



TRENDS IN MARKETING COMMUNICATIONS LAW

BLOCKCHAIN & DIGITAL ADVERTISING • CHILDREN'S ADVERTISING • COPYRIGHT • ENTERTAINMENT • FASHION & BEAUTY • FDA: COSMETICS • FDA: FOOD & DIETARY SUPPLEMENTS • FTC: REGULATORY & STATE • INFLUENCER MARKETING / ENDORSEMENT GUIDES • MOBILE / DIGITAL / PROGRAMMATIC • NAD • NATIVE ADVERTISING • PATENTS • PRIVACY & DATA: EMERGING TRENDS • PRIVACY & DATA: REGULATORY UPDATES • RECREATIONAL MARIJUANA • SAG / JPC • SPORTS • TRADEMARK • VIRTUAL REALITY

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FIFTH EDITION

CLIENTS, COLLEAGUES AND FRIENDS



I am pleased to share the latest edition of *Trends in Marketing Communications Law*, our annual publication dedicated to covering the latest legal developments affecting marketers and their agencies. Davis & Gilbert is widely regarded as the premier law firm for the advertising and marketing communications industry. With our level of involvement and experience, we are an integral part of the innovative and leading-edge changes in law, cases and regulations that are shaping today's market.

In the following 20 articles, the attorneys in our Advertising, Marketing & Promotions Practice Group share practical and helpful insights on these trends and how businesses and agencies will be impacted.

Over the past year, major technological advancements, including those in digital media, virtual and augmented reality and blockchain technology, have opened the doors for innovative business solutions. This has also introduced new legal considerations, such as those related to data privacy and intellectual property.

At the forefront of these changes is the pending General Data Protection Regulation (GDPR), which we address in two different articles. On the regulatory front, we share updates on the FTC's continued focus on making sure brands and influencers are complying with the Endorsement Guides, and we take a closer look at the FDA's withdrawal of IA 66-38 and what that means for the manufacturers and advertisers of imported skin care or cosmetic products.

And, as an increasing number of influencers become content creators, our Intellectual Property attorneys explore related issues, including copyright infringement of digital content shared via inline links, foreign entity laws that restrict photo retouching, the latest effort to crack down on abusive patent troll litigation and trademark protections for titles of creative content.

Lastly, all eyes are still focused on the #MeToo and #TimesUp movements. The movements have already sparked major changes across the country, and our Entertainment attorneys address the resulting new considerations in the negotiation and drafting of performance talent agreements.

As always, our attorneys are committed to staying at the forefront of these changes, and those to come, to help our clients navigate new developments. I would like to thank all of the authors that contributed to this year's publication, with a special nod to our Editorial Board – Allison Fitzpatrick, Gary Kibel and Devin Kothari – for their thoughtful selection of topics and dedicated attention to each of the articles.

I hope you find the content useful. If you have any questions, please do not hesitate to contact me, any of the authors or the D&G attorney with whom you have regular contact.

Ron

We are an integral
part of the innovative
and leading-edge
changes in law,
cases and regulations
that are shaping
today's market

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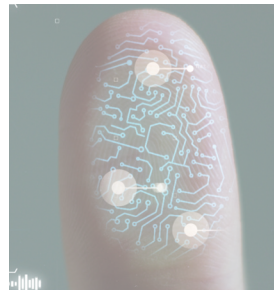
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BLOCKCHAIN & DIGITAL ADVERTISING

BLOCKCHAIN TECHNOLOGY
POISED TO DISRUPT
DIGITAL ADVERTISING

Blockchain technology, the basis of cryptocurrencies such as Bitcoin, took off in 2017 across a wide array of industries, and is poised to make significant strides in digital advertising in 2018. The inherent benefits of blockchain – security, transparency and accountability – hold great potential for the digital advertising industry, where marketers and publishers have been struggling to combat bot fraud and transparency issues. However, the same benefits also pose a variety of technical, practical and legal barriers.

Blockchain is a decentralized and mutually-verifiable digital ledger – like a digital spreadsheet where entries are verified by consensus. The transactions are encrypted and cannot be erased or altered once they are entered, and because they are confirmed via consensus, the need for an independent middleman is removed. Theoretically, this creates an environment of greater transparency, security and trust between all parties involved in the digital advertising ecosystem, and many in the digital ad world are jumping on its potential to solve their woes.

In September 2017, the Interactive Advertising Bureau (IAB) announced a working group would begin “exploring ways to leverage blockchain to improve efficiency and value realization in digital advertising,” but the purported benefits, like diminishing bot traffic, promoting viewability and protecting brands from unsavory content, were enough for some, particularly start-ups, to begin utilizing blockchain in digital advertising right away. Among those were a company that uses blockchain technology to crowdsource a verified whitelist of non-fraudulent publishers, and another that acts as a decentralized ad exchange with a focus on fraud, privacy and consent.

While many are bullish about the prospects of blockchain in the digital advertising industry, there remain a number of potential roadblocks. Among the technological concerns, for example, is that the benefits of transparency and mutual verification come at the cost of transaction speed, which will pose a problem for real-time bidding. From a practical standpoint, requiring mutual verification from all “nodes” involved in a particular transaction may be unworkable.

There are also a number of significant legal issues associated with the rise of blockchain. First, while having all relevant transaction data available as part of the blockchain may increase transparency, certain information may be subject to data privacy laws, applicable privacy policies or the data security obligations of a particular party. The fact that the data cannot be altered raises concerns as well – because once private or personally identifiable data is disclosed, it cannot be easily retracted, even if erroneous. Another potential concern for parties to consider is who actually owns the information in the blockchain. If all relevant parties have access to view and independently verify the blockchain data, the next step is to define and police each party’s respective rights to use, repurpose and distribute such data.



KEY TAKEAWAYS

Blockchain technology can potentially increase transparency and trust among stakeholders in the digital advertising industry.

Legal considerations related to data privacy and intellectual property should be addressed before participating in blockchain-based ad platforms.

Media contracts will need to allocate liability differently on issues such as ownership, infringement and data to address the use of blockchain in the media ecosystem.



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CHILDREN'S ADVERTISING

DEVELOPMENTS IN CONNECTED TECHNOLOGY CREATE NEW COPPA CHALLENGES

After a resoundingly quiet 2017, the Federal Trade Commission (FTC) started 2018 with a bang, announcing two back-to-back settlements with companies alleged to have violated the Children's Online Privacy Protection Act (COPPA).

The FTC's action against VTech Electronics Limited (VTech), the provider of digital learning games and the operator of the "Kid Connect" app for children, marks the FTC's first-ever COPPA case involving connected toys. In 2015, VTech learned that a hacker had breached its network and accessed its customers' personal information, including the personal information of many children. According to the FTC, the children's personal information was linked to their parent's registration data (such as home address), and none of this data was encrypted. The FTC alleged that VTech's collection of personal information from children without appropriate parental notice and consent, and its failure to take reasonable steps to secure the data it collected, violated COPPA.

Shortly after the VTech settlement, the FTC announced its settlement with Prime Sites, Inc., operating as Explore Talent (Explore), an online talent search network for aspiring actors and models. According to the FTC, between 2014 and 2016, over 100,000 of its registered users were under 13 years of age. While Explore's privacy policy stated that it did not knowingly collect personal information from children under 13, and that such children's profiles must be created by a parent, the FTC claimed that this policy was not accurate. According to the FTC, Explore violated COPPA by failing to prominently display its privacy policy; describe its information collection and disclosure practices; and obtain verifiable parental consent prior to collecting, using or disclosing children's personal information.

The FTC is not the only entity enforcing COPPA. Indeed, last summer, Viacom and Disney were both sued in class action lawsuits alleging that their child-directed mobile apps and games violated children's privacy rights by tracking, collecting and exporting user data for behavioral advertising purposes without parental consent. Even the FBI published its own COPPA guidance in 2017, issuing a public service announcement cautioning that smart toys and other connected devices may present a cybersecurity risk insofar as they contain sensors, microphones, cameras, data storage components and other multimedia functions with speech recognition and GPS capability, all of which put the privacy and safety of children at risk as large amounts of personal information may be unwittingly disclosed in the absence of proper data security protections.



KEY TAKEAWAYS

To fully comply with COPPA, operators' privacy policies should be prominently displayed, meaningfully disclose information collection and usage practices and adequately notify parents about information collected from children.

Connected toys, apps and games must comply with COPPA and should incorporate data security technologies to protect children's personal information from hackers and data breaches.

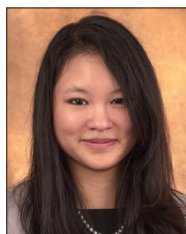
Remember that the FTC is not the only entity enforcing COPPA, as state regulators, prosecutors and consumer class action plaintiffs are bringing their own COPPA enforcement actions.



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COPYRIGHT

INLINE LINKS TO UNLICENSED THIRD-PARTY CONTENT NOW MAY BE COPYRIGHT INFRINGEMENT

For years, copyright attorneys throughout the country have relied on a decision from a Federal appellate court in the 9th Circuit (California and surrounding states) to advise clients that they may safely place on their websites unlicensed photos, videos and other copyrighted content taken from third-party websites, so long as that content appears on their sites only through “inline links” to the third-party sites. Following that guidance, website operators have displayed and performed unlicensed YouTube videos, news photos, social media posts and other third-party content on their sites, and have avoided copyright infringement claims and liability for doing so because they did not copy that content onto their own web servers and instead provided that content by posting the file address (i.e., inline link) of the page where the content is stored on its original web server.

As of February 2018, however, this right of website operators to make unauthorized use of third-party content is gone. A Federal District court in New York has ruled that there is no legal distinction between a website providing third-party content via its own web server and a website providing that same content via inline link, and that in both instances the website’s use of that content is subject to the copyright rights of the content owner. The court explicitly rejected the 9th Circuit “server test,” stating that a website operator’s liability for allowing site visitors to view unlicensed third-party content should not turn on the superficial technical issue of whether the content is hosted on the site’s own web server or hosted on a third-party server. Although this decision is legal precedent only in a narrow swath of New York counties, its practical effect is nationwide because any U.S. website should be accessible in New York and, thus, subject to the case’s restrictive view of inline linking.

It is worth noting that the facts of this case, while interesting, are by no means unusual: The plaintiff posted to his Snapchat account a photo of Tom Brady. Although the account was for private access only, the photo went viral and was posted by third parties to Twitter. News outlets then embedded the photo on their websites via inline link to the third-party Tweets. The plaintiff sued the news outlets for their unauthorized online display of the photo. The commonness of the defendants’ actions illustrates that this case should impact all websites that, until now, have been unhesitatingly displaying and performing unlicensed third-party content through inline links.



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**KEY TAKEAWAYS**

Inline linking is no longer a workaround for licensing third-party content.

A website operator’s use of unlicensed third-party content still may be defensible under fair use, *de minimis* use and the Digital Millennium Copyright Act (DMCA) safe harbor. If the content was posted with a “share” icon it also may be defensible as “licensed” by the content owner.

If the New York case is reversed on appeal, the 9th Circuit “server test” will continue to govern, until another case successfully attacks it.

ENTERTAINMENT

TALENT CONTRACTS IN THE WAKE OF #METOO AND #TIMESUP

No story rocked the entertainment industry in 2017 more than the stunning allegations of sexual assault against previously-powerful men. While the long-term ramifications of the #MeToo and #TimesUp movements are still playing out in Hollywood and on Madison Avenue, the industry has responded by zooming in on old contractual provisions like the “morals clause” and the new “inclusion rider” provision.

Designed to protect a producer’s investment, the morals clause allows the producer to terminate the performer and recoup payment if the performer engages in scandalous, offensive or criminal behavior. It is based on the premise that a film or television performer’s or product endorser’s salary is based on his or her ability to deliver box office results, ratings or create a positive association between audiences and the brand. This rationale is undermined, if not shattered, when performers engage in morally repugnant behavior that offends those very audiences.

The inclusion of moral clauses in talent contracts has ebbed and flowed over the years, but as a result of the watershed #MeToo and #TimesUp movements, producers are now insisting on them for performers of every stature. In the event of unscrupulous behavior by a performer, a morals clause not only protects against a potential public relations backlash, it can also prevent the costly expense cost of reshooting or rewriting projects midstream or, being forced to pay the performer. For example, Kevin Spacey reportedly did not have a morals clause in his contract for House of Cards, forcing Netflix to pay his full fee for the final season, even after removing him from the show.

In particular, these movements have focused attention on the triggering events for a morals clause. Relying on a criminal conviction or arrest as the trigger leaves producers exposed to substantial losses, since the criminal justice system can move at a slow pace and, as demonstrated by the #MeToo movement, obtaining an arrest or conviction can remain difficult even with multiple, credible accusations. Drafters of morals clauses will renew their focus on the actions themselves, the credible reporting of those actions and their immediate impact on a production.

These movements have also shed light on how gender and ethnic imbalances can perpetuate a system that protects and empowers abusers. The movement for equality in pay and representation for women and other underrepresented groups have crystallized in the “inclusion rider,” which requires increased diversity in staffing cast and crew. Frances McDormand championed this concept in her 2018 Academy Award acceptance speech, resulting in many top stars calling for these riders and commitments by producers to honor these demands. Studios, networks and marketers will likely see increased demand for such socially-minded contractual clauses.



KEY TAKEAWAYS

Studios, networks, agencies and marketers are negotiating for stronger and broader morals clauses in talent contracts in the wake of the #MeToo revelations.

Given the financial stakes, negotiations over morals clauses will likely become more protracted.

Talent representatives are seeking inclusion riders in talent contracts that seek equal representation in staffing and casting for productions.



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FASHION & BEAUTY

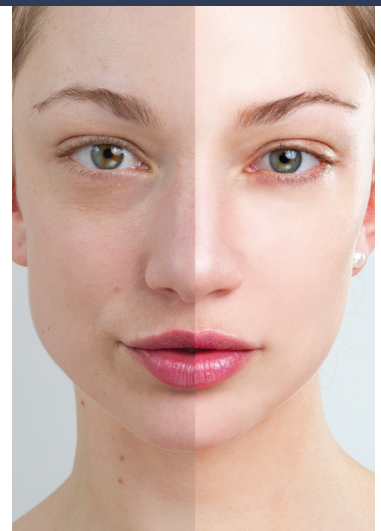
PHOTO RETOUCHING: CHANGING EXPECTATIONS FOR FASHION AND BEAUTY ADVERTISING

From smoothing skin to whittling waists, the practice of retouching beauty and fashion photographs has come under increased scrutiny, and 2017 was no exception. With female equality and empowerment at the forefront of the national conversation, retailers responded with their own policies on photo retouching. These policies, coupled with legislation enacted in France in 2017 mandating the disclosure of certain body shape retouching, make the landscape for fashion and beauty advertisers even more complex.

CVS Pharmacy (CVS) announced that beginning April 2018 it will no longer retouch beauty images it creates for its stores, websites, social media outlets and other marketing. Although CVS may continue to feature retouched photographs from brands, images that have been “materially altered” will be labeled as “digitally modified.” CVS is partnering with brands to develop specific guidelines, but believes that “material alterations” include changing or enhancing a person’s shape, size, proportion, skin or eye color, wrinkles or other key characteristics. As a result, brands may need to decide whether to develop unaltered imagery specifically for CVS, or to add a label designating their images as “digitally modified,” which may impact public perception. Even brands that do not sell products at CVS will likely monitor the development of the CVS guidelines, as they may shape industry standards in the future.

Perhaps signaling a larger trend, CVS framed its decision both as a response to the larger conversation of body authenticity and celebrating different types of beauty, but also as an issue of public health and corporate social responsibility, noting that the connection between unrealistic body images and negative health effects on girls and young women has been well established. Similarly, clothing retailer ASOS stopped retouching photographs of models wearing swimsuits; American Eagle lingerie brand Aerie barred using retouched images in all advertising campaigns; and Getty Images banned photos modified to change a model’s body shape. Getty’s decision followed the enactment of a new law that went into effect in France in October 2017, requiring any commercial photograph of a model digitally retouched to look thinner or thicker to be labeled as “photo retouched.”

Moving forward, fashion and beauty brands must consider their approach to photo retouching, taking into account global legal compliance, newly evolving third-party policies and consumer perceptions in an era of increased awareness and activism. Marketers and their agencies should seek legal counsel to manage these issues and develop procedures to navigate this rapidly evolving landscape.



KEY TAKEAWAYS

Fashion and beauty marketers producing campaigns internationally must remember that laws such as those in France may apply to photo retouching, and seek appropriate advice from counsel to ensure compliance.

Retailers and brands are developing their own policies on photo retouching, and may expect partners to comply. Marketers and their agencies should consider addressing these issues in their client agreements.

Content creators should review their existing photo retouching practices and consider developing internal policies and procedures.



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FDA: COSMETICS

FDA WITHDRAWS ANTI-AGING IMPORT ALERT AND CONTINUES OVERSIGHT OVER COSMETICS CLAIMS

In late 2017, the U.S. Food and Drug Administration (FDA) officially withdrew Import Alert 66-38, “Skin Care Products Labeled as Anti-Aging Creams” (IA 66-38), potentially opening the doors for cosmetics manufacturers and marketers to make stronger anti-aging claims.

For the past 30 years, IA 66-38 was used to detain imported skin care and cosmetic products with labels containing claims that the product would affect the aging process, including by rejuvenating, repairing or restructuring the skin. The FDA said such claims would categorize the product as a “drug,” resulting in a denial of entry into the United States. This posed a problem for products manufactured abroad, which could not bear claims similar to domestically manufactured products.

While the FDA did not provide a basis for withdrawing IA 66-38, it may be a sign that the FDA now considers certain claims indicating a product’s efficacy in addressing the appearance of aging are appropriate, as they are currently included on domestic products. However, a product label claiming that it will affect a structure or function of the skin, such as by repairing or rejuvenating the skin, should continue to be viewed with caution for all skin care and cosmetic products.

Additionally, the Trump administration has continued to oversee the regulation of cosmetics, including through the issuance of multiple warning letters. In the letters, the FDA singled out claims that products had “anti-inflammatory” or “anti-redness” properties or are appropriate for skin with rosacea, eczema or psoriasis. The FDA found that these claims rendered the products to be new and unapproved drugs.



KEY TAKEAWAYS

The FDA’s withdrawal of IA 66-38 may open the doors for imported skin care or cosmetic products claiming anti-aging properties.

Despite the FDA’s withdrawal, companies should avoid making any claims that a product will affect a structure or function of the body.

Companies should continue to vet all product packaging, marketing and websites to ensure compliance with FDA regulations and review claims through a conservative lens.



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FDA: FOOD & DIETARY SUPPLEMENTS

REGULATORY AND CLASS ACTION CLAIMS AGAINST “HEALTHY” AND “NATURAL” FOOD AND DIETARY SUPPLEMENT PRODUCTS ON THE RISE

The U.S. Food and Drug Administration (FDA) and class action bar are continuing to pursue enforcement and litigation against food and dietary supplement manufacturers who make drug claims, and in 2017, paid particular attention to products purported to have “anti-inflammatory” effects or to “treat” or “cure” cancer. Class action attorneys have been keeping a steady eye on and drawing from the FDA’s warning letters when deciding to bring class action claims, and as a result, FDA enforcement actions and consumer class action claims have seemingly followed the other.

The Federal Trade Commission (FTC) also continues to actively pursue cases against dietary supplement manufacturers that make unsubstantiated claims about their products. In 2017, the FTC imposed a \$6.57 million judgment against a dietary supplement company and its advertising agency, in part for making unsubstantiated claims that the dietary supplement would reverse mental decline and reduce joint and back pain, inflammation and stiffness in as little as two hours. As part of the settlement, the dietary supplement company and its advertising agency are barred from making false or unsubstantiated health claims and are required to have competent and reliable scientific evidence to support their claims.

In 2018, FDA Commissioner Scott Gottlieb indicated that the FDA is expected to issue long-awaited guidance on the definition of “natural” and revise the definition of the term “healthy.” The FDA requested public comment on the use of both terms, and the comment periods ended in 2016 and 2017, respectively. While the FDA has yet to take action on the comments, class action cases against products advertised as “natural” and “healthy” continue to be brought against companies with mixed results. Certain courts have stayed consumer class action cases against “natural” products on primary jurisdiction grounds while awaiting a decision from FDA on the definition, while other courts have allowed such cases to proceed.



KEY TAKEAWAYS

“Natural” and “healthy” claims should be reviewed carefully in light of a lack of guidance from the FDA and continued oversight from the class action bar.

Manufacturers and marketers of food and dietary supplements should review product claims on their packaging, websites and other advertising to ensure compliance with FDA regulations and review claims through a conservative lens.

Manufacturers and marketers of food and dietary supplements should ensure they have competent and reliable scientific evidence to support their product claims.



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FTC: REGULATORY & STATE

FTC ENFORCEMENT PRIORITIES IN A NEW ADMINISTRATION

The changing of the guard for the federal government often signals changing priorities, especially where regulatory agencies are concerned. Unlike some agencies, which have decreased enforcement activities as a result of the Trump administration's deregulatory bent, the Federal Trade Commission (FTC), and in particular, the Bureau of Consumer Protection, have showed no sign of letting up on enforcement where it deems marketing practices to be unfair or deceptive.

For the past several years, the FTC has been cracking down on deceptive marketing practices for dietary supplements and weight-loss products. Although the FTC has tended to go after the marketers themselves, it has recently shown an increased willingness to take on the advertising agencies who participate in the preparation of false or misleading claims for such products.

In February 2018, the FTC obtained a \$2 million judgment against an advertising agency for publishing consumer testimonials about weight-loss pills in "health news" reports, where the "consumers" were in fact paid actors and their results were fabrications that were not backed by scientific evidence. The FTC, in particular, noted that the advertising agency was in possession of legal advice that the ads were "particularly risky" and would require substantiation, yet published the ads without receiving that substantiation. Similarly, in April 2017, the FTC settled with an advertising agency over the agency's preparation of radio ads that were deceptively formatted to sound like talk shows, and which featured "experts" who did not have the expertise they claimed to have.

In both cases, the FTC made clear that advertising agencies cannot rely on unsupported assertions from their clients and have a duty to ensure that they have a scientific basis to make any advertising claims they place in marketing materials.

Regardless of the regulatory priorities of the FTC's new slate of commissioners, confirmed on April 27, 2018, the agency has made clear that it will not let up on policing deceptive marketing practices. Rather, all indications suggest that the FTC will continue to enforce its mandate where it finds that marketers are causing real, tangible harm to consumers.



KEY TAKEAWAYS

Advertising agencies can be held responsible for the truth and accuracy of all marketing materials they disseminate and should not rely on the unsupported assertions of their clients.

The FTC's consumer protection mandate remains the same under Republican and Democratic administrations, and the agency will continue to bring enforcement actions where it believes consumers are being harmed by deceptive marketing practices.



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INFLUENCER MARKETING / ENDORSEMENT GUIDES

NOTICE PERIOD IS OVER: REGULATORS HEIGHTEN FOCUS ON INDIVIDUAL INFLUENCERS

Regulators and public watchdog groups intensified their focus on paid influencer marketing campaigns in 2017. Last spring, in the wake of petitions published by groups such as Public Citizen and TruthInAdvertising.org, which flagged “suspicious” celebrity Instagram posts, and criticized the adequacy of “built-in” social media disclosure tools, the Federal Trade Commission (FTC) sent more than 90 letters to celebrities, athletes and other influencers – as well as to marketers – calling for influencers to “clearly and conspicuously” disclose their “material connections” in social media.

To bring the point home, the FTC issued 21 follow-up letters to recipients of the original 90 letters, including celebrities like Naomi Campbell, Vanessa Hudgens, Sofia Vergara and Lindsay Lohan, requiring them to provide a written response to the FTC on the status of their “material connections” to brands (and in the event of a brand relationship, to describe what actions they are or will be taking to ensure clear and conspicuous disclosure). In these letters, the FTC stated that ambiguous disclosures such as “#thanks,” “#collab,” “#sp,” “#spon” or “#ambassador,” or simply tagging a brand in a post without a disclosure, were not in compliance with the FTC’s Endorsement Guides. The FTC is clearly heeding the concerns raised by consumer advocacy groups – and in light of the recent investigation by the New York State Attorney General into the practice of creating and selling fake “followers” to boost influencers’ presence online – regulators will continue to closely monitor honesty and transparency in influencer marketing.

The FTC also updated its staff publication “The FTC’s Endorsement Guides: What People are Asking” (the FAQs) to address more than 20 new questions relevant to influencers and marketers. The updates expressly included FAQs regarding Instagram Stories and Snapchat, noting that when scrolling through a “stream of eye-catching photos” (e.g., on Instagram), a viewer may not see a disclosure based on its size, placement, time spent looking at the image, competing text and how well it contrasts against the image.

The FTC also announced its first enforcement action against individual influencers, Tom Martin and Trevor Cassell, for failing to disclose their material connections in YouTube and social media videos. In the videos, Martin and Cassell claimed to have discovered “CS:GO Lotto,” a video game virtual gambling site, and praised the game and touted their purported winnings – all without disclosing that they co-owned and co-operated the site. Further, the pair managed their own influencer program for CS:GO Lotto in which they prohibited paid influencers from making any negative statements about the website, in violation of the FTC’s Endorsement Guides requirement that endorsers only express truthful and honest opinions. Martin and Cassell settled the action by agreeing to refrain from making any such misrepresentation and to clearly and conspicuously disclose their material connections in the future.



KEY TAKEAWAYS

Influencers who do not comply with the Endorsement Guides could be subject to their own FTC action.

Advocacy groups will continue to monitor influencer campaigns and highlight disclosures that they believe to be inadequate.

The FTC’s current focus on the form and sufficiency of influencer disclosures does not mean that marketers, publishers, influencer networks and/or agencies can rest easy – or that the other key principles of the underlying Endorsement Guides, such as the need for influencer statements to be truthful and honest, are obsolete.



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MOBILE / DIGITAL / PROGRAMMATIC

PRIVACY, TRANSPARENCY AND QUALITY ISSUES DRIVE CHANGES IN DIGITAL MARKETING

Throughout 2018, publishers, marketers and agencies will continue to employ new technologies, products and services to address evolving consumer privacy, advertiser transparency and brand safety issues.

Among the new consumer privacy obstacles for digital advertisers are changes in the use of cookies. Traditionally used to track user activity and build consumer profiles for targeted advertising, cookies are often critical to digital ad product offerings. When Apple released its iOS 11 in late 2017, however, it included an “Intelligent Tracking Prevention” feature that blocks certain cookies, making this more difficult. On the regulatory front, enforcement of the European Union’s new General Data Protection Regulation (GDPR) begins May 25, 2018, which complicates the ability of digital marketers to use tracking cookies to collect data from, and retarget, EU consumers. Under the GDPR, tracking cookie data is considered personal data and requires a legal basis (such as consent from the data subject) in order to process such data. Accordingly, marketers seeking to collect cookie data from EU data subjects for behavioral advertising purposes should implement affirmative opt-in mechanisms, work closely with their publishers, set up internal compliance procedures and provide easily accessible opt-out mechanisms.

The rise of ad blocking technologies continues to present challenges for the industry, but marketers are responding by improving the user experience and minimizing ad intrusiveness to stem the tide. Even ad blocking technology providers have refined their approaches to focus on ad curation rather than solely blocking. One company, for example, has its own ad network that requires ads to meet a set of acceptability criteria, such as non-disruptive placement, distinguishability as ad content and size and content restrictions. On the whole, consumers may ultimately prefer more nuanced approaches that increase ad relevance and consumer satisfaction over technologies that simply block ads.

Technological developments also play an important role in the continued battle against ad fraud and ensuring brand safety. The ability to reliably monitor site quality and ad adjacency is increasingly important in an environment where fake news sites abound. Major brands have pulled ads from YouTube due to concerns about being associated with inappropriate or disturbing video content. Many in the industry are hopeful that blockchain technology, with its potential transaction transparency benefits, may help marketers and their agencies address this concern and improve viewability. Additionally, a growing number of marketers and their agencies are employing quality control tools and technologies to confirm (and in some cases to implement) whitelist and blacklist compliance in programmatic advertising.



KEY TAKEAWAYS

Both regulators and major technology companies are focused on protecting consumer privacy.

Digital marketers will need to find new ways of building consumer profiles to comply with new regulatory requirements, like the GDPR.

Ad blocking technologies still loom large in the digital advertising space, with marketers focused on improving ad quality and relevance; and new ad networks provide paths to ad curation and seek to provide pre-approved ads, rather than blocking ads entirely.

Viewability, ad fraud and brand safety risks abound, but so do promising new technologies that industry stakeholders hope will increase transparency in the digital and programmatic transactional chain.



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NAD

THE NAD TAKES ON HEALTH AND FITNESS FADS (AND A FEW KARDASHIANS IN THE PROCESS)

Every year brings with it a new set of health and fitness fads, and a new set of opportunistic marketers seeking to take advantage of consumers' never-ending desire to look and feel their best. Never one to blindly follow trends, the Advertising Self-Regulatory Council's National Advertising Division (NAD) spent much of the past year ensuring that advertisers do not exploit these fads at the expense of consumers.

Last year, the NAD addressed a pair of challenges involving FitTea, a beverage that promised to "Boost Energy, Boost Immunity, Boost Metabolism, Burn Fat" when used as part of a diet and exercise regimen. As a part of its marketing push, FitTea hired social media influencers — including Kourtney Kardashian, Khloe Kardashian and Kylie Jenner — to post Instagram endorsements of its product. In addition, FitTea populated its website with various social media posts and testimonials that it received from uncompensated consumers. Many of these posts included claims that FitTea boosts metabolism and burns fat, and included before-and-after photos showing substantial weight and fitness changes. The NAD found that, although the diet and exercise program that FitTea promoted may result in weight loss and fitness improvement, there was no evidence that FitTea itself boosts metabolism, boosts immunity, burns fat or otherwise results in weight loss. The NAD therefore required FitTea to stop re-posting consumer testimonials that contained such claims and to ensure that its paid endorsers avoid conveying such untrue messages. In a separate challenge involving the influencers themselves, the NAD found that they had failed to adequately disclose their connection to FitTea, and required that the influencers modify their posts to make clear that they were compensated for their statements.

The NAD also reviewed advertising for a natural deodorant product that included claims that the product absorbs wetness and moisture without aluminum (a common ingredient in most antiperspirants). Although the advertiser presented laboratory testing and consumer-use surveys as evidence that the product helps absorb wetness, the NAD found that the advertiser's claims were unsubstantiated, absent testing of the product on actual consumers.

Other health misrepresentations were far more blatant. For example, one advertiser marketed its version of the wildly popular fidget spinner as an "ADHD Focus Anxiety Relief Toy" that is "Great for Anxiety, Focusing, ADHD, Autism." Others proclaimed that all-natural herbal remedies and dietary supplements could treat a broad range of ailments, from cramping and kidney stones to opiate addictions and even cancer. In each case, the advertiser refused to participate in the self-regulatory process or provide substantiation, resulting in referrals by the NAD to the Federal Trade Commission.



KEY TAKEAWAYS

Marketers are responsible for statements made in paid-for testimonials and must ensure that their influencers adequately disclose their material connections to the advertiser.

Today's fad could be tomorrow's NAD challenge. Marketers seeking to leverage health or fitness trends must therefore ensure that their advertising claims are truthful and substantiated.



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NATIVE ADVERTISING

NATIVE ADVERTISING: HERE TO STAY, AND SO ARE REGULATORS

The native advertising trend is showing no signs of slowing down. With regulators paying increased attention to adequate disclosures of paid relationships in digital, mobile and social media, marketers, publishers and their agencies should not be lulled into a false sense of security due to the relative lack of recent enforcement action in the native advertising space.

Nearly two years after the Federal Trade Commission (FTC) first issued its Enforcement Policy Statement Regarding Deceptively Formatted Advertisements and the accompanying Native Advertising Guide for Businesses (the Native Guides), regulators may be primed to bring enforcement actions in 2018 against those who fail to comply. In fact, a recent study released by the Native Advertising Institute found that 11% of news media publishers were not labeling native ads at all, and a survey of magazine publishers reported similar levels of compliance. Parties along the chain of a media buy or custom content deal are struggling to balance the need to meet budget demands with the need to appropriately label sponsored content, as marketers and their agencies negotiate to determine contractual and practical responsibility for making compliant disclosures.

Regulators continued their focus on social media and mobile platforms in 2017, an important trend to recognize as the nexus between influencer marketing and native content intensifies. Influencers are becoming their own production companies and content creators, working with publishers across online and multi-channel networks, and sometimes beyond visual platforms. For example, online podcasts and even virtual voice assistants frequently feature marketer content that is read live by podcast hosts, while entire series of podcasts are now being developed by marketers themselves, blending editorial as well as sponsored content. In light of these recent developments, regulators are likely to revisit their position on native advertising practices going into 2018.

As a potential harbinger of actions to come, in December 2017, the FTC published a report detailing the agency's findings pursuant to a multi-year study of consumer recognition of paid search and native advertising. During the study, participants viewed two versions of native ads: an "original" version and a "modified" version which had been altered by the FTC to comply with the Native Guides. Perhaps not surprisingly, the FTC found that the altered versions, which included modified disclosures to improve their prominence, legibility or clarity, greatly increased the likelihood that a participant understood the content to be advertising. The FTC re-emphasized that the overall impression of the ad matters (including position, text size and other visual cues such as borders and background shading), not just the disclosure.



KEY TAKEAWAYS

As native advertising formats continue to evolve, marketers and their agencies must ensure that sponsored segments incorporated into new formats remain readily identifiable to consumers as ads in compliance with the Native Guides.

Stay on top of the FTC's activity in the spheres of paid search, online reviews and influencer marketing, as these are all connected to native advertising and may inform the FTC's future guidance on these practices.



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PATENTS

SUPREME COURT SEEKS TO CURB THE WORST ABUSES OF THE PATENT SYSTEM

Congress, commentators and a wide variety of industry leaders have long noted that the patent system was broken. Besieged by a tide of weak patents and baseless patent troll litigations, these stakeholders argued that the current patent climate incentivized the weaponization of patent rights, thereby raising operational and legal costs and stifling innovation.

In 2017, the Supreme Court responded by taking aim at some of the worst abuses of the patent system in two landmark cases. The first, *TC Heartland v. Kraft Foods*, addressed the issue of venue. Hoping to limit the aggressive forum shopping of plaintiffs – which often led to an outsized number of cases in plaintiff-friendly places like the Eastern District of Texas – the Supreme Court held that venue is only proper in a patent case in the state where the defendant is incorporated or where it has a regular and established place of business. In narrowing the proper avenues for bringing suit, the Court reduced any home-field advantage for patent trolls.

In *Impression Products v. Lexmark Int'l*, the Supreme Court rejected Lexmark's efforts to prohibit purchasers of printer ink cartridges from refilling and reselling them. The Supreme Court found these restrictions to be a violation of the "first sale" doctrine, which protects downstream users of a product by exhausting a patent owner's rights in a product after it is first sold, thereby narrowing the field of legitimate patent defendants, and giving peace of mind to retailers and consumers.

A series of other decisions also made life more difficult for patent plaintiffs. In *Life Technologies v. Promega*, the Supreme Court weakened the rules prohibiting patent infringement overseas, and in *Helsinn Healthcare v. Teva Pharmaceuticals* and *University of Maryland v. Presens*, the Federal Circuit made it easier to invalidate patents by showing that the invention at issue was previously on sale or that it would have been obvious to someone working in that field.

These cases have helped curb the most abusive patent litigation tactics and seemingly forced many patent trolls to reconsider their tactics. Indeed, 2017 had the fewest number of new patent filings in nearly a decade. In addition, the number of cases in the Eastern District of Texas has sharply decreased, and these cases have been redistributed to less plaintiff-friendly districts in Delaware and California, altering the balance of power in patent litigations. It is clear that the Supreme Court is listening carefully to claims about abusive patent litigation tactics and is prepared to intervene to correct distortions in patent law that hurt consumers and stifle innovation. Whether it continues this trend will be the patent story to watch in 2018.

Patents

KEY TAKEAWAYS

Companies should combat patent infringement risk by establishing a comprehensive risk management strategy that includes filing for and enforcing patents, identifying and clearing patent risks, instituting contractual strategies for risk-shifting and defending allegations of patent infringement.

After years of pro-patent troll decisions at the Federal Circuit, the Supreme Court got deeply involved in 2017 by strictly limiting plaintiff forum-shopping and prohibiting the use of patent law to control downstream users of a product.

Patent filings dropped in 2017, with fewer cases filed in plaintiff-friendly districts and more cases redistributed to other jurisdictions.



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PRIVACY & DATA: EMERGING TRENDS

BIOMETRICS AND ARTIFICIAL INTELLIGENCE: THE NEW TECHNOLOGICAL FRONTIER

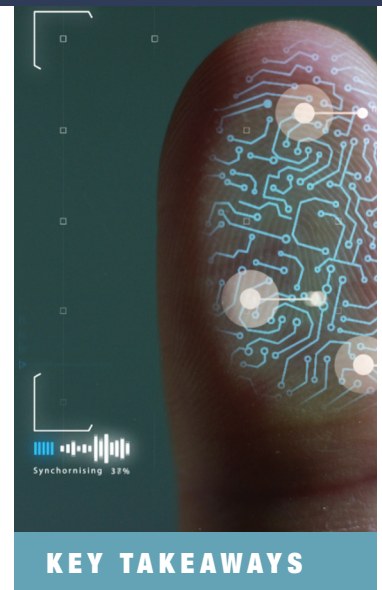
Biometric Data: In recent years, more companies have adopted the use of biometric data, such as facial recognition software and applications, in their internal business operations and to analyze customer behaviors for marketing purposes. This trend has been met with substantial legal action due to the private right of action and availability of liquidated damages under some state laws. The leading domestic biometric state law, the Illinois Biometric Information Privacy Act (BIPA), triggered a surge of class action lawsuits on the collection, safeguarding or retention of biometric data, including employment-related class actions. A recent Illinois state court decision, however, may change the landscape for biometric lawsuits in 2018.

In *Rosenbach v. Six Flags Entertainment Corp.*, the court held that the plaintiffs must claim actual harm, rather than simply a technical violation, to be considered an “aggrieved person” under BIPA, signaling that courts may be looking to reign in the number of BIPA-related class actions. As the *Rosenbach* decision is the first of its kind, plaintiffs will likely continue to test what constitutes an “aggrieved person” under BIPA. With the increase of biometric data class action suits and companies adopting this new technology, many other states have begun to consider BIPA-like legislation. Predictably, tech companies are pushing back against these new laws.

Machine Learning and the Downside of AI: Artificial intelligence (AI) has gained popularity across all industries. Auto companies like Tesla, Uber and Waymo are developing self-driving technologies, while brands and media companies are using AI to generate content. It is estimated that over 20 million Amazon smart speakers were sold last year and, as consumers continue to embrace this new technology, usage of smart home devices is expected to grow in the United States at an exponential rate. Even the U.S. government, through the Defense Advanced Research Project Agency, is dabbling in disaster relief robots and combat robots.

The increased use of these new technologies, however, has an ominous downside. While AI can help businesses become more efficient and automate work and processes, there are privacy and data security concerns to consider. For example, AI’s ability to strengthen defenses against cyber-attacks can also be used for machine-driven attacks that can locate vulnerabilities much faster than a human hacker can intrude and much quicker than a human patcher can respond.

Although not yet a primary focus of legal scrutiny, companies using AI technologies should be mindful of legal, ethical and societal implications. Major players in science and technology like Elon Musk, Bill Gates and the late Stephen Hawking have already cautioned against an unregulated world of AI, citing the potential harm to society, such as the risk of a global AI arms race. With the popularity of AI, it is only a matter of time until AI laws and regulations will be enacted.



KEY TAKEAWAYS

Companies are vying for control of biometrics and AI, the hot new technological frontiers, but like many new technologies, they come with a double-edged sword of existing and developing legal issues.

Companies should understand the legal implications and landscape of biometric data and other new data sources before collecting and using such data.

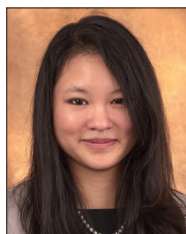
AI can help companies manage their businesses and boost their cyber defenses, but its use should be approached with caution and include appropriate data protection precautions.



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PRIVACY & DATA: REGULATORY UPDATES

LAWMAKERS REACT TO NEW TECHNOLOGY TRENDS WITH UPDATES AND AMENDMENTS

Federal and State Updates: In 2017, the Federal Trade Commission (FTC) continued to focus on data collection and information security practices, calling for more nuanced consent and disclosure practices and the implementation of adequate information security infrastructures and controls to protect consumer data. The FTC also emphasized compliance by domestic businesses under the new EU-U.S. Privacy Shield. There continues to be uncertainty regarding the FTC's direction and focus in 2018 as the new Commission and Chairman were only recently confirmed by the Senate on April 27, 2018.

Developments on the state level are also having a significant impact on the industry. Delaware made several amendments to its data breach notification law, including an expanded definition of a computer security breach and a new requirement that all entities operating within the state must safeguard personal information. The amendment also expanded the definition of "Personal Information" to include information such as passport number, a username or email address, in combination with a password or security question and answer that would permit access to an online account; certain medical or health information; unique biometric data used for authentication purposes; and an individual's taxpayer identification number. The new amendment also contains a 60-day notification period and mandatory identify theft prevention and mitigation services for a year for breaches involving a social security number. Meanwhile, the final states without such laws, South Dakota and Alabama, have very recently passed security breach notification bills.

GDPR and PECR: Companies are preparing for the European Union's new General Data Protection Regulation (GDPR) to ensure compliance by the enforcement commencement date of May 25, 2018. Compared to its predecessor, the EU Data Protection Directive (the Directive), the GDPR will impose more stringent consumer privacy requirements on companies handling personal data of EU citizens. As the deadline nears, companies subject to the GDPR should reevaluate their internal policies and practices, and conduct company-wide data audits to ensure compliance. Prior practices compliant with the Directive may no longer suffice, and violations can result in substantial fines. For example, consent that has been obtained prior to the GDPR's effective date that does not meet the new requirements will need to be re-examined and possibly require a re-opt-in prior to the upcoming deadline. In addition, companies should be mindful of their third-party service providers that also collect and process data (e.g., market research and analytics), and ensure applicable GDPR requirements are included in their vendor contracts.

While all eyes are on the GDPR, companies should not forget about potential changes in the Privacy Electronic Communications Regulation (PECR or e-Privacy Directive) that are expected to go into effect after the GDPR. PECR covers the storing or accessing of information on a user's device (including, but not limited to, the use of cookies, email and texting). While PECR requires consent, the GDPR has a number of legal bases for the processing of personal data, including consent and legitimate interest. Amendments to PECR are still possible, and the implementation date is still unclear.



As companies develop and use Internet-connected technologies to reach consumers and collect data across multiple devices, greater regulatory oversight to protect consumers gains momentum in 2018.

Companies should be actively preparing for the GDPR and become compliant *before* May 25, 2018, and assess whether updates to PECR will affect the way they use electronic communications and cookies.

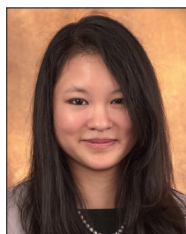
Companies should keep up-to-date on state laws pertaining to data security, privacy and breach notification.



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RECREATIONAL MARIJUANA

A WATERSHED YEAR FOR RECREATIONAL MARIJUANA INDUSTRY'S GROWTH

In November 2016, four more states – Nevada, California, Maine and Massachusetts – legalized recreational marijuana use, sparking the roll-out of state and local regulations as new recreational markets opened in 2017, marking a turning point for the industry.

Of the four states that legalized recreational marijuana in 2016, Nevada's market is furthest along in its evolution. Legal recreational sales began in most parts of the state on July 1, 2017, but Las Vegas' rapidly-expanding reputation as a hub of marijuana tourism presents unique legal issues. While purchasing marijuana is now legal, state and city regulations prohibit the use or consumption of marijuana in public places, creating an unusual catch-22 for Sin City tourists. While early sales figures have exceeded expectations, state legislators are beginning to look into altering regulations to allow for legal consumption in more locations.

In June 2017, California's state legislature integrated numerous regulatory frameworks to create the omnibus Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). MAUCRSA now allows the state's Bureau of Cannabis Control (BCC) to issue licenses related to the cultivation, manufacture, distribution and laboratory testing of marijuana, as well as those for retail and microbusinesses. Currently, only temporary licenses are being issued as California continues to refine the regulations, and would-be marijuana businesses can face a significant wait because of a backlog of license registrations. This has not stopped legalized recreational shops from sprouting up. The BCC has also exercised its power to stress the importance of proper licensing. In March 2018, the BCC sent a cease and desist order to a major online advertiser of dispensaries to stop advertising for unlicensed operators. That is in addition to nearly 1,000 cease and desist letters that have been sent to unlicensed plant-touching companies since enforcement began several months ago.

In Massachusetts, disagreements over the marijuana tax rate slowed down the regulatory implementation process. However, in July 2017, the governor signed the bill into law, and at least a dozen marijuana shops are expected to open for business during the summer of 2018.

But legalization is not moving forward unabated in all states. For example, despite a successful ballot initiative that approved legalization in Maine, the governor vetoed the proposed regulatory framework. Because the legislature had made several key changes to the voter-approved framework, the veto now requires that the legislature revert to the language of the ballot initiative and begin the legislative process again. By consequence, recreational sales in Maine are now unlikely before some time in 2019.

Finally, it should be noted that while the specter of increased federal enforcement still exists, as the industry solidifies, it seems less and less likely that the Trump administration will take drastic action to curtail marijuana business activity that is legal at the state level.



KEY TAKEAWAYS

Nevada, California, Maine and Massachusetts are in the process of legalizing recreational marijuana sales.

States have a variety of licensing and regulatory requirements that manufacturers, distributors, sellers and marketers should be aware of as they begin their businesses.

While the current administration has made statements indicating that it opposes state-level marijuana activity, there has been no significant federal enforcement thus far.



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SAG / JPC

ARE (MORE) GOOD THINGS ON THE HORIZON FOR SAG-AFTRA AGENCIES AND ADVERTISERS?

Heading into the last round of collective bargaining that resulted in the 2016 SAG-AFTRA Commercials Contract (Commercials Contract), signatory advertising agencies and advertisers voiced concerns about the challenges they faced when competing with their non-signatory counterparts. Most troubling was the comparatively high talent cost tied to an increased demand for digital content, and, to a lesser extent, the use of non-professional talent (i.e., real people) in commercials. Some prominent SAG-AFTRA advertisers withdrew from the Commercials Contract, leaving signatory agencies more vulnerable to non-union agencies able to “buy-out” talent for flat fees, ready to swoop in and take away their business.

The Commercials Contract introduced beneficial waivers aimed at reducing talent costs for the short-term use of commercials in social media and the use of real people in certain types of commercials. However, even with the new waivers, signatory agencies and advertisers have found it increasingly difficult to produce low-budget digital content with multiple performers at the current rates.

In October 2017, SAG-AFTRA and the Joint Policy Committee on Broadcast Talent Union Relations (JPC) responded to these concerns and created a rare mid-contract waiver for low-budget digital commercial productions – and the reviews have so far been positive. The new waiver allows for “free bargaining” with talent (i.e., there is no required minimum pay rate), union or non-union, in connection with digital commercial productions with budgets of \$50,000 and under. The digital waiver signaled recognition by SAG-AFTRA and the JPC that relief was necessary for signatory agencies to compete on the digital front, and may serve to mitigate the potential termination and withdrawal by signatory agencies and even more advertisers at the expiration of the current Commercials Contract in the Spring of 2019.

Among other things, agencies and advertisers have clamored for a blanket waiver for the use of non-professional “real people” that appear or perform non-scripted work in commercials. There are existing waivers for the use of the advertiser’s employees, people at live events, people filmed with hidden camera productions, testimonial givers and the use of certain non-professionals. Some have suggested that SAG-AFTRA and the JPC simplify and close the gap by collapsing these waivers into a blanket waiver.

As the expiration of the current Commercials Contract looms ahead in 2019, SAG-AFTRA and the JPC have much to consider as they attempt to level the playing field for signatory agencies, which may make negotiations for the next Commercials Contract even more complicated.



KEY TAKEAWAYS

Beneficial waivers introduced after the 2016 Commercials Contract went into effect have not helped dampen concerns raised by signatory agencies about talent costs.

An October 2017 mid-contract waiver was created to allow for “free bargaining” with talent, union or non-union, in connection with digital commercial productions with budgets of \$50,000 and under.

Some question whether SAG-AFTRA and the JPC should consolidate different waivers into a single blanket waiver to reduce talent costs across the board for non-scripted “real people” advertising.



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SPORTS

GERMAN CHALLENGE FURTHER THAWS OLYMPICS “RULE 40” ADVERTISING RESTRICTIONS

The International Olympic Committee’s (IOC’s) “Rule 40” has long restricted athletes from appearing in advertising for companies that are not official sponsors of the Olympics. The restricted blackout period extends from nine days prior to the opening ceremonies of each Olympic Games until three days after the closing ceremonies. Following closely on the heels of a relaxation of Rule 40 for the 2016 Summer Games in Rio, Germany’s Federal Cartel Office (the Bundeskartellamt) has filed an action against the IOC and the German Olympic committee, the Deutscher Olympischer Sportbund (DOSB), over what it describes as an unfair restriction on trade that significantly curtails athletes’ earning power. Though the outcome of the case is still pending, history may look back on 2017 as the turning point for Olympics advertising and athlete endorsements.

The Bundeskartellamt noted that, because of procedural complexity and a lengthy required review period, the waivers to Rule 40 allowed for the first time during Rio 2016 were insufficient to help any but the most famous of athletes increase the value of their Olympics-related endorsements. Instead, the Bundeskartellamt sought to have the advertising guidelines come under the purview of German statutory and common law. In response, the IOC and DOSB granted several specific concessions to German athletes, most significantly the ability to interact with their sponsoring brands on social media in the form of congratulatory, greeting or “thank you” messages without the need to seek DOSB approval, provided that the non-sponsors do not make any direct reference to the Olympics or a myriad of Olympics-related terminology, such as “Gold,” “Silver” or “Bronze.”

While this resulted in a notable uptick in non-sponsor interaction with German athletes during the 2018 Winter Games in PyeongChang, the German government has indicated that it will conduct a more comprehensive review in the coming months to determine whether the changes led to an acceptable result. If not, Germany may continue its case against the IOC and the current enforcement of Rule 40 in an attempt to provide more lucrative options for its athletes.

Regardless of the outcome of the German challenge, other countries are certain to follow suit and seek a relaxation of Rule 40 as it relates to their athletes. While this will certainly provide opportunities for non-sponsor entities to increase their exposure during future Olympic Games, marketers and their agencies should take care to conform to what will undoubtedly be a patchwork of regional or country-specific rules and restrictions.



KEY TAKEAWAYS

The ground-breaking case brought by Germany’s Federal Cartel Office against the IOC has already led to significant concessions related to non-sponsor advertisements involving Olympic athletes during the Games.

Marketers and their agencies should anticipate a further relaxation of these rules in numerous countries.

If there are additional relaxations of Rule 40 restrictions for 2020 and beyond, marketers and their agencies should analyze how best to take advantage of the new rules, while also staying abreast of regional and country-specific requirements.



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TRADEMARK

WHAT'S IN A NAME?

Selecting the title of a film, book or other creative content can be a daunting task. The creator must convey a message about the content and draw interest from the viewer. Also to be considered is that the title can become intertwined with the fame of a project and result in merchandising that extends far beyond the life of the original work. For example, Disney or Marvel films often result in years of residual merchandise and the products usually bear the title of the film. Title selection may even be more challenging when the creator must consider how to avoid infringing the intellectual property rights of others.

In general, a single title is not considered a trademark use unless it is part of a series, and the creator cannot claim exclusive trademark rights to it as the name of a work. However, a title still has the potential to cause confusion or infringe the rights of others. Fortunately, many courts will review the titles of expressive works under different standards than the general “likelihood of confusion” analysis used to determine trademark infringement because titles may implicate the First Amendment right of free speech. In most cases, and first established in *Rogers v. Grimaldi*, if the title has artistic relevance to the underlying content and if it otherwise does not explicitly mislead consumers as to the creator of the work, then a court would not find it to be infringing.

Most recently, in *Twentieth Century Fox TV v. Empire Distrib., Inc.*, the Ninth Circuit found that the popular Fox television show title “Empire” does not infringe the trademark rights of Empire Distribution, a hip-hop and R&B record label. The court held that use of the Empire title was relevant because the subject of the show is a fictional hip-hop record label and entertainment company named Empire Enterprises (a figurative empire) and the show is set in New York, the Empire State. Further, the court stated that the show contains no explicit references to Empire Distribution, and thus, is not explicitly misleading. Although the court in this case ruled in favor of Fox’s continued right to use the name Empire, this case is a prime example of the precautions that must be considered when selecting a title to avoid such litigation. Therefore, the importance of a title lies in what it signals to the consumer about its content, while at the same time not overstepping the intellectual property rights of others.



KEY TAKEAWAYS

The First Amendment gives creators of expressive content some leeway with title selection, but the intellectual property rights of others must still be considered.

Many courts will review the use of a title under a different standard, which takes into account the right to free speech and expression.

If a title uses or incorporates a similar trademark of another, be sure that the title has some legitimate connection to the underlying content and that the title does not explicitly mislead the consumer as to the source of the content.



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VIRTUAL REALITY

AS AUGMENTED REALITY ENGAGEMENT INCREASES, NOVEL LEGAL ISSUES ARISE

While both technologies still show great potential, the pace of evolution and rate of adoption of virtual reality (VR) and augmented reality (AR) began to diverge in 2017. VR continued to experience some initial legal growing pains last year, most notably through the ongoing lawsuit between Zenimax and Oculus. On the other hand, AR – in which computer-generated imagery is superimposed onto real-world content – is expanding much more rapidly due to its lower costs of entry and more widely available technology. Numerous brands have launched AR marketing and shopper experiences, such as programs that allow users to “try on” clothing, make-up or accessories, or to superimpose branded electronic “accessories” onto video content they generate. Meanwhile, new technology that facilitates AR experiences through a web browser obviates the need for a user to download a unique app for each program, further decreasing barriers to entry and use.

Unlike VR, where the entire experience is constructed with bespoke or specifically licensed intellectual property (similar to a highly immersive video game), AR experiences use a combination of constructed intellectual property content and real world or pre-existing content.

Before marketers distribute, or provide technology that enables consumers to distribute, combinations of newly created content and existing content, there are important copyright and trademark law implications to consider. In the copyright realm, are marketers who design augmentations and adornments for famous, copyright-protected statues (e.g., with clothing and sunglasses) creating derivative works of that statue for which a license may be required? Does the answer differ if the program used for the augmentation is built by a marketer for promotional purposes, or could be categorized squarely as First Amendment speech? Meanwhile, questions related to tarnishment and alteration arise under trademark law. If a marketer causes a well-known trademark displayed in the real world to appear differently on a user's smartphone screen through an AR application (e.g., with a giant red “X” over the mark), would that establish grounds for a tarnishment claim? Would that claim be against the user or the creator of the AR application?

Intellectual property infringement issues in the AR context have not yet been addressed in the courts, likely because AR technology (though increasingly popular) is still relatively new. But as marketers and their agencies see increased opportunities to use AR applications in 2018 and beyond, they should carefully consider how existing intellectual property frameworks may be applied to this new medium so as not to end up as a test case in this brave new world.



KEY TAKEAWAYS

AR use is expanding more rapidly than VR use because of AR's lower barriers to entry.

AR marketing may have copyright and trademark implications (pertaining to the creation and distribution of derivative works and to tarnishment, respectively) as AR programs find novel ways to “modify” the real world.

Marketers and their agencies looking to leverage the use of AR applications should carefully consider if their use may invite the ire of third-party brands and content owners (and, in some instances, what licensing arrangements may be necessary).



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The group is composed of over 30 attorneys who represent the world's leading advertising, marketing, digital, technology and media services companies, as well as many of the top global brands and marketers. To learn more about Davis & Gilbert's attorneys and the Advertising, Marketing & Promotions practice, please visit us online at www.dglaw.com.



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Davis & Gilbert LLP is a strategically focused, full-service mid-sized law firm of more than 130 attorneys. Located in New York City, the firm represents a wide array of clients – ranging from start-ups to some of the world’s largest public companies and financial institutions – throughout the United States and internationally.

- Davis & Gilbert is widely regarded as the #1 law firm for the marketing communications industry and has practices focusing on Advertising, Marketing & Promotions; Benefits & Compensation; Corporate; Digital Media, Technology & Privacy; Entertainment, Media & Sports; Insolvency, Creditors’ Rights & Financial Products; Intellectual Property; Labor & Employment; Litigation; Private Client Services; Real Estate; and Taxation.

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ADVERTISING & MARKETING LAW TOPICS

Advertising and Marketing Law 101

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COUNSEL2U[®] PROGRAMS

Davis & Gilbert offers educational programs on a variety of different topics ranging from advertising and digital media, privacy and data security; to intellectual property law; to employment law, which are tailored to business professionals and corporate counsel. Our programs vary in length based on our clients' business needs and provide practical suggestions that they can apply to their business. We offer on-site training at our clients' offices, at our offices, by videoconference or teleconference.

In addition, Davis & Gilbert regularly offers and conducts CLE-accredited educational seminars on a wide range of topics and issues that are suitable for both attorneys and key business personnel. We work proactively with our clients to understand what is most important to them and then design tailored programs that are helpful and relevant. These seminars allow our clients to learn substantively about relevant key areas, topics and hot issues.

For more information on the full range of the firm's educational programs, please contact the Davis & Gilbert attorney with whom you have regular contact or email us at info@dglaw.com.



RON URBACH'S *Madison Ave.*

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By Ron Urbach, Davis & Gilbert Chairman; Co-Chair, Advertising, Marketing & Promotions Practice Group

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