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TRENDS
in Marketing Communications Law

April 2022

VIII

DAVIS + GILBERT

TRENDS
IN MARKETING COMMUNICATIONS LAW

AUTHORS

Partner / Co-Chair

Ronald R. Urbach
Richard S. Eisert

Partner

Allison Fitzpatrick
Stuart Lee Friedel
Maxine Sharavsky Garrett
James Johnston
Gary Kibel
Devin A. Kothari
Joseph Lewczak
Marc J. Rachman
Brooke Erdos Singer
Aaron Taylor
Howard R. Weingrad

COUNSEL

Darren Fried
Oriyan Gitig
Joy J. Wildes

SPECIAL INSURANCE COUNSEL

Jack Schwartz

Associate

Claudia G. Cohen
Louis P. DiLorenzo
Zachary N. Klein
Paavana L. Kumar
Andrew Richman
Samantha G. Rothaus
Alexa Meera Singh
Jordan M. Thompson

ABOUT DAVIS+GILBERT LLP

Davis+Gilbert has helped guide the development of the marketing communications ecosystem over the past century. Today, we apply that same see-around-corners vision to real estate, financial services, hospitality, technology and other service sector clients across the country and around the world. And it's not just about the law; with deep insights into industry issues, our legal strategies work in tandem with business realities to reduce risk and make a real competitive difference.

We focus on Advertising + Marketing, Benefits + Compensation, Corporate + Transactions, Insolvency + Finance, Intellectual Property + Media, Labor + Employment, Litigation + Dispute Resolution, Privacy + Data Security, Private Client Services, and Real Estate. Davis+Gilbert is consistently ranked in *Chambers USA* and *The Legal 500 United States.*

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Clients, Colleagues and Friends,

Change is all around us, happening every day, and there are few places where it's more prevalent than in the marketing and advertising ecosystem.

Davis+Gilbert has been transforming too, making changes that reflect our status as a leader in marketing communications – both the industry and the practice. This year's **Trends in Marketing Communications Law** explores the latest business-focused legal developments, with value-added industry insights in a creative and reader-friendly layout.

In this year's edition, our attorneys discuss the continued change and rapid movement in the law and highlight the macro-trends pervasive throughout the marketing communications industry. This is relevant for any company that markets, advertises or sells products or services either directly to consumers or by utilizing traditional, digital or social media. For those who are in the business of providing creative services and producing content – whether it takes the form of advertising, promotions, entertainment, influencer-created content or any other content – the information contained in this year's publication is critical.

Ron

Ronald R. Urbach
Partner/Co-Chair, Davis+Gilbert LLP

In the following pages, we illuminate the industry's continued reliance on data and technology, highlight the interplay between climate change and environmental marketing, present the latest updates on digital and social media and review marketers' continued focus on TikTok while "dancing" with the latest social media apps and trends.

I hope you find this publication informative, practical, helpful and thought-provoking. At Davis+Gilbert, our goal is to help our clients achieve their business goals while successfully managing risk. In a world of constant change, pitfalls, new laws, government action, aggressive competitors and class actions, Davis+Gilbert has the industry experience, knowledge and practical business focus you need.

I am very proud to share with you the 2022 edition of Davis+Gilbert's **Trends in Marketing Communications Law**.

If you have any questions or would like to discuss any of these topics further, please reach out to me, any of the authors or the Davis+Gilbert attorney with whom you have regular contact

We look forward to navigating the changing world with you.

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COUNSEL 2U®

Guidance is more important now than ever, which is why clients and colleagues turn to the Davis+Gilbert Counsel 2U® programs to keep them advised and ahead of the latest hot topics and trends in the law. We have continued to offer trainings and CLE educational programs on a variety of different topics ranging from advertising and digital media, privacy and data security to intellectual property law and employment law.

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Navigating the Re-Entry of Live Events

The alcoholic beverage industry has traditionally been one of the most active live-event sponsors. Whether it be sporting events, music festivals or sponsored brand-experience events, alcohol brands gravitate towards live events because they offer the opportunity to build a brand and sell an experience.

Event marketing had to shut down virtually overnight due to the COVID-19 pandemic, stemming the flow of advertising dollars from alcohol brands. Though the omicron variant has created a new obstacle to a full reopening, this has not stopped the return of live events.

For those working with alcohol brands on live-event sponsorships, keep in mind the following:

1. Pick the Right Event

One of the most important rules for alcohol marketing is that brands cannot do anything that is likely to appeal primarily to children. Advertising materials should only appear in media where 71.6% of viewers are 21 years of age or older, and brands should only sponsor events that they anticipate will beattended by people who meet this demographic criteria.

2. Pour One Out for Pouring Rights

Alcohol brands cannot induce a retail licensee to carry their products or prohibit a retail licensee from carrying another brand's products. Although in event sponsorship agreements there is often a desire to require events to serve the sponsor's product — in event sponsorship agreements, doing so is strictly forbidden and could lead to significant liability.

For example, in 2020, the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) reached a $5 million settlement with Anheuser-Busch — which owns Budweiser, Michelob and Stella Artois, among many others — over its sponsorship agreements. In particular, the TTB alleged that Anheuser-Busch was including provisions in sponsorship agreements that required venues to stock its products and prohibited venues from stocking its competitors' products.

3. Know Who You're Dealing With

Alcohol brands are prohibited from giving anything of value to anyone holding a license to serve alcohol. This means that alcohol brands cannot typically enter into agreements with anyone who holds a "concessionaire's" license — a license to serve drinks to attendees at an event. This is the case whether the brand contracts directly, or does so through an intermediary like an advertising agency. Alcohol brands that sponsor live events must therefore ensure that the party with whom they are contracting is not a licensed entity.

Event promoters usually contract out concessions to a third-party vendor so that they are free to contract with alcohol companies. Although some stadiums also contract out their concessions, some prefer to maintain control of concessions and hold liquor licenses themselves. Whether alcohol brands can enter into agreements with such venues will depend on the specific state's law and whether any exception applies for stadiums or similar large venues.

4. Samples Aren't Simple

Alcohol brands are not typically permitted to serve drinks to consumers. But, as we've already discussed, they also are not allowed to give anything to a retail licensee. So, how do brands get drinks into the hands of consumers?

The answer varies by state. Most states permit brands to conduct sampling events. However, these sampling events are often restricted to certain types of premises (e.g., liquor stores versus bars or restaurants), and brands are typically limited in the quantities that they can serve, with distilled spirits often limited to ¼ ounce pours. Only a few states permit brands to conduct full-scale brand experience events where alcohol is served, and these states have limitations on how the event can be advertised and how much a brand can spend on the event.

5. Merchandising, Merchandising, Merchandising

A key appeal of live events is the ability to hand out branded merchandise like beer koozies and hats to consumers. Although most states permit alcohol brands to give out merchandise to consumers, the extent of this permission will depend on the state. Some states limit the value of the merchandise. For example, California limits merchandise to $5 per item for distilled spirits brands, $1 per item for wine brands and $3 for beer brands. States also have different rules regarding what types of items can be provided and whether the item can be distributed through a retail licensee.

"Advertising materials should only appear in media where 71.6% of viewers are 21 years of age or older, and brands should only sponsor events where they anticipate that attendees will meet these demographic criteria."

Aaron K. Taylor
Partner
ataylor@dglaw.com

Aaron helps clients develop highly effective advertising campaigns across all media while avoiding . . . **more**

Louis P. DiLorenzo
Associate
ldilorenzo@dglaw.com

Louis brings an industry perspective to helping clients develop creative, enduring advertising and marketing . . . **more**

Andrew Richman
Associate
ajrichman@dglaw.com

Andrew supports all aspects of entertainment, media, sports, advertising and technology transactions . . . **more**

The Regulatory Outlook for THC's (Mostly) Legal Cousin, Ingestible CBD

Gary Kibel, *Partner,* gkibel@dglaw.com
Louis P. DiLorenzo, *Associate,* ldilorenzo@dglaw.com
Alexa Meera Singh, *Associate,* alsingh@dglaw.com

Ingestible cannabidiol (CBD) products, including gummies, tinctures, tonics and capsules, are growing in popularity and make up a significant part of the multi-billion dollar global CBD market.

However, although CBD is generally legal under federal and most states' laws, the legal outlook for ingestible CBD remains quite complicated.

Federal Law

Despite state legalization efforts, marijuana continues to be illegal under the United States Controlled Substances Act. However, under the Agriculture Improvement Act of 2018 (the Farm Bill), CBD may be produced and marketed if it contains no more than 0.3% tetrahydrocannabinol (THC).

The Farm Bill preserved the FDA's power to regulate products containing cannabis or cannabis-derived compounds under the Food, Drug & Cosmetic Act (FD&CA). Although the FDA does not prohibit the inclusion of CBD in cosmetics products, the FDA considers it to be a drug, and therefore prohibits the use of CBD in ingestible products such as food, beverages and dietary supplements without FDA approval. And, because the FDA has only approved of the use of CBD in Epidiolex, an epilepsy drug, the overwhelming majority of food, beverages and dietary supplements are misbranded under the FD&CA.

This has led to a complicated regulatory environment for ingestible CBD products, with the FDA issuing a considerable number of warning letters to companies selling CBD products. These warning letters have focused largely on products that make unsupported claims that CBD can treat a host of medical conditions, including most recently that CBD can prevent or cure COVID-19. In addition, the FDA still maintains the position that **all** ingestible CBD products (other than Epidiolex) are unlawful while it evaluates CBD's health effects, and in some cases has also gone after CBD marketers for making more run-of-the-mill claims (or even just for simply selling ingestible CBD). Meanwhile, some in Congress have grown impatient with the FDA. Last year legislation was introduced in the House of Representatives that would legalize ingestible CBD so long as it otherwise complies with the FD&CA, and the proposed Cannabis Administration and Opportunity Act would require the FDA to develop a regulatory pathway for legalizing CBD in dietary supplements.

State Law

While the federal government continues to grapple with the question of how to regulate ingestible CBD, state legislatures are beginning to create their own regulatory schema for ingestible CBD.

For example, New York has enacted a detailed regulatory scheme for manufacturing and selling CBD and other hemp extracts, including in ingestible products, and now requires licensing to grow, process and sell it. California used to follow the FDA's lead, which categorizes all ingestible CBD as unlawful, but has since passed new legislation that legalizes ingestible CBD. Still, there are questions as to how inhalable CBD will be treated, as New York will require a recreational marijuana license to sell **inhalable** CBD, and California has banned inhalable CBD altogether until legislation governing taxation is passed (a curious position, considering that it was one of the first states to legalize recreational marijuana).

What Businesses Can Do Now

- Until the FDA provides further clarity (or Congress otherwise acts), the legal environment for ingestible CBD will remain cloudy.
- Nonetheless, the proliferation of ingestible CBD products across the United States has continued at a steady clip, and shows no signs of slowing down.
- Although it is difficult to ignore the allure of this booming market, marketers of CBD products and their advertising and media partners should comply with the patchwork of state laws and not make false or misleading health and safety claims.

Sports Betting: Where the Future Is Online

James Johnston, *Partner,* jjohnston@dglaw.com
Louis P. DiLorenzo, *Associate,* ldilorenzo@dglaw.com

Although the U. S. Professional and Amateur Sports Protection Act of 1992 (PASPA) previously prohibited most states from legalizing sports betting, the Supreme Court found in 2018 that PASPA was unconstitutional, clearing the way for states to legalize sports betting. Now, sports betting is legal in a plurality of states, though the regulatory scheme looks dramatically different from state to state.

Background

Up until PASPA was struck down, Nevada was the only state that offered any form of sports betting. Within weeks of the Supreme Court's decision that PASPA was unconstitutional, New Jersey and Delaware legalized sports betting, and, within a year, five different states followed suit.

Today, the stats are much different:

- **30 states** plus Washington, D.C. have launched legal sports betting operations in some manner;
- **Three states** have legalized but not yet launched sports betting;
- Most of the remaining states are considering or have considered legalized sports betting in some way, shape or form.

The State of the Industry Today

In an era of budget shortfalls due to the COVID-19 pandemic, states are eager to find new ways to bring in tax revenue. With a total of $4.29 billion in revenue in 2021 alone — up from $1.5 billion in 2020 and $328 million in 2019 — the sports betting industry has proven to be a lucrative one that offers significant potential tax revenue for states that opt in.

As states continue to authorize sports betting, there are a number of differences in how the industry can operate in each state.

The biggest divide is whether or not the state enables online betting, or whether betting needs to be conducted in-person at licensed casinos or other betting operations. As the chart on the next page shows, those states that allow online sports betting are able to derive significantly more tax revenue than those that allow users to place bets in person only, with the ten states that only allow in-person betting collecting less than 6.5% of sports bets in 2021. Granted, the COVID-19 pandemic made it difficult or impossible for users to place bets in person, so in-person revenue certainly suffered as a result, but the ability to place a bet from anywhere has a definite impact on the total amount wagered in a given state. It is a small wonder, then, that New York began allowing online betting starting this year.

There are other differences that affect how the industry operates in a given state. For example, Delaware's sports betting is controlled by the Delaware State Lottery, which licenses sports betting to third-party providers and retains 50% of revenue. Some states also have limits on the number of licenses that they will grant; for example, New York launched online sports betting earlier this year, but only offered nine licenses. Most states also have restrictions on betting for college sports, with some states prohibiting betting on in-state college teams and others allowing the practice but prohibiting propositional bets for in-state college teams.

For businesses operating within the sports betting ecosystem, including marketing agencies and other service providers, by far the biggest consideration is whether to register with the state's regulators. Some states — including New Jersey and Pennsylvania — broadly require all companies that provide services to gaming licensees to register. In contrast, some states — like Illinois — have specifically indicated that advertising companies do not need to register. In yet others, marketing "affiliates" — publishers or other companies that drive traffic to sports betting sites — need to register, though the states differ about whether various revenue models (for example, cost per acquisition, cost per click, cost per thousand impressions, etc.) make a third party an "affiliate."

In addition, many states have imposed content–based restrictions on advertising for sports betting. Most states require advertising to include a toll-free number for problem gamblers to seek help, as well as disclosures indicating that gambling is only available for individuals who are 21 years of age or older. In addition, a number of states prohibit certain misleading advertising claims regarding potential winnings.

What Businesses Can Do Now

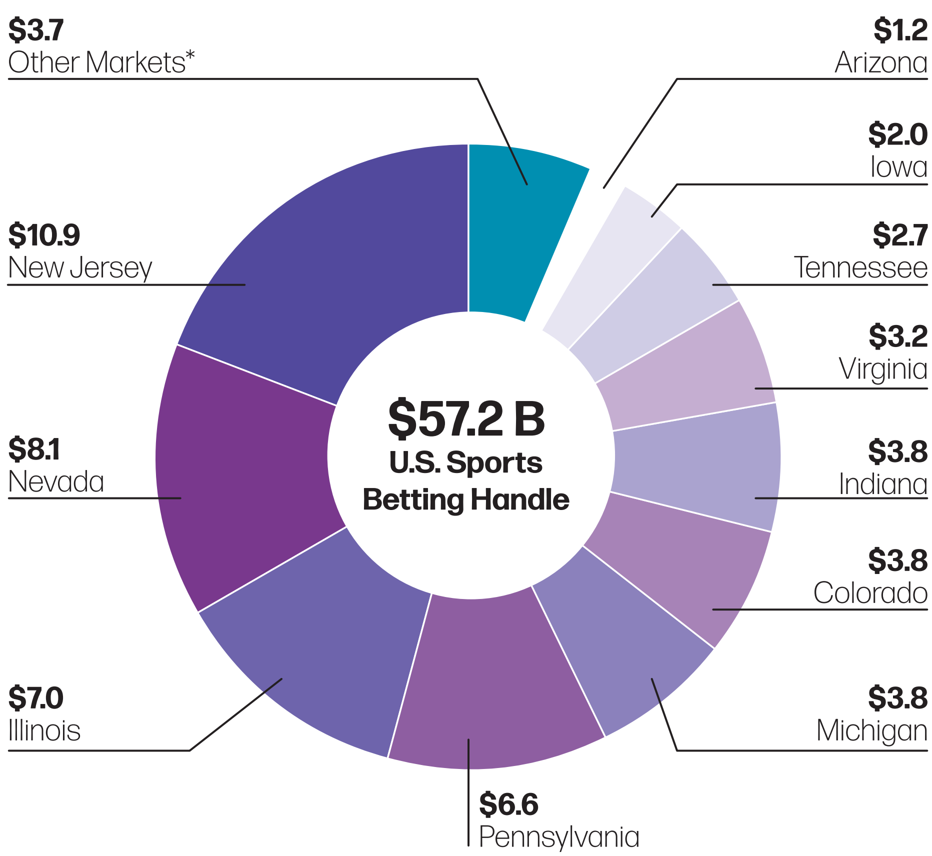
- In just three years, sports betting has grown from a kernel of opportunity to a $4.29 billion industry, and the revenue potential will continue to draw in more and more states.
- The opportunities for agencies, publishers and others seeking to jump in the mix are seemingly a jackpot in waiting, and will only grow in the coming years.

2021 Commercial Sports Betting Handle ($B)

States with **Online Betting Available** — 94% *of the market*

*Other Markets **In-Person Only ($3.7 B)** — 6% *of the market*

Arkansas	New York
Delaware	North Carolina
Maryland	North Dakota
Montana	South Dakota
New Mexico	Washington



The Future of Privacy in California

Richard S. Eisert, *Partner/Co-Chair Advertising + Marketing,* reisert@dglaw.com
Gary Kibel, *Partner,* gkibel@dglaw.com
Oriyan Gitig, *Counsel,* ogitig@dglaw.com

The California Privacy Rights Act (CPRA) will replace the California Consumer Privacy Act (CCPA) on January 1, 2023. With some rights retroactive to January 1, 2022, businesses should prepare now.

Changes to keep in mind under the CPRA include:

Businesses

A "business" is an entity that conducts business in California for-profit and annually either:

1. Has gross revenue of $25 million or more,
2. Buys, receives, sells or shares the personal information of 100,000 or more consumers or households (not devices); or
3. Derives 50% or more of its revenue from selling or sharing personal information.

Notice Obligations

The pre-collection notice obligation is revised by requiring businesses to disclose categories of personal information collected, purposes for which the information is collected or used, whether it is sold or shared, and the retention period. These disclosures are also required for sensitive personal information.

Sensitive Personal Information

A new category of "sensitive personal information" is created which includes "personal information that reveals" information such as SSNs, financial information, unique biometric data, precise geolocation, and the contents of mail, email or texts. Businesses must provide a new "Limit the Use of My Sensitive Personal Information" link, if applicable.

Enhanced Contractual Obligations

Additional contractual terms are now required between a business and:

1. Any "third parties" with whom it sells or shares personal information and/or
2. Any "services providers" or "contractors" (newly defined under CPRA) it discloses personal information to, that limit the use of such information, impose security obligations and grant the business rights to ensure such parties comply with their obligations.

Cross-Context Behavioral Advertising

The concept of "sharing" is introduced and defined as a business making available personal information to a third party for "cross-context behavioral advertising," meaning targeted advertising based on personal information obtained from the consumer's activity across businesses and different platforms that the consumer did not intentionally interact with. The same disclosure and opt-out rights that apply to "sales" also apply to "sharing."

Enhanced Consumer Rights

Now added are the "right to correct information," the "right to opt-out of sharing," the "right to data portability"; and the "right to limit the use of sensitive personal information."

Publicly Available Exception

The definition of publicly available information (which is not considered personal information) is now expanded to information that is made available to the public by the consumer or from widely distributed media.

What Businesses Can Do Now

- Reexamine their personal information processing in light of CPRA.
- Determine whether they are engaging in "cross-context behavioral advertising."
- Prepare to update contracts and privacy policy to address CPRA's requirements once California releases final CPRA regulations.

An Uncertain Future for EU-US Data Transfers

Gary Kibel, *Partner,* gkibel@dglaw.com
Oriyan Gitig, *Counsel,* ogitig@dglaw.com
Zachary N. Klein, *Associate,* zklein@dglaw.com

In the wake of the Court of Justice of the European Union's invalidation of the EU-US Privacy Shield Framework (Privacy Shield), which was established to allow for the transfer of personal data from the EU to the United States in compliance with the EU's General Data Protection Regulation (GDPR), businesses are forced to consider other mechanisms to legally execute such cross-border data transfers.

EU Privacy Law

The EU requires that, in the absence of an "adequacy decision" by the European Commission (Commission), transfers of personal data of EU data subjects from the EU to jurisdictions outside the EU are permitted only if appropriate safeguards are in place. The EU found that the United States did not fulfill that condition, based, in part, on the United States' lack of a comprehensive federal privacy law. And so, in the hope of creating a reliable legal mechanism that would allow for the authorized transfer of personal data from the EU to the United States, the parties negotiated and established the Privacy Shield.

In its pivotal July 2020 *Schrems II* decision, however, the Court of Justice of the European Union (the Court) invalidated the EU-US Privacy Shield, holding that the Privacy Shield failed to meet the necessary conditions under the GDPR, highlighting U.S. surveillance activities as a violation of the EU Charter of Fundamental Rights. As a result, businesses are required to consider legal mechanisms other than the Privacy Shield to legally execute cross-border data transfers.

EU Standard Contractual Clauses

The most widely-accepted method of attempting to satisfy EU cross-border data transfer law has been the use of EU Standard Contractual Clauses (SCCs) — contracts pre-approved by the Commission that establish certain controls to safeguard data as per the GDPR. The *Schrems II* decision upheld SCCs as a valid transfer mechanism in the aftermath of Privacy Shield. In June 2021, the Commission issued updated SCCs, in part, to satisfy the *Schrems II* ruling.

The new SCCs require the data exporter and importer to warrant that they have no reason to believe that the laws and practices in the recipient country prevent the data importer from fulfilling its obligations under the SCCs. The revised SCCs also require a data importer to notify the data exporter (and, where possible, the data subject) if it "[r]eceives a legally binding request from a public authority" or "[b]ecomes aware of any direct access by public authorities to personal data transferred." The revised SCCs are already required for new contracts and processing operations as of September 2021, and the Commission has stated that all existing contracts and data transfer agreements must be retrofitted with the new SCCs by December 22, 2022.

For now, the revised SCCs appear to offer a reliable, legal basis for data transfers in the wake of *Schrems II*. However, a recent decision by the Austrian Data Protection Authority (Austrian DPA) threatens to upend the state of EU-US data transfers yet again, as the legality of the new SCCs comes under question. In its Google Analytics decision, the Austrian DPA found that the updated SCCs used by a website operator and Google did not provide an adequate level of protection under the GDPR because the SCCs still subject Google to U.S. intelligence surveillance laws and did not enable Google's additional safeguards to eliminate the possibility of surveillance by U.S. intelligence agencies. These safeguards included obligations to: (1) notify data subjects about government access requests; (2) issue transparency reports; (3) implement a policy on handling government requests; and (4) carefully evaluate any such request.

The Austrian DPA's decision is the first of 101 similar complaints filed by the non-government organization "None of Your Business." It remains to be seen whether other European regulators and courts will echo the reasoning of the Austrian DPA. However, with additional scrutiny over the new SCCs, businesses hoping for some consistency in the area of EU-US data transfers may be disappointed.

What Businesses Can Do Now

- Business should already be using the new SCCs, and preparing to amend older contracts with the new form.
- A close eye should be kept on the developments in the EU which could significantly impact cross-border data transfers.

Safety First: Protecting Children in a Rapidly Evolving Landscape

Allison Fitzpatrick, *Partner,* afitzpatrick@dglaw.com
Paavana L. Kumar, *Associate,* pkumar@dglaw.com
Alexa Meera Singh, *Associate,* alsingh@dglaw.com

The children's advertising and privacy landscape is evolving quickly – and regulators and self-regulators are keeping up.

Davis+Gilbert Advertising partner **Allison Fitzpatrick (AF)** sat down for a conversation with **Dona Fraser (DF)**, Senior Vice President, Privacy Initiatives at BBB National Programs, and FTC veteran and current BBB National Programs Children's Advertising Review Unit Vice President **Mamie Kresses (MK)** to explore the major developments in this area, from child influencers to global privacy initiatives, and provide insights and practical tips for ensuring child-directed websites, apps, connected toys and influencer marketing campaigns stay in compliance with the law.

AF: **The Children's Advertising Review Unit (CARU) updated its self-regulatory guidelines for advertising to children (CARU Guidelines). What changes were made to the CARU Guidelines?**

MK: We looked to modernize the guidelines. It has been a long time since they were updated and advertising to children has changed dramatically, especially with online content and long-form influencer advertising videos. We are also living in an era where we have all been made more aware of the inequities in our society, and we hope to use the guidelines to inspire content that is welcoming to children of all backgrounds and abilities and makes them feel good about themselves.

AF: **Are there certain areas of children's advertising and privacy that CARU will be looking at more closely during the upcoming months?**

MK: Advertising and privacy are very linked these days, given the amount of data collection and data knowledge. So we will go where advertising goes and try to ensure we are setting a model for best practices in modern times.

DF: Years ago, everything was very siloed — you could deal with privacy separately from advertising. But now there is this convergence; ad practices are getting companies into trouble with their data collection practices. What we are trying to do is to constantly keep our finger on the pulse of what companies want to do versus what they can do within the frameworks, remaining cognizant of their challenges, especially for those global companies who may be working on global campaigns and dealing with the different privacy regimes and models around the world that are defining what a child is very differently than the way we define a child in the United States.

AF: Child influencers are very popular with marketers these days. What steps should marketers be taking when they engage child influencers to ensure they are not running afoul of the CARU Guidelines?

MK: Obviously advertising has to be truthful and non-deceptive. In particular, we need to ensure that when children are watching influencer content, they understand that it is advertising. We are dealing with that in our guidelines as well. It also needs to be clear that these influencers should not engage in other practices that are a concern in advertising to children, such as creating unrealistic expectations.

DF: Part of the conversation also needs to be about the actual influencers understanding the landscape. There needs to be some real uptick on the education to influencers themselves and their responsibilities. We cannot put this all on the marketers. They can explain what their guidelines are and what they want their influencers to do or not do, but I also think that there needs to be some real responsibilities on the influencers themselves. That will make them better partners for the marketers.

AF: The Federal Trade Commission (FTC) is currently reviewing the Children's Online Privacy Protection Act (COPPA) Rule to see whether additional changes are needed to address the different ways that children under 13 years of age access the Internet, including the increased use of mobile devices and social networking. What changes do you expect the FTC to make to COPPA as part of its review?

DF: We will likely see an expansion of the definition of personally identifiable information to possibly include biometric data. I would be surprised if there is not some additional scrutiny of safe harbors. I think that the issue of data security is going to be enhanced and the internal operations exceptions may also be reviewed, possibly expanded, or at least there will be a conversation about that because what was defined as internal operations 10 or 20 years ago has evolved.

AF: Over the past two years, the FTC has brought high profile actions against both TikTok and YouTube for violations of COPPA. What are some of the lessons that operators can learn from these FTC actions?

MK: I think there is a lot to be learned there. First, you cannot have it both ways. You cannot be a channel directed to children and then try to skip COPPA and not get parental consent and then avail yourself of behavioral advertising through a third party. Second, obviously it is a huge wake up call to platforms and other third parties that provide a whole host of services to individual child-directed marketers and advertisers and content providers.

AF: What do you see as the most significant challenge facing companies that want to direct their products and services to children?

MK: I think the challenge is to be exciting and innovative when you are competing with a whole host of exciting and innovative content geared to the public as a whole. So you really need to be focused on what is appropriate for children and how to capture their interest at the same time. And, of course, if there are issues of data security or data collection, then obviously you are going to fall into the COPPA basket and you need to be very cognizant of that.

DF: What we do not often talk about is the cost of doing business in this space. Whether you are on the side of a content creator or the side of data collection, there is a cost of doing business in the space that I think is higher than other spaces. And when I say cost of doing business, I mean everything from hiring outside counsel, to having your engineers to downstream everything from the outset. Being a good actor in this space is not terribly difficult because there are so many good actors in the space. But again, some of that does come at a cost.

AF: If you could provide one piece of advice to companies that market their products and services to children, what would it be?

MK: To look at what you are trying to accomplish through the eyes of a child: keep it simple and pure. Step back and ask yourself if you are marketing something that is great for kids, or something more focused on bells and whistles.

DF: Put yourself in the seat of a child but also put yourself in the seat of the parent. The overarching advice that I would give is: What do you want your brand to be known for? How do you want to build brand trust and longevity? If you do that from the outset, parents and kids recognize that this brand is fun. It is engaging and parents do not feel like it is intrusive. I think that's probably the best advice.

FIRESIDE CHAT

Alastair Mactaggart's Privacy Perspective: Past, Present and Where We're Headed

After leading the charge to enact the California Consumer Privacy Act (CCPA) and changing the landscape of data privacy in the United States, **Alastair Mactaggart**, Board Chair and Founder of the privacy rights group Californians for Consumer Privacy, spearheaded the movement to pass the California Privacy Rights Act (CPRA).

Like the CCPA, the CPRA has monumental implications on how businesses operate in the United States, especially in the ad tech ecosystem, and builds on the unprecedented data rights and protections that the CCPA gave to California consumers.

The following is an excerpt from a Fireside Chat discussion between **Alastair Mactaggart (AM)** and Davis+Gilbert partner **Richard Eisert (RE)** on what to expect once CPRA comes into effect on January 1, 2023, and the issues that the CPRA is meant to address:

RE: **The CCPA just came into effect [at the beginning of 2020]. Why CPRA now?**

AM: I was surprised in 2019 when the industry mounted a full scale assault, from my perspective, on the CCPA, right after it had just passed in 2018. It struck me we were going to need something more robust in terms of defending the law from the inevitable attacks. It was a good opportunity to strengthen the law, and in terms of bringing it up to world class standards, make it more GDPR centric. That was the goal, and I think we've done that.

RE: **A number of changes in the CPRA appear to address the ad tech industry, and what is now defined as cross context behavioral advertising. What does the new distinction between sharing and selling in the CPRA say about the concept of sales under the CCPA, and what does that new distinction mean for cross context behavioral advertising going forward?**

AM: I think that the language in the CCPA is clear, and I think the intent is clear. I was really surprised to see a thread developing among some attorneys saying, "don't worry about 'sell,' because that means exchange for valuable consideration," and essentially, "we can 'share,' and it'll all be OK." Even though I don't think the CCPA is ambiguous, if some people are saying it is ambiguous, let's make sure we close that out. It is now crystal-clear, when it comes to sharing consumer information for cross context behavioral advertising, that the law gives consumers the right to opt out.

RE: **The CPRA seems to effectively remove service provider status and the benefits of more limited responsibilities that service providers have for entities that are facilitating cross context behavioral advertising. Can you give us some background on the intent of that change?**

AM: I think it's all just an intent to try to reinforce and clarify that, under the CPRA, you are either a business, a service provider or contractor, or a third party. Service providers and contractors are basically very similar. In both cases, you're allowed to transfer information for a business purpose, but that purpose cannot be behavioral advertising for an opted out consumer.

The problem is that sometimes you want information to be sold or shared. Credit card fraud detection is a good example. In many cases, there *is* a sale taking place, because the fraud detection outfit is making money off the transaction, and so is the business by completing the sale to you. That's a good kind of sale. Then there's the kind where the consumer says, "No, I don't want to be tracked from site to site."

The CCPA included language saying that [for non-third parties] consumer information can't be disclosed outside of the direct business relationship between the business and the entity. That's now in the CPRA for service providers and contractors. We cleared it up.

RE: **In your view, can businesses engage in cross-context behavioral advertising in a way that is both pro-privacy in accordance with the CPRA and will work in a going-forward basis, or do you think, essentially, that's going out the window?**

AM: If you go to a music-sharing service and, all of a sudden, it's like 500 other companies you've never heard of are now going to share your information, and also use that as a portal to watch what you do on your phone as long as you have the other app open, most people say, "I don't like that." I think it really depends on the relationship of the business with the consumer. You can imagine lots of things in the future, because the law is pretty flexible. It allows any number of arrangements that are voluntary.

Also, in terms of behavioral advertising, remember that this law is not nearly as draconian as a law could be, in the sense that the first-party data the business has can be used in any way that the business wants with that consumer. If you have a relationship with the consumer, you should be able to use that.

RE: **Intentional interactions are carved out of sales or sharing of personal information. Let's say there's a disclosure to the user that the business is providing the user's personal information to a third party. The user then clicks on a consent box, kind of GDPR–like. Would that be considered an intentional interaction that somehow exempts it from being sharing or a sale?**

AM: At this point, I'm just a citizen. The regulations are going to come out for the new law [this year], and I hope that they will deal with your question. But I would just keep on coming back to the language [of the CPRA]— now it is pretty clear that cramming a consent down someone's throat is not "intentionally interacting."

RE: **Why was the cure period for violations not included in the CPRA?**

AM: If you look at the FTC model, which is notice and cure, it's been frustrating in some cases that you almost have to have a consent decree and then have that violated. Essentially, 30-day notice and cure is a "fix it" ticket. We went to a speeding ticket where if you are caught speeding, you're liable. I think it's a better enforcement model.

It's really important to also notice that [Cal. Civ. Code 1798.199.45], has language saying that the [California Privacy Protection Agency] is empowered to look at the business's behavior. Was it intentional? Are they trying to fix it? Did they come forward and disclose it? I'd suggest one of the Agency's primary tasks has got to be education.

RE: **Regarding the private cause of action in the CPRA, it doesn't seem very different from the CCPA — any insight as to whether there was an intention to do anything there or is it pretty much staying as it is?**

AM: Look, I understand both sides. I understand the businesses who think this is just a "stick up" thing. I understand the advocates who think an under resourced agency won't be able to keep up. What I will say is that I'm not nearly as negative about the prospect for effective regulation [from the Agency].

The other thing, which I don't think gets a lot of attention, is that because exclusive enforcement is removed in this law — under the CCPA, it was exclusively reserved to the Attorney General — now the Agency can enforce it. The AG can also step in. Under the Unfair Competition Law, any district attorney or city attorney for the four biggest cities in California can also prosecute a violation. If a company thinks, "oh, we're just going to ignore the law," it's probably not a wise course of action.

RE: **How do you think the Virginia law compares to the CPRA?**

AM: It's not nearly as strong in terms of security, and it allows unfettered pseudonymous tracking. Sales are specifically designated as for monetary consideration, so you can share information, especially pseudonymous information. It's kind of business-as-usual for tracking.

Richard S. Eisert
Partner/Co-Chair
Advertising + Marketing
reisert@dglaw.com

Richard's practice sits squarely at the crossroads of technology, advertising and marketing, e-commerce . . . **more**

Zachary N. Klein
Associate
zklein@dglaw.com

For agencies, startups and global brands struggling with the evolving legal landscape surrounding . . . **more**

Getting Personal: Biometric Privacy Laws Are on the Rise

Biometric data laws are growing as part of the privacy landscape in the United States. As physical biometric data increasingly becomes a preferred means of identification by many businesses, and particularly by employers, consumer protection concerns abound and state legislators have been struggling to find an appropriate balance.

While there is no uniform federal biometric data privacy law, several states in the United States, including Illinois, Oregon, Texas, California, Washington and New York, either have existing laws or are in the process of drafting new laws. Although it remains to be seen how such legislation will change the reliance upon and use of biometric data, it is clear that there is a need for businesses to implement formal data security and privacy frameworks, such as written policies, with respect to the collection and use of biometric data, whether or not required by law.

Private Rights of Actions

The Illinois Biometric Information Privacy Act (BIPA) (the first comprehensive biometric data law in the United States) is the only state law actually in effect that expressly affords individuals a private right of action. As a result, BIPA has become a favorite tool of class action lawyers and an expensive problem for businesses.

Other city-level regulations, such as was enacted in Portland, Oregon in January 2021, also provide private rights of action. Portland's city-wide ordinance prohibits the use of facial recognition technology by private entities in places of public accommodation. One challenge now facing affected businesses in Portland is that there is uncertainty around what constitutes "facial recognition technology," as well as whether informed consent creates an exception to the prohibition. Similarly, in June 2021, the city of Baltimore enacted a Private-Sector Face Surveillance System Ban, banning the use of facial recognition technology by individuals and private businesses within the city.

BPA

Also in January 2021, the New York State Legislature proposed the Biometric Privacy Act (BPA), seeking to enhance the privacy rights of individuals via the implementation of controls around the collection and processing by private entities of biometric information. New York City also passed a law requiring commercial establishments to post clear disclosures at all entrances where consumers might enter, notifying them of the collection, use and/or sharing of their biometric information.

Although several states have proposed biometric data legislation that has not advanced, it is likely that lawmakers will continue to be active and applicable laws will continue to evolve.

What Businesses Can Do Now

- The confluence of privacy, security and societal concerns have resulted in increased scrutiny over the use of biometric data.
- In the absence of a consistent federal standard, and in anticipation of increased state regulation, businesses should assess their practices and formalize their policies with respect to the collection and use of biometric data.
- As a general best practice, notice and consent should be given and received prior to collecting and using biometric data.

Gary Kibel
Partner
gkibel@dglaw.com
For companies operating at the intersection of digital media, advertising, technology and . . . **more**

Oriyan Gitig
Counsel
ogitig@dglaw.com
With Oriyan's counsel, creative agencies and technology companies understand and uphold privacy . . . **more**

Apple and Google Bring Big Changes to the Ad Tech Industry

Richard S. Eisert, *Partner/Co-Chair Advertising + Marketing,* reisert@dglaw.com
Gary Kibel, *Partner,* gkibel@dglaw.com

Two of the biggest names in the advertising technology industry are making fundamental changes to the way marketers track and target users using data collected on their platforms.

Apple's Monumental Changes

With the launch of Apple's iOS 14.5 last year, Apple changed its policy regarding app publishers' collection and use of its persistent identifier known as the "Identifier for Advertisers" (IDFA). Now, app publishers on Apple's platform have to receive a user's opt-in consent through Apple's new "AppTrackingTransparency" framework at the app level in order to access a user's IDFA for purposes of targeted advertising or advertising measurement.

This is a radical change from the prior opt-out regime. Apple users are presented with a one-time notification that explains how their IDFA will be used for tracking, and then gives the users the choice to either opt-in or block an IDFA at the app level (an option that was previously available to users only as an opt-out option located in a user's Apple Settings).

Experts believe that this change will significantly reduce the percentage of Apple app users who share their IDFA with the app publishers, disrupting the downstream flow of this information to ad tech companies, many of which rely on publishers for this information, and presenting a big challenge for the marketing efforts of these publishers and the ad tech companies with which they work.

Changes Brought By Google

Google announced that they would be blocking the use of third-party cookie technology in the Chrome browser within two years. Like the IDFA, cookie technology is widely used in the ad tech industry for retargeting. Then, in March 2021, Google went even further by announcing that once third-party cookies are phased out, Google will not build its own alternate method to track users across the web or use an alternative identifier in its own products. However, perhaps in part due to increased antitrust scrutiny, Google agreed to delay the effective date for this major change.

While these changes are explained as steps to protect Apple and Google users' privacy, they are forcing the rest of the advertising industry to create new ways to continue to track user activity and serve individualized, targeted advertisements.

Impact on Marketers

With these changes, marketers will have fewer authenticated users to target with ads across the various platforms. As a result, the ad tech industry is looking for new and creative ways to adapt as changes in both the technological and privacy landscape are narrowing their options. One solution is the "Unified ID 2.0" endorsed by numerous ad tech companies, which proposes a universal, anonymized user identifier that would require a user to opt-in once across all digital channels and devices to receive applicable ads. Many proposals are posted on the open source Prebid service.

The Interactive Advertising Bureau has also introduced an initiative — Project Rearc — to address the loss of third-party cookies on these large platforms.

At the same time, some lawmakers and regulators are pushing to further regulate or even eliminate retargeting users based upon their online data, which has been derisively referred to as "surveillance advertising."

These changes are signs of the changing ad tech privacy landscape, and marketers and their agencies should be prepared for more platforms to follow suit. All participants in the online advertising ecosystem, including publishers, ad tech companies and marketers, should consider these developments and how best to execute effective campaigns in this new reality.

What Businesses Can Do Now

- Google and Apple have implemented significant changes to their platforms that will shrink the pool of authenticated users to target with ads across other platforms.
- The ad tech industry will have to develop creative new methods to track and target users, including new industry-wide proposals.
- All participants in the online advertising ecosystem should consider these developments and their impact on advertising campaigns in this new reality.

From TikTok to Clubhouse: Expect the FTC To Stay One Step Ahead

Allison Fitzpatrick, *Partner,* afitzpatrick@dglaw.com
Joseph Lewczak, *Partner,* jlewczak@dglaw.com
Paavana L. Kumar, *Associate,* pkumar@dglaw.com

Consumers have been deprived of consistent in-person connections for almost two years now. In the wake of this, brands have redoubled their efforts to resonate with their audiences. Now more than ever, consumers reeling from political instability, acts of racial injustice and ongoing uncertainty about the future are revisiting their core values and priorities — resulting in consumer perception shifts that may long outlast the immediate crisis of the pandemic.

In response, brands have accelerated their efforts to partner with influencers who are deeply connected to their audiences and who genuinely care about diversity, inclusion and giving back. These influencers have, in turn, become more specialized in their fields and their ability to create interactive, successful content, and are increasingly becoming known as “content creators.”

In a world where influencer and “content creator” brand partnerships show no signs of slowing down, the Federal Trade Commission (FTC) is poised to issue updates to its Endorsement Guides in 2022 (following a public comment period that closed on June 22, 2020). These updates may well provide substantial new guidance with respect to recent developments in technology and how consumers perceive new media. In particular, platforms such as TikTok enjoyed an incredibly high profile year, and have been quickly followed by social networking platforms such as Clubhouse.

As of now, marketers should remember that even “viral” and “organic” content on platforms such as TikTok is still subject to the FTC’s core requirement — that influencers must clearly and conspicuously disclose their material connections with the marketer. Videos on TikTok include a standard text field in the bottom left corner of the video, where many influencers will add a disclosure. However, users on TikTok can easily export TikTok videos to platforms such as Facebook, Twitter and Instagram, and the standard text in the bottom left corner is often cut off when shared, and certain regulatory and self-regulatory bodies are starting to take action against such situations.

Last year, the National Advertising Division (NAD) of the Better Business Bureau opened an inquiry into a consumer goods brand with respect to this issue. The brand had contracted influencers to post videos featuring a “dance challenge” in which influencers break out into a dance while the voiceover sings about how it’s time to “clean up your life.” The brand’s products appeared in the background and all of the TikTok videos clearly and conspicuously included the appropriate hashtag disclosing the material connection between the influencer and the brand in accordance with the Endorsement Guides. However, when those videos were shared to Instagram, they did not include the applicable hashtag. The NAD did not pursue the inquiry further after the consumer goods brand demonstrated that it had taken action to ensure that disclosures would be made properly in the future.

What We Can Expect In the Future

- As norms around sponsorship disclosures continue to shift, expect the FTC to stay one step ahead.
- In particular, until further guidance is issued by the FTC, marketers running influencer campaigns on TikTok and similar platforms should consider requiring the influencer to include additional disclosures, such as “ad” or “paid,” superimposed over the video or image content in a centralized location, to ensure that the disclosures will follow if shared to another platform.

How "Sustainable" Are Your Sustainable Cosmetics Marketing Claims?

Stuart Lee Friedel, *Partner,* sfriedel@dglaw.com
Darren Fried, *Counsel,* dfried@dglaw.com
Alexa Meera Singh, *Associate,* alsingh@dglaw.com

When it comes to advertising or marketing cosmetic products as being "sustainable," brands should take into account several key considerations:

Can our brand make *any* environmental benefit claim?

As with any advertising claim, an express or implied claim touting the environmental benefit of a product must be substantiated with sufficient evidence.

Can our brand make a broad environmental claim if it is qualified with a specific benefit?

Yes, but the specific benefit should not be small or unimportant, as consumers are likely to consider the benefit to be significant.

Further, to minimize risk, the brand should identify the specific components of the product that are sustainable or renewable, and explain why.

Can our brand make a broad claim, such as our cosmetics are 'sustainable' or 'renewable'?

The Federal Trade Commission (FTC) has issued guidance that any broad, unqualified environmental claim should not be made. These types of claims are difficult, if not impossible, to substantiate because a reasonable consumer would likely understand the claim to convey a "general environmental benefit" with myriad benefits — all of which must be true and supported.

Does the brand have to take the overall product and supply chain into consideration when making a 'sustainable' claim?

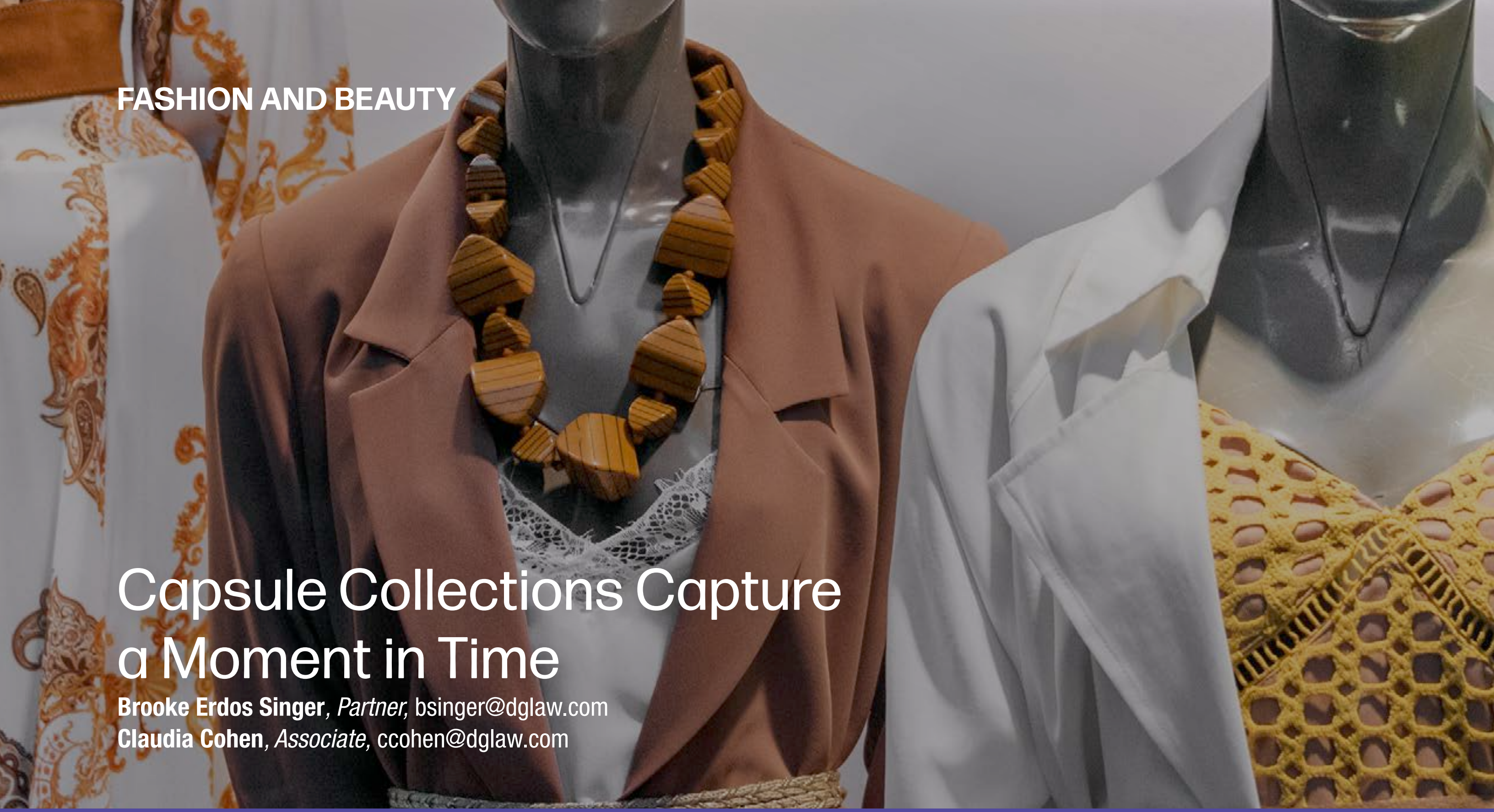
Yes, the brand should do so. 'Sustainable' claims may imply that the product has no negative impact on the environment overall.

For example: Even if the 'sustainable' claim is qualified to clearly convey that it applies only to a certain significant ingredient (and that claim is supported by adequate substantiation), the claim may be misleading if the product is not made using sustainable labor practices.

How concerned should we be about making a 'sustainable' claim?

Because these types of claims have increased tremendously in popularity, there is also the potential for increased scrutiny.

Brands should exercise caution before making any sustainable claims — or other environmental claims



Capsule Collections Capture a Moment in Time

Brooke Erdos Singer, *Partner,* bsinger@dglaw.com
Claudia Cohen, *Associate,* ccohen@dglaw.com

Capsule collections and collaborations continue to explode in the marketplace, with brands launching newer and quirkier collaborations, like Dolce & Gobbana's collaboration with Smeg, Gucci's North Face collection and the Kentucky Fried Chicken line of Crocs shoes. These attention grabbing collections offer designers the opportunity to translate their vision to entirely new product lines and reach a new set of customers.

Collaborations can also provide brands the opportunity to work with designers they typically wouldn't (such as "Yeezy Gap Engineered By Balenciaga"), or celebrities or artists who may not have extensive prior fashion design experience (like Cardi B's collection for Reebok), to bring a fresh perspective to their lines and entice new customers. Some capsule collections offer designer pieces at a lower cost, while others are very high-end and may even sell out in minutes, fetching high prices as shoppers compete to own an exclusive piece. In addition, some celebrities have used capsule collections as a way to give back by pledging to donate proceeds to charity or using the collection to encourage civic participation.

No matter the reason, capsule collections and collaborations only continue to grow in popularity, so brands and designers should keep in mind the associated possible legal risks.

No matter the reason, capsule collections and collaborations only continue to grow in popularity, so brands and designers should keep in mind the associated possible legal risks.

Here are five important topics to consider and cover in any written contract that governs a capsule collection or collaboration:

1. Include parameters for the licensed use of trademarks

The agreement should specify the permissible use of all specific trademarks that are licensed for use as part of the capsule collection or collaboration, including how long the license will last; which products can be manufactured, marketed and sold under the marks; the jurisdictions in which those products can be marketed and sold; and what the pricing of those products should be.

2. Determine who owns what

A new design or product may be created as part of the collaboration, so the parties should contractually agree in advance who owns those rights.

3. Include quality control provisions

The license agreement should include provisions that allow the owner to maintain the quality and integrity of their trademarks, granting the owner oversight and approval of the licensed use.

4. Consider whether to include exclusivity and/or restrictive covenants

It is important to consider whether the licensed use of a company's trademarks will be exclusive or non–exclusive in the relevant product category.

A non–exclusive license permits the owner and licensee to use the marks for the licensed use, and the owner can license the marks to others.

An exclusive license permits only the licensee to use the marks for the licensed use, and the owner is restricted from using, licensing or otherwise exploiting their marks in connection with the licensed use.

Relatedly, it can be valuable to include a restrictive covenant in the license agreement that limits the artist, celebrity, designer or brand to the specific capsule collection or collaboration, such that they cannot work on a similar collection or collaboration in the relevant product category with a competitor or other third party.

5. Specify the circumstances under which the contract can be terminated

The license agreement should include provisions that allow for its termination. For example, some licenses permit either party to terminate for any reason upon a certain amount of written notice or for an uncured material breach of the contract. Relatedly, some license agreements include a morals clause, that permits termination if a party engages in immoral, illegal or other conduct that may reflect poorly on the brand.

Spinning Out of Trademark Protection: Highly Distinctive Marks Versus Generic Terms

What do the words "aspirin," "escalator," "cellophane" and "thermos" have in common? Each used to be a distinctive trademark but, over time, became a generic term that lost its protection.

Trademark Protection for Fitness Terms

The most recent example regarding this issue involves the terms "Spin," "Spinning," "Spin Pilates" and "Spin Fitness," all of which are registered trademarks with the U.S. Patent and Trademark Office (USPTO) and owned by Mad Dogg Athletics, Inc.

Peloton Interactive, Inc. petitioned the Trademark Trial and Appeal Board of the USPTO (TTAB) to cancel all of these registrations on the grounds that the marks have become generic terms for a type of exercise bike and associated in-studio classes and thus are no longer entitled to protection.

Trademark Considerations

A trademark's protectability hinges on its distinctiveness (i.e., its ability to function as a source identifier for an entity), which falls on a spectrum. At the strongest end of the spectrum are fanciful and arbitrary marks, which are highly distinctive and entitled to robust protection. **Fanciful marks** are made-up words created to function as trademarks, such as "Clorox" for cleaning and disinfectant products. **Arbitrary marks** are real words used in connection with unrelated products or services, such as "Apple" for electronics.

In the middle of the spectrum are **suggestive marks**, which conjure up or hint at qualities of a product or service without actually describing them, such as "Netflix" for streaming movie and television services.

On the weakest end of the spectrum are **descriptive marks** and generic terms. A descriptive mark describes the characteristics of the product or service and can only become protectable if it acquires secondary meaning through extensive advertising, high profile usage and/or consistent use over time, such that consumers come to associate the descriptive mark with the brand. One such example is "U.S. Postal Service" for mail delivery services in the United States.

In contrast, a **generic term** identifies the class of which the offered product or service is a member, such as "Smartphone" for a mobile phone with computer functions. A generic name is not, and can never become, protectable, otherwise competitors would be precluded from referring to their own products or services by their commonly known names or terms.

There is tension between a well-known word being a highly distinctive, protectable trademark and becoming generic and thus incapable of protection. Specifically, a trademark can be so ubiquitous and successful that consumers identify it as the commonly known name or term for a product or service, rather than as a particular brand. When that happens, the trademark can be the victim of "genericide" and lose its legal protection, which is what happened to "aspirin" for a pain reliever, "escalator" for a moving staircase, "cellophane" for a thin transparent wrapping material, and "thermos" for an insulated bottle.

Notably, if properly used and maintained, and in direct statutory contrast to protection for patents and copyrights, trademark protection does not have a time limit.

In fact, there are multiple steps that can be taken to help protect a distinctive trademark indefinitely, such as:

- Always using a trademark as an adjective that is followed by a generic term or noun, and never pluralizing a trademark or using it as a verb.
- Never altering or abbreviating a trademark and always setting it apart from other words, such as by capitalizing it, using a different typography or color, or enclosing it in quotation marks.
- Using proper trademark notice, such that the symbol ® should be used after a federally registered trademark and the symbol TM should be used after an unregistered mark.
- Policing and enforcing against infringements of a trademark.
- Marketing campaigns to educate the public about proper trademark use, such as when Kimberly-Clark Worldwide Inc. took out a newspaper advertisement explaining that KLEENEX is a registered trademark that should always be followed by the ® symbol and the term “Brand Tissue.”

What Businesses Should Know

- Generic terms can never be protectable trademarks. Highly distinctive marks can become generic terms that lose their protection if they become synonymous with the common name or term for a product or service rather than associated with a brand. However, there are steps that can be taken to help maintain trademark protection, even indefinitely.
- While highly distinctive marks may not immediately communicate to consumers the specific products or services being offered, they are afforded the broadest scope of protection.
- Advertisers and their agencies can seek to mitigate risk by carefully selecting a mark and consulting with counsel to evaluate its strength and protectability, as well as how to help maintain its protection.

> Specifically, a trademark can be so ubiquitous and successful that consumers identify it as the commonly known name or term for a product or service, rather than as a particular brand.

Brooke Erdos Singer
Partner
bsinger@dglaw.com

Brooke helps clients achieve brand success, coordinating the myriad of trademark, contract . . . **more**

Joy J. Wildes
Counsel
jwildes@dglaw.com

Joy plays a key role in the creative branding process with strategic trademark, advertising . . . **more**

Claudia G. Cohen
Associate
ccohen@dglaw.com

Claudia’s practice spans all aspects of domestic and international trademark law. She advises brands . . . **more**

The ABCs of Software IP

Devin A. Kothari, *Partner*, dkothari@dglaw.com
Marc J. Rachman, *IP Litigation Partner*, mrachman@dglaw.com

Nearly every company is a software company on some level. Below, we discuss how to protect and enforce your rights in your software:

Q: How can I protect my software under copyright law?

A: The U.S. Copyright Office has ruled that most software expresses sufficient creativity and is thus copyrightable. Specifically, the U.S. Copyright Office allows the human-readable version of software, called source code, to be protected by copyright.

The "unregistered" copyright in source code attaches the instant it is typed into a computer. However, technology companies go a step further and submit their source code to the U.S. Copyright Office to get a "registered" copyright. Doing so provides certain enhanced protections, such as the ability to file a lawsuit and receive statutory damages. Importantly, the U.S. Copyright Office has made a specific exemption for source code to be submitted in redacted or partial form to make sure the entire codebase is not made public.

Q: How do I protect my software under trade secret?

A: In addition to being protectable via copyright, source code can also be protected as a trade secret.

> Trade secret = Information that is not known by others outside of the owner, has independent economic value independent of its secrecy, and for which the owner has taken reasonable measures to keep secret. Most software falls into this category, and is therefore protected as a trade secret.

There is no trade secret registration database like there is for copyrights and patents. Instead, companies should take reasonable efforts to protect their software from unauthorized access and use. These measures will vary based on the value of the trade secret and the measures others in the industry take to protect their source code. But, at a high level, they include physical, electronic and contractual security measures:

- Physical security includes security cameras, restricted access zones, need-to-know access, etc.
- Electronic security includes passwords, firewalls, encryption, limitations on printing and downloads, etc.
- Contractual measures include employee confidentiality agreements, use of Non-Disclosure Agreements (NDAs), confidentiality clauses in agreements, etc.

Q: Is my software patentable?

A: Some software is patentable. As compared to a copyright or trade secret, which protects the specific lines of code that are written by developers, a patent rarely contains any actual source code. Instead, it claims the algorithm underlying the software, typically in flow charts that show how the software architects a solution to a particular problem. Software patents must be filed with the U.S. Patent Office, which will review the patent before it issues.

Because software patents exclude others from practicing in a space even if they did not explicitly copy the software, they are much more difficult to get than other forms of intellectual property protection. For example, software patents must be novel and non-obvious. They also must pass heightened scrutiny in order to prove they are "patentable subject matter." At a high level, this requirement means that a software patent must show an advance in the "computer technology space" and not simply the execution of a well-known process on a computer. Hundreds of previously-issued patents have been struck down for failing to meet this requirement; it is important to carefully consider whether your software meets patentable subject matter requirements before filing.

Q: How do I know I am not infringing someone else's software?

A: To avoid infringement of someone else's software, the most important thing is to track where employees are getting their code. Companies should not be using code from another job or from the internet without permission, and should not be reverse engineering or code hacking a third party's software. If companies follow these basic restrictions, then, generally speaking, they will not violate a third party's software copyrights or trade secrets.

Avoiding patent infringement is much more difficult, as one does not need to know of a patent or explicitly copy a patent to infringe. There are many weak software patents on basic internet functionalities which are asserted indiscriminately against legitimate companies by "patent trolls", also referred to as Non-Practicing Entities ("NPEs").

If companies are concerned about software infringing a third party's patent, discuss doing a "freedom to operate" search with counsel, who can pull relevant patents and analyze how similar they are to your software. If a specific patent is discovered that could be similar, companies **must** design around it; otherwise, they could be liable for enhanced damages for willful infringement.

Q: How do I best protect myself from patent troll claims?

A: Although there is no sure–fire way to prevent a patent claim from being asserted against a company, there are steps that can be taken to help defray the costs once a claim is threatened or raised.

One way to reduce potential exposure is to negotiate a patent indemnity provision in contracts with technology providers that puts the responsibility for any patent claims relating to the technology on the provider. If a claim is raised, companies can seek indemnification for the claim from the appropriate provider.

Another option to consider is to use a defensive patent aggregator, which acts almost like an insurance policy. A defensive patent aggregator acquires patent rights to make available to its members for an annual fee. These patents are strategically purchased by the aggregator to stave off patent troll claims for its members.

Q: What if an employee leaves with software or technology?

A: Protecting a company's technology upfront can prevent disputes over ownership down the road. It is a best practice to require employees to enter into Work for Hire agreements upon joining the company, agreeing that whatever technology they participate in as part of their employment is a work for hire that is owned by the company, not the employee, despite whatever they may have contributed to the development of the technology.

With such an agreement signed by the employee, any claim that they have rights in the company's technology when they leave can be quickly addressed. It is also important to have employees agree to NDAs at the onset of their employment to protect any potential trade secret information belonging to the company from being used to compete against the company when they leave.

Q: What if someone comes out with software that competes against your software?

A: If someone believes that there might be infringement on patented technology, the best thing to do is to seek the advice of counsel to determine whether the patent is being infringed. If it is determined that the competing software is infringing, counsel will then advise you on the next steps that should be taken, which can include sending a cease and desist letter or filing a lawsuit.

Q: What if I get a letter asking to pay for a license or threatening an infringement claim?

A: Depending upon the history of the party sending the letter, you may be better off responding rather than taking a wait and-see approach. Legal counsel can assist with making this assessment, as often they will have had prior experience with the patent owner making the threat or seeking the license.

The Changing Regulatory Paradigm for Food Delivery Services

Ronald R. Urbach, *Partner/Co-Chair Advertising + Marketing,* rurbach@dglaw.com
Stuart Lee Friedel, *Partner,* sfriedel@dglaw.com
Louis P. DiLorenzo, *Associate,* ldilorenzo@dglaw.com

The food and grocery delivery space is a testament to how a regulatory scheme can develop organically for a nascent industry that has quickly found itself in the spotlight.

An Increase in Demand

Although delivery services were already growing rapidly to accommodate consumers' busy lifestyles, COVID-19 created a massive need that delivery services were happy to fill. Restaurants were forced to close their doors and could only serve patrons using third-party delivery services like Grubhub and DoorDash. Aversions to crowded grocery stores meant that many consumers were staying home and paying companies like Amazon and Instacart to deliver their groceries.

The increased importance of food delivery services has been met with increased regulatory scrutiny. Every major delivery service has been hit with some combination of class action lawsuits and enforcement actions from the Federal Trade Commission (FTC) and state attorneys general, and the scrutiny has led several states to consider legislation or regulation aimed at curbing billing practices.

The Toll of Fees

There have been a number of class actions regarding delivery fees in the past couple of years. For example, a class action complaint filed in 2020 against DoorDash, Postmates and Uber Eats alleged that the "exorbitant" fees charged by these entities violated antitrust laws.

Regulators have also been particularly active in the space. To date, the largest regulatory action over delivery fees came in February 2021 with a $61.7 million settlement between Amazon and the FTC. According to the FTC, Amazon advertised to its delivery drivers and customers that 100% of tips would go to delivery drivers, when in actuality Amazon lowered delivery driver wages and used tips to make up the shortfall. Similarly, Instacart received a lawsuit in 2020 from the Washington, D.C. Attorney General over allegations that it pocketed the optional "service fee" that the company claimed it would use to pay its delivery personnel, and the D.C. Attorney General has brought further regulatory action over fees as recently as March 2022.

Given how important delivery services have become for both consumers and restaurants, a number of municipalities chose to begin regulating delivery services more directly. Los Angeles, Chicago and other major cities passed ordinances that limit delivery fees to 15% while pandemic-related restrictions are in effect. Some cities also require apps to increase fee transparency by listing the restaurant's actual menu price and the app's fees, and prohibit apps from retaining tips meant for restaurant workers.

Permanent caps have also been implemented in San Francisco and New York City. The New York City law has been particularly controversial. In June, a class action was filed alleging that major delivery apps have been deliberately flouting the New York City law. And in September, Grubhub, Uber Eats and DoorDash filed suit to enjoin the New York City law, arguing that the legislation "bears no relationship to any public-health emergency, and qualifies as nothing more than unconstitutional, harmful, and unnecessary government overreach."

California and Texas have also recently passed laws that more comprehensively regulate the industry statewide. The California law makes it unlawful for a food delivery platform to charge a purchase price that is higher than the price posted by a restaurant, or to retain any amounts designated as a tip or gratuity. The bill also requires delivery platforms to provide a cost breakdown to consumers for each order. The Texas law takes a lighter hand, simply prohibiting delivery apps from charging restaurant fees unless the restaurant has agreed to those fees in writing.

What's on the Horizon

- The regulatory scrutiny being faced by food delivery services demonstrates what can happen when an industry grows rapidly.
- Regulation begins with individual, targeted actions by regulators and consumers that are aimed to curb particularly harmful practices.
- But, if a particular industry is seen as wielding too much power, it can find itself subject to a more pervasive regulatory scheme.

Evergreen Focus on Green Marketing at the National Advertising Division

Ronald R. Urbach, Partner/Co-Chair Advertising + Marketing, rurbach@dglaw.com
Alexa Meera Singh, *Associate,* alsingh@dglaw.com

The National Advertising Division's role (NAD) in evaluating green marketing is significantly important because the FTC's Green Guides (which are used to help guide both legal advice and business decisions) were last updated in 2012 and are under review this year. The expectation is that the new Green Guides will focus on some of the more current and consumer-relevant green claims, which the current Green Guides do not specifically address.

Q: How have green claims (and related NAD challenges) evolved over the years?

A: As a self-regulatory adjudicative body, the NAD will look to the FTC for guidance as it reviews green advertising claims and evaluates the substantiation for such claims. Although the FTC's Green Guides and FTC actions provide specific direction for certain types of claims (e.g., eco-friendly) and espouse general principles to be followed (e.g., no overbroad claims), the NAD has a lot of room in which to interpret the law and provide its own perspective on what constitutes legally compliant environmental advertising. For example, we successfully defended clients in two NAD challenges that, in one case, concerned use of the term "eco" in a product name, and in the other established guidelines for what qualifies as a "green" computer. These NAD decisions established de facto standards and provided industry guidance.

Q: What are some claims that are becoming increasingly popular, but primarily informed by NAD precedent?

A: "Sustainability" claims — undoubtedly some of the most popular types of green marketing claims today — are primarily informed by NAD decisions. The Green Guides specifically address claims like "green" and "eco-friendly," but do not specifically reference "sustainability"— largely because sustainability marketing was not as prevalent a decade ago. But NAD decisions help to fill this gap. In *Beech-Nut Nutrition Company* (*Beech-Nut Baby Foods*), NAD clarified that "sustainability" — like "green" and "eco-friendly" — is a general environmental benefit claim. When used without qualification, these claims are misleading because they may convey a wide range of reasonable, but unsupported, meanings.

The NAD has continued to issue decisions illustrating how to qualify these claims. For example, in *Georgia-Pacific Consumer Products LP* (*Quilted Northern Ultra Soft & Strong Bathroom Tissue*), the NAD found that certain "sustainability" claims were sufficiently qualified when consumers were not likely to miss or ignore the claims' ties to specifically described environmental benefits (e.g., tree planting and energy efficiency).

"Carbon neutral" claims have also become increasingly popular. While the Green Guides do not discuss carbon neutrality explicitly, they offer general principles and specific guidance on carbon offsets that help inform treatment of carbon neutrality claims. Applying this guidance, the NAD found in *LEI Electronics, Inc.* (*Eco Alkalines Batteries*) that "carbon neutral" claims are not sufficiently supported when the advertiser fails to provide material information (when carbon reductions occurred or will occur) and provides an unreliable life cycle analysis.

Q: Why has there been an uptick in challenges to green claims at the NAD?

A: Marketers are more focused on environmental claims and consumers are more interested in them because of the administration change in Washington, the constant barrage of environmental disasters and the further growing acceptance that climate change is a real and present danger. As such, regulators — governmental and self-regulatory — and class action counsel have become especially focused on environmental claims.

Q: What trends are popping up in recent NAD cases that highlight the technical and practical risks of green marketing?

A: There is a continuing focus on potentially overbroad claims. Advertisers need to ensure that broad claims are qualified with specific, supportable benefits. For example, earlier this year in *PurposeBuilt Brands* (*Green Gobbler Drain Clog Dissolver*), the NAD heard a challenge concerning, in part, the claim "POWER meets Green" for a drain cleaning product. The NAD recommended that this claim be discontinued because it reasonably conveyed the unsupported message that the drain opener product achieved the unlikely combination of being both sufficiently powerful to unclog drains, but broadly environmentally friendly. On the flip side, the NAD recently found, in *Safe Catch, Inc.* (*Pouched and Canned Tuna*), that the claim "100% Sustainably Caught Wild Tuna" was sufficiently supported, largely because the claim was qualified and based on reputable methods that were clearly communicated to consumers.

Recently there has also been a focus on aspirational claims (like "aim to," "commit to" and "strive to"); just because a claim is aspirational, it is not necessarily puffery. In *Butterball, LLC* (*Butterball Turkey Products*), a recent case concerning sustainability marketing, the NAD found that the claim that a company "recognizes" its "responsibility" to "preserve the planet" required evidence that the company had taken concrete steps to meet the stated goal.

Q: The NAD has also challenged environmental marketing by independently monitoring the marketplace. What are these cases about?

A: When deciding to open a monitoring case, among the things the NAD considers is whether it would be filling a gap in the FTC's and the state AGs' regulatory efforts, and/or if the advertising addresses a novel or emerging issue of interest. Arguably, modern green marketing fits both of these criteria, and it is anticipated that the NAD will continue to monitor the marketplace — particularly if the FTC releases revised Green Guides.

The NAD recently challenged several environmental benefit claims in *Georgia-Pacific Consumer Products LP* (*Quilted Northern Ultra Soft & Strong Bathroom Tissue*) — including sustainability claims ("Premium comfort made sustainably") that consumers may not understand were limited to specific described benefits. In *Everlane, Inc.* (*Everlane ReNew Clothing*), the NAD brought a monitoring case against a fashion brand, recommending modification to environmental benefit claims to ensure that there is no deception.

Q: What can companies hoping to support environmental efforts do to manage legal risk?

A: Just as green technologies are rapidly evolving, this area is continuing to develop; industry standards are emerging, and updated regulatory guidance may soon be released. There will likely be further enforcement activity (particularly at the NAD) and class action counsel are on the hunt. Companies must keep apprised of all NAD, FTC and state developments in this area to be sure the decisions they make are well informed and the advertising is legally compliant.

Now Streaming: The Rise of the at Home Theater and the Changing Model for Content Distribution

James Johnston, *Partner,* jjohnston@dglaw.com
Paavana L. Kumar, *Associate,* pkumar@dglaw.com
Jordan M. Thompson, *Associate,* jthompson@dglaw.com

The talent compensation model for A-list film productions has traditionally resisted disruption in the entertainment industry. In particular, the model has long adhered to the following two-part format: the guaranteed up-front payment, and the contingent backend revenue share payment (beginning with theatrical box office and moving through home video, pay television and free television exhibition windows).

If a film does well at the box office, talent earns the guaranteed compensation, plus a cut of the revenues based on a pre-negotiated percentage. If the film is a dud and doesn't earn its money back (or simply costs too much), there's no back-end revenue share to be realized, and talent is left with the guaranteed up-front payment as primary compensation for their performance. Back-end deals align the interests of producers and talent, so that, when the movie makes more money, the talent (theoretically) makes more money. For lower budgeted productions, talent may even negotiate smaller up-front guarantee fees in exchange for larger back-end contingent revenue shares.

Yet the rise of streaming services has begun a gradual erosion of the traditional model. Subscription-based streaming services like Netflix, Hulu and Amazon Prime now regularly produce straight-to-stream original productions, featuring A-List talent that never hit the traditional box office or subsequent exhibition windows.

Enter 2020's widespread stay-at-home orders arising from the COVID-19 pandemic. With theatres being closed around the world film distributors were finally forced to consider real and lasting alternatives to the traditional mainstream in-theatre distribution channel and associated talent compensation model. Instead of pushing out distribution dates and waiting for mandatory quarantines to lift, traditional distributors partnered with streaming services to take a dual release approach, releasing major studio films in a limited number of theatres (where open) and online to streaming service subscribers simultaneously.

This fundamental shift in release strategy by major distributors upended the assumptions built into traditional back-end pay structures. When the only revenue generated from a film is the subscription revenue paid for the streaming service as a whole, calculating revenue shares becomes a Herculean task. Moreover, even when films are sold by traditional studios to streaming services, in most cases these streaming services are affiliates or subsidiaries of major media companies, like Warner Brothers/HBO Max, Disney/Disney Plus, Searchlight/Hulu and Universal/Peacock, ratcheting up concerns about self-dealing and below market pricing to new heights.

The question for talent then becomes: How should backend profits be calculated, and how should they be tracked when talent is left in the dark about such cross-affiliate related party transactions? Like the distributors, talent reps are now becoming forced to think creatively and evolve past the traditional way of doing business.

With the ever increasing number of streaming services and the vertical integration of these services into major studios, even though theatres have reopened, we'll continue to see changes in distribution strategy that outlast the pandemic, with many motion pictures distributed exclusively on, or simultaneously with, streaming channels.

What's on the Horizon

- A push for increased front-end guaranteed compensation;
- Alternative approaches to backend, including pre-negotiated automatic backend buyouts in the event there is no theatrical distribution;
- A push for transparency when it comes to performance on streaming services (e.g,, number of streams, subscription growth relative to film releases); and
- Strategies to circumvent the often losing battle over fair compensation when a studio sells a film to an affiliated streaming service.

COVID-19's Impact on Commercial Productions

Howard R. Weingrad, *Partner,* hweingrad@dglaw.com
Samantha G. Rothaus, *Associate,* srothaus@dglaw.com

Ever since COVID-19 was declared a global pandemic in March 2020, it would be an understatement to say that the world has changed.

In particular, the world of producing advertising content has certainly changed significantly. Production of commercials, film and television shows all paused for a brief period that felt like a lifetime during the spring 2020. As production activities slowly began to resume in summer 2020, a number of new and continually evolving protocols, best practices and expectations have emerged.

The two key issues that every production must now consider:

1. What is the financial impact if the production needs to be unexpectedly postponed or cancelled due to circumstances arising from COVID-19?

2. What protocols and guidelines should be implemented in order to reduce the spread of COVID-19 and protect the health and safety of those participating in the production?

Postponement or Cancellation

All productions for advertising content should be done pursuant to a production agreement or other contract. The COVID-19 pandemic has given rise to a reconsideration of contractual provisions related to cancellation, postponement and force majeure.

Health and Safety Precautions

Over the course of the pandemic, new guidelines and best practices have emerged to mitigate the risk of a production being interrupted by COVID-19, and to protect the health and safety of participants on set while working to avoid ongoing spread of the virus. Many of these protocols and precautions have been determined by federal, state and local authorities, and have been adopted by industry authorities.

Some of the precautions that have become standard practice for advertisers and agencies to require, and for production companies to implement and enforce are:

- Carefully selecting shooting locations, considering: indoors versus outdoors; level of infection in the proposed location; and whether people would need to travel long distance.

Pre-COVID-19

- Most companies did not enter into production contracts with an expectation that cancellation or postponement would be likely.

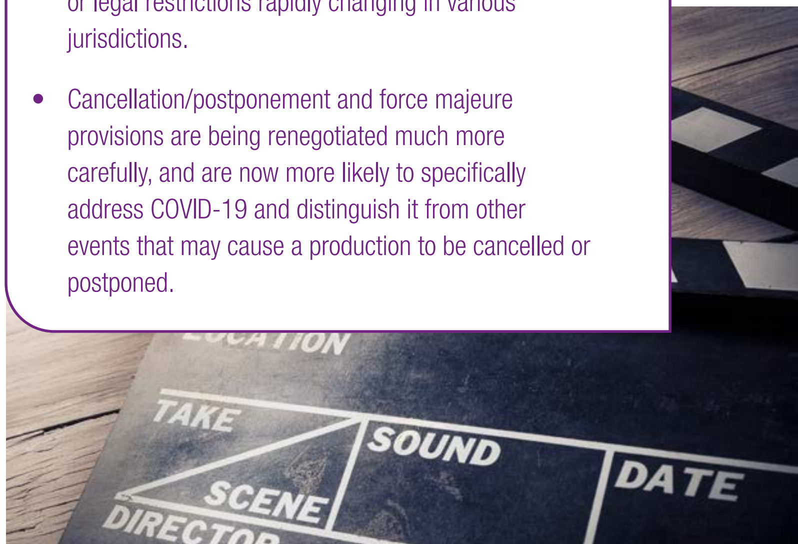
- At the outset of the pandemic, before shut-down restrictions and regulations, it was unclear what cancelling or postponing due to health and safety concerns would mean financially. Many production contracts did not address this situation very clearly.

- Cancellation and postponement provisions, and force majeure provisions — which excuse performance when it becomes impossible or illegal due to an unforeseeable event — typically consisted of boilerplate legal terms that were not often heavily negotiated.

Post-COVID-19:

- All parties have become more aware of the likelihood of production delays or cancellations due to unplanned circumstances arising from COVID–19 — such as key personnel getting sick or testing positive for the virus, becoming unavailable due to quarantine measures, or legal restrictions rapidly changing in various jurisdictions.

- Cancellation/postponement and force majeure provisions are being renegotiated much more carefully, and are now more likely to specifically address COVID-19 and distinguish it from other events that may cause a production to be cancelled or postponed.



Pre-COVID-19 (cont'd)

- Force majeure provisions sometimes did not specify how costs should be allocated in such an event, and sometimes provided that such costs would be handled in an identical manner as if the advertiser terminated "without cause."
- Termination "without cause" would typically result in the advertiser's obligation to pay for a significant portion of the total production budget (including all out-of-pocket costs, and the director and production company's service fees), based upon how far in advance of the production the cancellation occurred.
- Termination for "breach" typically required the advertiser to pay only for the production company's non-refundable out-of-pocket costs.

Post-COVID-19: (cont'd)

- More attention is being paid to the notion that a COVID-19 interruption should only be viewed as a force majeure event if it is truly out of any party's control. One lesson from the pandemic has been that many COVID-19 risks are, in fact, within the parties' control. Therefore, not every COVID-19 event may be deemed as a force majeure.
- Cancellation provisions now often focus on the importance of proper precautions and preparation to avoid a last minute COVID-19-related interruption. If appropriate precautions are taken and a COVID-19 event still interferes with the production, then it may be truly a force majeure. But a failure to take such precautions could also be viewed as a breach.
- Properly determining whether a COVID-19-related cancellation or postponement to a production is due to a force majeure event or a breach has significant implications on the amount of money each party must bear.

- Preparing a back-up plan to avoid cancellation if a COVID-19 interruption arises (such as having a back-up location or back-up personnel lined up).
- Minimizing the number of people necessary to attend, and using remote technologies to enable participation without being physically present.
- Requiring personnel to provide a negative COVID-19 test, and/or proof of full vaccination, prior to beginning work on the production, and additional periodic testing if a multi-day production or if circumstances otherwise warrant.
- Requiring all attendees to complete a health symptom questionnaire and submit to a temperature check upon arrival on set.
- Requiring social distancing and restricting mingling of groups on set.
- Requiring the use of face masks and other PPE whenever possible.
- Limiting food and beverages on set, and providing single-use, individually wrapped and served refreshments.
- Increasing sanitizing of common spaces and restrooms.
- Using improved air flow and filtration systems.

Different productions may require different sets of precautions, as the particular circumstances of each shoot vary widely.

While advertisers and agencies may have some input and are ultimately responsible to pay for the additional costs required by COVID-19 protocols, the production company is the party in charge of overseeing and managing the production on set. As a result, the production company is typically in the best position to take responsibility for implementing and enforcing these health and safety measures, and it has become common for production companies to hire a COVID-19 safety officer to help manage and enforce such protocols.

Production contracts should specify each party's obligations for the foregoing COVID-19 protocols so that responsibility is clear in the event they are not properly followed and an interruption occurs as a result.

The Esports Sponsorship Landscape

James Johnston, *Partner,* jjohnston@dglaw.com
Andrew Richman, *Associate,* ajrichman@dglaw.com

Navigating the esports landscape can be a daunting task. For sponsors seeking to leverage this fast-growing category, there are many entry points and opportunities to connect with a devoted audience. Here is a primer on the esports ecosystem.

Leagues/Tournaments

Could be run directly by the **publisher** (i.e. Overwatch League), or could be third parties (i.e., ELeague).

- Pays licensing fees directly to **publishers** for rights to use and feature games.
- **Sponsors** must pay leagues to be featured as tournament sponsors, or oftentimes to license tournament footage.

Sponsors

Sponsors have the ability to int
every aspect of the esports lan

- Who a brand partners with
and rights the sponsor will
- There is currently not one r
body, so each **league/tour**
play, and their relationships
may vary.
- Sponsors should ensure tha
rights they are intended to r
agreements may need to b
rights holder.

Publishers

Game creators and rights holders to the games, and in-game content.

- **Sponsors** must pay publishers to be featured directly in games (which allow for such integration).

Teams

A single organization may have several teams across different **tournaments**, with many **players**, playing different **games**.

- **Sponsors** may pay teams to be featured on player's jerseys, custom team content, or other similar sponsorships.
- If a **sponsor** wants to partner with a team but feature their gameplay, a pass through license with the **league/tournament** will be necessary.
- **Sponsors** may be able to use some group **player** name, image or likeness, but most often will require a separate player deal if featuring one player prominently.

Players

Many popular players are paid to join and share in the winnings of a **team**.

- Media platforms may pay players directly for the exclusive right to stream their non-competitive gameplay.
- **Sponsors** can partner with players directly, but similar to deals with traditional athletes, any commercial use of the player cannot integrate the player's team, league and, in this case, publisher/game which the player is affiliated with without further licenses from the aforementioned.

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Media Platforms

Streaming services (i.e., Twitch and YouTube Gaming) are currently the biggest broadcast rights holders.

- Media platforms pay rights fees to the **leagues/tournaments** for the ability to stream contests, and oftentimes to the **publishers** for the right to use gameplay.
- **Sponsors** may purchase integrations into a streaming broadcast, but may not grant the sponsor rights to rebroadcast or distribute footage to the event, without further licenses from the **leagues/ tournaments** and/or the publishers.

SAG-AFTRA's Influencer Agreement and Waiver to the Commercials Contract

Howard R. Weingrad, *Partner,* hweingrad@dglaw.com
Samantha G. Rothaus, *Associate,* srothaus@dglaw.com
Jordan M. Thompson, *Associate,* jthompson@dglaw.com

In early 2021, two new developments arose in the world of influencer marketing and talent unions. First, in February 2021, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) announced that it would begin welcoming online influencers into the union under its "Influencer Agreement." Shortly thereafter, SAG-AFTRA and the Joint Policy Committee representing advertisers and agencies (JPC) announced the introduction of a new "Influencer Waiver" to the SAG-AFTRA Commercials Contract.

Below are some common questions and answers regarding this development and what it means for advertisers and their agencies.

Q: What is the SAG-AFTRA Influencer Agreement?

A: The SAG-AFTRA Influencer Agreement (Influencer Agreement) is a contract intended to enable social media influencers who self-produce branded content for advertisers and meet certain additional criteria to be treated as members of the union in connection with their qualifying services.

Q: What are the requirements for influencers to produce content under the SAG-AFTRA Influencer Agreement?

A: In order for an influencer to be eligible to sign on to and produce qualifying content under the Influencer Agreement, they must meet the following criteria:

- Influencers must self-produce original on-camera video or voiceover content that features an advertiser's product or service. This means they must be the only performer appearing in the content and they must also independently write, film and produce all elements of the content. The content cannot be written or produced by a third party, such as a production company or an advertising agency.
- Distribution of the content must be limited to the advertiser's and the influencer's own social media channels (including YouTube, Facebook, Instagram, TikTok, Twitter, etc.).
- Influencers must incorporate as an LLC or corporation in order to sign on to the Influencer Agreement.
- Influencers must contract directly with an advertiser or an advertiser's agency. They cannot be procured or contracted through an influencer procurement network or other third-party intermediary.
- Influencers may not perform hazardous stunts, gratuitous nudity and sexual content under the Influencer Agreement.
- There are no follower-count requirements for an influencer to qualify to produce sponsored content covered by the Influencer Agreement.

Q: Who is considered to be the influencer's "employer" (and why does it matter)?

A: Influencers that want to perform union-covered services under the Influencer Agreement must do so through a business entity that is deemed to be their "employer." Influencers working under the Influencer Agreement must first incorporate themselves or establish an LLC. The entity they create then signs on to the Influencer Agreement and is considered the influencer's "employer" for purposes of their union-covered services. The influencer's entity as the SAG-AFTRA signatory is also responsible for paying the influencer's pension and health (P&H) contributions to the union from the influencer's compensation earned from their union-covered services.

Q: How can my agency/brand hire an influencer who has joined SAG-AFTRA under the Influencer Agreement?

A: Advertisers and agencies that are not signatories to the SAG-AFTRA Commercials Contract may freely hire influencers who have become union members under the Influencer Agreement and will not be subject to any union obligations. In such a case, the influencer (through his or her entity) would be solely responsible for complying with all union requirements, including calculating and contributing P&H payments to the union. The advertiser or agency will not need to modify their usual course of action in order to hire this influencer – and in fact may not even know whether the influencers are providing services under the union or not.

For advertisers and agencies that are signatories to the SAG-AFTRA Commercials Contract, influencers cannot be engaged under the Influencer Agreement. Instead, these signatories can utilize the Influencer Waiver to the Commercials Contract, discussed in more detail below.

Q: What is the Influencer Waiver to the Commercials Contract?

A: Advertisers and agencies that are signatories to the SAG-AFTRA Commercials Contract are required to abide by certain minimum requirements and standards when engaging performers to appear in commercials. With the rise in influencer-produced sponsored content in recent years, it has not always been clear whether certain influencer content could be deemed a commercial. The Influencer Waiver to the Commercials Contract (Waiver) offers a solution to this murky question by providing a safe harbor to signatory agencies and advertisers who seek to utilize influencer-produced sponsored content, while giving influencers treatment similar to what they would receive if they produced qualifying content under the aforementioned Influencer Agreement.

By utilizing the Waiver to engage influencers to self-produce sponsored content, signatory advertisers and agencies may freely negotiate the fee to be paid to the influencer, with no union-required minimum rates, and may utilize the influencer-produced content for up to one year. In exchange, the signatory advertiser or agency must make the P&H contribution to the union on the influencer's behalf, based upon the influencer's union covered services. As long as the contract clearly states the influencer's gross compensation amount as well as the total amount to be contributed to the union's P&H funds, the parties can freely negotiate as to whether the P&H contribution should be deducted from, or paid in addition to, the influencer's fee.

If the advertiser or agency wishes to expand its use of the influencer content outside of social media (such as to television) or beyond a one-year period, then notice to the influencer and further negotiation is required. Any expanded use of the influencer's content in other media or for a longer duration will trigger the need to pay the influencer additional usage fees in accordance with the Commercials Contract.

Q: If my agency/brand is a signatory to the Commercials Contract, does that mean we can only hire influencers who become SAG-AFTRA members?

A: A signatory advertiser or agency is free to hire any influencer, whether or not they are a member of the union. As long as the individual is providing influencer-produced sponsored content, then the advertiser or agency can engage the individual utilizing the Influencer Waiver regardless of the individual's union membership status. By utilizing the Waiver and giving the influencers benefits similar to those they would receive under the Influencer Agreement, signatory advertisers and agencies can avoid potential challenges from the union if the influencer-produced content might be considered a commercial.

Q: Will it become more expensive or complicated for my agency/brand to hire influencers now?

A: Because influencers who create qualifying content as SAG-AFTRA members are now obligated to make contributions to the union's P&H fund, they may be incentivized to charge higher rates. However, these developments are unlikely to have a significant impact on the usual process for engaging influencers.

Agencies and advertisers who are not signatories to the Commercials Contract are unlikely to see any changes or have any increased obligations due to the influencers they hire. Agencies and advertisers who are signatories will need to engage in some additional negotiation regarding how the influencer's P&H contribution will be paid, but otherwise will not be required to undertake any increased obligations.

SPORTS

What's in Store for Name, Image and Likeness Use

James Johnston, *Partner,* jjohnston@dglaw.com
Andrew Richman, *Associate,* ajrichman@dglaw.com
Jordan M. Thompson, *Associate,* jthompson@dglaw.com

The fundamental relationship between colleges and student-athletes has, and is continuing to undergo, a rapid and transformational change. As of July 1, 2021 student-athletes are able to contract and profit from the use of their name, image and likeness without risking their NCAA athletic eligibility. The changes will impact not only the sports themselves, but also the sports media and marketing landscapes.

Below are answers to some frequently asked questions about the risks and opportunities that these changes present for those involved in sports media and marketing.

1. When can sponsors start entering agreements with college athletes?

Now, in many states. Marketers could consider July 1, 2021 opening day. Beginning July 1st, name, image and likeness (NIL) laws in Alabama, Florida, Georgia, Mississippi and New Mexico took effect; meaning college athletes attending schools in these states can start entertaining brand endorsement deals without the concern that doing so will jeopardize their collegiate eligibility. Many other states have quickly followed suit.

2. Will permission from the school be required?

Yes and No. While the fundamental purpose of state NIL laws is to prevent colleges and universities from enacting, enforcing and upholding institutional and/or NCAA regulations that restrict a college athlete's ability to profit from their NIL rights, college athletes will need to work closely with their school to ensure that brand partnerships do not conflict with school or team pre-established engagements.

For example, under Mississippi law, prior to signing an endorsement deal, college athletes will be required to disclose the potential deal to their school. In Georgia, college athletes are prohibited from entering into NIL agreements that conflict with team contracts. Further, marketers must keep in mind that team names, marks, logos (including team uniforms and colors) and other school indicia are the intellectual property of the school, and permission must be obtained from the school prior to any use in connection with college-athlete sponsored content.

3. Will there be product category limitations?

Yes. In the hours prior to the July 1st effective date, the NCAA released interim guidelines around NIL rights for its athletes. These guidelines failed to provide much information, and instead deferred regulations to the school a student attends, which conference they are in and the state where the school is located. It is expected that many universities and conferences will build guardrails to uphold their values and principles, limiting the types of products and services a college athlete can endorse. Some states have similarly factored in ethical standards in their NIL lawmaking. Alabama and Mississippi laws, for example, prohibit college athletes from sponsoring products and services in the tobacco, marijuana, alcohol, gambling and adult entertainment categories.

4. Will NIL laws be the same for every school?

Not Yet. Until federal legislation passes, a marketer's ability to partner with a college athlete will depend on the laws of the state where the school is situated.

5. What role will agents play in securing college athletes as endorsers?

College athletes will be allowed to hire agents and other professionals **to assist them with their NIL opportunities**. The NCAA's interim guidelines simply state that an "Individual can use a professional services provider for NIL activities." While specific guidance has not been developed, it is likely that school or conference clearinghouses, where athletes would be required to file how much they were being paid, who was paying them and what for, will also oversee the agents and their representation.

6. Will sponsors be able to secure multiple players or entire team rosters?

Yes (sort of). As of now, there are no plans for group licenses of student-athlete NIL. The NCAA and others believe that, if permitted, the group licenses may be used as a new tool for improper recruiting. NIL rules are being established to help protect fair competition, and endorsements with certain companies linked to future enrollment could be seen as a form of pay-for-play. For now, any deal with multiple athletes will need to acquire the rights of each player separately. But marketers should proceed with caution. Some sponsors have begun to sign team-wide deals, but these are already under scrutiny by the NCAA.

7. Are there limits on how much student athletes can be paid or for how long?

Not Quite. There is currently no limit on how much a student athlete may be compensated. However, legislation in several states will allow schools to implement regulations to ensure that no recruiting violations are taking place and that boosters are not paying egregious sums for insufficient services. The NCAA will also continue to monitor transactions it views as "pay-for-play," challenging transactions that are not based on the market-based value of the student-athletes' NIL rights.

8. Can sponsors engage with high school athletes before they begin college?

In some states. The change in NCAA rules also applies to high school athletes. However, eligibility for high school athletes is still determined at the state level. Some states, such as Texas and Florida, have specifically prohibited high school athletes from exploiting their NIL rights, while California permits high school athletes to participate in this new era.

Livestreaming Is Here To Stay

As a result of the pandemic, livestreaming of music is booming and unlikely to go away even after in-person concerts return in full force. Brands and agencies that want to use this impactful marketing tool will need to understand the basics of music licensing before getting involved.

The following Q&A provides information on what marketers should take into consideration about music licensing for livestreams before diving in.

Q: We want to hire a band, singer or rapper to perform a livestream to help promote our brand/products. We already have a talent agreement with the performer, so do we still need to worry about music licenses?

A: Yes, your talent agreement will likely only require the talent to perform and grant you rights to the talent's name, image and likeness.

Even if the performer wrote all of the songs to be performed, the talent agreement will probably **not** include rights to:

- Use those songs;
- "Publicly perform" those songs; or
- Use any existing sound recordings that may be used in the performance.

Q: Our products are not going to be featured in the livestream and we won't have any signage. Do we still need to worry about music licenses?

A: Yes, if you plan to promote the livestream on social media (or elsewhere), you should ensure the music is appropriately licensed. The commercial association between your brand and the songs may be enough to trigger the need for music licenses.

Q: We want to use clips of the artist performing the songs on social media to promote the upcoming livestream, and then, after it's over, to promote that it happened. What licenses do we need?

A: It is important to understand that using recorded clips of the artist performing songs live will likely require the same licenses you would need if you used a song in a traditional TV, radio or digital commercial.

This means you will need to obtain a synchronization (synch) license allowing you to use the musical composition (the words and music), and you may need a license from a record label for the actual use of the newly created master recordings from the live performance, in the event the artist is a party to an exclusive recording agreement. Even if you paid for the production of the livestream event, and paid the artist for the performance, you still need to consider these synch and master recording licenses. In addition, if an artist wants to use pre-recorded music within their live performances, additional third-party licenses may be required.

Q: We don't want to use recorded clips in promotion, but we want to re-play the entire livestream and leave it up for a period of time. Do we still need to consider obtaining synch and master recording licenses?

A: Yes, you still need to consider synch and master recording licenses in these circumstances.

Q: We want to record our livestream in advance for production reasons but it will otherwise appear live. We will only play it one time, and won't use any recorded clips in promotion. Do we still need to worry about music licenses?

A: Yes, in these circumstances, you may still need to consider synch and master recordings licenses.

Q: Our livestream will be truly live — not recorded in advance — and we won't re-play it or use any recorded clips in marketing before or after the event. Do we still need to worry about music licenses?

A: Yes, you will still need to consider public performance licenses, which allow you to publicly "perform" the musical compositions live. The livestreaming platform may not have a license in place, so you may need to obtain a "one-off" license from the performing rights organizations such as American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI).

> "It is important to understand that using recorded clips of the artist performing songs live will likely require the same licenses you would need if you used a song in a traditional TV, radio or digital commercial."

Howard R. Weingrad
Partner
hweingrad@dglaw.com

Howie is the advertising lawyer clients trust to help them navigate the complex problems and potential risk . . . **more**

Darren Fried
Counsel
dfried@dglaw.com

While handling thousands of transactions and music and talent matters over his more than 20-year legal career . . . **more**

Samantha G. Rothaus
Associate
srothaus@dglaw.com

For agencies and brands exploring innovative ways to promote their content and products, Samantha . . . **more**

Employment Practices Liability & Cyber Liability – Insurance Policies Not to Neglect

There are certain insurance policies, such as workers' compensation and general liability, that are ubiquitous and are purchased by nearly every operating company in every industry.

There are certain insurance policies, such as workers' compensation and general liability, that are ubiquitous and are purchased by nearly every operating company in every industry. While some companies will purchase additional insurance policies that are applicable to their operations and industry specific risk exposures, other companies elect to self-insure, declining to purchase certain insurance coverage they deem to be low risk exposures or not worth the investment in coverage.

Employment Practices Liability Insurance

As employment practices liability insurance started gaining prominence over a decade ago, with some companies understanding and appreciating the importance of the coverage, there were some that expressed hesitancy to purchase the coverage, struggling and failing to understand the need for it.

Fast forward to today and one would be hard-pressed to find a company operating without such coverage. The arrival of the #metoo movement and the attention it placed on workplace behavior ushered in a new era of understanding — appreciating the significance and need for such insurance coverage.

Jack Schwartz
Special Insurance Counsel
jschwartz@dglaw.com

Jack Schwartz is an experienced insurance lawyer offering the firm's clients effective strategies they can use in all facets of their business, particularly in their contracts and agreements. Jack has spent the past 15 years deeply immersed in the insurance industry, including as coverage counsel and assistant general counsel at a brokerage.

A unique resource within a law firm setting, Jack offers clients valuable perspective into understanding insurance policies, their procurement and placement, coverage negotiation, and claims handling. He draws on his rare depth of technical knowledge to help position clients to address multilayered insurance concerns. Jack leads **Davis+Gilbert Risk Management LLC**, an insurance consultancy firm and wholly owned subsidiary of Davis+Gilbert.

Cyber Liability Insurance

A similar evolutionary process (though not from a moral equivalency perspective) has been unfolding in the insurance industry with cyber liability insurance. As it emerged in the industry, there was significant hesitancy in exploring the coverage, let alone purchasing it. Initially, companies refused to acknowledge the importance of the coverage. Even as large cyber events took place, most businesses failed to realize that they were targets, incorrectly believing that only "brand name" companies were targets of the deleterious designs of cyber criminals.

Over time, it has become apparent that smaller and lesser name companies are actually greater targets of cyberattacks. Due to a lackadaisical approach and weaker attempts at cybersecurity, smaller companies are easier targets and ultimately more often the victims of cyberattacks. Given multiple sources of data supporting this notion and indicating that anywhere from 50% to two thirds of small businesses have suffered at least one cyberattack, along with greater education and awareness, it is now rare to encounter a company that is not, at the very least, interested in exploring the coverage, if they haven't already purchased it.

It is important to be aware of the key points for these two lines of coverage to better understand the potential exposures to risk and how to address it with insurance.

Employment Practices Liability

Some of the standard coverages include:

- Discrimination
- Harassment
- Wrongful Termination
- Retaliation
- Defamation
- Invasion of Privacy
- Failure to Promote
- Deprivation of a Career Opportunity
- Negligent Evaluation

Some enhanced coverages include:

- Third Party Liability — Discrimination and Harassment of a Nonemployee
- Defense for Wage and Hour Claims Brought under the Fair Labor Standards Act
- Defense against Claims Brought under Federal Immigration Laws

Cyber Liability

Coverages can vary significantly by carrier, but the following are some of the coverages that can be afforded:

- Data Breach
- Data Restoration
- Crisis Management
- Business Interruption
- Cyber Extortion
- Network Security and Privacy Liability
- Notification Costs
- Regulatory Fines & Penalties
- Media Liability

Some enhanced coverages may include:

- Computer Fraud
- Funds Transfer Fraud
- Social Engineering
- Phishing
- Invoice Manipulation
- Cryptojacking
- Bricking

What Businesses Can Do Now

- Due to the variety of different forms and the amount of carriers competing in this space, multiple quotes should be obtained and compared in order to achieve best pricing and to better understand the coverages available.
- It would be prudent to review the coverage with an insurance broker or consultant that is well-versed in cyber liability coverage to ensure the right coverage is put in place.
- Because there are no standard forms, carriers are more flexible when negotiating terms and coverage, and unique exposures can be addressed without the typical roadblocks one would encounter when trying to negotiate terms with other insurance policies.

DIVERSITY/PRO BONO SPOTLIGHT

Creating an Opportunity To Be SEEN

Andrew Richman, Associate, ajrichman@dglaw.com

The sports and entertainment industries, while one of the most coveted industries to break into, have long been one of the most difficult to enter, particularly for black and brown professionals. These industries have lacked diversity, making it difficult for black and brown individuals to gain the exposure and experience needed to succeed in the business.

This combination has provided for a disparate impact, and one that Sports and Entertainment Equity Network (SEEN), a 501(c)(3) non-profit, is looking to break.

Led by industry veterans and co-founders, Melcolm Ruffin and Tristan Mitchell, SEEN has made lasting impacts on 1500+ professionals as it strives to close the diversity, equity and inclusion (DEI) gap prevalent in the business of Sports and Entertainment. Through advancement, community building and giving back, SEEN aims to offer its members the opportunity to accelerate their careers and build authentic relationships, providing them with impactful opportunities to reinvest their time and resources into the next generation of diverse sports and entertainment leaders.

While initially founded in 2015, amidst the global pandemic, SEEN and its leadership team decided to register as a non-profit to help its growth and promote its mission. With the legal assistance of Davis+Gilbert attorneys, including Davis+Gilbert associate and SEEN board member Andrew Richman, SEEN was able to successfully register and organize as a 501(c)(3) organization, and receive the expertise needed to begin the journey of a sustainable organization.

Davis+Gilbert has supported SEEN in its grassroots origin and has provided legal assistance in building the young organization from the ground up, providing support from a trademark perspective, advising on employment issues relating to SEEN's first full-time employee, providing risk assessments and analysis, drafting contract templates and participant releases, and helping launch their website SEENTogether.org. "Davis+Gilbert's pro bono consultation has been truly invaluable as we laid SEEN's foundation for sustainable, long-term growth" — Melcolm Ruffin, SEEN's President.

Making a Difference

To learn more about the organization, donate and find ways to support their mission, visit their website and connect with them on Instagram and LinkedIn.

SEEN
SPORTS & ENTERTAINMENT EQUITY NETWORK

In the past year, SEEN has:

- Formed a highly successful mentorship program — "SEEN NextGen" — which pairs young black and brown professionals with two mentors each and has already led to several new career opportunities for its mentees.
- Executed the SEEN Career Showcase, in which over 125 black and brown professionals were able to network and connect with recruiters from eight of the top sports and entertainment organizations, including the NBA, MLS, CAA and Overtime.
- Launched the SEEN-McCormack Fellowship in partnership with the University of Massachusetts Amherst to annually provide two individuals in the SEEN network scholarships covering all tuition and fees for the McCormack Department of Sports Management's top-ranked MS or MS/ MBA program for the next three years.
- Executed several digital panels (including Black Activism in Sports: Athletes Leveraging Their Platform for Social Justice and Women Driving Change: A Celebration of Women in the Sports and Entertainment Industry) and various networking events attended by more than 500 members.

Engage
Interact
Share

Connect with us to stay up-to-date on all of our latest content offerings. We understand the challenges companies face day in and day out and strive to issue guidance with an eye to the future.

All of our Davis+Gilbert thought leadership can be found on our website or via our social media channels.

- Advertising + Marketing
- Benefits + Compensation
- Corporate + Transactions
- Insolvency + Finance
- Intellectual Property + Media
- Entertainment + Sports
- Labor + Employment
- Litigation + Dispute Resolution
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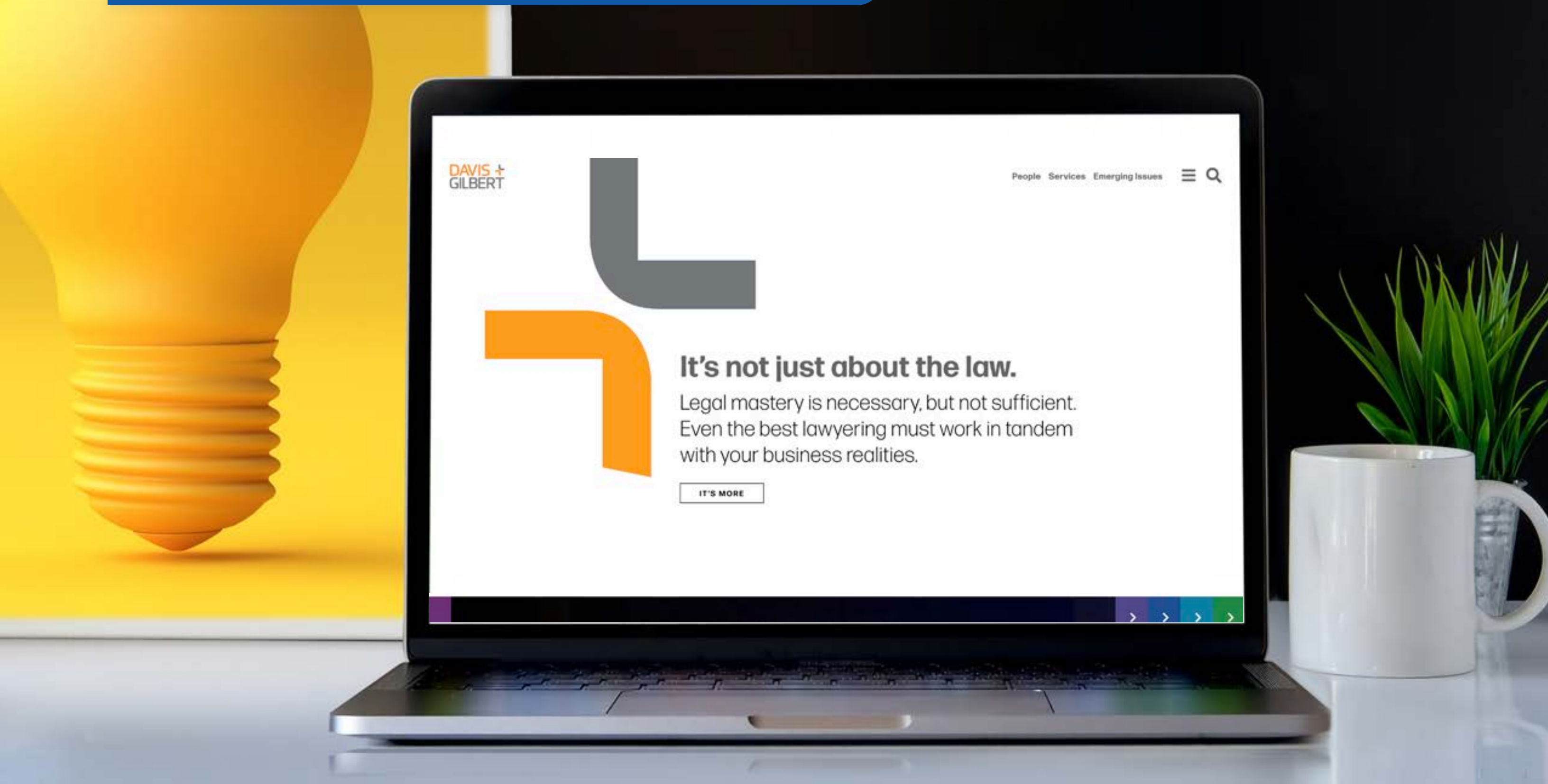
- Real Estate
- Taxation

Contact us at **info@dglaw.com** to learn more and register to receive updates to your inbox



DAVIS + GILBERT

Meet the Davis+Gilbert Advertising + Marketing, Intellectual Property + Media and Privacy + Data Security Practice Groups


Ronald R. Urbach
Partner/Co-Chair


Richard S. Eisert
Partner/Co-Chair


Claudia G. Cohen
Associate


Ashima A. Dayal
Partner


Louis P. DiLorenzo
Associate


Sara L. Edelman
Partner


Allison Fitzpatrick
Partner


Darren Fried
Counsel


Stuart Lee Friedel
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Gary Kibel
Partner


Zachary N. Klein
Associate


Devin A. Kothari
Partner


Paavana L. Kumar
Associate


Joseph Lewczak
Partner


Sumi Naidoo
Associate


Andrew Richman
Associate


Samantha G. Rothaus
Associate


Brooke Erdos Singer
Partner


Alexa Meera Singh
Associate


Kurt E. Sohn
Associate


Aaron K. Taylor
Partner


Jordan M. Thompson
Associate


Gia M. Wakil
Associate


Howard R. Weingrad
Partner


Joy J. Wildes
Counsel

DAVIS + GILBERT

It's not just about the law.

Legal mastery is critical, but not enough. Even the best legal strategies must work in tandem with your business realities. Our industry focus and deep insight about the issues that drive your business enable us to provide solutions that make a difference.

Davis+Gilbert's proactive, business-oriented approach stems from our long history of working with key industries not just as advocates, but as counselors. We helped guide the marketing communications ecosystem as it evolved from the early 20th century to today's world of data, digital and social media. For many years, we have successfully applied that same see-around-corners vision and focus to real estate, financial services, hospitality, technology and other service sector industries, becoming the firm of choice for the market leaders of today and tomorrow.

Adding value

When we commit to your legal work, we go all in on your business. We immerse ourselves in the complexities of your operations, the dynamics of your industry, the nuances of your culture — and we continually expand what we know.

This lets us share insights about what is happening in your industry. We're able to discuss the key trends, enforcement practices and strategic developments. Our holistic focus is one reason clients stay with us, decade after decade, as markets, technologies and business models evolve.

Practical business-focused advice

Clients rely on us for information and advice that helps them make informed decisions. We quantify risks that clarify not just the potential legal consequences, but the practical realities facing companies and their executive teams.

IQ plus EQ

We listen to and work closely with your people — up, down and across the org chart. We go out of our way to understand your culture, your goals and what makes your company tick.

Legal excellence is the cornerstone

Central to our work is our unyielding commitment to hiring and training lawyers with exceptional legal knowledge and skill. Many of our lawyers come to Davis+Gilbert with significant accomplishments at other prominent law firms and government entities, and in corporate legal departments and executive suites. Others are home-grown lawyers who have risen to prominence through their training and experience here. All collaborate seamlessly to help our clients meet their goals.

dglaw.com

Advertising + Marketing

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- Advertising Review, Production and Media
- Data, Digital Media and Ad Tech
- Digital and Social Media Marketing and Advertising
- E-commerce and Retail Sales
- Marketing and Promotions
- Regulated Products and Industries

Intellectual Property + Media

- Content Creation and Use
- Entertainment and Sports
- Intellectual Property Litigation
- Technology Creation and Protection
- Trademark and Brand Management

Privacy + Data Security

- Breach Response and Ransomware
- Data, Digital Media and Ad Tech
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Davis+Gilbert LLP 1675 Broadway, New York, NY 10019 212 468 4800 dglaw.com