KILPATRICK TOWNSEND

KTS Retail and Consumer Goods Team

ALERT: 2020 VISION

With the turn of the calendar, the beginning of the new year, and the collective making of resolutions, it is also a good idea to understand the biggest legal risks that companies may confront in the near- and long-term. Kilpatrick Townsend's Retail and Consumer Goods Team works with companies in all industries, and has put together this list of the team's top 10 legal issues and risks for this year, along with recommended risk mitigation strategies.

1. **ADA Compliance**. Consider yourself lucky if your company has not already received a complaint or a demand letter from a plaintiff's firm alleging that your website fails to comply with the Americans with Disabilities Act by permitting access by blind or deaf plaintiffs. Hundreds, if not thousands, of demands have already been made, and these plaintiff firms seem to be making lists and checking them more than twice for target defendants. In addition, the latest twist is a new alleged ADA compliance failure because gift cards fail to include braille writing on them. These actions continue to bedevil even companies with the best of intentions, because websites continually evolve and change, and implementing the appropriate software code permitting screen readers to interact with the website is a labor intensive process. **Recommendation**: Work closely with your IT team to immediately (or as soon as practical) implement measures for the company website, mobile applications, and all other consumer facing measures to comply with the Web Content Accessibility Guidelines, the industry standard for complying with the ADA.

2. **Copyright and Publicity / Privacy Rights Clearance**. Photographers, artists, and other content providers have become more aggressive in enforcing their intellectual property rights. If your company publishes photos, videos, text, or any other form of content on company-controlled sites, including pages on social media platforms, you are a target for an action seeking compensation for wrongful use of another's intellectual property. **Recommendation**: Together with the marketing and advertising department as well as your advertising agency(ies), coordinate exactly how images, videos, text, and other intellectual property is collected, vetted, and used in company marketing collateral, and ensure that everyone is familiar with best practices around the clearance and use of third party intellectual property.

3. **Privacy, Data Collection, and Data Breach Notification**. California's new privacy law, the California Consumer Private Act (the "CCPA"), went into effect as of January 1, 2020. The CCPA establishes a new privacy framework by expanding the definition of "personal information," creates new data privacy rights for California consumers, imposes special rules for the collection and sale of personal information directly from minors, and creates a private right of action and statutory damages for security breaches. Following in California's footsteps, a number of states considered or passed privacy legislation in 2019. Though Nevada's privacy law, Nevada Senate Bill 220 ("SB 220"), was signed in on May 29, 2019 (Nevada Senate Bill 220 ("SB 220"), it was effective on October 1, 2019. SB 220, which applies to companies that operate websites or online services for commercial purposes, provides consumers the right to opt-out from the sale of personal information. Though CCPA and SB 2020 are similar, they differ substantially in how "sale" is defined. New York passed the New York Stop Hacks and Improve Electronic Data Security ("SHIELD") Act on July 25, 2019. The data breach notification requirements became effective October 23, 2019, and data security requirements will become effective March 21, 2020. Finally, 2019 has shown that using biometrics (including fingerprints, retina scans and facial geometry scans) presents several legal risks and challenges, with over 300 class action lawsuits filed in

2019 in Illinois based on violations of the Illinois Biometric Privacy Act ("BIPA"). Privacy legislation in 2020 is unlikely to slow down, with comprehensive privacy legislation being considered in Washington and New Mexico, as well as a renewed effort in California to place an even more restrictive privacy law, with increased consumer protections, on the California ballot in November, 2020. While there are currently two draft privacy legislation bills pending at the federal level, notable differences include the issues of preemption of state legislation and enforcement. Accordingly, federal legislation will not necessarily eliminate the patchwork of privacy regulations that currently exist in the US.
Recommendation: As regulations on data privacy increasingly tighten, retailers and brands will need to adjust their marketing and data practices to enable them to continue to offer personalized content and offers while adhering to new regimes. Action items to take include data mapping, implementing policies and procedures for responding to consumer requests, updating privacy policies, scrutinizing vendor relations, and amending vendor agreements. A silver lining in this new era of data regulations is that retailers engaged in compliance are seeing a marked increase in consumer trust, loyalty, and engagement levels.

4. **Franchising and Licensing**. Two U.S. Supreme Court cases decided in 2019 should impact the way you draft your franchise or license agreements in 2020 and beyond.

    a. *Mission Product Holdings, Inc. v. Tempnology, LLC*. (Bankruptcy). Trademark licensees and their franchisee colleagues have, for some time, faced uncertainty when their licensors/franchisors entered bankruptcy. A bankruptcy debtor can either assume or reject an agreement with remaining performance, known as an executory contract, such as a trademark license or franchise agreement (which includes a trademark license). If the debtor trademark licensor/franchisor assumes a trademark license/franchise agreement, usually all is well for the non-debtor trademark licensee/franchisee. But if the debtor rejects a trademark license/franchise agreement, the licensee's rights following rejection were in doubt until recently. And a mix of decisions eventually resulted in a circuit split leading to the recent Supreme Court decision in *Mission Product Holdings, Inc. v. Tempnology, LLC*. As stated in Justice Sotomayor's concurring opinion, the Court held in Mission Product that "a debtor's choice to reject an executory contract under [the bankruptcy code] functions as a breach of the contract rather than unwinding the rejected contract as if it never existed." The Court made clear that a debtor's rejection of a trademark license, therefore, does not automatically cut off the licensee's right to continue using the licensed mark following rejection. That is good news for licensees. But the Court did not go so far as to hold the inverse, namely, that a licensee can continue using the licensed mark in every instance following a debtor's rejection. Instead, the inquiry is whether the licensee's right to continue using the licensed mark would survive under applicable non-bankruptcy law had the licensor breached the trademark license outside of bankruptcy. The answer to that question will depend upon the terms of the trademark license or franchise agreement and the applicable non-bankruptcy law governing such agreement.
    Recommendation: In light of a right owner's ability to limit or permit assignment by a debtor licensee under applicable law, it is likely prudent for rights owners to always include affirmative or negative assignability provisions in intellectual property and franchise agreements.

    b. *Henry Schein, Inc., et al. v. Archer & White Sales, Inc*. (Arbitration). Critics of arbitration state that arbitrators have a tendency to "split the baby" rather than making hard decisions and arbitration often does not result in cost savings. However, a well-drafted arbitration provision may stipulate the number and qualifications of the arbitrator(s), include time limits for the arbitration process and specify precise procedures and evidentiary rules that are designed to lead to a more efficient resolution. In addition, arbitration agreements can be attacked on several grounds -- which may mean that the parties could end up in litigation to determine whether arbitration applies. But with proper drafting, that result may be avoided. See *Henry Schein, Inc., et al. v. Archer & White Sales, Inc*. (139 S. Ct. 524 (2019)) (holding that that parties to a contract may agree to have an arbitrator decide not only the merits of a particular dispute but also questions of arbitrability). Perhaps most importantly, a class action waiver in an arbitration provision is more likely to be enforced, which may mean that businesses can to avoid lengthy and expensive class action lawsuits. **Recommendation**: Carefully evaluate whether your agreements should contain an arbitration clause, and if so, make sure it is well-drafted.

5. **Labor and Employment**. California employers should be aware that their current independent contractors may have become employees effective January 1, 2020 under the new California Assembly Bill 5 ("AB 5"). There are a number of exceptions and carve-outs, but unquestionably AB 5 will impact a substantial number of employers who use independent contractors. **Recommendation**: California employers, as well as employers in New Jersey, Connecticut, Massachusetts, and Vermont (which use a similar independent contractor test as in AB 5), should take steps to ensure that any independent contractors are properly classified under applicable law.

6. **Leasing**. Retailers closing under-performing store locations is in the news constantly. Whether a company wants to reposition a store or exit a market entirely its leases may provide options that have not been fully considered. Subleasing and assignment rights, termination options, "going dark" provisions, operating co-tenancy requirements and other landlord lease obligations may provide a retailer negotiating leverage. However, even where a lease provides explicit termination rights, those rights typically must be exercised in strict accordance with the contractual requirements or be waived – a potentially devastating result. **Recommendation**: Work with your counsel and brokerage teams to fully evaluate whether each lease in your portfolio provides exit options and how they can be effectuated.

7. **Sale Price Advertising**. January is a great time to clear out unsold inventory and get ready for the new year's skus and models. However, sale price advertising is subject to Federal and state regulation and can be the subject of consumer class action complaints. The FTC requires that the advertised former price be an actual, bona fide price that was offered to the public on a regular basis for a reasonably substantial period of time. 16 CFR §233.1. However many states have their own individual requirements which are more specific. For example, California's Business & Professions Code §17501 prohibits advertising a price as a "former" sale price, unless it was "the prevailing market price" within the three months immediately preceding the publication of the advertisement, or unless "the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement." Recent challenges by retailers to the statute's constitutionality were struck down. **Recommendation**: Train your sales, advertising and marketing staff to maintain current and accurate pricing and advertising records in the event of a deceptive pricing claim. Work with counsel to conduct a review to see how your company would fare if a Federal or state regulator inquires about sale price advertising.

8. **Automatic-Renewal Laws (ARL)**. If your company sells any goods or services as a subscription service to consumers, now is a good time of year to assess whether your methods for commencing, renewing, or cancelling subscriptions are complying with the 2010 Federal statute, ROSCA, as well as myriad individual state "ARL" statutes. In 2019 alone, two new ARLs became effective (Virginia and D.C.), while Vermont made significant changes to its statute, with more stringent opt-in requirements. **Recommendation:** Check-in with your counsel to determine whether your enrollment and cancellation disclosures are compliant with the ARLs for all the states your company ships to.

9. **TCPA Compliance**. The year 2020 is likely to be another active year for TCPA litigation and possibly an increasingly active year for government enforcement. On December 30, 2019, the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (or the TRACED Act) became law and other consumer protection measures are potentially on the horizon. The TRACED Act maintains the Telephone Consumer Protection Act (TCPA) as the primary federal authority for stopping unwanted telephone calls, faxes, and text and real-time messages. And, as it has been for the last decade, the TCPA will continue to be a favorite of the plaintiffs' class action bar. The new legislation significantly increases the per-violation penalties in agency enforcement actions involving willful

conduct, removes existing constraints upon FCC enforcement actions, empowers the FCC to promulgate additional regulations requiring carriers to authenticate caller identification and regulations to limit access by TCPA violators to toll-free numbers, and creates an interagency working group to increase enforcement actions. Some legislators are pushing for more aggressive legislation, and federal courts hearing TCPA cases (and state courts hearing cases involving state law counterparts) may be particularly critical of unwanted calls to consumers in 2020. **Recommendations**: Vigilance is key. Be sure your marketing department and your outside vendors have a plan to comply both with rolling TCPA developments and with the new TRACED Act. Make sure that your company's policies and its standard contracts require consumer opt-outs to be strictly observed and appropriate compliance with the national Do-Not-Call list and your internal Do-Not-Call list. Particularly in the case of vendors, be sure that their contracts protect your company with appropriate indemnification and arbitration provisions. Regularly revisit policies and procedures to ensure that they are keeping up with the law.

10. **Advertising Claim Substantiation**. Whether your products are eco-friendly, improve memory and brain function, last longer than your competitor's, or simply work better, a seemingly endless number of potential challenges may arise. Whether from the Federal Trade Commission, a state attorney general, a municipal attorney, a consumer advocacy group, or especially, and in particular, a class action plaintiff, your advertising claims – whether express or implied – must be substantiated. The nature of the claim itself drives what type of substantiation is ultimately necessary, thus substantiation can take many forms. However, the law requires in all cases that advertisers have a "reasonable basis" of support for all express and implied claims made about the goods or services advertised. What qualifies as a reasonable basis will differ depending on the type and nature of the claim, but the most basic requirement is to have reliable, objective evidence of the truth of the claim. **Recommendation**: The company's marketing team must put their money where their claims are. The more creative the claim, the better, as long as the claim – however consumers may perceive it – is justified by appropriate proof. Make sure that the company has, in its files before any advertising with the claim is published, that the claim is substantiated.

But wait, there's more! This one goes to 11 – what good would a top ten list be without a bonus?

11. **Design Patent Law Update**. In the first verdict after *Apple v. Samsung*, a California District Court opted to use the four-factor test when deciding *Columbia Sportswear North America, Inc. v. Serius Innovative Accessories, Inc*. Columbia Sportswear sued Serius for design patent infringement, covering the wavy pattern used for Columbia's heat-reflective technology called Omni-Heat® Reflective. Despite the end product being a glove, the jury identified Omni-Heat® Reflective — a single component — as the article of manufacture and awarded damages based on "total profits" at $3,018,174. Both parties appealed the verdict to the Federal Circuit. The Federal Circuit recently remanded the case to the District Court ruling that covering a design with logos is enough to raise a question of material fact of infringement. There is concern now that copycats could avoid design patent infringement by slapping their logos all over the apparel item. Columbia filed a combined petition for rehearing and rehearing en banc on Jan. 13, 2020. **Recommendation**: Work closely with design counsel to properly capture the critical dates and relevant contributors to the essential aspects of the innovative new ornamental design and the article or product to which that ornamental design is applied.

While this is hardly a fully comprehensive list of the legal challenges and risks that companies face, with foresight and vision for 2020, it is a good start to limit your company's downside risks. If you have any questions about any of these areas, please feel free to reach out to anyone at Kilpatrick Townsend.

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ATLANTA
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SEATTLE
SHANGHAI
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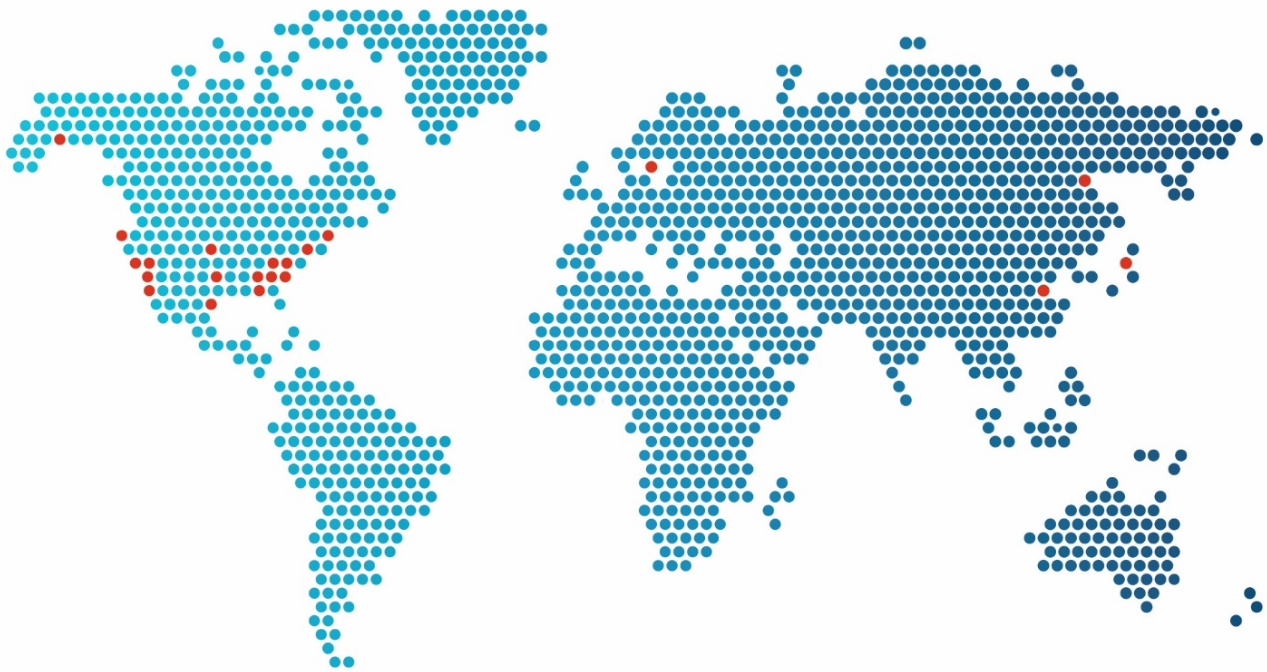

Counsel to Innovative Companies and Brands Around the World

We help leaders create, expand and protect the value of their businesses and most prized assets. Our attorneys bring a balance of business savvy, technical skills, and creative thinking to the opportunities and issues our clients face daily. From the most complex challenges to the routine, we work together to make businesses better, smarter, more protected, and more successful.