ADA & WEBSITE COMPLIANCE

ALCOHOL

CHILDREN'S ADVERTISING

COPYRIGHT

ENTERTAINMENT

FASHION & BEAUTY

FDA

FTC: REGULATORY & STATE

MOBILE/DIGITAL

MUSIC

NAD

PATENTS

PRIVACY & DATA: CALIFORNIA CONSUMER PRIVACY & OTHER LEGISLATION

PRIVACY & DATA: INTERNAL SECURITY COMPLIANCE

SOCIAL MEDIA / INFLUENCER MARKETING / NATIVE ADVERTISING

SPORTS

TELEMARKETING

TRADEMARK

TRENDS

IN MARKETING COMMUNICATIONS LAW

VI EDITION

D&G | Davis & Gilbert LLP

TRENDS
IN MARKETING COMMUNICATIONS LAW

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Clients, Colleagues and Friends,

It is my pleasure to announce the 2019 edition of our annual publication, *Trends in Marketing Communications Law*. Each year, attorneys in our Advertising, Marketing & Promotions Practice Group provide insight into the latest and most significant changes affecting the advertising and marketing industry. This year's articles draw on the benchmark cases, formative laws and regulatory developments that emerged in 2018 and dive into how they will impact the industry in 2019 and beyond.

As media and content evolve, Davis & Gilbert continues to deploy strategies for our clients that are tailored to the digital age, including, with respect to influencer marketing and native advertising campaigns to mobile apps, cross-device tracking and consumer targeting. In 2018, despite the Trump administration's deregulation push, the Federal Trade Commission has shown no signs of reducing enforcement actions against unfair or deceptive consumer marketing practices. The NAD has followed suit, and state regulators have kept a close watch on privacy and cross-device tracking practices, especially in light of the new European Union data regulations.

The 18 articles that comprise this year's publication examine the innovative use of content and technology pushed by leading edge brands including everything from copyright protection relating to music to artificial intelligence in the fashion and beauty industries, as well as regulators' growing focus on the use of CBD in cosmetics to federal and state "tied-house" laws in the alcohol industry, data security in the United States, the increase in ADA lawsuits against websites and much more.

I hope that you enjoy this year's issue. At Davis & Gilbert, our goal is to manage risks for our clients by consistently staying ahead of new developments in the industry. Please reach out to me, any of the authors or the D&G 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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"AS MEDIA AND CONTENT EVOLVE, DAVIS & GILBERT CONTINUES TO DEPLOY STRATEGIES FOR OUR CLIENTS THAT ARE TAILORED TO THE DIGITAL AGE, INCLUDING, WITH RESPECT TO INFLUENCER MARKETING AND NATIVE ADVERTISING CAMPAIGNS TO MOBILE APPS, CROSS-DEVICE TRACKING AND CONSUMER TARGETING."

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LOCATION
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TRENDS

IN MARKETING COMMUNICATIONS LAW

Seeing the road ahead

"AT DAVIS & GILBERT, OUR GOAL IS TO MANAGE RISKS FOR OUR CLIENTS BY CONSISTENTLY STAYING AHEAD OF NEW DEVELOPMENTS IN THE INDUSTRY."

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LAWSUITS BY THE DISABLED AGAINST WEBSITES SPIKE

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2018 saw a nearly 200% increase in the number of lawsuits targeting websites and mobile apps for their alleged failure to comply with Title III of the Americans with Disabilities Act (ADA), which prohibits "places of public accommodation" from discriminating against persons with physical and other disabilities on the basis of those disabilities. (A majority of federal courts and the Department of Justice (DOJ) consider consumer-facing websites to constitute "places of public accommodation.")

This rise in website ADA claims has prodded companies to attempt to make their websites ADA compliant, but that effort has been stymied by the lack of a definitive legal standard for compliance. Under the Obama administration, the DOJ had proposed support for the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 Level AA Guidelines (WCAG 2.0 AA) as the minimum standard for website accessibility. However, under the current administration, the DOJ has changed course by stating that websites "have flexibility in how to comply with the ADA[.] . . . [N]oncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

Despite the uncertainty as to whether WCAG 2.0 AA is the official legal standard for website accessibility, courts consistently look to it as a benchmark. (Even though the updated WCAG 2.1 standards were issued in 2018, courts generally have continued to reference WCAG 2.0 AA in their website assessments.)

WCAG 2.0 AA requires, among other things, that websites provide (1) captions for audio and video content, (2) machine-readable text and audio descriptions for onscreen content, (3) operability entirely through a keyboard, (4) minimum contrast ratios for text and images, and (5) the ability to change background colors, font colors and font sizes.

Companies with websites that are not substantially compliant with WCAG 2.0 AA may be less vulnerable to a website ADA claim and liability if they take these measures:

Begin Compliance Efforts

Three recent website ADA cases were dismissed on the basis that the defendants had entered into settlement agreements or consent decrees requiring WCAG 2.0 AA compliance, and were in the process of meeting that obligation, prior to receiving the plaintiffs' claims. These cases suggest that a court may look favorably upon a defendant that has independently initiated bona fide website ADA compliance efforts.

Provide Alternative Means of Access

The DOJ and at least one court have taken the position that website ADA compliance can be satisfied through an accessible website alternative, "such as a staffed telephone line, for individuals to access the information, goods, and services" offered by the website.

Understand Insurance Coverage

Some commercial general liability, cyber liability and employment practice liability policies may cover the costs of defense and settlement of a website ADA claim (but, notably, not the costs of website remediation). Businesses, particularly those that are high-profile or whose websites are highly ADA non-compliant, should consider adding website ADA insurance coverage.

KEY TAKEAWAYS:

- ADA lawsuits (both class action and individual suits) against websites are increasing.
- The WCAG 2.0 Level AA Guidelines are an accepted legal measure for website ADA accessibility.
- Companies whose websites are not ADA compliant should (1) initiate at least some compliance efforts, (2) provide an alternative means for consumers to access the website's content, and (3) consider adding website ADA insurance.

THE TTB RAMPS UP ENFORCEMENT OVER TRADE PRACTICES

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Over the past year, the United States Alcohol and Tobacco Tax and Trade Bureau (TTB) has substantially increased enforcement in the alcohol industry, indicating that increased regulatory scrutiny may be here to stay for alcohol manufacturers, wholesalers and retailers.

The alcoholic beverage industry consists of three "tiers" of participants: manufacturers, (e.g. wine growers, liquor distillers, beer brewers, importers, etc.), wholesalers and retailers (e.g. bars, restaurants and liquor stores). The federal government, as well as every state in the United States, prohibits certain entanglements between the three tiers. Most prominently, manufacturers, wholesalers and retailers cannot be under common ownership, and, with few exceptions, are not permitted to provide anything of value to one another. This means that manufacturers and wholesalers are largely prohibited from providing funding, equipment, services and free advertising to retailers, and retailers are forbidden from providing special treatment (including exclusivity) in exchange.

Enforcement of these so-called "tied-house" laws can often be spotty, especially at the federal level, but that is changing. In 2017, the federal government allocated $5 million to the TTB to increase enforcement within the alcohol industry. Whereas the TTB averaged two alcohol-related enforcement actions per year prior to receiving the funding, the TTB announced six major enforcement actions in 2018 and the beginning part of 2019. Three of those cases resulted in one-day permit suspensions, and the remaining three cases resulted in "offers in compromise" of over $2.7 million.

More specifically, in May 2018, the TTB accepted a $900,000 offer in compromise from Warsteiner Importers Agency Inc. (Warsteiner), which imports beer from Germany's largest privately owned brewery. The TTB alleged that Warsteiner engaged in "pay-to-play" practices, including by paying to have dedicated tap lines installed for retailers and by sponsoring events on retailers' premises in exchange for exclusivity for its products — meaning that the retailers were not permitted to serve competitors' beer at the events. Both of these allegations, if true, constitute clear violations of the tied-house laws by interfering with the retailers' independence. At the time, the $900,000 offer in compromise was the largest in TTB history.

Just months later, the TTB, in a joint operation with the Florida Division of Alcoholic Beverages and Tobacco accepted an even larger $1.5 million offer in compromise from QAC, LLC, a wholesaler in Miami, also for pay-to-play schemes.

KEY TAKEAWAYS:

» Federal and state tied-house laws can be complicated and difficult to understand, even for seasoned industry participants, and the consequences can be severe when manufacturers and wholesalers get too cozy with retailers.

» Lack of enforcement of the tied-house rules may have made many industry players complacent, but compliance obligations remain critical.

» With over $2.7 million in settlements and several permit suspensions, the TTB has shown what it can do with a modest enforcement budget, and a more aggressive regulatory regime may be here to stay for the alcoholic beverage industry.

AFTER 20 YEARS, COPPA SHOWS NO SIGNS OF SLOWING DOWN

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Last year marked 20 years since Congress passed the Children's Online Privacy Protection Act (COPPA). Fittingly, the Federal Trade Commission (FTC) kicked off 2018 by settling two back-to-back cases with companies alleged to have violated COPPA. While the FTC spent the remainder of 2018 focusing on outreach and education, holding workshops and providing guidance on COPPA, the state attorneys general flexed their enforcement authority by bringing notable COPPA actions against companies that violated the law.

The New York Attorney General shocked the privacy world when it announced its settlement with Oath, Inc. (Oath), formerly AOL Inc., for its alleged violations of COPPA, totaling $4.95 million — the then-largest COPPA penalty to date. Oath operated several ad exchanges for display ads, conducting billions of auctions for ad space on hundreds of websites the company allegedly knew were directed to children under the age of 13. The Attorney General claimed that Oath violated its own policies by knowingly auctioning display ads on child-directed websites, and by knowingly setting up certain client accounts in a way that would violate COPPA in order to increase ad revenue.

The New Mexico Attorney General similarly made waves after filing a lawsuit against app maker Tiny Lab Productions, alleging that the company failed to give notice of the app's data collecting and processing practices, and did not obtain verifiable parental consent when collecting children's personal data, including geolocation data. The Attorney General alleged that the company built detailed profiles of its child users and sold the data to numerous third parties in violation of COPPA.

The Children's Advertising Review Unit (CARU), the children's arm of self-regulation, brought an inquiry last year against Musical.ly, Inc. (now known as TikTok), a video-sharing app, claiming that the app violated COPPA. According to CARU, the app is immensely popular among teenagers and tweens, and many account profiles and user videos posted on the app feature children who appear to be under 13. Despite its popularity with children, the app's registration process did not require users to disclose their age, and CARU determined that, even though the app was primarily intended for use by a teenage audience, several characteristics of the app demonstrated that it also was directed to children under 13 years of age. CARU recommended that the app implement an age-gate to limit content served to children under 13 and that parental consent be secured prior to the collection of any personal information from those children. Because Musical.ly declined to adhere to all of CARU's recommendations, CARU referred the matter to the FTC which announced its own COPPA action against the app in February 2019. The FTC's action resulted in a $5.7 million settlement with the app — as of this writing, the largest civil penalty to date in a COPPA case.

Notably, a coalition of consumer protection organizations filed a complaint with the FTC last spring alleging that YouTube violated COPPA in much the same way as Musical.ly — by knowingly offering its services to, and collecting the data generated by, children under 13 without parental consent. According to the complaint, despite YouTube's introduction of the COPPA-compliant YouTube Kids service in 2015, most of the under-13 demographic still use the same general audience version of the platform as adults. Teenagers and children under 13 are increasingly using mobile video platforms as their primary source of entertainment, and as this trend continues to grow over the coming years, YouTube and other digital content providers will face mounting pressure to bring their services into compliance with COPPA in a meaningful way.

KEY TAKEAWAYS:

» Despite the FTC bringing only a few COPPA enforcement actions in 2018, companies should not relax their COPPA compliance efforts as the FTC maintains that COPPA is still one of its top priorities, particularly with the emergence of connected toys and the Internet of Everything.

» The state attorneys general and CARU continue to aggressively monitor and enforce COPPA. The New York and New Mexico Attorneys General appear to be particularly vigilant in this area.

» As children increasingly use mobile entertainment platforms, regulators and self-regulators will more closely scrutinize websites and digital platforms with significant child audiences to ensure COPPA compliance, as part of a larger cultural shift toward protecting user privacy online.

SUPREME COURT SETTLES CIRCUIT SPLIT ON WHEN A PLAINTIFF MAY SUE

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The Supreme Court handed down a unanimous copyright decision in March 2019 with implications for anyone involved in a copyright dispute, as well as for marketers and brands that create and use copyrighted materials. In *Fourth Estate Public Benefit Corporation v. Wall Street.com, LLC* (*Fourth Estate*), the Court resolved a long-standing split among the circuits over the requirement to obtain a copyright registration before filing a lawsuit.

The creator of an original work of authorship, such as a photograph, musical composition or screenplay, automatically obtains copyright protection in his or her work, which includes the right to prevent others from reproducing or displaying the work. But under Section 411 of the Copyright Act, a copyright owner may not file an infringement lawsuit until registration of the copyright "has been made" with the Copyright Office. The question in *Fourth Estate* was: what does "has been made" mean?

Until recently, courts were divided on this question: some allowed a copyright owner to file a lawsuit as soon as an application was filed with the Copyright Office (the application approach); while others held that a pending application was insufficient and that the Copyright Office must either issue a copyright registration or reject the application before a lawsuit may be filed (the registration approach).

In *Fourth Estate*, the Supreme Court settled the issue in favor of the registration approach, ruling that a copyright owner may not file an infringement lawsuit until after the Copyright Office has acted on the application by either issuing a copyright registration or refusing to do so.

One practical consequence of this decision is that a copyright owner may need to delay filing suit for an extended period of time because the Copyright Office can take up to 15 months to act on an application (and longer if the application is filed by mail). For some, this may result in significant consequences — a long wait time could create the risk of missing the Copyright Act's three-year statute of limitations. While seeking a registration on an expedited basis (approximately five business days) is available in certain circumstances (such as prospective litigation), the expedited handling fees ($800 as of this writing, as opposed to the single basic registration fee of $35) may be prohibitive for many parties.

Moreover, if the Court's decision results in an uptick in expedited registration applications, as is expected, even expedited review times could be delayed. This may be particularly problematic where a copyright owner is seeking an emergency court order, such as a preliminary injunction, to stop the sale of infringing goods and may need to rely on such expedited processing in order to commence a lawsuit.

There are also implications for those who post and share content online. The Digital Millennium Copyright Act (DMCA) provides safe harbor provisions protecting online service providers (such as YouTube and Facebook) from liability for copyright infringement for content posted by their users. If a copyright owner files a DMCA takedown notice, the user may file a counter-notice stating that they had the rights to post the content, at which point the service provider must reinstate the content. However, if the copyright owner still believes that the use of the content was infringing, it must file a lawsuit within 14 days in order to have the content removed. Because of the Court's decision, a copyright owner who does not have a registration in hand could face an uphill battle in removing content under the DMCA process.

The decision further underscores the importance of applying to register copyrighted material on a timely basis. Awards of statutory damages and attorneys' fees are only available for infringements that occur after the registration date. Although the effective date of copyright registration is retroactive to the date on which the application was filed, it is worth remembering that failure to promptly apply to register a work with the Copyright Office may deprive the owner of significant potential remedies.

Savvy content creators should consider applying to register their copyrights regularly in the course of their business, so that they can act quickly in the event of an infringement and seek the recovery of statutory damages and attorneys' fees.

KEY TAKEAWAY:

» Content creators should consider regularly filing copyright applications to avoid possible delays in the event of an infringement and maximize potential damages and the opportunity to seek the recovery of attorneys' fees and costs.

RIGHT OF PUBLICITY AND THE RISE OF TRUE CRIME

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Among the many high-profile entertainment industry headlines in 2018, one case in particular stands out for its impact on the rising trend of "true crime" entertainment. Olivia de Havilland, a leading lady during Hollywood's "Golden Age," sued FX Networks and producer Ryan Murphy, alleging her unauthorized portrayal in the show *Feud: Bette and Joan* violated her right of publicity and portrayed her in a false light. After conflicting decisions from the lower court and appellate court, de Havilland, now 102, filed a petition for certiorari in late 2018, seeking to bring her case before the U.S. Supreme Court. However, her petition was denied and, consequently, the decision of the California Court of Appeals still stands.

The California Court of Appeals found that FX and Murphy were not required to obtain de Havilland's permission, and that the First Amendment protected FX and Murphy from the actress's claims. The Court noted, "[w]hether a person portrayed in … expressive works is a world-renowned film star — 'a living legend' — or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people." De Havilland's false light claims were similarly rejected because the court did not find actual malice present in the nature of her portrayal in the show. The Court concluded its decision by noting that de Havilland's position would put "authors, filmmakers, playwrights, and television producers in a Catch-22. If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative — even fictitious and therefore 'false' — way, they face a false light lawsuit if the person portrayed does not like the portrayal." This result would have a chilling effect on the exercise of First Amendment rights by artists and filmmakers.

The de Havilland case is notable in light of the rising popularity of docudramas, especially in the genre of "true crime." As producers have explored, dramatized and monetized real life events of people impacted by tragedy, these stories have spawned lawsuits alleging right of publicity, false light and defamation claims. Within the past year alone, three high-profile lawsuits have been filed on these grounds: in July 2018, the estate of John B. McLemore sued the makers of the hit podcast "S-Town" and in January 2019, JonBenét Ramsey's family settled a defamation lawsuit it had brought against CBS and the producers of the documentary *The Case of: JonBenét Ramsey.*

Given the stakes and personal sensitivities involved in "true crime" stories, producers seeking to create documentary work about real people should proceed with caution, and budget for potential litigation defense.

KEY TAKEAWAYS:

- Individual rights of privacy and publicity are defined on a state-by-state basis, leading to a lack of clear consensus on the legal standards required for these claims.
- Works of artistic expression, including documentaries, works of historical fiction, and docudramas, are typically given full protection under the First Amendment. Nevertheless, producers of "true crime" and similar stories should still expect legal challenges.
- To decrease the likelihood of a claim, it is best to get consent clearly and in writing from the individuals who are the subjects of these stories. Even if a producer ultimately prevails under the First Amendment, the road to victory can be long and expensive.

THE ROLE OF ARTIFICIAL INTELLIGENCE

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The use of artificial intelligence (AI) in the fashion and beauty industries — and the marketing of the same — has steadily gained traction over the last few years and it's not hard to see why. AI provides a myriad of opportunities and potential applications within the fields of fashion and beauty, but it can also be a double-edged sword presenting several potential legal issues.

The fashion and beauty industries have begun implementing AI over the last several years, offering a number of new and innovative services like bespoke digital styling solutions, the ability to "try-on" clothing and makeup digitally, creating individualized apparel, accessories, and makeup products and targeted marketing and sales, all of which employ AI to track, understand and respond to their customers' preferences. Specifically, brands have been employing the use of technology such as magic mirrors (allowing consumers to test merchandise digitally) and data analysis to prepare personalized products (anything from hair color, to bespoke clothing, to customized makeup palettes tailored to complexion and coloring). Brands can track consumer purchases, analyze purchase history (both frequency and content), and use the data to more effectively market and sell personalized styles. The attraction for consumers is clear — not only do these opportunities save time, but they also provide unique products and services, an increasingly hot commodity nowadays.

Although the collection and analysis of personalized data provides an invaluable opportunity to gain and retain customers and create targeted marketing, it also presents data privacy and security issues. Consumers are increasingly concerned about the protection of their data, and the constant evolution and globalization of laws governing the collection and use of consumer data (and the steep penalties for noncompliance) make data security even more of a priority. Further, the collection of sensitive data — photographs of physical characteristics and facial features, biometric data — is even more heavily regulated. Companies must implement and maintain adequate security controls, confirm compliance with relevant regulations, and respond quickly to any threatened breach.

AI is also gaining traction in the actual design process, with the use of algorithms that analyze existing designs and sales patterns, identifying the elements that are most profitable, before utilizing that data to create a design that incorporates those specific elements. In conjunction, AI is being used elementally to generate specific fabric patterns and designs, clothing silhouettes and fashion sketches. When a design is created entirely through AI or in collaboration with some human oversight, to whom would that design belong? The designer? The individual who built the machine or program? Fashion design is notoriously difficult to protect, but how might designers pursue protection, when actual ownership is, as yet, an undetermined legal question?

When utilizing AI in any step of the design process, companies should ensure that the governing services contract directly addresses the ownership of any intellectual property created thereunder in order to protect themselves against potential challenges.

KEY TAKEAWAYS:

- Using AI is an attractive and potentially lucrative endeavor that may trigger complex legal issues. However, particular attention must be paid to data protection and intellectual property ownership.
- Companies in the fashion and beauty industries using AI should consult with legal counsel before implementing AI so that privacy and data security and issues of intellectual property ownership can be properly addressed and managed before any potential issue arises.

THE NEWEST INGREDIENTS IN COSMETICS: CBD AND PROBIOTICS

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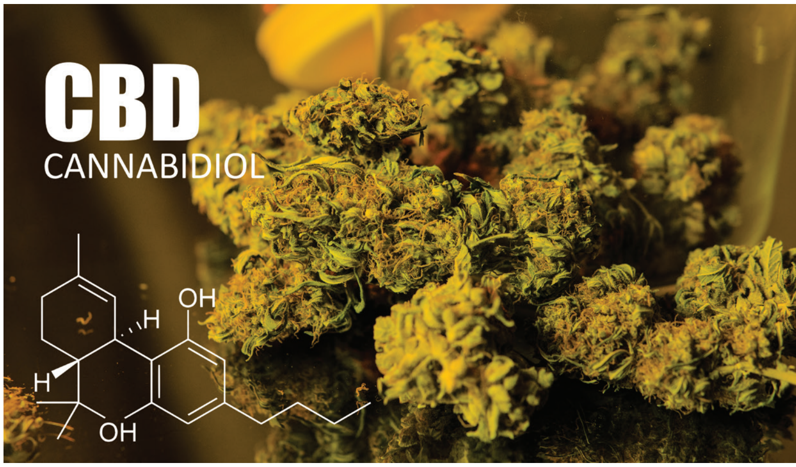

Cannabidiol (CBD) appears to be everywhere lately — available as an additive in certain food and drink products, as an oil meant to be used as a dietary supplement and even in cosmetics. But despite the widespread popularity and excitement over CBD's purported ability to provide therapeutic benefits, there is still some uncertainty as to its legality, especially when it comes to its presence in cosmetics. And although CBD is derived from a cannabis plant, its molecular structure — and, as a result, how the body processes it — is separate and distinct from tetrahydrocannabinol (THC), the cannabis derivative that is commonly known for its psychoactive effects.

Under the Agriculture Improvement Act of 2018 (more commonly known as the "2018 Farm Bill"), all cosmetic products made from industrial hemp (including CBD) will be legal under the Controlled Substances Act (CSA). The ability to manufacture, market and sell CBD products is still slightly complicated given the patchwork of state laws that are still in effect. To further confuse the issue, following the passage of the 2018 Farm Bill, the FDA issued a press release acknowledging public interest in CBD, and promised commitments to clarify public health responsibilities and evaluate new products that may pose risks to consumers.

Much of the FDA's focus, however, has been on the inclusion of CBD in food and dietary supplements (which they've deemed illegal, pending further research and review of its safety) — they've been silent on cosmetics incorporating CBD. As of right now, as long as a cosmetic product doesn't make any false or misleading claims (i.e. no health benefit claims, including anxiety-related) and clearly states that any CBD in a product is hemp-derived, there seems to be a low risk of violating hemp regulations or attracting FDA scrutiny. That being said, it is clear that with growing public interest, CBD products will likely face growing scrutiny — and potential regulation — by the FDA.

Another increasingly popular trend in the cosmetics industry is adding probiotics to certain products. Probiotics — live microorganisms that are believed to provide health benefits when consumed — have been migrating from the food and dietary supplement industries into skincare, cosmetics and other products in the beauty business. When marketed in food, probiotics are promised to improve gut health and prevent digestive tract irritation, encourage the growth of "good" bacteria, and promote a healthy immune system. In skincare and cosmetics, manufacturers are promising that probiotic products will soothe inflammation, strengthen the skin's natural barrier and maintain a healthy bacterial balance.

Despite the range of positive outcomes promised by marketers of probiotics, there is little to no consensus within the scientific community on the veracity of those claims. The FDA does not currently regulate the use of probiotics in skincare and only recently issued draft guidance for the use of probiotics in dietary supplements. Issues that may arise through the use of probiotics in cosmetics are manifold. There is, however, some concern that if the probiotics alter the existing microbiome of the skin, the cosmetics that include probiotics could actually be considered a drug. If that were the case, these probiotic cosmetics would be subject to FDA scrutiny and regulation. Given the use of preservatives in cosmetics, the microorganisms used would be considered postbiotics, or the metabolic byproducts from probiotics (and thus dead, not live, microorganisms).

KEY TAKEAWAYS:

- The increasing popularity of using CBD and probiotics in cosmetics portends a likely increasing interest in the two additives and scrutiny by the FDA in the near future.
- The mislabeling of products (promising probiotics, delivering postbiotics) could leave marketers open to claims of false or misleading advertising. Companies should continue to vet all cosmetic packaging, marketing and websites to ensure compliance with current FDA regulations and review claims with a conservative lens.

STATE ATTORNEYS GENERAL TAKE THE REINS IN POLICING DECEPTIVE ADVERTISING

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It can be easy to focus solely on the Federal Trade Commission (FTC) when evaluating the regulatory landscape for advertising and marketing practices. But with the FTC still ramping up its new commissioners, who were sworn in between May and September of 2018, state attorneys general have taken up the mantle in pursuing deceptive advertising and marketing practices nationwide.

Often, this has come in the form of coordinated actions between various state attorneys general. In January 2019, 46 attorneys general reached a $120 million consent judgment with Johnson & Johnson and DePuy Inc. to address allegations that the companies deceptively promoted their hip implant devices. The attorneys general alleged that both parties exaggerated the longevity (or "survivorship") of their devices, claiming that the devices had a nearly 100% survivorship after five years, when, in fact, a substantial percentage of devices were failing, causing severe side effects for consumers.

Similarly, New York Attorney General Letitia "Tish" James and Florida Attorney General Ashley Moody both reached a settlement with social media marketer Devumi. Devumi made headlines in 2018 after the *New York Times* revealed that Devumi had been selling fake social media followers to influencers, celebrities, politicians and even CEOs, in order to make them appear more popular on platforms like Facebook, Twitter and YouTube. The Attorneys General found that this practice deceived a number of parties, including advertisers who compensate influencers based on their follower count, as well as consumers that are more likely to view influencers and politicians as credible when they have more social media followers.

Even alone, attorneys general have been successful in extracting multi-million dollar settlements from major companies. In December 2018, Charter Communications agreed to a $174.2 million settlement with then-New York Attorney General Barbara Underwood over allegations that Charter inflated the internet speeds it promised to consumers. In particular, the attorney general's office alleged that Charter aggressively marketed its superior internet speeds but failed to maintain enough network capacity to sustain the advertised speeds and leased consumers deficient modems that were unable to achieve the advertised speeds. The $174.2 million settlement included $62.5 million in direct refunds, touted as the largest payout to consumers by an internet service provider in United States history. Just days later, the attorney general's office announced settlements with Altice, Frontier, RCN and Verizon, requiring the providers to articulate that their touted speeds were "wired" (i.e. not necessarily achievable via WiFi), to substantiate speed claims with regular speed testing, and to warn consumers that "wireless speeds may vary."

KEY TAKEAWAYS:

» Regardless of the current federal regulatory environment, state attorneys general have the same consumer protection mandate as the FTC and are just as vigilant — if not more — in seeking out and redressing harm to consumers in their states.

» By coordinating across states, attorneys general have ample resources to redress consumer harms and, as recent settlements indicate, are just as effective as the FTC in securing substantial financial penalties.

BIG DATA AND BIG QUESTIONS

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The use of biometric and location data has been on the rise for several years, but the expanded uses of this data must be reevaluated in light of the associated risks and evolving legal regimes. Although the use of biometric data is nothing new in industries such as health and fitness, 2018 saw a broader range of companies collecting information such as eye tracking and facial coding to analyze consumers' reactions to various types of content (and therefore to predict consumer behaviors).

The use of biometric data has been met with substantial legal challenges, in particular under the Illinois Biometric Information Privacy Act (BIPA), which allows for a private right of action for damages. A January 2019 Illinois Supreme Court decision holding that plaintiffs need not prove actual injury to prevail under the BIPA has led to a rash of class actions in Illinois.

Location data usage is also more widespread than ever, providing advertisers with the ability to learn a consumer's general shopping patterns or even the precise moment at which a consumer is in a physical position to make use of a promotion. Companies offering mobile apps may use location data to allow for or improve app performance, but a user's consent to the use of location data for one purpose (e.g., to hail a car or learn the weather) does not constitute consent to use such data for all purposes (e.g., sale of such data to third parties). In January 2019, the provider of a weather app was sued by the city of Los Angeles alleging that the location data it had collected from mobile app users, for the stated purpose of providing relevant weather forecasts, did not adequately notify app users that such data could also be used for marketing purposes.

If the increasingly complicated legal landscape were not enough to merit rethinking the use of biometric and location data, there is also a darker side to this data and the technology used to harness it. Facial recognition and location data have been used to identify and track Muslim populations in China; meanwhile, in the UK and United States, police forces are experimenting with facial recognition technology to identify criminals, despite claims that the technology has high error rates and may be susceptible to racial bias. In January of this year, concern for the misuse of this technology led a group of Amazon's shareholders to urge Amazon to stop selling its Rekognition tool to governments.

If these issues seem distant from the world of data usage for advertising purposes, marketers should note that once these sensitive categories of data have been collected, they are susceptible to access and use for unauthorized purposes. (For example, researchers discovered that the personal information of about 2.5 million individuals in China was exposed due to insufficient precautions taken by a facial recognition technology provider.) Therefore, advertisers who are collecting location and biometric data should do so responsibly, securely, and with a clear focus on offering consumers meaningful notice and a right to consent (or object) to the collection and use of such data.

KEY TAKEAWAYS:

» Interest in sensitive categories of data, such as biometric and location data, continues to grow among advertisers.

» Although data is a powerful tool to optimize consumer experiences with content, it is also susceptible to misuse due to a lack of adequate consent or in the event of a breach or leak.

» While the principles of notice and consent apply to these categories of data, there are other evolving legal requirements that must be observed.

WHAT'S GOING ON? ANOTHER MARVIN GAYE LAWSUIT TESTS THE LIMITS OF COPYRIGHT PROTECTION

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Just when you thought it was over, another copyright infringement lawsuit involving a Marvin Gaye song is set for trial. The dust had barely settled on the infamous *"Blurred Lines"* case when a second suit, this time targeting world-famous pop star Ed Sheeran, took another step closer to trial. Similar to the prior case, the battleground being fought over is the "feel" and "style" of the song — elements that were long presumed to be unprotectable from a copyright standpoint. These recent developments have found many artists and content creators — including marketers and their agencies — concerned that musical ground long considered "safe" may now be off-limits.

The suit against Sheeran claims that his hit "Thinking Out Loud" infringes Gaye's classic "Let's Get It On." In January 2019, a court ruled that there were enough similarities between the two songs for the case to proceed to a jury trial. The ruling came less than a month after Robin Thicke and Pharrell Williams were ordered to pay Gaye's estate $4.9 million as the final step in a years-long saga that reached its crescendo when a jury found "Blurred Lines," the worldwide hit written by Thicke and Williams, had infringed Gaye's "Got to Give it Up."

As in the *"Blurred Lines"* case, it will be up to a jury to decide if the similarities between "Thinking Out Loud" and "Let's Get It On" constitute infringement. The most hotly contested issues at trial will again likely involve what elements of the songs may be compared for purposes of determining infringement. The analysis of whether a song has infringed the copyright in another song has long focused on whether any of the lyrics, melodies, harmonies or similar elements had been copied. Stylistic similarities such as similar drums, tempo, instrumentation and other stylistic factors that are used to create a certain vibe or feel were not typically considered sufficiently original to warrant protection. The *"Blurred Lines"* case seemed to represent a shift in those long-held presumptions. If the judge in the "Thinking Out Loud" case determines that elements such as percussion and "aesthetic appeal" may also be considered, the landscape will be altered even further.

Another common element in both of the Marvin Gaye cases is that Sheeran, like Williams before him, made a high-profile, public connection between his song and the Gaye song at issue. Williams, in an interview, had specifically credited "Got to Give it Up" as the inspiration behind "Blurred Lines." Sheeran took it one step further by transitioning directly from "Thinking Out Loud" into "Let's Get It On" at a live performance, making the connection undeniable. The judge cited footage of the performance as something with which the jury might be "impressed."

For content creators, the unsettled landscape in copyright protection may mean additional risk when commissioning new music. Using a new musical work that was "inspired" by the "style" of an underlying source and which shares similar elements may no longer be as safe as it once was. A careful analysis of all of the factors — musical, stylistic and the overall sound and feel — will be more important than ever.

KEY TAKEAWAYS:

» Two recent high-profile copyright infringement cases involving Marvin Gaye songs may end up expanding the boundaries of copyright protection. Elements such as the "style" or "feel" of a song, which were long-presumed to be "safe" to copy, may now qualify for copyright protection.

» Owners of original music that serve as the source of inspiration for the "feel" or "vibe" of newly created musical works may be emboldened to take legal action.

» Marketers and their agencies should exercise caution when commissioning original musical works in the same "style" or "feel" as pre-existing music and when publicly discussing the source of the musical inspiration.

THE NAD EXPOSES HIDDEN FEES

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As a regulatory force in its own right, the National Advertising Division (NAD) makes waves whenever it brings a challenge on its own behalf against a major advertiser. And, with recent leadership changes for the Advertising Self-Regulatory Council (ASRC), the NAD's most recent challenges may offer a glimpse into its enforcement priorities in the coming years. In particular, while the NAD has been increasing its focus on technology platforms, it took a particular interest this past year in large, reputable technology platforms which charged consumers hidden fees for their services.

The NAD kicked off 2018 with a challenge against StubHub, an industry leader in after-market online ticket sales. StubHub allows consumers to resell tickets to popular concerts, sporting events, plays and similar events, and charges ticket purchasers a 24% to 29% service fee. The NAD challenged StubHub's practice of advertising ticket prices exclusive of its service fee and subsequently adding the service fee at the check-out page. The NAD also noted that the service fee was not itemized as a separate charge, but was instead simply added to the total price of the ticket purchase. In response, StubHub argued that the challenged practices are common in the industry and that consumers understand that they will have to pay a service fee at checkout. The NAD disagreed, finding that a reasonable consumer may not expect to have to pay a 24% to 29% service fee on top of advertised ticket prices. The NAD also found that consumers are likely to be misled by StubHub's failure to disclose these services fees because they cannot meaningfully compare prices across platforms without knowing what service fee each platform will charge.

StubHub declined to comply with the NAD's recommendation that it clearly disclose its service fee when the initial ticket price is advertised and the case was referred to the FTC for possible enforcement action. Fittingly, the FTC is currently planning to hold a workshop focused on the online ticket-sales industry in June and may look at tackling service fee disclosures as a part of this workshop.

In December 2018, the NAD challenged PayPal's claim that there is "no purchase fee" when consumers order its PayPal Prepaid Mastercard online. Although it was true that PayPal did not charge consumers to initially acquire the card online, PayPal assessed a monthly fee to use the card, and, in many cases, a "load fee" to add funds to the card. The NAD found that consumers might reasonably interpret "no purchase fee" to mean that they can use the card without paying a fee. Although the advertisements at issue disclosed that "[o]ther costs, terms, and conditions are associated with the use and reloading of this Card Account," the NAD found that this disclosure did not provide sufficient detail to effectively communicate the material terms of the "no purchase fee" offer. Accordingly, the NAD recommended that PayPal discontinue the "no purchase fee when you order online" claim or modify the claim to clearly disclose the fees associated with the use of the card.

KEY TAKEAWAYS:

- Even though a particular advertising/pricing practice may be standard in the industry, consumers may not necessarily understand the practice and such advertising/pricing can still be misleading.
- The NAD's decisions in the *StubHub* and *PayPal* cases confirm that service charges and other fees are material terms that must be clearly and conspicuously disclosed in order to be effectively communicated.

PATENT TROLL SUITS DOWN, NOT OUT IN 2018

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Over the past half-decade, Congress and the courts have made aggressive efforts to curb the worst abuses of the patent system. In 2013, Congress passed the America Invents Act (AIA), which established the Patent Trial and Appeal Board (PTAB) to hear patent validity challenges outside of the federal court system. In 2014, the U.S. Supreme Court issued its landmark ruling in *Alice v. CLS Bank* (*Alice*), which led to thousands of software and business method patents being labeled unpatentable "abstract ideas." And, as we reported in the 2017 edition of *Trends in Marketing Communications Law*, the Supreme Court issued *TC Heartland v. Kraft Foods* (*TC Heartland*), which neutralized the patent-friendly Eastern District of Texas (ED Tex), and narrowed the potential venues for patent suits.

Although 2018 lacked any similar landmark cases, the Supreme Court and Federal Circuit issued a series of decisions meant to solidify the hard-won gains of the AIA, *Alice* and *TC Heartland*. In *Oil States v. Greene's Energy*, the Supreme Court affirmed the PTAB's critical role in the patent system by holding that PTAB reviews are constitutional. Then, in *SAS Institute v. Iancu*, the Supreme Court expanded the PTAB's mandate, holding that the PTAB must rule on the validity of all challenged claims before it. And in *Helsinn Healthcare v. Teva Pharmaceuticals*, the Supreme Court expanded the grounds under which a patent may be invalidated, holding that a confidential or secret sale of a product could be prior art. The Federal Circuit, drawing on these threads, rejected the efforts of patent holders to shield their patents from PTAB review through the assertion of sovereign immunity and permitted appellate review of a greater range of PTAB decisions.

These cases sent a clear message: the Supreme Court and Federal Circuit wish to rid the system of weak patents and make it more difficult for patent trolls to file and prosecute lawsuits for the sole purpose of extracting a settlement in order to avoid the costs of getting the claims dismissed. Their efforts appear to have been successful. In 2018, the number of patent lawsuits filed in federal district court dropped more than 10% from 2017 and more than 40% from 2015. Patent troll activity has taken an even more severe drop, with the number of cases filed by "high volume" patent trolls dropping 50% since 2015. And the patent cases that were filed are now more evenly spread throughout the country, with the number of cases filed in the ED Tex dropping dramatically.

Looking forward to 2019, the news for patent holders is not all grim. For example, in *WesternGeco v. ION Geophysical*, the Supreme Court opened the door to patent holders who lost profits on foreign sales — a particularly critical finding in the era of complicated global supply chains. Meanwhile, the Federal Circuit has made it more difficult to invalidate software and business method patents early in litigation by requiring the resolution of certain factual questions in discovery before deciding on patent eligibility. In addition, the United States Patent and Trademark Office (USPTO) has breathed life into previously extinct patents by issuing new and greatly streamlined patent eligibility guidelines, noting simply that software and business method patents which include meaningful limits on their core "abstract idea" should be issued.

After more than a half decade of reform-minded decisions limiting the rights of patent holders, it remains to be seen whether these patent-holder friendly decisions are a sign that the pendulum is swinging back in favor of patent holders. Accordingly, the impact of these decisions on patent litigants is a key issue to watch in 2019.

KEY TAKEAWAYS:

» In 2018, the Supreme Court and Federal Circuit issued a series of decisions solidifying the PTAB's authority, making it easier to invalidate bad patents and discouraging frivolous lawsuits.

» In 2019, a series of decisions making it easier to issue software patents, fight back patent invalidity challenges and recover damages for foreign sales may provide a lead to renewed efforts by patent holders.

» Patent infringement is a risk for all industries and requires a comprehensive risk management strategy integrated into every aspect of a company's business that includes filing for and enforcing patents, identifying and clearing patent risks, instituting contractual strategies for risk-shifting and defending allegations of patent infringement.

LED BY CALIFORNIA, U.S. STATE AND FEDERAL LAWMAKERS INCREASINGLY FOCUS ON CONSUMER PRIVACY

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The California Consumer Privacy Act

The California Consumer Privacy Act (CCPA), a comprehensive state privacy law that was passed and amended in 2018, is at the forefront of a rapidly changing privacy landscape in the United States. The CCPA broadly governs how companies doing business in California handle personal information relating to Californian residents. It grants rights to the consumer that are similar to those afforded data subjects under the European Union's General Data Protection Regulation (GDPR), including the right to deletion, access, portability and freedom from discrimination. "Personal Information" is defined more broadly in the CCPA than in any prior U.S. law, including expansive categories of data relating to consumer internet activities (e.g., browsing patterns, search history, interaction with a website or advertisement) and even inferences drawn from data elements, such as consumer preferences and tendencies.

In 2019, companies anxiously await the California Attorney General's implementing regulations that are expected to clarify compliance requirements under the CCPA. To further this process, public forums were recently held as part of the Attorney General's preliminary inquiry into public sentiment. The resulting regulations could be critical to many forms of marketing and consumer relationship management, including retargeted or behavioral advertising.

The California Attorney General will not begin enforcing the CCPA until the earlier of (1) six months after the Attorney General issues implementing regulations or (2) July 1, 2020. However, the law will become effective as of January 1, 2020, so companies should be proactive in their compliance readiness efforts. One reason is the "look back" provision, which entitles a consumer to request that a business provide certain disclosures related to the processing of their personal information within a year preceding the request. Since consumers can begin inquiring for this information beginning January 1, 2020, this means that businesses should be keeping records on their processing activities in a way that enables them to respond effectively to this "look back" provision.

Other Legislation

Following California's lead, state legislatures across the United States have been introducing similar privacy bills to enhance consumer privacy. For example, New York has a pending privacy bill called the Right to Know Act, designed to provide consumers additional transparency and control over the processing of their personal information. Washington has introduced the Washington Privacy Act, which would provide Washington residents protections similar to those under the GDPR. However, the bill failed to pass the Washington House prior to the end of their current legislative session.

The federal government has also responded to the growing pressure to address consumer privacy and corresponding data security requirements by introducing multiple bills, one of which, titled the American Data Dissemination Act, would preempt state privacy laws (such as the CCPA), thus creating a more uniform approach towards privacy, which would benefit and provide a more streamlined approach for businesses operating in the United States.

KEY TAKEAWAYS:

» Companies should actively prepare for the CCPA, including assessing how the new law will affect their data processing activities and ability to meet a consumer's transparency demands.

» Due to the increasingly complicated and fluctuating United States privacy regime, companies should remain diligent and keep abreast of legislative developments that may impact their business operations.

» Companies should regularly revisit their privacy policies and other consumer disclosures regarding how they collect and process information.

DATA SECURITY LEGISLATION IS ON THE RISE – MARKETERS AND THEIR AGENCIES MUST BE VIGILANT ABOUT THEIR CONTROLS

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2018 saw a surge of state data security legislation, including by Alabama, Arizona, California, Colorado, Iowa, Louisiana, Nebraska, Ohio, Oregon, South Carolina, South Dakota, Vermont and Virginia. These laws are intended to enhance and strengthen existing data protection guidelines and, in some cases, are modeled after existing standards, such as the European Union's General Data Protection Regulation. These new (or amended) regulations set minimum data security requirements and practices for businesses that collect and process personal data. Additionally, they identify breach notification time periods, broaden the definitions of "personal information" and add safeguards with regard to the information of minors. Other notable changes include, in the case of Colorado and Nebraska, requirements to flow down appropriate security measures to service providers receiving personal information.

While all 50 states have now implemented general data breach notification laws, a few states went further to add sector-specific laws in 2018. In order to provide more transparency to consumers regarding the collection and use of their information, Vermont passed a new law that imposes on data brokers certain minimum data security standards, breach disclosure obligations and a yearly registration requirement with the Vermont Secretary of State. South Carolina's new Insurance Data Security Act also reflects this trend, requiring state licensed insurance companies to implement comprehensive written cybersecurity programs.

The Ohio Data Protection Act (Ohio Act), described as the "first-of-its kind," provides any business that has suffered a data breach with a safe harbor to limit exposure to litigation if the business can show that it maintained and complied with an "appropriate" cybersecurity program at the time of the breach, taking into account multiple factors, including the size, complexity and nature/scope of the business's data processing activities.

However, states are not the only bodies paying attention to the need for better data security practices. The National Institute of Standards and Technology has also updated its existing "Cybersecurity Framework" (Framework) and released a "Roadmap" to accompany the Framework, in order to clarify the requirements that make up the Framework, while also allowing for some flexibility in its implementation. Although the Framework is not law, it is generally accepted as a streamlined tool to manage the risks and threats inherent to an organization's cybersecurity. As these threats continue to evolve (and grow in importance with ever-greater reliance on technology), lawmakers are increasingly looking to the Framework and other industry standards and best practices for guidance in crafting their respective recommendations. Notably, adherence to the Framework and other standards is cited by the Ohio Act as one element of qualifying for the safe harbor.

Although not yet uniform, a common theme in data security legislation has been the requirement to implement an internal security program with appropriate safeguards, which would benefit marketers and consumers alike.

KEY TAKEAWAYS:

» Data security is a growing priority to U.S. lawmakers.

» Covered organizations must remain diligent in their compliance efforts, bearing in mind the various laws and regulations that may apply.

» An appropriate information security program must take into account the type of data and related processing activities.

A MUST "FOLLOW": STRICTER GROUNDWORK FOR INFLUENCER MARKETING

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Throughout 2018, regulators and self-regulators stayed focused on deceptive influencer marketing campaigns and native advertising practices across the United States.

In an action against Creaxion Corporation, a public relations agency, and Inside Publications, a magazine publisher, the Federal Trade Commission (FTC) alleged that these companies misrepresented paid endorsements for a marketer's new insect repellent as independent consumer opinions. According to the FTC, the companies paid thousands of dollars to two Olympic gymnasts to post endorsements for the repellent on social media without requiring them to disclose that they were paid to do so. In addition, the companies paid employees and their "friends" to purchase the product and post reviews for it on social media (again, without instructing these individuals to disclose their relationship with the marketer in their posts). The FTC also alleged that Inside Publications violated the Native Advertising Guides by running paid ads for the product that were disguised as independent editorial features. Notably, the FTC looked to the agency's and publisher's contracts, as well as their degree of involvement in the marketing materials to determine which parties should be named in the action.

In a new development in influencer marketing, the Securities & Exchange Commission (SEC) brought its first cases involving violations of endorsement regulations in connection with cryptocurrency investments. In the first action, the SEC claimed that music producer DJ Khaled failed to disclose a $50,000 promotional payment he received from Centra Tech Inc., a company that conducted an initial coin offering (ICO) for its "Centra tokens."

DJ Khaled had promoted the ICO on his Instagram and Twitter posts, and he ultimately agreed to pay over $150,000 to the SEC in disgorgement and penalties to settle the claims. Similarly, in a separate case, the SEC alleged that retired boxer Floyd Mayweather Jr. failed to disclose $300,000 in promotional payments he received from three ICO issuers, which he had promoted on his Instagram, Twitter, and Facebook accounts. Mayweather agreed to resolve the SEC's claims by paying over $300,000 in disgorgement and penalties.

The National Advertising Division of the Better Business Bureau (NAD) will continue to scrutinize paid influencer and native advertising practices in 2019, particularly as the line between advertising and editorial content blurs even further. In a recent action, the NAD asked *Buzzfeed* to substantiate various claims it made about a St. Ives moisturizer in a digital "shopping guide" of products that its editorial staff recommended to readers. After the investigation, the NAD agreed that the shopping guide was not "national advertising" under its jurisdiction because it was not a "paid commercial message," since the content was created independently without advertiser input and without commercial motivation, despite the presence of affiliate links in the article (which were added after the editorial content was fully developed).

KEY TAKEAWAYS:

- Influencers must disclose when their social media endorsements are paid, as failure to do so could result in actions against the influencers — and their sponsoring marketers — by the FTC, state attorneys general, the NAD and even the SEC.
- Regulators will take action against marketers, agencies and publishers when their influencer campaigns fail to disclose sponsored content and will more closely scrutinize the facts, chronology and context of these campaigns to determine which party should ultimately be held responsible.
- Online publishers and marketers should be mindful of the steps that *Buzzfeed* and similar publishers have to take maintain independence between editorial content and commercial affiliate marketing activities if they want to avoid their own regulatory or self-regulatory actions.

BEHIND STATE LINES: IS IT TIME TO CASH IN ON LEGALIZED SPORTS BETTING?

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The Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Association* (*Murphy*) to overturn the Professional and Amateur Sports Protection Act (PASPA) seemingly opened the door for states to legalize sports betting. The ruling promised to transform the sports and media industries and create new opportunities to monetize sporting events.

Since the *Murphy* decision, several states have begun offering legal sports betting (including mobile app-based sports books), and many others are seeking to do the same. While this decision is a big win for daily fantasy sports and sports books, the potential for growth in legalized sports betting lies in online transactions. However, the operation and advertising of online sports betting platforms raise new legal questions that need to be considered.

In particular, the Interstate Wire Act of 1961 (Wire Act) prohibits the interstate transmission of sports wagers, the winnings of such wagers, or information assisting the placing of wagers. While the Wire Act is <u>not</u> triggered by communications that occur entirely within state lines, intermediate transmissions that cross state lines are subject to federal jurisdiction. Given the decentralized transmission of information over the Internet, online gambling and sports book operators may find themselves in violation of federal law, even if legally operating under state law.

The Court did offer a glimmer of hope in the *Murphy* decision, suggesting that the Wire Act would not be implicated so long as wagering was legal in the states where the interstate transmissions occurred. This contradicted the long-held view that the Wire Act was independent of a state's gambling laws. As more states legalize sports betting, this novel interpretation could be game-changing.

In contrast, the U.S. Department of Justice (DOJ) has consistently interpreted the Wire Act to aggressively prohibit gambling-related activity. In 2003, the DOJ took the position that media outlets running ads for illegal offshore online sports books were aiding and abetting those operations and were punishable as principal violators of the Wire Act. More recently, the DOJ issued a reinterpretation of the Wire Act that more broadly applies the Wire Act to non-sports, including online poker, lotteries and other gambling.

At the center of these opposing forces seeking to loosen and restrict sports betting are individual states. For example, some states have taken measures to protect participants in the sports betting market by restricting where computers and other equipment used for wagering can be located. Others have attempted to define their way around the Wire Act by providing that the intermediate routing of electronic data will not determine the location of a wager.

Until federal restrictions such as the Wire Act are aligned with the overturning of PASPA, businesses seeking to capitalize on sports betting must wait for federal clarity or move forward behind the shield of state legislation. At a minimum, marketers looking to advertise their wagering platforms and online publishers contemplating whether to open their ad inventory to these marketers, will need to implement geolocation and other technologies to ensure that wagering is only available and ads are only served to individuals who are physically located in the relevant jurisdiction and meet gambling eligibility requirements. With the explosive potential of this industry, both federal and state lobbying is sure to be intense to create certainty in this shifting landscape.

KEY TAKEAWAYS:

» Despite state-by-state control over state-based sports betting, federal law still applies to interstate online sports betting operations and those who publish their ads.

» Sponsors, publishers, data processors, marketers and their agencies should consider all available technologies, including geo-fencing techniques, in creating campaigns for lawful online sports books.

» Businesses in the sports betting industry should monitor developments at both the federal and state level when developing legal compliance strategies.

TELEMARKETING LAWSUITS FUELED BY REGULATORY UNCERTAINTY

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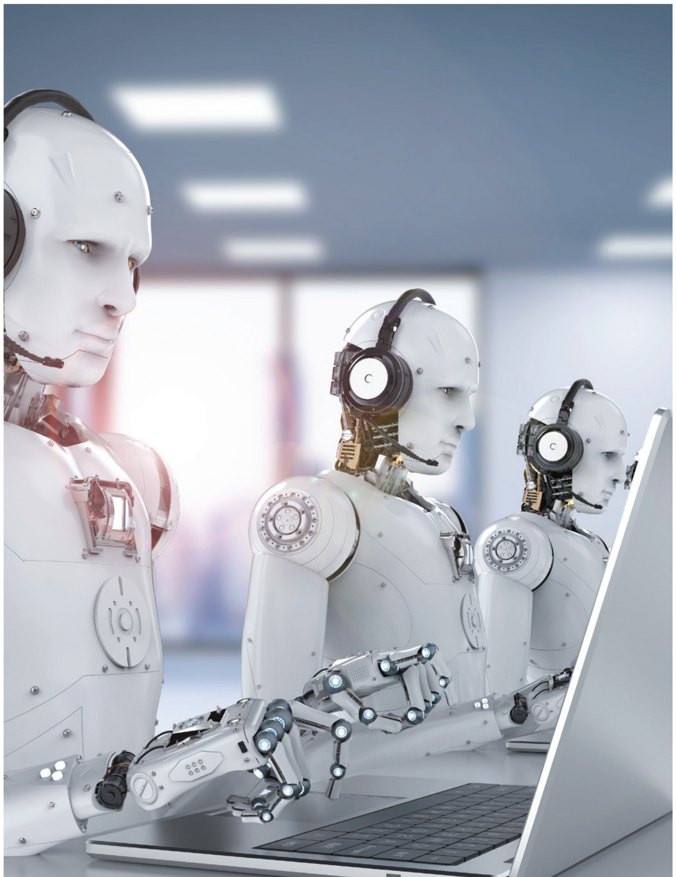
Recent developments continue to highlight the high risks associated with class action lawsuits brought under the Telephone Consumer Protection Act (TCPA). With statutory damages of up to $1,500 for a single unauthorized text message, consumers are highly incentivized to bring lawsuits for violations of the TCPA, which regularly settle for multimillion-dollar figures. While the pace of TCPA litigation shows no signs of slowing down, marketers face regulatory ambiguity, making the parameters of how to text and call consumers while avoiding liability often unclear. This year will bring important developments on this front, with anticipated rulemaking from the Federal Communications Commission (FCC) as well as decisions from the courts, including the U.S. Supreme Court, continuing to shape the regulatory landscape.

Companies that call or text consumers using autodialers are subject to increased regulation, yet the legal definition of an autodialer remains unclear. The FCC's expansive autodialer definition from its 2015 Declaratory Ruling was struck down by the D.C. Circuit in 2018's *ACA International* ruling, but the Ninth Circuit's decision in *Marks v. Crunch Fitness* (*Marks*) created a circuit split by essentially reverting to the earlier broad definition of an autodialer as "a device with the capacity to automatically dial stored numbers." Following the decision, the FCC sought public comment on the autodialer definition and is expected to issue new guidance. It remains to be seen whether courts in the Ninth Circuit will follow the FCC's new rules or will continue to follow the precedent set in *Marks*.



In the meantime, courts continue to decide key telemarketing compliance issues, such as the distinction between informational/transactional calls and texts and those that constitute telemarketing/advertising and require increased levels of consumer consent. In *Phan v. Agoda*, the plaintiff booked a hotel with the defendant's travel website and received confirmation texts with a link to the company's app. The plaintiff argued that the app promoted the company's products and services and therefore the texts constituted telemarketing communications necessitating prior express written consent. The court disagreed because the app allowed the consumer to manage their reservation and trip details, and therefore the texts were transactional. Although the decision represents a win for marketers, it also shows how difficult it can be to draw a line between informational and telemarketing texts.

KEY TAKEAWAYS:

» The FCC may resolve ambiguity over the autodialer definition but, in the meantime, marketers should be aware of the Ninth Circuit's broad definition and plan accordingly.

» The line between informational and telemarketing text messages and calls is not always clear. Marketers can seek to minimize risk by carefully crafting the content of any planned transactional messages and consulting with counsel to develop a telemarketing compliance strategy.

NO LONGER "FUCT" - SCANDALOUS MARK PROVISION STRUCK DOWN BY SUPREME COURT

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What constitutes a "scandalous" trademark? The United States Patent and Trademark Office (USPTO) has been grappling with this question since the enactment of the 1905 Trademark Act, later codified in the 1946 Lanham Act, which forbids registration of any mark that "[c]onsists of or comprises immoral . . . or scandalous matter." Since the creation of this provision, the USPTO has regularly rejected marks for being "scandalous." Now, after the 6-3 Supreme Court opinion issued on June 24, 2019, the USPTO will no longer be the arbiter of what constitutes a "scandalous" mark.

In 2017, when the Supreme Court issued its historical decision allowing the federal registration of "disparaging" trademarks in *Matel v. Tam*, many thought the holding would also encompass so-called "scandalous" marks. Just months after the Supreme Court's ruling on "disparaging" marks, the Federal Circuit struck down the "scandalous" trademark ban on similar grounds, and, in doing, so overruled the Trademark Office's refusal to register the mark FUCT for an apparel company in *In re Brunetti*.

On appeal of the Federal Circuit's ruling, the USPTO argued that the First Amendment analysis, which the Supreme Court applied to "disparaging" marks, should not apply to "scandalous" marks. Now, the fates of marks such as FUCT have been decided, with the decision holding that, as with "disparaging" marks, the ban on "scandalous" marks is an unconstitutional viewpoint-based restriction.

The inconsistent application of what constitutes a "scandalous" mark made this provision particularly ripe for review. For example, in 2007 the application for POTHEAD 420 was rejected because the Examiner concluded that the mark's reference to illegal activity was offensive. POTHEAD 420 was rejected despite the fact that several years later, another mark, THE POTHEAD DIARIES EST. 4.20.09, which incorporated both "POTHEAD" and a reference to "420" was ultimately registered.

In the majority opinion, Justice Kagan cited other examples of the inconsistent application of this provision in USPTO decisions, which were clearly based on the perceived underlying viewpoint of the mark. She noted that the USPTO denied registrations to marks that seemingly promoted drug use, such as YOU CAN'T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, and KO KANE for beverages, while registering marks that advocated against drug use, such as "D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS — REALITY IS THE BEST TRIP IN LIFE."

She stated that, as in *Matel v. Tam*, any provision that disfavors "ideas that offend" discriminates based on viewpoint and is therefore unconstitutional. Justice Alito concurred with the majority opinion, emphatically noting that "viewpoint discrimination is poison to a free society."

With this decision, the Supreme Court upheld the Federal Court's ruling that "The statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."

While the USPTO argued that it could, in fact, apply this provision constitutionally, a majority of the Justices were not convinced and held that the provision must be invalidated. As Justice Alito concluded, "At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." The Court's decision this term will shape the landscape of trademark registrations, potentially in "scandalous" ways, for years to come.

KEY TAKEAWAYS:

» The Supreme Court has made it clear that viewpoint restrictions, whether based on perceived "disparagement," "immorality" or "scandal," are unconstitutional and violate the First Amendment's prohibition of viewpoint-based restrictions.

» The USPTO will no longer refuse registration based solely on an Examiner's determination of what constitutes an "immoral" or "scandalous" mark.

» The USPTO could see a flurry of applications that may have previously been rejected under this provision.

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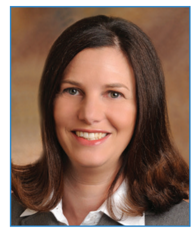
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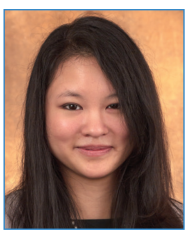
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