2024

Top 10 Advertising + Marketing Trends

Balancing Risks & Rewards

The marketing and advertising landscape in 2024 presents a complex tapestry of evolving regulations, groundbreaking technological advancements and shifting consumer behaviors.

These changes are not just trends: they are signals of a fundamental transformation in the way brands connect with their audiences. Navigating this terrain requires a nuanced understanding of the legal frameworks that govern advertising, the ethical considerations tied to emerging technologies and the strategic foresight to leverage these dynamics effectively.

For brands and agencies aiming to stay ahead of the curve, embracing this knowledge is essential for sustainable growth and ethical engagement in today's digitally driven market.

Top 10 Issues in 2024

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Regulation vs. Innovation: Generative AI Legal Concerns

By: Samantha Rothaus and Andrew Richman

While generative AI's meteoric rise was the hot button issue for 2023, it is sure to remain a key focus across the advertising industry in 2024. The coming year is likely to bring more clarity to the many legal concerns raised by this technology, along with more attempts to regulate it.

Many of the lawsuits filed against generative AI companies early last year have advanced to more substantive litigation stages. Several courts are expected to issue decisions this year addressing whether the unauthorized online scraping of information for use as training data constitutes a copyright infringement, and whether this practice could be considered a fair use.

The U.S. Copyright Office (USCO) is also expected to provide greater clarity this year on its stance regarding generative AI's impact on copyright law. Last summer, the USCO undertook an initiative to study generative AI in detail and issued a notice of inquiry (NOI) focusing on, among other things, the legal status and eligibility for copyright protection of AI-generated materials and the legality of using copyrighted works to train generative AI models. Its conclusions from the NOI are anticipated to be issued in 2024, which will help guide the courts and legislative efforts to address copyright infringement issues.

In the coming year, the Federal Trade Commission is also expected to target its enforcement efforts against the use of generative AI in a manner that may mislead or deceive consumers or constitute unfair competition. In addition, the Biden administration's executive order on AI issued last fall called for more transparency and new standards for labeling AI-generated material to disclose to consumers when AI is being used in communications. Government agencies will be working in 2024 to develop regulations around these new standards and disclosure practices, which could be adopted within private industry. On a legislative level, there are several state and federal proposals pending that seek to address concerns raised by generative AI, but it remains to be seen whether any will be passed into law this year and what impact such legislation would have on marketing practices.

While this year will likely bring greater clarity and uniformity to the use of generative AI within the advertising, marketing and communications sector, marketers and agencies should still continue to closely monitor the way their organizations use generative AI technologies, ensuring that inputs remain generic while strongly vetting all output that is created using these tools.

Unlocking the Future: The Transformation of Influencer Marketing

By: Allison Fitzpatrick

In June, the FTC released its final Endorsement Guides, which were last updated in 2009. Important updates include expanding the definition of "endorser" to include virtual influencers, re-emphasizing that agencies, intermediaries and influencers can be held liable for deceptive endorsements, and a new section on influencer marketing directed to children.

Notably, the updated Endorsement Guides articulate a stricter definition for "clear and conspicuous" disclosures, going above and beyond the prior standard to mandate that online disclosures must be "unavoidable." This means that a consumer cannot miss the disclosure and must not be required to click through or take other actions to see material information. According to the FTC, the social media platforms' built-in disclosures tools are not unavoidable and therefore not sufficient. Instead, influencers should include their own disclosures in the video itself and include audio and visual disclosures if the endorsement is made via both mediums.

In its guidance accompanying the Endorsement Guides, the FTC cautioned that disclosures, such as "sponsored," "promotion" and #sweepstakes, are not sufficient on their own and should include the name of the sponsoring party in the post.

The National Advertising Division (NAD) applied the FTC's guidance in an independent monitoring action when it found that a "sponsored" disclosure was insufficient for social media content promoting a brand and posted by a publisher because consumers may not understand whether the post was sponsored by the brand or by the publisher.

The FTC (as well as NAD) will be monitoring influencer content to ensure compliance with the updated Endorsement Guides, specifically focusing on whether influencers are clearly identifying the sponsoring party in their posts and are including audio and visual disclosures when their endorsements are made both audibly and visually.

Ensuring Authentic Consumer Reviews

By: Paavana Kumar

In the wake of its updates to the Endorsement Guides, the FTC also recently announced a Proposed Rule on the Use of Consumer Reviews and Testimonials. Although the practices prohibited by the Proposed Rule are already unlawful under Section 5 of the FTC Act, the Proposed Rule is a hefty deterrent to non-compliance and allows the FTC to seek civil penalties of up to $50,000 per violation. The Proposed Rule would **prohibit** businesses from:

- Writing or selling fake reviews or testimonials by a person who (1) does not exist, (2) did not use the product or (3) misrepresented their experience with the product,
- Obtaining or disseminating reviews or testimonials that they know or should know are fake or false,
- Review hijacking, i.e., repurposing reviews for one product for a different product,
- Providing payment or other incentives conditioned on writing a positive or negative review,
- Having officers or managers write reviews or testimonials or solicit them from company employees or their relatives, and not properly disclosing insider relationships,
- Creating or controlling a website that purports to provide independent opinions about a category of products that includes their own,
- Suppressing negative reviews by unjustified legal threats, intimidation or false accusations, and
- Selling fake social media indicators, including fake followers.

The FTC has also intimated that it will be paying special attention to AI use to generate reviews. While the FTC codifies these updates, companies should ensure that all featured consumer reviews are (1) verified to confirm that they came from real people, (2) not altered in a way that affects their original meaning, (3) transparent about their source and any "material connections" or incentives offered in exchange for the review and (4) representative.

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Trademark Considerations for Copyrighted Works in the Public Domain

By: Joy Wildes and Claudia Cohen

In the United States, an original work of authorship fixed in a tangible medium of expression (meaning the work can be communicated in a visual or audio form) is a protectable copyright. This means that the owner has the exclusive right to reproduce, adapt, publish, perform and display the work. Because copyright protection has a set term, copyrights in certain works necessarily expire each year and enter the public domain. Once a work has entered the public domain, it no longer retains copyright protection and cannot stop use of the work by others based on its prior copyright rights. However, a work's copyright expiration does not extinguish any trademark rights that the owner may maintain in that same work. This is because protection of trademarks, which are words, phrases, symbols and designs that identify the source of goods or services, is separate from protection of copyrights and does not necessarily expire so long as the work is continuously and regularly used as a trademark.

On January 1, 2024, the copyrights in a number of recognizable works entered the public domain, including, among others, Disney's iconic Mickey Mouse film "Steamboat Willie," along with the specific depictions of Mickey Mouse and other characters in the film; A. A. Milne's book, with illustrations by E. H. Shepard, "House at Pooh Corner," which introduced the Tigger character; and D.H. Lawrence's book "Lady Chatterley's Lover." This means that there is no longer copyright protection in these works or the specific depictions of characters in them. But it is important to remember that any existing trademark protection in them subsists.

For example, Disney owns separate and enforceable trademark rights in its Mickey Mouse character and has apparently taken steps to shore up its trademark rights in "Steamboat Willie." Specifically, Disney owns a federal trademark registration for an iconic video clip from the "Steamboat Willie" film, which is used in connection with certain Disney motion pictures. Further, Disney still owns valid copyright and trademark rights in other, more modern versions of Mickey Mouse.

What does this mean for marketers who may be interested in producing advertising content using copyrighted works that have entered the public domain? They should closely consider whether these proposed uses present trademark and false advertising risks. They should also assess whether proposed modifications to the depiction of public domain content may nevertheless present copyright risks to the extent that such modifications are substantially like variations of such characters that are not yet in the public domain and are still subject to copyright protection.

Differentiate Fair Pricing from Foul Play for Traditional and E-Commerce Retailers

By: Louis DiLorenzo

The online marketplace has become increasingly competitive over the years, and e-commerce merchants are constantly looking for ways to compete effectively. Since price is one of *the* most – if not the most – important consideration for consumers in making a purchasing decision, regulators and class action attorneys will be paying close attention to pricing practices in 2024.

The FTC, along with many states, requires that "reference prices" – or prices represented as regular, original, former or "strike through" prices – be offered to consumers in good faith for a reasonably substantial period of time. In addition, the FTC has made it clear that creating a false sense of urgency by advertising a "limited time" sale that is in fact evergreen constitutes a "dark pattern." Recently, class action lawyers have created a cottage industry of filing lawsuits against retailers whose products are almost always discounted when the retailer never or seldom actually offered or made sales at the reference price. These lawsuits reaped settlements in the tens or hundreds of millions of dollars in the past, and 13 such suits were filed in the fourth quarter of 2023 alone. Expect to see many more suits and settlements in 2024.

Meanwhile, the FTC has targeted "junk fees," or hidden and bogus fees for products and services like hotel stays, concert tickets and utility bills. In November, the FTC proposed a rule that would ban hidden fees that are disclosed late in the purchase process and bogus fees designed to obfuscate the nature or purpose of any amount a consumer must pay. If implemented, many industries will need to rethink the fees that they impose on consumers.

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The Game Plan for NIL and Sports Marketing Regulation

By: James Johnston

While 2023 was marked by a continued stalemate in Congress over federal regulation of name, image and likeness (NIL) rights, in 2024, the National Collegiate Athletic Association (NCAA) will step back into the spotlight with proposals that promise to, once again, transform the rules governing NIL rights for college athletes and marketers and alter the sports marketing landscape.

An NCAA-friendly bill was introduced in July by Sens. Joe Manchin and Tommy Tuberville that required registration by agents and NIL collectives, standardized NIL agreements and imposed various public disclosure obligations on athletes for NIL activities. It also included protections for the NCAA and institutions, including restrictions on the athlete transfer portal and protection for institutions and conferences (but not athletes) from liability for violations of the law.

On the opposite end of the spectrum, Sen. Chris Murphy and Rep. Lori Trahan re-introduced an updated athlete-focused bill that would expand athletes' rights to negotiate NIL deals with both their schools and outside parties, prohibit the NCAA from regulating NIL activities and institute anti-discrimination protections targeted at NIL collectives. These bills were in addition to the Senate bill proposed by Sens. Richard Blumenthal, Cory Booker and Jerry Moran and the updated House bill introduced by Rep. Gus Bilirakis.

While Congress spent 2023 introducing and reintroducing bills that never made it out of committee, the NCAA started 2024 with an announcement that the NCAA Division I Council approved a proposal that would create a "voluntary" national registry for NIL service providers, create standardized NIL contract templates, and require that athletes and recruits disclose all NIL agreements within 30 days of the agreement or risk their eligibility. Once ratified, these new rules will go into effect August 1.

The rules announced in January are a stark contrast to the "forward-looking" proposals announced by NCAA President Charlie Baker in December 2023. In those proposals, the NCAA would allow schools to directly negotiate NIL deals with their athletes, uncap the benefits to those athletes and create a new voluntary subdivision in which Division I schools could pay up to $30,000 into a trust fund for athletes. Pointedly, the rules approved by the Division I Council prohibit schools from entering into NIL arrangements with their athletes.

This surge in activity at the NCAA, however, does signal that the NCAA is increasingly skeptical of a federal legislative solution. The Division I Council rules will provide greater transparency and standardization of the NIL marketplace, allowing marketers to engage confidently with college athletes in marketing campaigns and influencer programs. Should Baker's proposals move forward, even greater opportunities will become available to marketers to integrate student-athletes into their sports marketing portfolios.

Regulatory Developments in Environmental Marketing and Green Claims

By: Alexa Meera Singh

The FTC is continuing to review, and potentially revise, its Green Guides for the Use of Environmental Claims. In 2023, the FTC received public comments on potential updates to the Guides and held a workshop on recyclability claims. It is possible that updated guidance may be released this year and, along with it, an uptick in enforcement.

States continue to be active in this area. California passed the Voluntary Carbon Market Disclosure Act, which will require that companies making carbon reduction claims include certain disclosures on their websites (including how interim progress toward the stated goal is being measured). The law takes effect this year, but it is possible that enforcement may be delayed to give companies time to comply.

On the self-regulatory and class action front, challenges to environmental marketing claims are an ongoing trend. Notable developments include:

- The National Advertising Review Board (NARB) affirmed a NAD decision that JBS' commitment "to be net zero by 2040" was unsupported, as the claim communicated that JBS, the second-largest food company and the largest animal protein producer in the world, was already in the process of implementing a documented plan that had been evaluated and found to have a reasonable expectation of achieving the stated goal.
- In a class action challenge to a "carbon neutral" claim made on Evian product packaging, the court found that "the term 'carbon neutral' is more technical and scientific, unfamiliar to and easily misunderstood by the reasonable consumer" and was the type of unqualified general environmental benefit claim prohibited under the FTC's Green Guides.
- A court dismissed a class action challenge against H&M over its "Conscious Choice" clothing line, which was positioned as including "more sustainable materials." The court determined that the sustainability claims were clearly qualified by H&M.

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FTC Focuses on Bringing Dark Patterns Out of the Shadows

By: Paavana Kumar

The FTC remains laser-focused on the use of "dark patterns" – otherwise known as the tactic of designing user interfaces to trick or manipulate consumers into taking actions they would not otherwise take or putting obstacles in place to discourage consumers from exercising certain rights. Examples of "dark patterns" cited by the FTC in its staff reports, as well as various enforcement actions, include:

- Advertisements deceptively formatted to look like independent, editorial content
- The undisclosed use of AI tools to communicate with consumers
- Purportedly neutral comparison-shopping sites that, in fact, rank companies based on compensation
- Countdown timers on offers that are not actually time limited
- Claims that an item is almost sold out when there is actually ample supply
- False claims that other people are also currently looking at or have recently purchased the same product

Dark patterns can also operate by hiding or obscuring material information from consumers, such as key limitations and fees, and by making it unduly onerous to cancel a purchase or membership, especially in the context of subscription-based programs. This type of dark pattern includes, for example:

- Hiding limitations behind obscure buttons that consumers are unlikely to click on
- Hiding fee disclosures in un-bolded text, sandwiched between more prominent, bolded paragraphs
- "Drip pricing," where only part of a product's total price is advertised (to lure in consumers) and other mandatory charges are disclosed late in the buying process
- The use of "misdirection," colors or shading to encourage consumers down a particular path (e.g. signing up for more services)
- The use of complicated or confusing cancellation flows that do not permit consumers to cancel their subscription immediately.

In light of the explosion of subscription-based programs, the FTC has also proposed updates to the federal Negative Option Rule, which would impose additional disclosure, consent and cancellation requirements (i.e. "mirror cancellation" or "click to cancel" requirements), and also would require that sellers first obtain a consumer's *unambiguously affirmative consent* to receive additional offers or upsells before confirming their cancellation (e.g., "Would you like to consider a different price or plan that could save you money?"). Stay tuned for the FTC to announce the regulations that have been codified into law this year.

Elevating Safeguarding Measures: Advertising and Privacy Laws in the Digital Playground

By: Allison Fitzpatrick

The FTC unveiled its report in September entitled Protecting Kids from Stealth Advertising in Digital Media, which advised marketers to not blur advertising with entertainment and educational content and to provide prominent just-in-time disclosures when marketing to children.

The Children's Advertising Review Unit (CARU) provided similar recommendations in its Guardrails for Child-Directed Advertising and Privacy in the Metaverse, advising that advertising should be transparent in language that children will understand (e.g., "Ad" or "This is an Ad"). Prior to releasing the Metaverse Guardrails, CARU announced an inquiry against Roblox, claiming the platform did not include clear and conspicuous advertising disclosures that children would understand.

Both the FTC and CARU will be monitoring digital ads directed to children (including in influencer marketing and in the metaverse) throughout 2024 to ensure they comply with their recent guidance.

On the privacy front, the FTC announced its proposed changes to the Children's Online Privacy Protection Rule (COPPA) at the end of last year. The updates are intended to provide greater protections for children's personal information, such as by requiring operators to have a separate opt-in consent for targeted advertising and to implement a written information security program for children's data.

Despite a court blocking California's Age-Appropriate Design Code Act on First Amendment grounds, we can expect to see other states enacting their own privacy laws that focus on combatting the harms of social media on children and teens.

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Brands Take a Gamble on Online Sports Betting, Gaming and Sweepstakes

By: Louis DiLorenzo

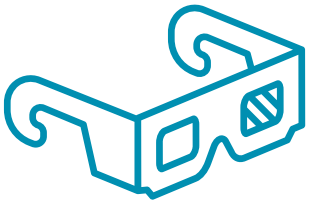
Online gaming – including sweepstakes, contests, casino gambling, sports betting and fantasy sports – is becoming a larger part of consumers' lives and will continue to grow in 2024.

While marketers have leveraged sweepstakes and contests for decades, the recent popularity of sports betting and fantasy sports is a popular avenue for brands looking to connect with a particular demographic. Meanwhile, agencies, media companies and publishers are chomping at the bit to get into the multi-billion-dollar market. The opportunities are irresistible, but the legal framework remains complicated.

Since the federal ban on sports betting was overturned in 2018, more and more states have legalized sports betting, with 38 states and Washington, D.C. now allowing sports betting in some form.

For marketers, agencies and media companies looking to work with sports books, it is important to understand the distinction between various games and contests that they provide:

- **Free-to-Play Contests/Sweepstakes**: Many sports books allow brands to sponsor promotional contests or sweepstakes, where entrants can submit predictions for free, with the winner(s) receiving a prize funded by the sponsor. If there is no entry fee, and no consideration required to enter, these promotions are treated like promotional contests and sweepstakes, rather than sports betting or fantasy sports.
- **Daily Fantasy Sports:** "Daily fantasy sports" refers to games where users build teams of players and compete to see whose team scores the most points in a given week. Although users typically pay an entry fee to enter, most states do not consider daily fantasy sports to be "gambling" because the element of skill predominates.
- **Sports Betting:** Sports betting entails placing wagers on the performance of teams or individual players and is extremely closely regulated. Anyone working with a sports betting company must ensure that the sports book is legally operating in and licensed in the United States and states where they operate. In addition to licensing requirements for operators, many states also have registration requirements for third parties working with them. Plus, every state has its own disclosure requirements, targeting requirements and content restrictions applicable to sports betting marketing.
- **"Pick 'Em" Fantasy Sports:** Recent years have seen an explosion in "pick 'em" fantasy sports, where a user pays an entry fee to pick two to six over-under bets on individual players. Although operators argue that "pick 'em" fantasy sports games are skill-based, and therefore should be treated as fantasy sports, rather than sports betting, in 2023 alone 10 states found that pick 'em fantasy sports is actually sports betting and are, therefore, unlawful.



Looking Forward

Awareness and adaptability to evolving and emerging regulations are crucial for brands and agencies not only to withstand regulatory scrutiny, but to have responsible, competitive and innovative engagement that resonates with the modern consumer. As marketers navigate regulations, the focus should be on building trust, embracing innovation responsibly and aligning marketing strategies with the ethical and legal expectations of today's marketplace.

For More Information

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

Claudia Cohen
Associate
212 468 4838
ccohen@dglaw.com

Louis DiLorenzo
Partner
212 468 4805
ldilorenzo@dglaw.com

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

Andrew Richman
Associate
212 468 4804
ajrichman@dglaw.com

Samantha Rothaus
Partner
212 468 4868
srothaus@dglaw.com

Alexa Meera Singh
Associate
212 237 1479
alsingh@dglaw.com

Joy Wildes
Counsel
212 468 4974
jwildes@dglaw.com