

Snake Oil in the 21st Century?

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Introduction

A questionable culture of loopholes and unregulated gray areas have allowed several different issues to come up recently within the research industry. Some of the recent issues involve exploiting a misrepresentation of an aspect of the writer's identity, knowingly or unknowingly. Although laws exist to combat misrepresentation, certain areas are not as heavily scrutinized or fall under a legal gray area where accuracy is rarely addressed. This article will explore the regulations, or the lack thereof, concerning misrepresentation of information in three different fields: research publishing, advertising claims, and social media content disclaimers.

Issue

Researchers are familiar with the pressure to publish, also known as the "Publish or Perish" maxim in academia. This particular saying emphasizes the importance of publishing and its finality is meant to be a way of upholding a certain standard of research.¹ The rigidity of this mantra, unfortunately, also has negative consequences. An article in the prolific journal, *Nature*, has reported that an analysis of 600 randomly chosen clinical

¹ *Publish or Perish*, Understanding Science. University of California at Berkeley, http://undsci.berkeley.edu/article/howscienceworks_15. (Retrieved March 24, 2016.)

trials resulted in half of them being unpublished.²

The “standard of research” that this kind of mindset tries to uphold leaves it open to bias, the so-called “publication bias.” The Director of the Stanford Prevention Research Center and an often-cited researcher himself, John Ioannidis, addressed the issue of bias in his 2005 paper, “Why Most Published Research Findings Are False.” In this paper, Ioannidis made an argument that perhaps “claimed research findings may often be simply accurate measures of the prevailing bias.”³

The importance of publishing in the research community is emphasized repeatedly through career growth and expectations from sponsoring organizations. A researcher’s reputation is taken very seriously because of the emphasis on credibility, based on results that they have produced. In fact, an article on plagiarism in science called scientific publishing “. . . the ultimate product of scientist work. Number of publications and their quoting are measures of scientist success while unpublished researches are invisible to the scientific community, and as such nonexistent.”⁴

² Nicola Jones, *Half of US clinical trials go unpublished*, Nature (2013), <http://www.nature.com/news/half-of-us-clinical-trials-go-unpublished-1.14286>. (Retrieved March 24, 2016.)

³ John P. Ioannidis, *Why Most Published Research Findings Are False*, PLOS Medecine (2005), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0020124>. (Retrieved March 24, 2016.)

⁴ Izet Masic. "Plagiarism in Scientific Publishing." *Acta Informatica Medica* 20.4 (2012), 208-213. Print. doi:10.5455/aim.2012.20.208-213.

This emphasis on credibility is important because the results of research are used as sources for future papers and experimentation.

Advertisers are not so heavily scrutinized by their peers as researchers are in the scientific community, but they are regulated by the Federal Trade Commission (FTC). FTC regulations have actual legal distinctions for the way in which advertisers are allowed to portray their products or services. The FTC investigates when charges of misconduct are made. Consumers can also contribute to the regulation enforcement by submitting complaints to the FTC in order to prompt an investigation. In some cases, advertisers may emphasize the quality of the product, making claims that sound as though they are based on fact. In such cases, the advertiser is using “puffery”, defined as a “term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.”⁵

But the line between what is puffery and what is fact can be blurred. The U.S. Department of Justice recently had to argue whether marketing statements like “most competitive rates” would qualify as puffery or fraud in the case against the Bank of

⁵ Scott Berinato, *The Power and Perils of Puffery*, Harvard Business Review (2010), <https://hbr.org/2010/05/the-power-and-perils-of-puffer/>. (Retrieved March 24, 2016.)

New York Mellon.⁶ By making careful claims that are partly exaggerated and sometimes backed with pseudoscientific claims, advertisers attempt to avoid legal troubles by avoiding directly making claims and instead relying on implications. The company, Power Balance, made hologram balance bracelets that were notorious for this particular style of advertising. They made claims that “resonate with and respond to the natural energy field of the body.”⁷ They made millions before public criticism led to an investigation that had the company retract those claims. This was a high-profile company that relied on celebrity athletes using their products, so their claims were reviewed by many. The same level of review is not given to companies with lesser known products.

Social media users follow the same principle with the use of pseudo jargon as an attempt to protect themselves, many times breaking the law in the process. An example of one type of these “legalese” disclaimers is featured below:

⁶ Peter J. Henning, *The Difference Between Puffery and Fraud*, New York Times, Oct. 10, 2011, http://dealbook.nytimes.com/2011/10/10/the-difference-between-puffery-and-fraud/?_r=0. (Retrieved March 24, 2016.)

⁷ Mark Hodgkinson, *Power Balance bracelets: source of energy or just a gimmick?* The Telegraph, Oct. 15, 2010, <http://www.telegraph.co.uk/sport/8065032/Power-Balance-bracelets-source-of-energy-or-just-a-gimmick.html>. (Retrieved March 24, 2016.)

The screenshot shows a YouTube video player interface. At the top, there are icons for 'Add to', 'Share', and 'More'. On the right, there are icons for 'Like' (188) and 'Dislike' (1). The video title is 'Published on Jan 19, 2016' followed by 'I DO NOT OWN THIS. PARIS EP (2012)'. Below the title is a copyright disclaimer: 'Copyright Disclaimer Under Section 107 of the Copyright Act 1976, allowance is made for "fair use" for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. Fair use is a use permitted by copyright statute that might otherwise be infringing. Non-profit, educational or personal use tips the balance in favor of fair use'. Below the disclaimer, there are two rows of metadata: 'Category' is 'Music' and 'License' is 'Standard YouTube License'. At the bottom of the video player, there is a 'SHOW LESS' button.

Social media users sometimes add in disclaimers such as, “No infringement intended” or cite the Copyright Act of 1976 which allows use of copyrighted material if it falls under Fair Use.

- § 107 . Limitations on exclusive rights: Fair use
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.⁸

⁸ 17 U.S.C. § 107(1)(2)(3)(4).

These “disclaimers” are not actually enforceable nor do they give any sort of legal protection. Rather, the user has just acknowledged that they knowingly used a copyrighted work without permission, but are washing their hands of the matter by excusing themselves. The problem becomes two-fold when considered from the perspective of the content creator and the content distributor (i.e. the user and the social media platform). The user can be held liable, but social media sites like YouTube have some measure of protection if legal action is taken. The Internet Service provider (ISP) can claim “safe harbor” if they comply with the Digital Millenium Copyright Act, which requires compliance with the “conditions set forth in Section 512 including ‘notice and takedown’ procedures that give copyright holders a quick and easy way to disable access to allegedly infringing content.”⁹

Regulation

These particular methods of framing questionable activity as though it follows regulation or industry standard falls into a legal gray area since many of these issues are not regulated by law nor have they been brought up before. Thus, they continue to go on unnoticed.

Some of these activities may fall under misrepresentation in which, under contract law, a plaintiff can “recover on grounds of

⁹ *Digital Millennium Copyright Act*, Electronic Frontier Foundation, <https://www.eff.org/issues/dmca>. (Retrieved March 24, 2016.)

negligent misrepresentation” if the following elements are met:

- a representation was made;
- that was false;
- that when made, the representation was known to be false or made recklessly without knowledge of its truth
- that it was made with the intention that the plaintiff rely on it;
- that the plaintiff did rely on it;
- and that plaintiff suffered damages as a result¹⁰

Usually misrepresentation is an issue that occurs as part of a business problem, such as with financial institutions and/or contracts, and is described as fraud.

Marketers must also be aware of federal and state level regulations. Federal regulation of advertising and marketing is done by the Federal Trade Commission (FTC) which states that, “Under the law, claims in advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based. For some specialized products or services, additional rules may apply.”¹¹ Even seemingly exaggerated statements may not count

¹⁰ *Fraudulent Misrepresentation*, Legal Information Institute, Cornell University Law School,

https://www.law.cornell.edu/wex/fraudulent_misrepresentation. (Retrieved March 24, 2016.)

¹¹ *Advertising and Marketing*, Federal Trade Commission, Cornell University Law School, <https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing>. (Retrieved March 24, 2016.)

on puffery as a defense according to FTC Chairman James Miller in the *FTC Policy Statement on Deception*.¹²

Analysis

Research publishing is not well governed or defined. There is no set body of law addressing it. Rather, publishers are the ones who set standards and uphold them in order to maintain the publication's reputation within that community.

Even prolific journals such as *Nature* have papers retracted. Several of *Nature*'s papers were retracted recently and even some peer-reviewed papers were considered to be lacking in credibility. A scandal involving fake peer reviews was discovered in publications from *Springer*, also associated with *Nature*. This debacle led to a retraction of 64 articles in 10 journals.¹³

Just as poor methods of adhering to standards by research publishers allow unreliable papers to be published, advertisers can present their products in a favorable light by omitting facts, whether intentionally misleading or not. The

¹² FTC Chairman James Miller, *FTC Policy Statement on Deception*, Oct. 14, 1983, https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf. (Retrieved March 24, 2016.)

¹³ Ewen Callaway, *Faked peer reviews prompt 64 retractions*, *Nature* (2015), <http://www.nature.com/news/faked-peer-reviews-prompt-64-retractions-1.18202>. (Retrieved March 24, 2016.)

framework set up by the FTC is faulty and advertisers might fall into the well of questionable legality. Homeopathy is an excellent example of the problem, as told by the FTC staff who illustrated the point,

“(T)he FDA’s regulatory framework for homeopathic drugs, set forth in a 1988 Compliance Policy Guide, does not require that over-the-counter (OTC) homeopathic drugs be approved by FDA as safe and effective if they satisfy certain conditions, including that the product’s label contains an indication for use. Yet the policy guide does not require sellers to have competent and reliable scientific evidence to support the indication for use.”¹⁴

A common problem shared with social media users’ disclaimers and marketers’ questionable advertisement strategies has become a recurrent issue where sometimes the wrongful actor is intentionally confusing or misleading the consumer, or the wrongful actor may be trying to use a sophisticated tool (contract structures) without having the requisite knowledge needed. Whether the uploader intended to infringe on rights or not does not change the fact that infringement did occur. Under certain circumstances, social media sites can claim safe harbor

¹⁴ *FTC Staff Comment: FDA Should Reevaluate Its Current Regulatory Framework for Homeopathic Products*, Federal Trade Commission, Aug. 21, 2015, <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-staff-comment-fda-should-reevaluate-its-current-regulatory>. (Retrieved March 24, 2016.)

provisions to avoid conflicts over copyright infringement yet continue to profit from users who are under the impression that their disclaimers are legitimate or are using the disclaimers as an excuse.

Conclusion

In each circumstance, we see a lack of adherence to a set standard, whether it is intended or not, and a certain profit gained by doing so. One can argue that leaving the industry to regulate itself is sometimes necessary, that needless interference from the government will just create more pressure and backlogs of existing issues. But the pressure to “Publish or Perish” within academia has led to multiple credible criticisms of the process even without interference. In publishing, those who were affected by the deception may be left with a tarnished reputation even if they were not responsible for the damage. In marketing, a whole company takes the fall for the bad judgment of its leaders. And with social media sites, the ISP can leave their users liable while they escape liability by claiming ‘safe harbor’ protection. Public policy requires closer scrutiny of the loopholes in our systems that allow for ongoing profits from legally and ethically questionable practices.