Alcohol
Cannabis/CBD Advertising
Children's Advertising
Copyright
Digital Media
E-tail/Retail
Entertainment
Fashion and Beauty
FDA
FTC: Regulatory and State
Gambling
Influencer Marketing/Native Advertising

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TRENDS

IN MARKETING COMMUNICATIONS LAW

Music
NAD
Patents
Political Advertising
Privacy and Data: California Consumer Privacy Act
Privacy and Data: Other Legislation
SAG-AFTRA
Social Media/IP
Sports
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VII EDITION

TRENDS
IN MARKETING COMMUNICATIONS LAW

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Clients, Colleagues and Friends,

I am pleased to report that the first *Trends in Marketing Communications Law* publication of the new decade is now available. In our annual publication, attorneys in the Advertising, Marketing and Promotions Practice Group provide insight and trends on the most significant changes and challenges facing the advertising and marketing industry.

While 2020 may have marked the dawn of a new decade, the challenges and complexities of an ongoing pandemic, the rising demand for social justice in a systemically racist society, the devastating effects of climate change and rise of technological reliance have strained nearly every facet of life, including those in the advertising and marketing world. These inexplicably difficult challenges are all set against the backdrop of an already fast-paced election year, and now, more than ever, the concerns of facts and storytelling are at the forefront of not just the public's, but the advertising industry's, mind.

In our largest issue yet, the 22 articles that follow discuss the rapid changes in regulatory and state laws that are being fueled by a health crisis, rise of data and technology, innovation, the continued importance of truth and consumers' tastes changing to adapt to a socially conscious mindset. This year, when juxtaposed to the year prior, provides a look into how ardently the reactions by advertisers and marketers across the country have been increasingly heartfelt and personal, and the power that empathy carries not only in the ad and marketing world, but the world at large.

I hope that this year's issue brings guidance, information and proves helpful to you and your business during this difficult time. At Davis & Gilbert, our goal is to manage risks for our clients by consistently staying ahead of new developments in the industry — and the world. Please reach out to me, any of the authors or the Davis & Gilbert attorney with whom you have regular contact if you have any questions or would like to discuss any of these topics further.

Ron

Ronald R. Urbach
Chairman
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IN MARKETING COMMUNICATIONS LAW

This year, when juxtaposed to the year prior, provides a look into how ardently the reactions by **advertisers** and **marketers** across the country have been increasingly ***heartfelt*** and ***personal***, and the power that

empathy

carries not only in the ad and marketing world, ***but the world at large.***

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#Counsel2U #MarComTrends

ALCOHOLIC BEVERAGES: ENGAGING WITH CONSUMERS FROM A DISTANCE

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For an alcohol brand trying to gain market share, there are few things more important than getting consumers to try its product. Although most states' alcoholic beverage codes offer some provision for providing consumers with free samples, the wave of bar and restaurant closures due to the COVID-19 pandemic has turned this practice on its head. As a result, alcohol brands are finding themselves with fewer and fewer ways to engage directly with their consumers.

The federal government and every state in the United States have laws governing the manufacture and sale of alcoholic beverages, and there are two legal restrictions that come into play whenever alcohol brands want to provide samples to consumers. First, generally speaking, an alcohol supplier — the brewer, distiller or winery — cannot itself serve alcohol to consumers. Second, the alcohol supplier cannot pay or provide anything of value to a "retail" licensee — like a restaurant, bar or liquor store — to serve drinks on its behalf.

In the past, suppliers were able to avail themselves of a few specific exceptions to these rules. For example, many states permit suppliers to conduct sampling events, where representatives can provide free samples to consumers and provide educational content about the unique qualities of their beverages. In addition, a few states — including Texas, California and New York — allow suppliers to conduct "invitation-only" branded experience events for consumers under certain restrictions.

However, the current circumstances have severely restricted these possibilities. In the early days of the COVID-19 pandemic, states across the country ordered bars and restaurants to close down. Even though some states have allowed these establishments to reopen, most have reopened with significant restrictions, including the requirement that diners be seated outdoors and strictly separated from one another. And, even where a manufacturer is legally able to provide samples, the practical implications of social distancing can stand in the way of meaningful engagement with the consumer. Moreover, although states have recently expanded the ability of bars and restaurants to deliver drinks to consumers, suppliers are typically not permitted to sponsor such delivery or deliver drinks themselves.

Some suppliers have resorted to more indirect means to get drinks into the hands of consumers. In May, Coors launched a social-media promotion whereby consumers could receive a free six pack of Coors Light. However, because Coors was not legally able to actually send the beer, the promotion was structured as a rebate, whereby consumers purchased beer and then received a rebate via PayPal. In addition, the rebate could not be offered in 11 states due to state laws prohibiting rebates, and consumers could only claim half of the purchase price in another 14 states.

KEY TAKEAWAYS:

- The COVID-19 pandemic has complicated an already highly regulated alcoholic beverage industry. Many of the marketing practices on which alcohol suppliers once relied are no longer available, and it has become increasingly difficult to reach and engage with consumers.
- With 50 states having different and often inconsistent regulations, legal counsel should be engaged at the earliest possible point to help structure campaigns so that they meet the marketing team's goals while still complying with various states' laws.

NAVIGATING HIGH STAKES ISSUES IN A BUDDING INDUSTRY

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Last year was a watershed moment for the cannabis and hemp industries. And despite the widespread impacts of COVID-19 on the U.S. economy, if those developments are any indication, the years ahead will bring significant changes to the burgeoning field.

The monumental change of descheduling hemp from the Controlled Substances Act in 2018 means that, for the first time, hemp and hemp-derived cannabidiol products (CBD) (which are cannabis with less than 0.3% tetrahydrocannabinol (THC)) are no longer controlled substances under federal law. As a result, an entire new industry of CBD salves, edibles, tinctures and other products quickly sprung up.

Legislatures and regulators are playing catch-up to the rapidly expanding business opportunity. In response to hemp's descheduling, many states updated their laws to allow, and attempt to regulate, the sale of hemp and CBD products. The Federal Trade Commission (FTC) and Food and Drug Administration (FDA) issued numerous joint warning letters to CBD advertisers, reinforcing the critical point that, just because the product is newly legalized does not mean that advertising can contain unsubstantiated or deceptive claims about its benefits or medicinal properties. Additionally, although the use of CBD in foods, beverages and dietary supplements remains illegal, the FDA indicated it is open to issuing regulations to allow the use of CBD in these products depending on information it receives from the industry.

On the marijuana front, both medical and recreational marijuana remain illegal at the federal level (the Farm Bill only de-scheduled hemp), but states continue to press ahead with contradicting laws. Michigan and Illinois both finalized regulations to allow the purchase and sale of recreational marijuana. While other states will follow suit, California, which legalized recreational marijuana in 2016, identified THC as a reproductive toxicant in 2019, and, beginning in 2021, it will be added it to the list of chemicals that require a "Prop 65" disclosure.

Over ten states are expected to attempt to legalize or expand the legalization of cannabis for adult use, which will further complicate the patchwork of relevant laws.

Congress is not expected to take any meaningful steps to introduce legislation that would create a harmonized set of rules for the industry anytime soon, so marketers and their agencies will have to continue adapting to rapidly changing state regulations. And state regulations will evolve further, as the three last holdout states are likely to legalize CBD, and several others will issue statutorily-required regulations governing its production, sale and advertising.

Separately, the federal Secure and Fair Enforcement Banking Act (SAFE Banking Act) was passed by the House of Representatives and is expected to potentially go to the Senate for a vote at some point. If passed, it would allow banks to work with cannabis businesses that are currently forced to work almost entirely in cash, which, in turn, often requires agencies working with such businesses to accept cash payments. The passage of the SAFE Banking Act would allow cannabis businesses to operate like non-cannabis businesses and pay agencies by wire.

KEY TAKEAWAYS:

- The patchwork of state laws governing the advertising and marketing of cannabis and CBD products continues to pose challenges for marketers and their agencies.
- Moving forward, marketers and their agencies will need to quickly adapt to changing laws in order to ensure that their marketing and advertising complies with new and changing state laws.

RECORD COPPA SETTLEMENTS INDICATE STRONGER PRIVACY PROTECTIONS FOR CHILDREN

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Last year, the Federal Trade Commission (FTC) reached record settlements with popular online social media platforms that were collecting personal information from children in violation of the Children's Online Privacy Protection Act (COPPA).

In early 2019, the FTC agreed to settle claims against the operators of Musical.ly — now known as TikTok — for $5.7 million, which, at the time, was the largest civil settlement in a COPPA action to date. That record was shattered only six months later when the FTC, with assistance from the New York Attorney General's Office, announced a COPPA settlement with Google and YouTube, with the companies agreeing to pay a whopping $170 million — nearly 30 times larger than the previously record-breaking TikTok settlement.

In addition to imposing significant penalties, regulators have been imposing more affirmative obligations upon operators of child-directed platforms to age-gate their content and to ensure that child-directed content is appropriately identified. For operators of websites and other online platforms that draw large audiences of children under 13 years of age, the FTC's actions serve as a warning that their days of turning a blind eye to children's use of content hosted on their platforms may be over.

In both cases, the FTC's investigations revealed that, regardless of whether the services included terms of use prohibiting users under 13 years of age from using the platform, each of these platform operators had actual knowledge that children under 13 were using the services. As a result of these settlements, TikTok implemented an age-gate, providing new users who indicate they are under 13 years old with a different version of the platform which does not collect or share their personal information without parental consent.

While an age-gate was not necessary in YouTube's case, since the content at issue was clearly directed to children, the settlement did require YouTube to provide channel owners a way to designate its content as child-directed and to notify such owners of their COPPA obligations. YouTube also agreed to end personalized advertising on children's content altogether and introduced machine learning techniques to identify content that targets children.

The FTC also announced it would be reevaluating COPPA and held a workshop last October to assess whether the rule needed to be updated in response to rapid changes in technology, such as "smart" toys and devices. Child-directed content creators, privacy advocates and FTC officers discussed whether COPPA's "actual knowledge" standard should be replaced with a heightened standard. Under discussion was also whether COPPA should be amended to better address websites and online services that do not include traditional child-oriented activities but have large numbers of child users, such as certain social media platforms.

However, reactions to last year's groundbreaking developments have been mixed. Privacy advocates, as well as some regulators and lawmakers, felt that the settlements did not go far enough in imposing penalties and requiring meaningful changes, particularly as new "smart" technologies increasingly threaten new invasions of people's privacy. On the flip side, many content creators complained that new restrictions would hurt their livelihood by preventing them from monetizing personalized ads on child-directed channels. What is clear is that the public is paying attention to these developments, as the FTC received over 175,000 responses to its request for comments on COPPA.

KEY TAKEAWAYS:

- This year and the coming decade will likely bring more enforcement actions against companies that violate COPPA, including social media platforms and technology services.
- The FTC's settlements with TikTok and YouTube should put online services on notice that if they claim to be general audience sites but attract a large number of children, they should re-evaluate their COPPA obligations and take preemptive steps to ensure they are in compliance with the law.
- Through the FTC's attempt to adapt COPPA to children's use of modern technologies, COPPA may be expanded to create accommodations which will enable continued technological innovations while also keeping up with children's increased use of digital platforms.

THAT POST COULD COST YOU: COPYRIGHT INFRINGEMENT CLAIMS CONTINUE FOR SOCIAL MEDIA POSTS

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What do Kim Kardashian, Amy Schumer, LeBron James, Gigi Hadid, and the brands Versace, Fenty and Moschino all have in common? Each has been sued for copyright infringement after posting on their social media channels photographs owned by paparazzi and various photography agencies. Gigi Hadid was sued multiple times after posting photographs of herself and of her boyfriend to her personal Instagram account. Similarly, fashion brand Versace was sued after posting red carpet photographs of Jennifer Lopez wearing the brand's clothing. And Amy Schumer was sued for copyright infringement after posting a photograph of herself wearing a sweatshirt that she designed and pushing her son in a stroller. The comedian's Instagram post encouraged followers to purchase the shirt on her website. This trend has continued throughout 2020, with a flurry of claims brought by many photographers and photo agencies.

Marketers who wish to avoid costly lawsuits must remember what these celebrities and brands have seemingly overlooked: simply because a person or a company's products are depicted in a photograph does not provide a legal right to use that photograph. Rather, under the Copyright Act, the "author" of a photograph (typically, the photographer who took the photograph or the photography agency for whom the photographer works) owns the copyright and controls the exclusive right to allow others to use the photograph.

Although a few celebrities and brands asserted various arguments in their defense, all of these lawsuits have settled before a court could pass on the merits of these defenses. For example, Gigi Hadid filed a motion to dismiss a lawsuit brought by the photo agency Xclusive after she posted a photograph of herself on her Instagram account. Hadid argued that because she stopped, smiled and posed when the photographer approached her on the street, she contributed to the protectable elements of the photograph and increased its value, and, therefore, had an implied license to use the photograph. In addition, Hadid claimed that her post on Instagram constituted a fair use and was not infringing. However, the court never addressed these arguments because the case was dismissed on the ground that Xclusive failed to register its copyright in the photograph, which is required before filing an infringement lawsuit.

Ultimately, brands and celebrities should refrain from posting paparazzi photographs to their social media channels (or using them in any other capacity), unless they have received permission to do so.

KEY TAKEAWAYS:

- The photographer or the photography agency (and not the subject of the photograph) is the owner of the copyright in the photograph, and has the exclusive right to license its use.
- Marketers should refrain from using photographs of their products in social media posts or otherwise, unless they have permission from the copyright owner of those photographs.

DIGITAL MEDIA IN THE AGE OF CCPA

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Since the January 1, 2020 effective date of the California Consumer Privacy Act (CCPA) came and went without the issuance of final regulations by California's Attorney General, and since the final regulations were not yet in force when the Attorney General's enforcement activity commenced on July 1, 2020, members of the digital marketing ecosystem have continued to experience the challenge of operating in an environment of uncertainty. This stems from the complexity of an ad tech ecosystem that does not easily lend itself to the rigid structure set out in the CCPA.

Compliance frameworks introduced by the Interactive Advertising Bureau (IAB) and Digital Advertising Alliance (DAA) have attempted to address these challenges through a collaborative industry approach, but were forced to rely on interim versions of the regulations. Since CCPA enforcement commenced on July 1, 2020, and since the Attorney General only filed the final regulations on June 1, 2020, members of the industry (including the aforementioned industry groups) were not provided ample time to digest the final regulations prior to the start of enforcement activity.

The CCPA requires that companies that sell personal information (PI) about a California resident to a third party offer the consumer the ability to opt-out of such sales. The transfer of data from a publisher's website to an ad tech company (that is not acting as a service provider) via cookies or similar technologies for retargeting purposes is generally believed to be such a sale. The IAB and DAA frameworks each provide a process to offer consumers the ability to opt-out and to inform third parties when a user has opted-out of such sales.

Where a California resident opts out, the CCPA does not prohibit the publisher from continuing to collect PI for the purpose of interest-based advertising, as long as the publisher does not transfer the PI to parties that will use PI for purposes outside of the performance of services for that one publisher.

In order to prevent the processing of PI by media partners from constituting a "sale," some online platforms are trying to establish a "service provider" relationship with customers under CCPA. Google created the Restricted Data Processing (RDP) program, which establishes Google as a service provider when RDP is enabled, and limits Google's right to use the PI that it processes.

Similarly, Facebook issued California-specific terms, supplementing its Custom Audiences Terms Program and Business Tools Terms. Facebook amended its California-specific terms midyear to only apply where Facebook's own "Limited Data Use" program is enabled. While the programs offered by Google and Facebook have the potential to be helpful, in both cases, the burden of confirming CCPA compliance is placed on the customer of the online platform.

It is likely we will see continued demand for interest-based advertising products, presenting some advantages for website publishers and other players that have direct contact with consumers (*e.g.*, cable companies, OTT providers and content platforms that stream directly). In the post-CCPA landscape, consumer opt-outs do not prevent these players from collecting data for targeting purposes as long as the PI is not sold.

KEY TAKEAWAYS:

» Now that the regulations have been finalized and the enforcement period has begun, compliance cannot wait.

» Industry proposed solutions and major platform initiatives should be carefully reviewed.

E-TAILERS BEWARE: REGULATORS ARE DRILLING DOWN ON NEGATIVE OPTION MARKETING

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If you look at your credit card statements, chances are that you have one or more recurring monthly or annual charges, whether for media subscriptions, meal delivery services, workout apps, cosmetics shipments or clothing rentals. Subscription services, with their "negative option" business model, are the new normal of e-commerce, appealing to a younger demographic that is plugged into the sharing economy and craves personalization, efficiency and convenience.

The Federal Trade Commission (FTC) has increasingly sought to regulate negative option marketing through both enforcement cases and regulation, including its Negative Option Rule and Telemarketing Sales Rule (TSR). The FTC also relies on the federal Restore Online Shoppers' Confidence Act (ROSCA) to address online negative option practices and protect consumers from being billed on a recurring basis for products they did not intend to purchase — and cannot easily cancel. Further, states such as California have stringent local laws that go above and beyond the federal requirements.

States have started to follow California's example, implementing new consent and disclosure requirements for "free trial" or automatic renewal programs. Vermont now requires consumers to affirmatively opt-in to automatic renewal terms, in addition to accepting the underlying subscription contract. For free trial offers of one month or longer, Washington, D.C. requires that consumers affirmatively and specifically consent to the automatic renewal before being charged. Like other states, both Vermont and D.C. impose specific requirements for clarity and conspicuousness of renewal terms and require that consumers are notified of upcoming automatic renewals.

The FTC also continues to focus on subscription programs. San Francisco snack company UrthBox recently settled allegations by the FTC that it failed to adequately disclose material terms of the company's "free trial" negative option marketing plans. The FTC alleged that customers who had ordered a free UrthBox snack box were unaware that UrthBox had enrolled them in a six-month subscription plan until discovering the charge on their credit card statements. UrthBox's settlement payment may be used to compensate consumers deceived by the trial offers.

The FTC also filed a complaint against Match Group (owner of Match.com, Tinder and other dating sites) alleging that the company violated ROSCA by failing to provide a simple method for consumers to stop recurring charges and that it misled consumers with a "confusing and cumbersome cancellation process" that caused consumers to believe they had cancelled their subscriptions when they had not. "Each step of the online cancellation process… confused and frustrated consumers and ultimately prevented many consumers from cancelling their Match.com subscriptions," the FTC said.

In light of these actions, the FTC recently collected public comments on its existing regulations governing negative option marketing, which may pave the way for significant expansion of the existing Negative Option Rule. The current Negative Option Rule applies only to "prenotification plans" for the sale of goods and does not cover other common forms of modern negative option marketing, such as continuity plans, automatic renewals and trial conversions.

Further, ROSCA and the TSR do not address negative option plans in all media: ROSCA applies only to online negative option marketing and the TSR applies only to telemarketing programs. The FTC's call for public guidance on the Negative Option Rule to better address prenotification negative option marketing, continuity plans, trial conversions and/or automatic renewals is likely a harbinger of more scrutiny in this area to come.

KEY TAKEAWAYS:

- The FTC and state regulators continue to focus their attention on the "negative option" business model of subscription services.
- The last year has brought new states implementing consent and disclosure requirements aimed at ensuring that consumers are not charged for subscription renewals and trial conversions without their awareness and agreement.
- Marketers can expect more scrutiny of negative option marketing activities going forward, given that the FTC recently collected public comments on the Negative Option Rule to better address prenotification negative option marketing, continuity plans, trial conversions and/or automatic renewals.

HOLLYWOOD ATTEMPTS TO REOPEN PRODUCTION AFTER COVID-19 SHUTDOWN

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The dominant storyline for Hollywood in 2020 has been how to respond to the COVID-19 pandemic. Travel restrictions and bans on non-essential work paused nearly all film and television production for several months throughout the spring and summer. The industry is pursuing a wide range of strategies in an attempt to return to work safely, but the failure to control COVID-19 in the United States continues to hamper many efforts.

Safety Guidelines: In June, a coalition of major studios, streaming services and unions including Screen Actors Guild — American Federation of Television and Radio Artists (SAG-AFTRA), Directors Guild of America (DGA) and International Alliance of Theatrical Stage Employees (IATSE) released COVID-19 workplace health and safety guidelines designed to slow the spread of COVID-19, including specific requirements unique to the entertainment industry. The guidelines include employing a "COVID-19 compliance officer" for each production, constant hand hygiene, personal protective equipment use and limiting the number of people on set to the greatest extent possible.

Shortly thereafter, the major industry unions published their own set of guidelines titled, "The Safe Way Forward," containing even more specific recommendations for working on set safely. These guidelines described, a "zone" system which would physically separate workers on set depending on their role, and the various safety measures and testing cadence applicable to each zone.

It is still unresolved as to which party is responsible for the costs of complying with the guidelines and whether studios can require workers to sign liability waivers or acknowledgments of risk before arriving on set. In particular, liability waivers continue to be roundly rejected by the unions.

Costs of Testing: A major cornerstone of each back-to-work plan is rapid and repeated testing of workers, especially actors that cannot wear masks on camera and workers in direct contact with the actors, such as make-up artists. However, in mid-July California announced priority tiered testing in an effort to ensure that limited tests are deployed where most needed — and the entertainment industry received lowest priority. Further, the cost of repeated testing (the guidelines call for testing as often as once per week during filming) creates a burden on independent and smaller productions without the deep pockets of a blockbuster studio production. Testing availability and cost is, and likely will continue to be, a major sticking point in resuming production in a number of cases.

International Production: Many overseas productions have looked to restart in jurisdictions that have responded more successfully to COVID-19. For instance, *Jurassic World: Dominion* was one of the first productions to resume operations outside of London and the success of New Zealand in combatting the virus has allowed production to resume on the Avatar sequels and Amazon's Lord of the Rings series.

Shows and films looking to restart production have been coordinating with locations and facilities in Hungary, the Czech Republic and other European countries in an effort to find safer working environments. However, this approach has required production companies to address several international labor and employment law issues (including varying local requirements for COVID-19 safety) that were not anticipated when the production was authorized to take place in the U.S. Moreover, continued restrictions on international travel may limit the ability of U.S.-based crews to travel to these locations to resume production.

KEY TAKEAWAYS:

- Networks and studios are trying to balance worker health and safety while simultaneously restarting production and continuing business. As the situation rapidly evolves, production companies must be flexible and creative in their approach.
- Guidelines disseminated by both the studios and unions focus on widespread testing and social distancing on set to mitigate risk, but the big question of how to pay for increased costs has not been fully answered.
- Productions will need to coordinate closely with insurers to understand which costs are insurable and which are not in the event productions are disrupted once again by a resurgence of cases.

AT THE CROSSROADS OF FASHION, SUSTAINABILITY AND COUNTERFEITING? BLOCKCHAIN.

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Climate change and concern over what individuals can do to lessen their impact on the environment continue to be issues of concern in many sectors, including in the world of fashion. Consumers are reevaluating the consequences of their behavior, including taking steps to create a smaller carbon footprint. The focus in fashion has started to shift towards sustainability, which has manifested in a larger appetite among shoppers for second-hand and resale clothing, as well as increased attention to brands who can back up their sustainable bona fides.

Although the growing resale market for fashion is a boon for sustainability advocates, it presents certain risks for fashion brands and luxury consignment purveyors as they try to combat the rise in counterfeit goods in both the primary and secondary markets. It is estimated that, globally, counterfeiting has become a trillion dollar industry, which has caused total losses of up to $98 billion dollars across the fashion, cosmetics and textile industries.

Enter blockchain technology. Blockchain, which gained prominence as the technology powering the cryptocurrency Bitcoin, is a generic term for technology that permanently stores records of transactions in an authenticated tamper-proof database. Blockchain databases are also decentralized and publicly available, providing an open and secure time-stamped record of transactions. Blockchain provides a unique solution for fashion brands seeking to crack down on sales of counterfeit goods.

For each individual item of inventory, use of blockchain would enable brands to record, and consumers and re-sellers to track, the history of the item at each step of the supply, manufacturing and shipping processes. Not only would this provide brands and retailers greater transparency in the supply chain process, but it would also enable them to identify disruptions quickly — and allow brands and retailers to promptly address those issues in order to get the product in the hands of consumers more efficiently. Blockchain technology allows consumers and resellers to verify that they are receiving legitimate, non-counterfeit goods while also allowing brands to easily identify illegitimate goods in the marketplace.

Additionally, the COVID-19 pandemic has presented new challenges for fashion supply chains, as worldwide disruptions in manufacturing caused by the virus have left many fashion brands and retailers without sufficient inventory to meet demand. The historical opacity in the supply chain process has made it difficult for brands and retailers to quickly identify these interruptions and rectify them. Transparency in the supply chain, especially through the use of blockchain technology, may help brands and retailers to expeditiously identify these problems faster, enabling them to pivot in order to reduce disruptions in getting products to consumers.

Moreover, blockchain tracking technology could provide consumers the ability to verify a brand's sustainability credibility by offering a complete picture of a product, from the earliest stages of development to the end product. For example, Danish designer Martine Jarlgaard has included scannable tags in all of her clothing. When a consumer scans the tag's QR code or NFC-enabled label, a full digital history of the production of the garment is viewable — from raw material all the way through to the finished garment.

Blockchain technology offers brands and consumers the opportunity to substantiate claims of authenticity and sustainability. Ideally, the ability to track the full production life cycle of a garment will both challenge widespread counterfeit culture and create greater transparency related to the growing focus on environmentally-friendly practices.

KEY TAKEAWAYS:

- A growing emphasis on sustainability has consumers carefully selecting which brands they shop and has increased an uptick in the purchasing of second-hand clothing.
- Blockchain is an attractive solution for brands that are looking to crack down on counterfeiting and want to substantiate sustainability claims.
- Supply chain disruptions due to the COVID-19 pandemic have caused fashion brands and retailers to seek new ways to bring more transparency to the supply chain.
- Using blockchain, brands would have the ability to track, and make publicly available, information regarding their inventory through every step of the supply, manufacture and shipping process.

HOW "NATURAL" IS THAT COSMETIC? LEGISLATORS MAY DECIDE.

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Consumers are becoming increasingly savvy, even as the retail landscape is constantly evolving with new categories and sub-categories. In the cosmetics space, new independent brands have joined an already crowded field, while established cosmetic giants are expanding existing offerings to appeal to different market subsets. "Natural cosmetics" and "cruelty-free cosmetics" are two areas that have seen a rapid proliferation of product offerings, and, concurrent with such new developments, legal regulation is also endeavoring to evolve quickly.

Food and Drug Administration (FDA)-regulated products which are labeled as "natural" have been the focus of many class action lawsuits, as well as several Federal Trade Commission (FTC) enforcement actions in recent years. One of the key uncertainties related to the use of the term "natural" on labeling or packaging is that there is no FDA or FTC definition of the term. FDA guidance has indicated that "natural," at least as related to food products, means that "nothing artificial or synthetic (including all color additives, regardless of source) has been included in, or has been added to" a product that would not normally be expected to be in the product.

As it relates to cosmetics, the FDA has remained silent, leaving cosmetics companies to try to chart their own course in the naturals space, with the FDA's food guidance serving as a somewhat inadequate map. However, several pending and recently enacted laws seek to address this void.

The Natural Cosmetics Act, a bill introduced in the House of Representatives (the House) in late 2019, seeks to clarify the meaning of "natural" cosmetics. Among other things, the bill would require that a product labeled as "natural" include 70% or more of natural ingredients, excluding water, and with some exceptions, only use naturally-derived ingredients. The bill would also prohibit the use of the word "natural" if the product was made using certain processes.

In the cruelty-free legislative space, the California Cruelty-Free Cosmetic Act took effect on January 1, 2020 and is one of the first successfully-passed laws in the United States that tackles the role of animal testing in cosmetics products head-on. The law prohibits selling cosmetics that have been tested on animals or contain ingredients that have been tested on animals (with several narrow exemptions).

Along with the Personal Care Products Safety Act, introduced in the U.S. Senate in 2019, and the Safe Cosmetics and Personal Care Products Act, introduced in the House the same year, these new laws have the potential to greatly change the landscape of cosmetics regulation, providing concrete guidance in these areas for the first time.

KEY TAKEAWAYS:

- Interest in "natural" and "cruelty-free" cosmetics is growing and both state and federal legislatures have taken steps towards implementing a more robust regulatory framework.
- Using words like "natural" or "cruelty-free" may leave marketers open to an increased risk of class action litigation, without statutory law to help bolster their claims.
- Companies should continue to review all cosmetic packaging and substantiation through a cautious lens in order to ensure compliance with current state and federal legislation.

REGULATORS TARGET FALSE ADVERTISING FOR POST-SECONDARY EDUCATION

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Federal Trade Commission (FTC) enforcement efforts tend to focus on certain areas where the perceived harms are high. Although the FTC has historically focused on blatantly fraudulent practices or practices likely to have a negative effect on public health, the FTC, joined by a number of state attorneys general, has recently turned its eye to the educational space.

According to the Federal Reserve Bank of New York, as many as 44.7 million Americans have student loan debt, totaling $1.47 trillion — more than credit card or auto loan debt. It is no surprise, then, that companies have gotten more aggressive in offering debt relief services. In one case, the FTC obtained a temporary restraining order against a marketer claiming to be affiliated with the Department of Education and able to reduce or eliminate monthly payments and principal balances. Instead, the FTC alleged, the advertiser charged up-front fees as high as $1,800, and failed to deliver on the sweeping benefits promised in its advertising.

Not all debt relief claims were blatantly fraudulent. The FTC settled with SoFi, a student loan refinancer, over allegations that SoFi inflated the average amount that it could save borrowers by refinancing. In particular, SoFi's advertisements claimed that borrowers could save an average of $22,359 a year or $292 per month by refinancing their student loans with SoFi, but the FTC found that this calculation was inflated because it excluded large categories of consumers.

The FTC also took issue with several for-profit universities that used deceptive tactics to increase enrollment. The University of Phoenix agreed to pay $50 million and cancel $141 million in student debt over allegations that its advertising gave the false impression that it partnered with and could provide specific job opportunities with companies like Twitter, Yahoo! and Adobe. In another case, Career Education Corporation agreed to pay $30 million over allegations that it used third-party lead generators to convince potential students that it was affiliated with or preferred by the United States military.

State attorneys general have been just as active as the FTC in policing these consumer protection issues. The attorneys general of 49 states and the District of Columbia also settled with Career Education Corp., which agreed to forego collecting roughly $493.7 million in student loans over allegations that it failed to disclose information to prospective students about total student loan costs, transferability of credits, course offerings and job placement rates. Attorneys general also frequently acted alone to redress consumer harms. California Attorney General Xavier Becerra settled with Student CU Connect CUSO LLEC for $168 million in relief over allegations that it assisted now-defunct ITT Technical Institute in providing predatory loans it knew students could not pay back. Similarly, the attorneys general of Massachusetts and Pennsylvania also settled with educational institutions over allegations that they reported false data in order to boost their rankings and improve enrollment.

KEY TAKEAWAYS:

» Advertisers in all industries are responsible for ensuring that their advertising is truthful and not deceptive.

» While some federal agencies — including the Department of Education — have followed a policy of deregulation, the FTC will not hesitate to step in where it believes that consumers are being misled.

BETTING ON A NEW INDUSTRY: THE METEORIC RISE OF ONLINE SPORTS BETTING

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Until 2018, the U.S. Professional and Amateur Sports Protection Act (PASPA) prohibited states from passing bills that would legalize sports betting. However, in May of that year, the United States Supreme Court struck down PASPA, clearing the way for sports betting in states that chose to legalize it.

New Jersey was the first state to launch sports betting (other than Nevada, which was excluded from PASPA), and the first online sports book in New Jersey went live in June 2018. Now, there are 21 states plus Washington, D.C. that have legalized sports betting. As for the remaining states, most have introduced sports betting legislation.

Morgan Stanley estimates that the legal sports betting market generated $833 million of revenue in 2019, and projects that it will be a nearly $8 billion industry by 2025. In addition to traditional casinos and sports books, big names in fantasy sports — most prominently FanDuel and DraftKings — have jumped into the mix and launched online betting services in states where it has been legalized.

The launch of such a sizeable industry, virtually overnight, has created a whole new segment for marketers, agencies, media companies and nearly everyone involved in the advertising ecosystem. But the regulatory scheme in place is complicated, and there are many pitfalls to keep in mind before working with gaming companies.

For now, sports betting continues to be illegal in the majority of states. Moreover, federal law prohibits sports books in states where betting is legal from accepting bets placed in states where it is illegal. Although legitimate betting operations have technical measures in place to help prevent illegal bets from being placed, advertising should make clear that bets can only be placed from certain states. In addition, digital advertising should be geotargeted only to states where sports betting is legal, in order to prevent any implication that users can place bets by clicking an ad online. To complicate things further, federal and state law also restrict the transmission of betting odds in furtherance of wagering, so caution is needed to ensure that advertisements refrain from advertising odds for individual bets.

For states where sports betting is legal, regulations will still come into play for anyone looking to accept advertising for sports books. For example, most states require gambling advertisements to include a toll-free number to call for help with gambling addictions. In addition, certain states require that vendors for licensed sports books be registered with state regulators, and this may include marketing agencies and media companies. And, in line with alcohol, cigarette and marijuana advertising, advertisements should be targeted to viewers and users who are of age, including by using demographic data (if available) to ensure that ads are targeted to users who are legally allowed to gamble and using creative that is not designed to appeal primarily to underage audiences. To establish best practices in the marketplace, the American Gaming Association (AGA) has also issued Advertising Guidelines for Sports Betting which provide more in-depth guidance on compliance.

KEY TAKEAWAYS:

- As with any new industry, sports betting faces a complicated and rapidly changing regulatory scheme.
- Since the patchwork of state and federal regulations will continue to evolve, care should be taken to ensure that advertisements are geotargeted to markets where betting is legal and in compliance with the law.
- All participants in the marketing of sports betting should ensure that their partners abide by the AGA Advertising Guidelines.

MIXED REALITY: NAVIGATING INFLUENCER AND NATIVE ADVERTISING IN A VIRTUAL WORLD

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In a marketing landscape dominated by social and digital platforms, the lines between advertising and content — and reality and virtual reality — are becoming more and more blurred. When influencers (formerly known as "bloggers") and online advertorials were new on the scene, the Federal Trade Commission (FTC) issued guidance to help marketers in this emerging space comply with their disclosure obligations. Now, much of that early wisdom has become sorely outdated. While digitally fluent consumers are savvy to integrated marketing techniques — even coming to expect an influx of sponsored content from influencers — the ongoing development of new media formats and the sustained desire of marketers to continue pushing boundaries means that new and novel questions about disclosure obligations are constantly arising.

In today's digital landscape, the worlds of native advertising and influencer marketing are merging. For example, publishers are increasingly working with influencers to both appear in and help promote custom native advertising content to their followers, as well as the publisher's existing viewers. But for a campaign to be legally compliant, publishers must disclose when native content has been paid for (and accurately convey the degree of the brand's involvement), and influencers need to disclose their own material connections with an advertiser. In 2019, the FTC finally settled its enforcement action against Creaxion Corporation and Inside Publications LLC with respect to hybrid influencer and native campaign.

Beginning with its series of letters to influencers in 2017, the FTC has made it clear that, along with marketers and agencies, it does and will continue to hold influencers individually accountable for compliance. As recently as November 2019, the FTC launched a new microsite directed to influencers, with updated and easy to understand guidance about why disclosures are important and how to make them in an appropriate and compliant manner. The microsite specifies that influencers — or those responsible for managing influencer accounts — no longer have an excuse to feign ignorance. In addition, the FTC announced a review of its Endorsement Guides at the beginning of the year, and sought public comments through June 22nd, 2020 on whether changes need to be made to them, indicating the possibility of new developments for the future of branded content.

To add yet another layer, the use of real people as influencers may find itself at an inflection point. Agencies and marketers have begun experimenting with virtual influencers — avatars like Lil Miquela, who have huge social media followings even though they are not real people. So far, the FTC's party line is that the usual rules will apply.

The regulators have also demonstrated a sensitivity toward the increased risk of deception that can result from fake online profiles and fraudulent online metrics. For example, in 2019, the FTC followed New York and Florida attorneys general in bringing enforcement actions against Devumi, LLC, a company that traded in the sale of social media bots and fake followers. The FTC also brought an action against Sunday Riley Modern Skincare and its CEO over charges that company employees posted fake reviews of the company's products on the Sephora website at the CEO's direction.

KEY TAKEAWAYS:

- Entering the new decade, we will continue to increasingly interact with and confront complex new digital technologies that make it difficult to differentiate the real from the unreal.
- Along with the use of new technologies, such as dynamic advertising, artificial intelligence and machine learning, marketers will be faced with new challenges when handling and monitoring native advertising and influencer marketing campaigns.
- Regulators will continue to keep an eye on the new media landscape, ready to issue ongoing guidance and recommendations, and to pursue enforcement action when marketers, publishers or influencers cross the line.
- The FTC's decision to revisit the Endorsement Guides may well herald substantial changes to address recent developments in technology and how consumers perceive new media.

THE BATTLE OVER 'UNPROTECTABLE' ELEMENTS IN MUSIC COPYRIGHT SUITS RAGES ON

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Taylor Swift and Katy Perry joined the growing ranks of famous musicians who have battled copyright infringement suits in recent years. While claims of impermissible copying are nothing new in the music business, the recent spate of suits reflect a new trend where musical elements that may once have been considered 'unprotectable' are now being claimed as original and deserving of protection. The ramifications extend far beyond the pop music industry and into every sphere where music is used in a commercial context, including the use of music by marketers and their agencies.

As we discussed in the 2019 edition of *Trends in Marketing Communications Law*, the lawsuits waged by the estate of Marvin Gaye against Ed Sheeran and Pharrell Williams/Robin Thicke, respectively, included fights over 'stylistic' elements, such as drums, tempo and 'feel' of a song. Williams and Thicke lost their suit and, along with their co-defendants, were ordered to pay almost $5 million dollars in damages.

This case shook the music industry by appearing to significantly expand the traditional battleground of 'protectable' elements, such as lyrics and melodies. For marketers and their agencies who commission original music in the style or feel of a certain artist or song, this meant that additional caution was now warranted. That caution extended to when publicly discussing the 'inspiration' behind the commissioned music, since public statements made by Williams may have contributed to the jury's finding.

However, the Gaye estate has sought to reopen the case and is now seeking millions of dollars in attorneys' fees due to Williams' alleged fraud and perjury. Such claims were based on public statements regarding the creative process Williams made long after the case had concluded.

A development that may have swung the pendulum in the other direction occurred when a federal judge overturned a jury verdict that found Katy Perry and co-writers of the song "Dark Horse", a worldwide smash for Perry, copied a 2008 song by the artist Flame. The judge found Perry's argument — that both songs simply used common chord structures, i.e., the same 'musical alphabet' or 'building blocks' — was a winner and should have prevented Flame from being awarded $2.8 million in damages. While it's possible the jury took into consideration similarities between previously 'unprotectable' elements, the judge did not cite those elements and ruled that a short musical phrase was not enough to constitute infringement.

On the other hand, Taylor Swift recently suffered a defeat in a suit accusing her of infringement relating to her hit song "Shake it Off." The suit focused on the lyric "*…the players gonna play…and the haters gonna hate...*", a similar version of which had appeared in a previously released song. The case was initially dismissed, with the judge ruling that the lyrics at issue were 'short phrases' without enough originality to qualify for protection. This kept with the generally accepted notion that judges could act as gatekeepers in order to stem the tide of copyright suits based on short, unoriginal (and therefore unprotectable) phrases.

But the ruling was reversed on appeal and the suit will now go back to the trial court. Regardless of the outcome, the appellate ruling may keep the floodgates open to lawsuits focusing on previously unprotectable elements.

Content creators, including marketers and their agencies, must carefully pay attention to how they create and commission original music. Working with legal counsel and musicologists, as well as risk management to ensure appropriate insurance coverage is in place, is vital. Marketers, agencies and the music creators they hire should also exercise caution when publicly discussing the creative process or source(s) of inspiration.

KEY TAKEAWAYS:

- Musical elements that were long considered safe to use may carry increased risk.
- Even the use of short, seemingly unoriginal phrases may warrant additional legal review.
- Content creators must exercise caution when using music in advertising, marketing and publicity materials, and when publicly discussing the source of any inspiration.

THE NAD'S NEED FOR SPEED

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The National Advertising Division (NAD) has become increasingly focused on the issue of speed, both in the context of advertising challenges regarding 5G technology and updates to the NAD's procedures.

Claims Regarding 5G Technology: Telecommunications companies have begun touting the arrival of their 5G networks and the groundbreaking Internet speeds that these networks will provide consumers. In a pair of recent decisions, the NAD examined 5G advertisements from AT&T and Verizon and concluded that their 5G technology claims were either too fast (i.e., premature) or too furious (i.e., failed to prominently disclose material limitations).

First, the NAD examined AT&T's claim that the network offered "5G Evolution, The First Step to 5G." Of critical relevance to the NAD's decision was the fact that AT&T's "5G Evolution" network delivered 4G rather than 5G service. In an effort to address this disconnect, AT&T argued that "5G Evolution" is simply the name for its current 4G network, and that its use of the term "Evolution" conveys the more limited message that the company is in the process of upgrading its network to enable 5G performance. Unpersuaded, the NAD concluded that "5G Evolution, The First Step to 5G" referred to a level of technology — 5G — that AT&T could not deliver and, therefore, recommended that AT&T discontinue its claim.

Shortly thereafter, the NAD examined Verizon's claim that it was the "First to 5G." With respect to the claim itself, the NAD concluded that Verizon was the first carrier to offer 5G service (albeit in the context of a "small launch" in two cities). That said, the NAD also noted that "[c]onsumers generally assume that, if a service is being advertised to them, it is something that is available now." Verizon's 5G service, however, was not available across Verizon's coverage area, or even a significant part of it. Accordingly, the NAD recommended that Verizon modify its advertising to clearly and prominently disclose the fact that its 5G service is "more unavailable than available."

NAD's Fast-Track Process: Not to be outdone by the telecommunications giants, the NAD recently introduced a "fast-track" challenge process that significantly increases the speed with which the organization resolves certain advertising disputes. Unlike the traditional NAD challenge process, whereby the NAD endeavors to provide a decision within 60-90 business days (with many challenges taking considerably longer to resolve), the fast-track process ensures that challenges are resolved within 20 business days.

While this increased efficiency is certainly attractive to potential challengers, the fast-track process is only available in certain, limited situations. Specifically, fast-track challenges must be limited to a single issue and cannot involve implied claims or claims that require complex substantiation (*e.g.*, clinical studies or technical product testing). Moreover, the NAD fast-track process is reserved, at least initially, for specific claim categories, such as: misleading pricing and sales claims; misleading express claims; and insufficient disclosures (including disclosure issues in influencer marketing, native advertising and incentivized reviews). Despite these limitations, the fast-track process has proven popular with challengers, with six fast-track challenges having been resolved in the program's first three months.

KEY TAKEAWAYS:

» Advertisers touting 5G technology — or any new technology — must ensure that the technology and corresponding benefits are currently available to consumers. If the technology is not widely available, this material limitation must be clearly communicated.

» The NAD's fast-track process promises to enhance the organization's ability to efficiently resolve advertising disputes, and, in turn, make the NAD process more attractive to prospective challengers.

PATENT TROLL ACTIVITY LIKELY TO CONTINUE TO RISE

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For nearly half a decade, patent troll suits have been on the decline. Indeed, as we reported last year, the Supreme Court has gone out of its way to curb the worst patent troll abuses in order to protect innovators and call the viability of many patent troll litigations into question. This started in 2014, with the seminal *Alice v. CLS Bank* (*Alice*) decision that questioned the patent eligibility of certain software and business methods. Then in 2018, the Supreme Court took aim at forum shopping by patent plaintiffs in *TC Heartland v. Kraft Foods* (*TC Heartland*). These two cases led to an overall decline in patent troll lawsuits over a period of years.

However, developments from the Federal Circuit in 2019 introduced some uncertainty into the patent landscape, providing an opportunity for patent trolls to bring and maintain their litigations. For example, In *Cellspin Soft v. Garmin USA* (*Cellspin*), Garmin won its motion to dismiss the case on the ground that Cellspin Soft's patent for uploading data from a device, such as a GPS tracker, was too abstract as a pure matter of law and, therefore, should be invalidated. However, the Federal Circuit court disagreed, holding that the patent eligibility analysis under *Alice* presented questions of fact.

The case followed similar decisions from the court in *Berkheimer v. HP* and *Aatrix Software v. Green Shades* (*Berkheimer*), refusing to invalidate patents covering abstract ideas or intangible embodiments and showing a growing trend toward disallowing patent eligibility claims to be decided at the motion to dismiss or summary judgment stage.

Despite hopes that the Supreme Court would provide additional guidance on *Alice* or *TC Heartland*, the Court has refused to take on cases addressing these issues. In January 2020, the Court denied the petitions for certiorari in *Cellspin* and *Berkheimer*, as well as several other patent eligibility cases, signaling that the Court is disinterested in providing additional clarity on these issues, or is hoping that Congress will address the issue through the legislative process. Draft bills introduced in Congress last year to codify and reform patent eligibility were also unsuccessful.

In this environment of uncertainty, patent trolls have gained momentum in 2020, and the COVID-19 pandemic and resulting economic upheaval has done little to deter patent suits. In fact, non-practicing entities have exploited the boom in Covid-related innovation. In the first few months of the pandemic, patent trolls targeted technology and healthcare companies responding to the crisis, with the makers of tests and ventilators among those facing patent suits. Although public backlash led some patent plaintiffs to voluntarily drop their claims and offer royalty-free licenses for COVID-19-related uses, the specter of patent litigation presents an ongoing concern for companies involved in pandemic response efforts, and innovators across all sectors.

KEY TAKEAWAYS:

- The ability to quickly dismiss a patent troll lawsuit under *Alice* and *TC Heartland* has been curtailed, which may lead to increased costs in defending claims.
- COVID-19 has not slowed the tide of patent troll suits, which have continued to be filed at a steady pace.
- Companies should establish a comprehensive strategy to manage patent risk, including filing for and enforcing patents, identifying and clearing patent risks, instituting contractual strategies for risk-shifting, and defending allegations of patent infringement.

THE LEGAL LOOPHOLE FOR ONLINE POLITICAL ADVERTISING (BARELY) STARTS TO CLOSE

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With COVID-19, the nationwide call for racial justice, and the battle for the Supreme Court dominating the news, it has been easy to lose track of the fact that the U.S. Presidential election is just over one month away. To get voters to focus on the November 3 vote, political candidates and their backers are steadily increasing their advertising spending, especially in the digital media space. Voters expecting online political advertising this Presidential election cycle to dodge the criticisms and controversies that plagued the last Presidential election cycle are likely to be disappointed, however.

After the 2016 election cycle concluded, U.S. intelligence officials confirmed that foreign entities had affected the election outcome. Among the most widely reported examples of foreign interference was Russian actors' purchase of Facebook ads to spread misinformation in order to help Donald Trump win the Presidency.

To regain voter confidence in the integrity of the U.S. elections, and to help protect those elections from foreign meddling, Congress reintroduced the Honest Ads Act (the Act) in 2019, which extends to online political advertising certain requirements for television, radio and print advertising.

Under the Act, an online ad that mentions a political candidate and runs shortly before an election must identify the advertiser. The Act also requires online platforms with at least 50 million monthly visitors to maintain, for each advertiser that has spent more than $500 in political ads on the platform in a single year, a searchable public library of such ads and information about the advertiser, audience and media buy for each ad. Online platforms also must make "all reasonable efforts" to avoid selling political ads to foreign nationals. The Act had bipartisan sponsorship and support, but Senate Majority Leader Mitch McConnell blocked its passage in November 2019.

Congress's inaction on the Act was matched by the Federal Election Commission (FEC)'s failure to enact even more basic rules requiring online political ads to identify the advertiser, in the ad or one click away. Ideological deadlock, once again, doomed competing Democratic and Republican FEC commissioners' pending proposals in 2019.

Many states stepped into the void, however, passing laws requiring online platforms, ad networks and advertisers to create and maintain detailed records for their online political ads. The laws vary per state, but generally require the platform, network and/or advertiser to maintain (and, oftentimes, make publicly accessible), at a minimum, a copy of the ad, the price paid, the territory and the audience targeted. A federal appellate court struck down portions of Maryland's law in December 2019, however, ruling that the law violated the First Amendment by compelling publishers to identify political speakers and open their records to government inspection. The ruling leaves the legal status of other similar state laws now uncertain.

More lasting change has come from the social media platforms and other online publishers and networks that released rules for political advertisers in 2019. Most severely, Twitter and TikTok banned all political ads. Google prohibited advertisers from microtargeting political ads based on public voter records and/or political affiliations, and permitted targeting based on age, gender and/or zip code only. Google also barred "demonstrably false" political ads. Facebook announced that it would permit all (including demonstrably false) political ads, but would subject advertisers to expanded vetting to screen out foreign parties. More recently, Facebook has prohibited new (but not existing) political ads in the week before the election and ads linking voting to catching COVID-19.

Finally, the Digital Advertising Alliance (DAA), a trade group, released its own guidelines in 2019, requiring online political ads to include a "political ad" icon that provides the advertiser name, contact information, expenditure records and other information, one click away. The DAA is campaigning for its icon to form the basis for a federal legal standard.

KEY TAKEAWAYS:

- Congress and the FEC have not imposed any new obligations on online political ads for the 2020 election cycle.
- New state laws requiring maintaining publicly accessible records of political advertising may stand on shaky Constitutional grounds.

CCPA: A PRIVACY CONUNDRUM

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After much anticipation, the California Consumer Privacy Act (CCPA) took effect on January 1, 2020, becoming the most comprehensive privacy law in the U.S. CCPA provides California residents rights regarding the collection, use and sale of their personal information (PI), as defined broadly under the CCPA. It also imposes burdensome requirements on entities that collect PI if they are a "business," in order to provide greater transparency and control over the use of such PI.

Notwithstanding the CCPA effective date, businesses continue to struggle with compliance. Perhaps the biggest operational hurdle is implementing new consumer rights, including the right to: know what information is collected, request copies of that information, request that such information be deleted and opt-out of the "sale" of such information. Each has its own procedural requirements and, in some cases, the final proposed regulations exceed what is required by the plain language of the CCPA, such as recognizing user-enabled privacy controls for opt-out requests. The final proposed regulations provide more specificity regarding certain requirements, such as responding to consumer requests, and add new obligations, such as "just in time" pre-collection notice requirements for mobile applications.

Another obstacle many companies face is deciding how to categorize their role in a transaction involving PI. Determining whether an entity is a "business," or a "service provider" or "third party" (whose obligations are more limited), is a material component to understanding compliance obligations. This is particularly true when assessing whether a transaction constitutes a "sale" of PI, implicating elaborate opt-out requirements. To complicate matters, an entity may be both a business and a service provider or another type of third party, as confirmed by the final proposed regulations, which specify that a business that processes PI on behalf of another business could qualify as a "service provider" of that business with respect to such processing, if it meets the requirements and obligations for a "service provider".

The industry response has been mixed. Through new data sharing options, Google is helping businesses manage CCPA obligations, including by recognizing signals sent through the Interactive Advertising Bureau's CCPA Compliance Framework, which allows participants to ensure PI exchanged between them for targeted advertising complies with CCPA's notice and opt-out requirements. Google, via its "Restricted Data Processing" feature, also made additional tools available to its business users to assist in complying with certain CCPA obligations, such as consumer request verifications. Facebook has unveiled a "Limited Data Use" feature, which, when selected, will direct Facebook to process the PI of California residents as a service provider. Facebook announced that it would (unless otherwise requested by the applicable business) automatically implement this feature for such information through July 31st, after which businesses will need to affirmatively choose it.

In addition, among other updates, Amazon has made resources available to assist customers with CCPA compliance but has not taken a firm position regarding the "sale" issue. Instead, Amazon updated its advertising API terms to require users to comply with data protection laws including CCPA.

The industry had hoped for resolution by now of certain ambiguities in the CCPA; however, the implementing regulations submitted by the California Attorney General in early June indicate that many uncertainties are likely to remain until actual enforcement sets precedent and answers some of the remaining questions.

Finally, it is important to keep in mind that while enforcement officially began on July 1, regulators may attempt to apply the CCPA retroactively to the first six months of 2020.

KEY TAKEAWAYS:

- Companies must evaluate their internal privacy practices and consumer-facing disclosures with an eye towards compliance.
- Implementing procedures to comply with consumer requests may prove burdensome, but companies that are diligent from the start may ease the burden.
- Companies must conduct assessments of themselves and their providers to determine their roles under the CCPA.
- Industry players are taking varied approaches and may place the onus of compliance on customers.

PRIVACY & DATA: BEYOND THE CCPA

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As the proliferation of connected devices, applications and other technology continues, the opportunities for the use and misuse of consumer data have also grown. With new and massive data breaches constantly entering the news cycle, lawmakers are responding to demands for privacy and data security.

The recent focus of privacy professionals in the United States has overwhelmingly been on the California Consumer Privacy Act (CCPA), particularly the release of the final regulations implementing the CCPA.

Amid the attention-grabbing CCPA headlines, businesses must not lose sight of other state laws that have recently passed, as well as legislation on the horizon. As reported by the National Conference of State Legislatures, more than half of U.S. states introduced consumer data privacy legislation and 43 states considered bills addressing cybersecurity in 2019.

Some of the new laws and proposed bills are summarized below and represent broader legislative trends that will likely continue into the new decade.

Nevada SB 220: Nevada was the first to follow California's lead when it passed SB 220. The Nevada law, which went into effect on October 1, 2019, provides Nevada residents with a right to opt-out of the monetary sale of certain data collected online to a person that makes an onward transfer or sale of the data.

New York SHIELD Act: New York passed the Stop Hacks and Improve Electronic Data Security Act (SHIELD Act), which amended New York's data breach notification law and requires businesses that hold information about New Yorkers to develop a data security program to protect that information. The SHIELD Act's data security requirements took effect on March 21, 2020.

California Data Broker Registration Law: Upon passing AB 1202, California became the second state, after Vermont, to require data broker registration. Borrowing heavily from the terminology of the CCPA, the California law defines data brokers as a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship. Data brokers must register no later than January 31 each year.

PENDING LEGISLATION

New York Privacy Act (SB S5642): The New York Privacy Act (NYPA), which was reintroduced in January 2020, goes further than the CCPA in many ways. In particular, the NYPA requires express and documented consent before using or transferring personal data and creates fiduciary duties of care and loyalty to the consumer. The NYPA also requires entities collecting personal data to act in the consumer's best interest, and creates a private right of action.

California Privacy Rights Act of 2020: The California Privacy Rights Act (CPRA) is a new California ballot initiative (sometimes referred to as CCPA 2.0) that qualified for the November 2020 ballot in California. If California voters pass CPRA into law, it would significantly makeover the CCPA. Some of the notable changes would include a requirement to provide consumers with the right to opt-out of personal information sharing for "cross-context behavioral advertising" and to correct inaccurate personal information, obligations on service providers to assist businesses with compliance and to enter into contracts with their sub-processors, a new definition for "sensitive personal information" and an expanded "publicly available" information carve-out from personal information.

KEY TAKEAWAYS:

» Although legislative priorities have shifted due to the COVID-19 pandemic, the CCPA and other state laws that follow will continue to change privacy compliance across the United States, and also (potentially) drive the discussion around privacy at the federal level.

» Companies that process personal information must adapt to the complex and ever-changing privacy regime that has now become the norm.

SAG-AFTRA'S NEW LETTER OF ADHERENCE SHAKES UP ADVERTISING INDUSTRY

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As commercial productions resume after being on pause due to COVID-19 shutdowns, advertising agencies that are not signatories to the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract (Commercials Contract) should keep in mind recent changes made by SAG-AFTRA at the beginning of the year, which impose new obligations and restrictions when working with third-party signatory entities to engage union talent.

Historically, non-signatory agencies have been able to hire third-party signatory entities on an ad-hoc basis to act as co-producer and employer of record for any union talent performing services in connection with a commercial production. However, last year SAG-AFTRA began cracking down on this practice in an effort to promote the interests of its members by beefing up the employer functions of the third-party signatories, while at the same time reducing the employer and production role of any non-union advertising agency connected to the commercial production. This was done in part to incentivize those non-union agencies to sign on to the Commercials Contract directly.

SAG-AFTRA sent a strong message to the industry in May 2019 when it revoked the signatory status of six leading third-party signatories, claiming they were not "bona fide employers" of the union talent performing services in connection with commercials produced by non-signatory agencies. After some negotiation, the union and those six third-party signatories reached a new "Letter of Adherence" (LOA) to the Commercials Contract which would permit them to retain their signatory status.

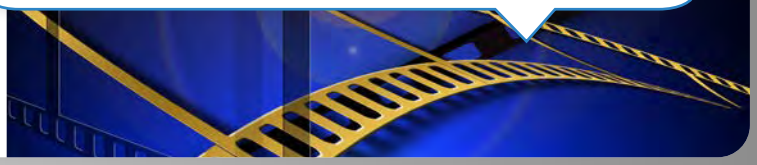
The LOA, which had been set to take effect on January 1, 2020, mandated compliance by the third-party signatories with a wide range of obligations characteristic of a bona fide employer. Of note, the LOA outlined ten "employer functions" that must be performed by the third-party signatory but cannot be performed by any non-signatory advertising agency attached to the production. Those functions included, among other things, having third-party signatory personnel on-set for every U.S. production and negotiating union talent agreements with performer representatives in collaboration with the advertiser client. Further, under the LOA, third-party signatories would only be able to serve as such for the advertisers themselves, and not the advertising agency hired by an advertiser to execute the production.

From the standpoint of the non-union agencies, the industry's response to the LOA was that it was deeply flawed. To them, the new obligations and restrictions relegated the non-union advertising agencies to a creative consultant role, while at the same time imposing production and other agency functions on the third-party signatories, whom the agencies contended were not equipped to handle those functions. In response to the industry backlash, the union provided for a 60-day non-enforcement window in order to allow talks with relevant stakeholders to continue, leading to SAG-AFTRA issuing an addendum to the LOA, which loosened (or undid) some of the more onerous requirements, including the restraint by the non-union agencies to engage the third-party signatories directly and the previous requirement that kept them off the set of their own commercial productions.

The amended LOA, which went into effect as of April 1, 2020, while still requiring the third-party signatories to perform the ten employer functions as originally drafted, is more reflective of how an ad agency must function within an integrated commercial production ecosystem, including allowing agency personnel on the set, so long as such personnel do not supervise talent — an employer function to be handled by third-party signatory personnel.

KEY TAKEAWAYS:

- The new LOA increases the employer functions of third-party signatories, including requiring third-party signatories to have involvement in the talent casting and production process, although not at the exclusion of the non-union advertising agency involved in the production.
- After concerns raised by the industry, the third-party signatories can continue to be engaged by non-union ad agencies and agency personnel can attend the shoots, provided they do not direct or supervise the talent on set.



#GOALS: USING SOCIAL MEDIA WITHOUT GETTING SUED

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In the rapidly changing social media landscape, new ways to create, share and use content are continually emerging, and this has left marketers scrambling to ensure that their legal compliance efforts keep pace with the changes. In social media, the maxim, "the more things change, the more they stay the same," is fitting. From Promoted Tweets to shoppable product stickers in Instagram Stories, marketers have to stay vigilant, as the same legal framework applies. Everything from a marketer's use of user-generated content or photographs, music or artwork in Snapchat stories to fully developed TikTok campaigns is not immune from copyright infringement claims just by virtue of being featured in a transient new form of media.

Developments in technology also make it easier for copyright owners to identify potential infringements, increasing the practical risk of a marketer receiving a claim. Automated bots allow copyright owners to scour the web for uses of their content, and send cease and desist letters demanding a costly settlement or threatening to bring a lawsuit. YouTube's Content ID uses artificial intelligence (AI) to flag content to copyright owners, who can then decide whether to leave the content in place and receive advertising revenue, have their content removed from the video, or have the entire video taken down. Yet even AI is not perfect and can lead to unfounded claims, so marketers should review any Content ID matches, including any takedowns, as penalties can include loss of a marketer's YouTube account.

Social media channels continue to expand, even as new ones come onto the stage. The explosive growth of TikTok continued in 2020, culminating in over 1 billion users worldwide, the majority of which are GenZers. Despite ongoing uncertainty about the platform's future in the United States due to efforts by the Trump administration to ban TikTok for national security concerns, marketers are continuing to make use of the platform. While many marketers have joined in on the action, the platform has posed unique challenges for legal compliance. TikTok makes it easier than ever to share music on the platform, which creates numerous copyright risks to marketers wishing to capitalize on the newest social media platform.

With TikTok sweepstakes and promotions also in high demand, marketers are turning to sponsored hashtag challenges, which offer a popular way to increase engagement. But hashtags raise their own set of risks — from trademark concerns to compliance with the Federal Trade Commission's disclosure guidelines. Additionally, promotions on TikTok must still comply with applicable state sweepstakes and promotions laws, including the creation and posting of official rules, which must be tailored to each TikTok campaign.

KEY TAKEAWAYS:

» Marketers can expect to see more developments in social media in 2020, but legal compliance obligations remain the same.

» Among other things, marketers must observe requirements imposed by the social media platforms' terms of service.

SCORE! COLLEGE ATHLETES WILL SOON CASH IN ON THEIR NAME, IMAGE AND LIKENESS

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2019 witnessed a landmark change in one of the most controversial matters plaguing college sports: the National Collegiate Athletic Association (NCAA) rule prohibiting student-athletes from accepting compensation for the use of their name, image and likeness (NIL) rights. Set to take effect in 2023, California passed Senate Bill 206, known as the Fair Pay to Play Act, which will allow collegiate athletes in California to sign endorsement and licensing deals and earn compensation, while prohibiting governing bodies, such as the NCAA, from disqualifying them as a result.

This move set off a chain reaction. Florida and Colorado recently passed similar legislation, and other states, including Illinois, Minnesota, Ohio, New York, Nevada, Pennsylvania and South Carolina have all introduced their own bills that will have a similar effect if passed.

With pressure mounting, the NCAA reached a monumental decision when the association unanimously voted to implement a framework allowing student-athletes to profit off of their NIL rights. The NCAA Board of Governors has recommended certain changes to the bylaws to reflect this decision, like permitting student-athletes to identify themselves by sport and school. It's now up to the three NCAA divisions to take those recommendations and amend their bylaws and draft new rules, standards and guidelines by January 2021.

Additionally, the Fairness in College Athletics Act was presented in the U.S. Senate which, if passed, would devise a national framework for permitting student-athletes to license their NIL rights, as opposed to forcing the NCAA and athletes to navigate conflicting state regulations.

This is potentially a huge win for collegiate athletes. With changes to the law and NCAA bylaws set to take effect in the coming years, athletes should soon be able to share in a portion of the vast revenues generated by college sports. National marketers will have an opportunity to create new partnerships with young and rising stars, while local and regional marketers will be able to leverage the enormous popularity of college sports and athletes in their communities, particularly in those communities without professional sports organizations.

As this watershed moment continues to unfold, it will be important to follow how the NCAA, as well as federal and state regulators, balances the interests of the athletes, the schools and conferences. The NCAA will certainly push for restrictions to protect existing partnerships and boosters from distorting the intent of these regulations. One thing is certain, though: college athletes will finally have the opportunity to reap the rewards of their hard work.

KEY TAKEAWAYS:

- California's Fair Pay to Play Act forced the NCAA to reconsider the fundamental relationship between colleges and student-athletes, permitting athletes to accept endorsements in exchange for compensation without being penalized.
- Faced with potentially incompatible state bills, the NCAA and Congress are taking steps to establish uniform guidance.
- Marketers and their agencies should monitor the progress of Congress, states and the NCAA to devise strategies to maximize the availability of NIL rights, and businesses will begin to develop strategies on how to market and license NIL rights on behalf of student-athletes.

BLACK LIVES MATTER MOVEMENT SPARKS BRANDING CHANGES

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The tragic killings of George Floyd, Breonna Taylor and Ahmaud Arbery this year, among others, have reinvigorated the Black Lives Matter movement, resulting in powerful nationwide conversations about racial injustice in the United States, with far-reaching ripple effects. Businesses across industries — such as sports, entertainment, consumer products and higher education — have reevaluated certain aspects of their legacy brands and have announced that they will discontinue the use of names, trademarks and logos with racist origins.

One of the most high-profile examples is the National Football League's Washington football team which, after vigorously defending its right to use the "Redskins" name, decided to retire the "Redskins" name and logo because the term "redskin" is widely regarded as derogatory towards Native American groups.

The team owns federal trademark registrations for its "Redskins" name and logo, which have been the subject of multiple legal challenges dating back to the 1990s. Specifically, several Native American groups filed lawsuits seeking to cancel the trademark registrations based on a provision of the Lanham Act, which prohibited the registration of disparaging marks. These cases were unsuccessful for various reasons, including an unrelated 2017 decision by the Supreme Court of the United States holding that the Lanham Act's prohibition against disparaging marks violated the Free Speech Clause of the First Amendment.

In the entertainment industry, country music groups have altered their names in order to move away from the racist connotations associated with references to the Confederate South. For example, the Dixie Chicks have dropped "Dixie" from their group's name and are now known simply as "The Chicks".

Further, multiple consumer products have been rebranded because of racial stereotypes connected with their names and logos. For instance, the Quaker Oats Company decided to remove the image of Aunt Jemima from its syrup and pancake mix packaging and change the name of the brand, after publicly acknowledging that Aunt Jemima was based on a racial stereotype. In addition, Mars Inc., the parent company that makes Uncle Ben's boxed rice, announced that it will "evolve" the brand, including its visual identity, and stated: "As a global brand, we know we have a responsibility to take a stand in helping to put an end to racial bias and injustices." Similarly, Dreyer's Grand Ice Cream will replace the "Eskimo Pie" brand name for its ice cream bar and remove imagery featuring the Eskimo Pie character, stating that Dreyer's is "committed to being a part of the solution on racial equality, and recognize[s] the term [Eskimo] is inappropriate."

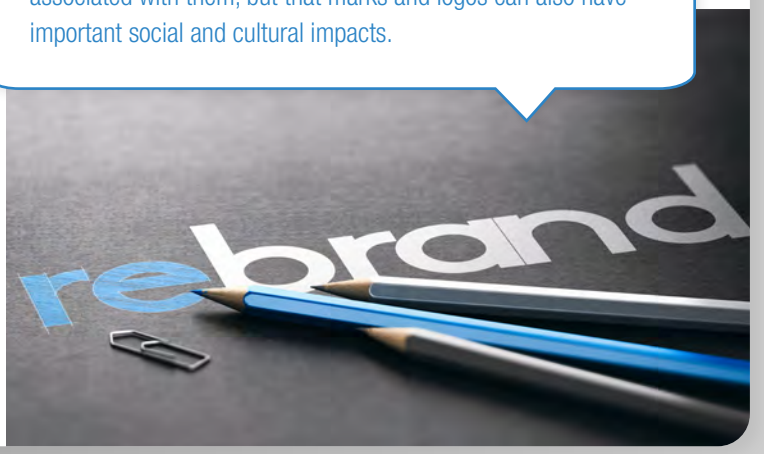
Relatedly, Conagra Brands, Inc. has decided to review its Mrs. Buttersworth's brand and packaging for pancake syrup, and B&G Foods, Inc. has similarly initiated a review of its Cream of Wheat branding.

Educational institutions are also reevaluating how race is reflected by their schools. Princeton University has decided to excise Woodrow Wilson's name from its School of Public and International Affairs and residential college because it does not want to be connected with his racist thinking and policies. Other colleges and universities have started discussions about changing the names of their schools and buildings in order to break with racist histories associated with their namesakes.

KEY TAKEAWAYS:

» Businesses across industries have begun to evaluate their brands to ensure they are not using names, trademarks or logos with any racist origins.

» Changes to longstanding trademarks across industries act as a reminder that trademarks not only help consumers identify and distinguish the products and services of the particular businesses associated with them, but that marks and logos can also have important social and cultural impacts.



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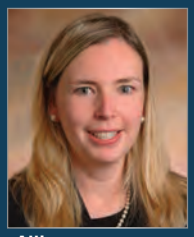

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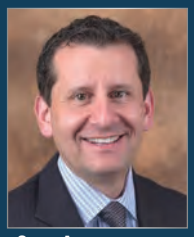

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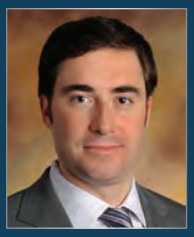

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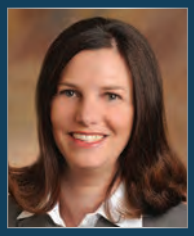

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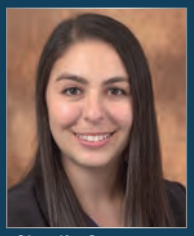

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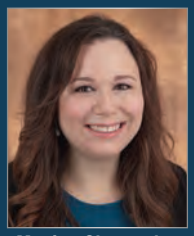

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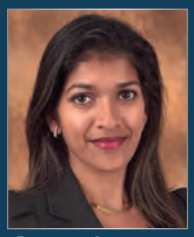

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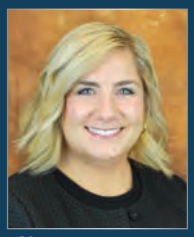

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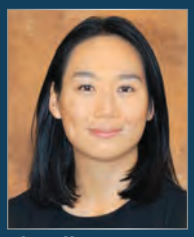

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