122 (Oct.11, 2012).

the environment. Because it's highly unlikely that a marketer can substantiate such an expansive claim, the revised guides caution against painting a product green with a broad brush. Rather, advertisers should use clear and prominent language that limits the claim to a specific benefit or benefits that can be understood and backed up. And they shouldn't imply that any specific benefit is significant if it is, in fact, minor.

We also found that, if a certification or seal of approval used in an ad does not convey the basis for the recognition, either through the name or some other means, consumers will believe the product offers a general environmental benefit. Again, our research showed that it is very improbable that marketers can substantiate such broad claims. So advertisers should avoid environmental certifications or seals that are not clear about the basis for the certification.

The updated Green Guides also address the brave new world (another term coined by Shakespeare, by the way – this time in *The Tempest*) of renewable energy claims. Our research showed that advertisers need to be careful in touting that a product or package was “made with renewable energy.” Such claims can be misleading unless the main processes used to make the product or package were powered with either renewable energy or non-renewable energy backed by renewable energy certificates. Otherwise, marketers should clearly specify the percentage of renewable energy that powered the manufacture of the product or package.

The FTC recently lodged complaints against Neiman Marcus and two other retailers that demonstrate what a brave new world the realm of green advertising truly is.⁹ We charged these companies with violating the Fur Products Labeling Act, legislation passed in 1951, when consumers wanted to make sure that the fur coats they were shelling out for were more mink

⁹ See FTC Press Release, *Retailers Agree to Settle FTC Charges They Marketed Real Fur Products as Fake Fur*, Mar. 19, 2013, available at <http://www.ftc.gov/opa/2013/03/neiman.shtm>.

than mouse. Today, it is just the opposite – high-end shoppers often demand faux over fox. We called out Neiman Marcus for describing several articles of clothing as containing only fake fur when, in actuality, they were made in part of the real thing. Neiman Marcus, as well as the two other retailers, DrJays.com and Revolve Clothing, have agreed to settlements that will, over the next 20 years, punish future violations with fines of up to \$16,000 per incident.

Quite a “sea change,” as Ariel, a character in *The Tempest*, first said.

While the words of Shakespeare are some of the most beautiful and pithy in the English language, he has also stayed so firmly woven into our discourse because of the themes he explored. Of course, one of Shakespeare’s favorite themes – one that appears in almost every play – is identity, and most particularly, the consequences of mistaken identity. There isn’t a comedy he wrote that doesn’t depend on that conceit. But so do many of his tragedies, including *Romeo and Juliet*. Those star-crossed lovers would have never died were it not for a massive miscommunication and misunderstanding about Juliet’s health status and intentions. Which makes *Romeo and Juliet* a cautionary tale about the dangers of losing control over how others perceive you.

And that brings me to Do Not Track. Consumer data is the currency of the Web. Targeted advertising helps enable free content and services for consumers. But the amount of behavioral data collected and how it is used are hidden from the very consumers who are tracked and analyzed.

That is not a long-term recipe for success. Consumers regularly report unease with online tracking.¹⁰ And marketers acknowledge that consumer trust is vital to their success.¹¹ Online publishers complain that they lack knowledge or control over the entities that collect consumer data from their sites and how that data is used downstream.¹² And the profusion of tracking cookies on websites can slow down the loading of web pages, which can cause advertising conversion rates to plummet.¹³

¹⁰ See, e.g., Meredith Whipple, *CR Survey Finds That Most Consumers Are Still “Very Concerned” About Online Privacy*, CONSUMERS UNION BLOG, Apr. 3, 2012, <http://hearusnow.org/posts/1055-cr-survey-finds-that-most-consumers-are-still-very-concerned-about-online-privacy>; David Sarno, *Tech Firms’ Data Gathering Worries Most Californians, Poll Finds*, L.A. TIMES, Mar. 31, 2012, available at <http://www.latimes.com/news/local/la-fi-privacy-poll-20120331.0.2763981.story>; KRISTEN PURCELL ET AL., PEW INTERNET AND AMERICAN LIFE PROJECT, SEARCH ENGINE USE 2012 18-26 (2012), available at http://pewinternet.org/~media/Files/Reports/2012/PIP_Search_Engine_Use_2012.pdf; Ki Mae Heussner, *Divorcees, Southerners Most Concerned About Web Privacy, 90 Percent Of Online Adults Worry About Privacy Online, Study Shows*, AD WEEK, Feb. 12, 2012, available at <http://www.adweek.com/news/technology/divorcees-southerners-most-concerned-about-web-privacy-138185>; Lymari Morales, *Google and Facebook Users Skew Young, Affluent, and Educated*, GALLUP, Feb. 17, 2011, available at <http://www.gallup.com/poll/146159/facebook-google-users-skew-young-affluenteducated.aspx>.

¹¹ See, e.g., RESEARCH: *Consumers Feel Better About Brands That Give Them Transparency and Control Over Ads*, EVIDON BLOG, Nov. 10, 2010, <http://blog.evidon.com/tag/better-advertising>; Interactive Advertising Bureau, Press Release, *Major Marketing/Media Trade Groups Launch Program to Give Consumers Enhanced Control Over Collection and Use of Web Viewing Data for Online Behavioral Advertising*, Oct. 4, 2010, available at http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-1004100; Statement of Pam Horan President, Online Publishers Association, before the House Energy and Commerce Subcomm. on Commerce, Manufacturing and Trade, *Balancing Privacy and Innovation: Does the President’s Proposal Tip the Scale?* (Mar. 29, 2012), available at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CMT/20120329/HH_RG-112-IF17-WState-PHoran-20120329.pdf; Statement of John M. Montgomery, GroupM Interaction, *The State of Online Consumer Privacy*, Hearing Before the S. Comm. on Commerce, Sci., and Transp., 112th Cong. (Mar. 16, 2011), available at http://www.iab.net/media/file/DC1DOCS1-432016-v1-John_Montgomery_-_Written_Testimony.pdf (“We at GroupM strongly believe in protecting consumer privacy. It is not only the right thing to do, but it is also good for business.”); Statement of Alan Davidson, Director of Public Policy, Google Inc., *Protecting Mobile Privacy: Your Smartphones, Tablets, Cell Phones and Your Privacy*, Hearing Before the S. Subcomm. on Privacy, Tech., and the Law, 112th Cong. (May 10, 2011), available at <http://www.judiciary.senate.gov/pdf/11-5-10%20Davidson%20Testimony.pdf> (“Protecting privacy and security is essential for Internet commerce.”).

¹² John Sternberg, *On Privacy, Publishers Prefer the Sideline*, DIGIDAY, May 12, 2012, available at <http://www.digiday.com/publishers/on-privacy-publishers-prefer-the-sideline/>.

¹³ Evidon, *The Value of Revealing the Invisible Web*, Sept. 11, 2012, available at <http://www.slideshare.net/fmsignal/the-value-of-uncovering-the-invisible-web> (noting a one second delay in page load time can result in a seven percent decline in conversion, citing data from Wal-Mart).

In late 2010, when the FTC first called for Do Not Track, consumers had very few tools for controlling online tracking. There was no effective counterweight to the growing pressure on marketers to collect and analyze more and more consumer data. We therefore advocated the creation of a persistent Do Not Track mechanism that would apply across industry to all types of tracking; be easy to find and use; be effective and enforceable; and allow consumers to stop the collection of nearly all behavioral data gathered across sites and not just the serving of targeted ads.¹⁴

Our call for Do Not Track set off a burst of activity. All major browsers now permit their users to send out an instruction not to track them across websites, and major online publishers like Twitter and the Associated Press have welcomed this development.¹⁵ The Digital Advertising Alliance has widely deployed an icon-based opt-out system and last year at the White House promised to honor browser-based opt-outs.¹⁶ Microsoft has turned the Do Not Track setting on by default in Internet Explorer 10.¹⁷ Apple has implemented a “Limit Ad

¹⁴ See, e.g., Fed. Trade Comm’n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 52-55 (Mar. 26, 2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>; Prepared Statement of the Federal Trade Commission on Do Not Track (Dec. 2, 2010), available at <http://ftc.gov/os/testimony/101202donottrack.pdf>.

¹⁵ Nick Bilton, *Twitter Implements Do Not Track Privacy Option*, N.Y. TIMES, May 17, 2012, available at <http://bits.blogs.nytimes.com/2012/05/17/twitter-implements-do-not-track-privacy-option/>; Hayley Tsukayama, *AP Adopts Mozilla’s Do Not Track Header*, WASH. POST, Mar. 31, 2011, available at http://www.washingtonpost.com/blogs/faster-forward/post/ap-adopts-mozillas-do-not-track-header/2011/03/31/AF557R9B_blog.html.

¹⁶ Press Release, Digital Advertising Alliance, *DAA Position on Browser Based Choice Mechanism*, Feb. 22, 2012, available at <http://www.aboutads.info/resource/download/DAA.Commitment.pdf>.

¹⁷ Brendon Lynch, *Advancing Consumer Trust and Privacy: Internet Explorer in Windows 8*, MICROSOFT BLOG, May 31, 2012, http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/05/31/advancing-consumer-trust-and-privacy-internet-explorer-in-windows-8.aspx.

Tracking” feature for its mobile devices.¹⁸ And Mozilla has recently begun to test blocking third-party cookies by default.¹⁹

I am pleased that so many have responded to the FTC’s call for greater consumer control over online tracking. But consumers still await an effective and functioning Do Not Track system, which is now long overdue. The Tracking Protection Group of the World Wide Web Consortium (or W3C) has been working for some time to develop a self-regulatory Do Not Track standard. Ad networks, analytics companies, web publishers, browsers, social networks, and privacy groups have been involved in that ongoing effort. The differing viewpoints and interests of this broad range of stakeholders create undeniable challenges, but they also offer the potential of an enduring and broad solution.

I urge all stakeholders to take advantage of this venue to work toward consensus on a Do Not Track tool that gives consumers effective and meaningful privacy protection. This includes both the websites that permit ad networks to track consumers on their sites and the companies who pay for their ads to be targeted with the resulting behavioral data. Web publishers and advertisers are every much as part of the ecosystem as the ad networks and the browsers and they should continue to actively engage on this issue.

These are heady days in the online and mobile world, and the market in personal data collected through tracking is some of the reason for that. One can forgive stakeholders for thinking that it will always be so – for believing that “not all the water in the rough rude sea can wash” the shine off this cyber-economy. But an online advertising system that breeds consumer

¹⁸ Daniel Eran Dilger, *Apple Adds New "Limit Ad Tracking" Feature to iOS 6*, APPLE INSIDER, Sep. 12, 2013, available at http://appleinsider.com/articles/12/09/13/apple_adds_new_limit_ad_tracking_feature_to_ios_6.

¹⁹ Alex Fowler, *Firefox to Get Smarter About Third-Party Cookies*, MOZILLA PRIVACY BLOG, Feb. 25, 2013, <http://blog.mozilla.org/privacy/2013/02/25/firefox-getting-smarter-about-third-party-cookies/>.

discomfort is not a foundation for sustained growth. More likely, it is an invitation to Congress and other policymakers in the U.S. and abroad to intervene with legislation or regulation and for technical measures by browsers or others to limit tracking.

I therefore urge all players in the online advertising ecosystem to dive into the W3C process with good faith and a resolution to hammer out their differences to develop a transparent Internet advertising system that meets the needs of consumers and advertisers alike. If that happens, and I believe it can, I hope to join you again next year for Shakespeare's 450th birthday – this time with a speech titled “All's Well That Ends Well.”

Thank you.