

AUGMENTED REALITY, ADVERTISING, AND PRACTICAL LEGAL CONSIDERATIONS

By

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New technologies, new media, and new methods of engaging consumers continue to disrupt the advertising industry. The “song remains the same,” so to speak, with the new technology of augmented reality. As it gets deployed across the advertising landscape, legal practitioners must understand how it works, how consumers interact with and perceive advertising messages using this technology, and how to apply the traditional advertising legal standards. As a first step, it is important to understand what augmented reality technology is, and how it is different from a similar technology, virtual reality.

Augmented and Virtual Reality are the Same, Right?

If you consume any form of media, whether it’s television, radio or video, then you’ve probably heard the terms “augmented reality” and “virtual reality” used synonymously. As disruptive as these technologies have the potential to be to media, augmented reality and virtual reality really are quite different. With augmented reality, the user continues to be in touch with their real-world surroundings while interacting with virtual objects. Virtual reality, however, immerses a user into a completely altered computer generated virtual reality, as is the case with the popular virtual reality glasses. In other words, augmented reality is a technology that overlays or superimposes a computer generated image on a user’s view. Augmented reality is an interactive experience, in which the user’s environment is “augmented” by the computer generated image.

The term augmented reality (or AR as it is often called) was coined by a Boeing researcher in 1990, when he created a view of a real-world environment that included certain computer generated augmented elements and images.ⁱ AR now refers to technology platforms or devices that superimpose text, sound, graphics, or video on top of our actual environment. The digital content is essentially customized to the context of and space surrounding our real environment. The most recognizable use of augmented reality was the 2016 launch of Pokémon Go, an augmented reality mobile game, which generated over 100 million users. As an example of a wearable AR device, think of Microsoft’s HoloLens system.

Because of the innate technological differences between augmented reality and virtual reality, augmented reality may be the most accessible of the new media technologies for brands and advertisers to deliver and commercialize.

One of the primary ways that people share and consume content is through video, therefore using augmented reality as an innovative technology in media is the natural next step in the media and advertising industries progression. Further, the technology already exists in order to bring such content to the mass market. According to Citi GPS, augmented reality is quickly growing into a new trillion-dollar market with annual revenues of \$692 billion expected by 2025.ⁱⁱ

Show Me How to Augment My Reality!

As pervasive as media is today, new technologies are seeking ways to connect, engage and empower consumers continuously throughout their day. Notwithstanding Pokémon Go's smashing success, AR technology was truly pioneered by popular messaging applications, and is now being adopted by industries' main players and largest platforms, blending the real and virtual worlds through phones and other devices.

One such messaging platform first introduced "selfie-commerce", which is a term used to describe blending augmented reality shopping ads, selfies, and commerce, also call this new creation, "shoppable AR".ⁱⁱⁱ Consumers have the opportunity to add the commerce lenses to their videos, and the applications also include a button that leads to a shopping page, an app-install page, a video, or a website without leaving the platform. Last November, consumers were introduced to a "swipe to try" augmented reality advertising with BMW and it became the first car brand to create a 3D augmented reality version of a product within a messaging platform. The ad began like a typical video ad, however, when users swiped up, the technology enabled the camera on the consumer's device and allowed the user to virtually walk around the augmented reality car and see all of its details. This ad became a way for consumers to "interact and play with a 3D augmented reality version of a product before considering buying it."^{iv}

During the summer of 2018, brands in a variety of industries began testing the augmented reality feature by creating ads that allowed users to simulate trying on sunglasses, lipstick shades and viewing furniture in their home setting.^v Unlike more traditional methods of advertising, this augmented reality feature has the capability to fully engage the consumer. Using a Sephora AR ad as an example, consumers who clicked on the promo could test a shade of lipstick on their lips by enabling the application's camera.^{vi} Consumers then shared share a photo of this augmented moment, with a sticker advertising the product to their on-line friends directly or on their user stories. In addition to a new level of consumer engagement, the consumer also had three ways to shop - from the messaging application's post, the AR ad, or the shared consumer generated advertising, all of which link to a product page. This level of consumer engagement coupled with commercialization is a brand's dream.

Social media giants are not the only companies taking advantage of augmented reality. Blippar, a technology and augmented reality company, is also enabling brands to use AR in digital banner ads. Blippar introduced its AR ad unit in May 2017, using a smartphone or desktop camera to deliver AR experiences from banner ads.^{vii} Other AR companies have tested these types of banner ads with home goods and furniture retailers, which allowed consumers to see what furniture and holiday decorations would look like in their homes. Consumers viewing these types of

advertisements spent an approximate average of two minutes interacting with the ads, and the campaign had an average click-through-rate of 12.5%.^{viii}

Augmented reality advertising is still developing, and with countless brands wanting to overlay a consumer's vision with augmented text, elements and graphics, consumers will need to decide which brands they trust with altering their reality. Given Blippar's recent acquisition and additional investment into AR technology, we are likely going to see continued and increased use in advertising. However, controlling and coordinating these elements, while also protecting the consumer, will be the key to successfully growing and commercializing augmented reality and the platforms that support it.

New Technology – The Same Old Song

While augmented reality technology and its use in advertising have the potential to completely reshape how consumers and brands engage with each other, it is also important to keep in mind the legal considerations. AR may be a relatively new concept in advertising, but existing legal constructs still apply. These legal considerations largely fall within three categories: (i) the Federal Trade Commission's regulation of advertising; (ii) the use of consumer data and related privacy concerns; and (iii) negotiating commercial terms in service provider agreements and terms of service.

The Federal Trade Commission

The Federal Trade Commission (the "FTC") has not yet released any specific guidelines for marketers to comply within the context of augmented reality advertisements; however, as this technology continues to expand and marketers take advantage of the novel marketing opportunities it provides, the FTC, at some future point, may release guidelines outlining how such advertising fits into the existing regulatory framework. Until then, marketers should apply existing guidance to these newer forms of advertising, because while the technology used to deliver such advertising may be novel, banner ads, native advertising, and endorsements are nothing new.

Over the years the FTC, which regulates advertising in the hopes of reducing consumer deception by mandating the use of disclosures, has worked to keep pace with technology by providing practical guidance regarding what must be disclosed to consumers by advertisers, brands, and social media influencers. Section 5 of the FTC Act prohibits unfair or deceptive business acts or practices and charges the FTC with enforcement.^{ix}

In December 2015, the FTC issued a policy statement (the "Policy Statement"), which provided guidance and examples of how to avoid deceptive advertising in native ad placements, and such guidance would still apply if brands or marketers use augmented reality in native ad placements.^x Marketers would still be responsible for ensuring that consumers understand that the advertisements or promotional messages they convey are indeed ads. The Policy Statement relied upon three overarching principles to avoid deceptive advertising and misleading consumers by reaffirming that: (i) transparency is paramount, and an advertisement or promotional message should not suggest or imply to consumers that it is anything other than an ad; (ii) some native ads

may be so clearly commercial in nature that they are unlikely to mislead consumers even without a specific disclosure. In other instances, a disclosure may be necessary to ensure that consumers understand that the content is advertising; and (iii) if a disclosure is necessary to prevent deception, the disclosure must be clear and prominent.^{xi} Perhaps given the potential for consumer engagement with AR advertising the ads may be deemed “so clearly commercial in nature that they are unlikely to mislead consumers.” As time and the commercialization of AR evolves, the industry is likely to have a clearer understanding. Again, these principles are not new considerations, rather, they serve to remind advertisers and publishers of longstanding principles, as well as to provide existing parameters around newer forms of advertising such as augmented reality.

The Policy Statement reminds advertisers that, as always, the FTC will look at the “net impression” of the ad to determine whether the commercial nature of the content is clear to the “reasonable” consumer. In determining this, the FTC will consider the overall appearance of the ad itself, and the verbal/audio content of the ad in the case of multimedia, as well as the similarity of the ad’s style and formatting to the surrounding non-advertising content and whether the substantive content is distinguishable from the surrounding non-advertising content. Thus, the more similar the ad is to the publisher’s site content, the more likely it is that a disclosure is necessary.

Notwithstanding the foregoing, given the level of consumer engagement involved with augmented reality advertising, the nature of such advertising may in fact make disclosure requirements easier for advertisers and publishers. The 2015 Policy Statement listed additional considerations when evaluating whether a consumer will recognize the content as an advertisement such as: (i) determining on what media the content is featured. The FTC acknowledges that consumers have different expectations depending on the media being consumed (e.g. social media versus a news website); (ii) determining who is the target audience. If children are the target audience, they are unlikely to recognize something as an ad; (iii) does the substantive content of the ad differ from the surrounding content?^{xii} An ad inviting a consumer to shop for dresses in a news stream is likely recognizable as an advertisement, as is an ad engaging consumers to try on a new lipstick shade and share the moment with social media friends; (iv) is the format of the ad similar in written, spoken, or visual style to the non-advertising content? Does the content look like an editorial article on a news site? Conversely, is the content set apart using background shading or other visual cues to indicate that it is an ad? Again, if marketers are focusing on engaging the consumer and making the consumer part of the advertising experience, then perhaps this consideration is minimized.

Following the Policy Statement, the FTC returned its focus to endorsements and provided specific guidance to social media influencers who endorse products. The FTC noted in its 2017 guidance entitled, “Influencers, are your #materialconnection #disclosures #clearandconspicuous,” that it had been spending time on social media because advertisers, endorsers, and consumers are spending a considerable amount of time on social media, and the FTC was concerned that some social media influencers may not be aware of the truth-in-advertising standards for endorsements and disclosures. Although this guidance arose as a result of certain social media influencers’ on-line actions, advertisers using augmented reality can glean certain learnings from the FTC’s advice on making effective disclosures.

The FTC stated^{xiii}:

(i) ***Keep your disclosures unambiguous.*** The FTC suggested making disclosures very clear and avoid vague terms such as, “#partner,” or “#sp”. These disclosures are unlikely to explain that there is a material connection between the influencer and the brand. One should avoid unfamiliar abbreviations or cryptic words that are subject to several interpretations. Further, the FTC recommends that the parties ask themselves, “In the context of this post, how can I make the connection clear?”

(ii) ***Make your disclosures hard to miss or unavoidable.*** When posting, an influencer’s or marketer’s goal should be to post in a way that makes the disclosures easy to spot. All disclosures should be placed above the “more” button.

(iii) ***Avoid hard to read hashtags.*** Avoid placing a disclosure in a string of hashtags because consumers are unlikely to read it.

Even though the enforcement of augmented reality has been limited, the FTC’s 2017 guidance and the 2015 Policy Statement provide a sound basis for reviewing augmented reality advertising within the existing legal framework. For example, certain social media platforms offer an augmented reality feature which allows users to alter their appearance with a variety of augmenting filters. Such platforms are taking affirmative steps to address disclosure issues associated with its augmented reality technologies, and specifically mandates that endorsers and influencers place a “clear and conspicuous disclaimer” if they were compensated for using the lens or filter.^{xiv} These platforms now retain the right to affirmatively place labels, such as “ADVERT” or “sponsored”, on posts it believes are advertising, thereby taking a more active role in policing and ensuring appropriate disclosure practices.^{xv} Moreover, using the Sephora AR ad discussed above as another example, consumers who clicked on and shared the promo testing a shade of lipstick were required to add a virtual sticker to clearly state that they were promoting the product in order to share the promo with their on-line friends or through their user stories.

The FTC may release entirely new regulations, regardless of whether they are consistent with existing guidelines that apply more seamlessly to novel and emerging technologies. Until that happens, advertisers and publishers must rely on the existing FTC regulations and the obligation to clearly and conspicuously disclose material connections to endorsements, digital advertising, and product placements.

Consumer Data and Privacy

Advertisers use data to power their decisions on how best to reach and engage consumers; and augmented reality technology presents interesting and novel questions around privacy, data collection and security. Augmented reality companies have the ability to collect different types of user data, such as data related to a devices’ movements and the dimensions of a room, images of the users or others around them, or information about a user’s activities in the application or connected social media account by making use of a user’s GPS, microphone, and camera.^{xvi}

Further, as the technology and applications develop, a user's interactions with devices are moving from using a click of a button or a touchscreen to facial or voice recognition. For example, certain applications may track where a user is looking and for how long a user looks at an object or person. Even more opportunities for data collection exist with customizable viewing options that increase occasions for brands to be able to leverage personalized data to "hyper-target" their content, advertising, and products. It is crucial for companies to find the balance between access for functionality of an application and the risk of access to a user's data being misused.

Given the potentially more expansive data collection practices and access to new kinds of data, it is critical for companies that provide or utilize augmented reality technologies to have thoughtful internal privacy policies that fully articulate the nature of data collected and the way in which it will be used and shared.

As companies design their privacy policies and internal processes, there are two main questions to consider: (i) is the information the company is collecting, using, and sharing "organic" (i.e. relevant to the actual services being provided), or "artificial" (i.e. overreaching and unrelated) and, relatedly, is the company asking for greater data collection permissions than necessary?^{xvii}; (ii) are the company's actual practices consistent with what is stated in its privacy policy or is the company collecting greater data than it leads users to believe it is collecting from them?^{xviii} Even with these considerations, if the technology is properly configured, augmented reality technology has the potential to implement best in practice privacy management; the concept of real time notice and consent.^{xix}

An AR environment that will collect and share information could be configured in numerous ways. For example, if a user has subscribed to a geo-location sharing application or service, the user could select options for informing other members of their location, notify all automatically (default open), notify only friends, notify specific individuals, request permission to notify when a registered individual comes within a certain range, or do not notify (default closed).^{xx} Likewise, with advertising, offers and ads could provide a real time privacy notice and selection for users.^{xxi}

It bears noting that companies who collect and process personal information or data of consumers who are physically in the European Union or whose personal data are processed by an entity established in the European Union will also need to comply with the recently effective General Data Protection Regulation (the "GDPR").

Furthermore, while the California Consumer Privacy Act (the "CCPA") is not yet effective until 2020, it will have sweeping effects on businesses' data practices, with additional compliance obligations. Moreover, the vastness of personal information regulated by the CCPA is the most far reaching in the U.S.. As currently drafted, the CCPA will affect businesses that (i) collect consumers' personal information, or on the behalf of which such information is collected; (ii) alone, or jointly with others, determines the purposes and means of the processing; (iii) do business in the State of California; (iv) meets certain threshold requirements (annual gross revenue exceeds \$25 million; annually sells the personal information of greater than 50,000 or derives greater than 50% of its annual revenues from selling personal information); and (v) controls or is controlled by

such an entity. In a nutshell, the CCPA establishes a new privacy framework for businesses that fall within its jurisdiction by:

- Creating an expanded definition of “personal information”;
- Creating new data privacy rights for California consumers, including rights to know, access, delete, and opt out of the “sale” of their personal information;
- Imposing special rules for the collection and sale of personal information directly from minors; and
- Creating a new statutory damages framework for violators that fail to implement and maintain reasonable security procedures and practices to prevent data security breaches.

Businesses would be wise in early 2019 to begin developing more robust data management processes, and for those companies that are not compliant with the GDPR, they should begin data mapping.

Finally, augmented reality does present certain data security risk considerations because digital data overlays the consumer’s environment. With any digital technology, there is a risk that hackers can infiltrate a system to access, remove, modify, or alter data. Augmented reality technology companies and those companies who incorporate AR into their existing technology must implement appropriate technical and organization security measures designed to protect the significant amount of user information that may be stored and transmitted, including designing internal security programs. These entities will need to conduct appropriate pre-engagement diligence in advance of contracting with vendors to ensure that a potential vendor offers industry standard information security controls.

Commercial Considerations

A critical component in providing augmented reality technology is the service provider agreement or terms of service between the developer or technology provider and the entity that will be using the AR technology, such as a brand, ad agency or social media platform. As this article has noted, the FTC’s regulation of advertising, and how parties collect and use data, are considerations that should be captured in these commercial arrangements. It goes without saying and it is worth repeating that it is vital that developers make users aware of what personal data is collected and processed, and how it may be used or shared, while still complying with privacy and data protection laws.^{xxii} It may be important for developers and service providers to aim to limit their access to only the data that is required to allow the technology to properly function, retain data for only as long as is necessary, and certainly make users aware of what data is being accessed by providing clear terms and conditions of use, and as applicable, the requirements of the CCPA.

Further, companies on both sides of any contract for use of these services must consider and stipulate the following:

- (i) A well-defined and customized definition of “customer data” specific to the technology, keeping in mind the applicability of the CCPA and how personal information is defined thereunder.
- (ii) Sufficient and well-drafted confidentiality obligations that include non-disclosure requirements of customer data, including security breach notification requirements.
- (iii) Provisions that reserve title in pre-existing intellectual property and properly defined definition of intellectual property, as well as any necessary carve-outs of user generated content.
- (iv) How will the parties treat infringement of third-party rights (e.g. through warranties, indemnities, including indemnities for combination claims)? Consider also appropriate disclaimers for third-party data and/or user generated content.
- (v) What are the future exploitation rights? Are there any data licenses that need to be complied with?
- (vi) Is the license to use such technology exclusive or limited to a certain territory? For example, is the company GDPR compliant and can the technology be used in the European Union?
- (vii) Who has the right to collect data, and how will this data be used? Can the data be aggregated with other data? What sort of restrictions are there on the ability to use data for internal use, first party advertising or third party advertising? Is the data 1st party or 3rd party data?
- (viii) When thinking about a limitation of liability provision, consider also the reliability of the technology and the data used to avoid liability for inaccurate, incomplete, or misleading information, which parties may want to consider waiving and excluding from consequential damages.
- (ix) What are the service providers privacy and security practices? Include representations and warranties with respect to those practices, as well as compliance with applicable laws.
- (xx) Will the technology be used on social media platforms that allow promotions and endorsements of a product? How will the parties ensure that the technology allows the brand or company to comply with current FTC requirements of disclosure? Whose responsibility is this? Can a mechanism be created that can delete a consumer’s information when requested?

Regardless of whether you are the application developer, brand or technology platform, it is important to develop a customized set of terms based on a variety of factors unique to the augmented reality application or service that is being provided. An effective agreement can

mitigate risks by protecting your business, third party partners, content and data providers, users and third party application providers while leveraging a company's augmented reality platform or service.^{xxiii}

Conclusion

The bedrock of the advertising industry is innovation, media disruption, and consumer engagement. Fortunately, advertising using augmented reality technology has the potential to meet each of these components so long as its use complies with existing FTC regulations, privacy requirements and includes appropriate commercial legal terms.

The use of AR will continue to develop and as it does, regulators and legal practitioners will continue to weigh in on this subject. One such conversation that technology innovators and brands are beginning to have is whether the block chain can help to renegotiate the relationship between the advertising industry and the consumers it serves. 2019 and beyond should prove to be an interesting time as the advertising industry continues to exploit and deploy advances in technology.

ⁱ Howard Yu, "What Pokemon Go's Success Means for the Future of Augmented Reality" (July 23, 2016), available at <http://fortune.com/2016/07/23/pokemon-go-augmented-reality/>.

ⁱⁱ Jay Samit, "Augmented Reality: Marketing's Trillion-Dollar Opportunity" (July 18, 2017), available at <http://adage.com/article/deloitte-digital/augmented-reality-marketing-s-trillion-dollar-opportunity/309678/>.

ⁱⁱⁱ Garrett Sloane, "Facebook Tries Selfie Commerce with Augmented Reality Ads" (July 10, 2018), available at <http://adage.com/article/digital/facebook-selfie-commerce-augmented-reality-ads/314161/>.

^{iv} Garrett Sloane, "BMW Test Drives Snapchat Lenses in First 3D Car Ad" (November 22, 2017), available at <http://adage.com/article/digital/bmw-test-drives-snapchat-lenses-car-ad-3d/311394/>.

^v See "Facebook Tries Selfie Commerce with Augmented Reality Ads" (July 10, 2018), available at <http://adage.com/article/digital/facebook-selfie-commerce-augmented-reality-ads/314161/>.

^{vi} Ann-Marie Alcántara, "Facebook Is Testing Augmented Reality Shopping Ads and Rolling Out 3 Other Tools for Brands" (July 10, 2018), available at <https://www.adweek.com/digital/facebook-is-testing-augmented-reality-shopping-ads-and-rolling-out-3-other-tools-for-brands/>.

^{vii} Lisa Lacy, "Can Augmented Reality Breathe New Life Into Banner Ads?" (April 20, 2018), available at <https://www.adweek.com/digital/can-augmented-reality-breathe-new-life-into-banner-ads/>.

^{viii} *Id.*

^{ix} See 15 U.S.C. 45 (The Federal Trade Commission Act).

^x The Federal Trade Commission, *Enforcement Policy Statement on Deceptively Formatted Advertisements* (2015), available at https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiv eenforcement.pdf; see also The Federal Trade Commission, *Native Advertising: A Guide for Businesses* (2015), available at <https://www.ftc.gov/tips-advice/businesscenter/guidance/native-advertising-guide-businesses>.

^{xi} See FTC Enforcement Policy Statement, *supra* footnote 15.

^{xii} See the Business Guide.

^{xiii} The Federal Trade Commission, *Influencers, are your #materialconnection #disclosures #clearandconspicuous?* (2017), available at <https://www.ftc.gov/news-events/blogs/business-blog/2017/04/influencers-are-your-materialconnection-disclosures>.

^{xiv} See Snap Inc. Advertising Policies, available at <https://www.snap.com/en-US/adpolicies/>.

^{xv} See *id.*

^{xvi} See Virtual reality and augmented reality: what are the legal issues, available at https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/tmt/Virtual_and_augmented_reality_what_are_the_legal_issues

^{xvii} https://www.law360.com/articles/820143/pokemon-no-go-how-lawyers-are-spoiling-the-fun-with-the-world-s-latest-craze-?article_related_content=1.

^{xviii} <https://www.law360.com/articles/816835/-pokemon-go-user-data-collection-sparks-senator-inquiry>.

^{xix} See Legal Issues with Augmented Reality, available at

<https://www.pillsburylaw.com/images/content/1/0/v8/102329/FS-Internet-Augmented-Reality.pdf>.

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} See Virtual reality and augmented reality: what are the legal issues, *supra* footnote 19.

^{xxiii} See Legal Issues with Augmented Realty, *supra* footnote 23.