

Advertising + Marketing

Top 10 Advertising and Marketing Issues for 2023

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The top advertising and marketing issues this year are largely focused on one theme: Protection. Marketers will need to be aware of various trends that could threaten their intellectual property rights, reputations and market shares. Meanwhile, regulators are focusing on ensuring consumers – especially children – are protected from dark patterns, privacy breaches, false claims and other unscrupulous marketing practices.

Below are the issues that marketers must be aware of in 2023 and, in some cases, address immediately.

Top 10 Issues for 2023

1. Artificial Intelligence

Artificial intelligence (AI) is an increasingly popular tool used to create a variety of content – including images, sounds, and text. AI platforms can generate content from text prompts, images and other materials uploaded to the platform. AI platforms may use a limited set of inputs (e.g., those uploaded by the user), or a wide range of inputs (e.g., scraping from various sources on the Internet).

Using AI-generated content in advertising presents unique legal issues, including that:

- An AI platform may not permit commercial use of content generated by the platform. Before using AI-generated content in advertising materials, it is critical to review the platform's terms of service to understand the scope of permissible use.

- Many AI platforms do not provide representations and warranties that AI-generated materials will not infringe on the rights of others. This means that you may be using the platform's AI-generated content at your own risk.
- Users of AI platforms may not be able to obtain exclusive ownership of AI-generated content (and, relatedly, may not be able to transfer ownership rights to clients).
- While this area continues to evolve, the U.S. Copyright Office has taken the position that AI-generated works do not qualify for copyright protection and cannot be registered. Accordingly, you may not have legal recourse against third parties who use the AI-generated work without permission.
- AI-generated content may infringe the copyright in a pre-existing work (including, for example, if the AI-generated content is substantially similar to protectable expression in a copyrighted work used to train the AI platform).

2. Influencers, Endorsements and Consumer Reviews

The FTC's [updated Endorsement Guides](#), expected to take effect later this year, will result in increased enforcement against deceptive influencer marketing practices. This includes actions involving virtual influencers, who are expressly covered by the updated Endorsement Guides. As influencers continue to reap millions of dollars in return for their posts, they will be held directly liable for their violations. In addition, the FTC has made it clear that agencies will be held liable for their client's influencer campaigns when they intentionally engage in deception.

Riding high on last year's \$4.2 million settlement with [online retailer Fashion Nova](#), the FTC will continue to bring actions against companies that suppress negative reviews and ratings and review sites that allow companies to pay for higher rankings.

3. Negative Social Stereotyping

The NAD announced in September that it would begin addressing advertising that is "misleading or inaccurate due to its encouragement of harmful social stereotyping, prejudice, or discrimination." Although the NAD has not brought any proceedings based on this authority, CARU – the NAD's sister agency charged with reviewing child-directed advertising – has used similar authority against clothing and toy companies that allegedly promoted harmful ethnic and gender stereotypes. Whether, and the extent to which, the NAD will leverage this authority (as well as whether the FTC would ultimately enforce a decision by the NAD) remains an open question. However, marketers should be on alert that stereotyping in advertising will now entail more than just negative PR implications.

4. Children's Advertising and Privacy

As the “kid influencer” marketplace continues to explode, the FTC will determine whether additional regulations are needed to protect children from influencer marketing and native advertising content that blurs the lines between advertising and content. The Children's Advertising Review Unit (CARU) will be monitoring the metaverse, where it intends to strictly enforce its Guidelines, including the blending of influencer marketing and advertising into content and games.

On the privacy front, the FTC will continue its review of the Children's Online Privacy Protection Act (COPPA) to determine whether additional changes are warranted. Congress will look to enact new laws to extend COPPA and other privacy protections for children and teens online, as states decide whether to follow California's lead in enacting its own [Age-Appropriate Design Code Act](#).

5. Name, Image and Likeness

The most significant development in college athletics in 2022 occurred off the field. Prompted by a lack of rules and oversight over athlete name, image and likeness (NIL) rights, boosters began to pool funds to help facilitate NIL deals for athletes and create their own ways for athletes to monetize their brands. By the end of 2022, more than 200 NIL collectives were formed, supporting student-athletes at colleges and universities nationwide.

Some NIL collectives operate as marketplace collectives, providing a digital meeting place for student-athletes and businesses/sponsors to monetize NIL rights. But most NIL collectives are donor-driven. Boosters and school supporters pool together, in many cases, millions of dollars to distribute to student-athletes and their families in exchange for NIL rights benefiting the donors. Donor-driven NIL collectives are a direct challenge to the NCAA's rules against “pay for play.” Yet antitrust concerns continue to hamper the NCAA's enforcement efforts. Expect continued tension between the NCAA and NIL collectives and renewed efforts to find a federal legislative solution.

6. Sponsorships

As 2022 came to a close, the sports and live event sponsorship industry approached a return to normalcy. But with that return to normalcy came challenges both old and new. The bankruptcy proceedings and related litigation involving crypto exchange FTX highlighted the perils of new industries entering the sponsorship market. The FTX meltdown cast a pall over the entire crypto-focused industry, one of the fastest growing segments of the sponsorship market.

The return of large-scale international events in 2022 also highlighted the risks of local customs to global sponsorships. Just days before the start of the 2022 FIFA World Cup, Anheuser-Busch was stung by a decision by the Qatari government to ban alcohol sales at World Cup venues. The decision took a significant chunk of value out of its \$75 million sponsorship, leading Anheuser-Busch to reportedly seek a credit of more than \$40 million on its 2026 World Cup sponsorship fee.

Long-term sponsorships will inevitably be faced with unexpected disruptions. The events of 2022 illustrate the need to create legal and business frameworks for responding to disruptions in a way that preserves value and enhances long-term relationships.

7. Dark Patterns

The FTC will continue to focus on “dark patterns.” These are user interfaces designed to trick or manipulate users into taking actions they would not otherwise approve of, or putting obstacles in place to discourage consumers from exercising certain rights. As discussed previously in [FTC Staff Report Brings Dark Patterns to Light](#) and in [FTC to Focus on Subscription Services – Hints at Taking Action Against “Dark Patterns,”](#) dark patterns can encompass a wide range of common marketing practices, from urgency offers to fee disclosures.

Companies should review design techniques and ensure that they are not using dark patterns in a way that the FTC might consider deceptive. In particular, the FTC is focused on design elements that:

- Induce false beliefs (e.g., countdown timers on offers that are not actually time limited)
- Hide or delay disclosure of material information (e.g., “drip pricing,” where only part of a product’s total price is advertised)
- Lead to unauthorized charges (e.g., obscuring the fact that a free trial will convert to a paid subscription absent cancellation)
- Obscure or subvert privacy choices (e.g., making sharing data the default setting or the more prominent choice)

8. Automatic Renewal

Automatic renewal and negative option offers come in a variety of forms. Generally, they contain a term or condition under which the seller may interpret a consumer’s silence or failure to take affirmative action to reject a good or service, or to cancel the agreement, as acceptance or continuing acceptance of the offer. The FTC and state regulators continue to be

keenly focused on these types of offers, which carry the potential to deceive consumers into making purchases they would not otherwise make.

In particular, the [2022 California updates to its already robust automatic renewal law](#) include additional notice and cancellation requirements for free trials, as well as for automatically renewing subscription plans. The FTC will keep a close eye on these programs in the wake of its Enforcement Policy Statement on Negative Option Offers and associated review of its [Negative Option Rule](#). In light of these developments, retailers and marketers should conduct an audit of their subscription programs to avoid being in the crossfire.

9. Environmental Marketing and Sustainability

Environmental marketing claims will continue to be the focus of regulatory, self-regulatory and class action challenges in 2023 particularly with respect to general environmental benefit and aspirational claims. For example, in the past year:

- The FTC reached a combined \$5.5 million settlement with Kohl's and Walmart for the retailers' allegedly making misleading representations that textile products provided environmental benefits because they were made of rayon derived from bamboo, [as we previously discussed](#).
- The National Advertising Division (NAD) challenged a wide variety of environmental claims – including general [environmental benefit claims and aspirational claims](#) – through its independent monitoring of the marketplace (not by way of a competitor challenge). This activity is another indicator that these claims are an enforcement priority.
- A wave of class action activity focused on alleged “greenwashing” and general environmental benefit, recyclability and aspirational claims.

At the end of 2022, the FTC announced that it is seeking public comment on potential updates and changes to the *Green Guides for the Use of Environmental Claims*, which have not been updated since 2012. Notably, the FTC specifically invited comments regarding whether the revised Guides should provide additional information on carbon offsets and renewable energy claims, “recyclable” and “recycled content” claims, and if additional guidance is needed for claims such as “compostable,” “degradable,” “ozone-friendly,” “organic” and “sustainable, as well as those regarding energy use and energy efficiency.

10. Brand Protection in Digital Media

Digital media allows brands to reach consumers throughout the global market. However, digital content is also inherently easier to copy, allowing infringers to easily make unauthorized uses appear legitimate. Therefore, it is important that brands protect their intellectual property online to ensure consumers are not misled by infringing third-party uses – and to prevent the potential reputational harm that results from those infringements. Early protection of a brand's intellectual property allows it to pursue more efficient enforcement actions against infringers online. This includes standard takedown reports and Digital Millennium Copyright Act (DMCA) notices of infringing content through webhosts or Uniform Domain-Name Dispute-Resolution Policy (UDRP) proceedings through ICANN's arbitration procedures. Having registered trademarks and/or copyrights ensures that the relevant authority reviewing the enforcement action will take it seriously, and will often expedite the processing.

For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

Allison Fitzpatrick**Partner**

212 468 4866

afitzpatrick@dglaw.com**James Johnston****Partner**

212 468 4867

jjohnston@dglaw.com**Paavana Kumar****Partner**

212 468 4988

pkumar@dglaw.com**Brooke Erdos Singer****Partner**

212 468 4940

bsinger@dglaw.com**Louis DiLorenzo****Associate**

212 468 4805

ldilorenzo@dglaw.com**Alexa Meera Singh****Associate**

212 237 1479

asingh@dglaw.com