



Insights: Perspectives

10 Key Takeaways | Reflections on the 2023 ANA Masters of Advertising Law Conference

December 7, 2023

Written by Laura C. Miller, Evan S. Nadel, Bryan J. Wolin,

10 KEY TAKEAWAYS

Reflections on the 2023 ANA Masters of Advertising Law Conference

[The ANA Masters of Advertising Law Conference](#) is among the highlights of the year in the world of advertising law. It is the rare legal conference that covers such a broad array of legal issues under one large “advertising law” umbrella, and it is overly stuffed with highly educational sessions. This year’s conference was no exception. While many sessions covered the obvious hot-button topic of the year—artificial intelligence—there were many other hot topics covered in both substantive and entertaining detail. As a long-time sponsor of the conference (remembered fondly as previously called the PMAA, PMA, and BAA law conference), Kilpatrick’s Advertising and Marketing team put together this list of its top 10 advertising legal issues covered at the conference.

1

Artificial Intelligence. Marketing pros are fixated on the potential of AI, and increasingly dabbling in its use. However, regulations lag and risks remain complex and opaque. If you use AI, ensure that you understand what it is, how it works, and what it was designed to do, and make sure you involve your legal counsel as early as possible in the process to sniff out latent risks. For example, the FTC has indicated that it does not need new regulations to act against ads created using AI, so do not expect them to sit back or ignore such content just because it uses a novel technology.

Indemnification. The content creation business can be a hornet’s nest of potential legal liabilities, and while indemnification is a valuable tool to protect advertisers against many risks, it is not as to all of them. For example, advertisers continue to grow their reliance on influencers, the majority of which are small-time, with limited financial resources. It is unlikely they can cover the cost of defending an advertiser hit with a class action, whether or not they are contractually obligated to do so. Even if advertisers can successfully enforce a right to indemnification, that will not repair the brand damage associated with public allegations of false advertising. While indemnification remains an important element of advertising transactions, advertisers would do well to not over-rely on it.

2

Green Guides. The FTC’s Green Guides have been under review for quite a while, and the advertising industry has been awaiting the updated version with bated breath. The industry needs updated guidance, and we need it now. National advertisers have it tough enough

3

complying with federal regulation—in the absence of effective federal regulation in the area of environmental marketing, states have stepped in to fill the perceived void. Federal regulations on the use of “organic” in product descriptions concern agricultural products (under the National Organic Program), but California’s Organic Food and Farming Act (“COFFA”) purports to apply those same rules to all products sold in California. Without more guidance from the FTC the void will continue to be filled with state and local action, as well as consumer and NGO action, leading to a range of potentially inconsistent outcomes across the country.

Junk Fees. The executive branch seems to think it has a winning political issue by attacking so-called “junk fees,” where companies advertise a low price to lure customers, but then add on unexpected additional fees and costs to the bottom line of the transaction. President Biden even mentioned the topic in his State of the Union address. The FTC has issued a proposed rule, and the State of California has passed its own legislation to address the issue. If your company layers on additional fees to a base price for a good or service, pay attention to this fast-moving area.

4

5

FTC’s Updated Endorsement Guides. In July 2023, the FTC issued its long-awaited update to the Endorsement Guides. Without making significant changes, the updated Guides went deeper and further into, among other things, how brand engagement on social media and the use of influencers should be managed. They added clarifications around the definition of an “endorsement”; expanded the kinds of “material connections” would require a disclosure; added new descriptions of how a “clear and conspicuous disclosure” should be made; addressed how consumer reviews could be utilized in advertising; and addressed atypical results, among other things. It will pay dividends for counsel to become very familiar with the updated Endorsement Guides given the extent to which social media engagement has infiltrated our daily lives.

Greenwashing → Woke-washing → Bot-washing? The conference recognized past and current advertising litigation trends, such as brands and products claiming to have environmental benefits or policies addressing diversity, equity, inclusion or social inequalities that they allegedly do not. Presenters then speculated on the next possible such trend. Perhaps it will be “bot-washing,” i.e., falsely claiming to use AI or to not use AI. Past deceptive statements have yielded waves of litigation challenging those statements. What harm could consumers allege due to false statements about the role of AI?

6

7

Aspirational Claims and Substantiation. Whether driven by ESG and/or other factors, companies are increasingly making aspirational claims about their environmental goals (e.g., “net zero by Year X; “carbon neutral”; etc.). Despite being aspirational, such claims—like any other—are not without risk from being challenged by competitors, consumers, and governmental agencies as false or misleading. To help minimize this risk, companies should ensure not only that they have objectives in place but also that they are taking steps to achieve those objectives and reach their stated environmental goal(s) before making aspirational claims.

8

Influencer Marketing and Brand Guidelines. Consistency is critical to building goodwill with consumers. To help maintain consistency across advertising channels, companies should adopt and implement brand guidelines—especially in the realm of influencer marketing. While influencers can help increase a company’s brand awareness and drive sales, there is a risk of them going “off script” and promoting their brand instead of yours. Educating influencers about your brand guidelines—and requiring compliance with them—will help the influencer stay “on brand”—yours—and maintain consistency across your company’s advertising channels.

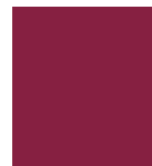
9

Class Actions and Similar Lawsuits Continue Apace. Assertions of advertising-related class action lawsuits, positioned by plaintiffs’ counsel as consumer protection, continue without letup. Recent cases have continued to challenge express and implied product claims involving “natural”-formatives, such as “All Natural” or “100% Natural” or sometimes just suggesting natural ingredients together with images of fruits, vegetables or other depictions of nature on the package. These claims—and the lawsuits challenging them—are not just on food products, but also on shampoo, cosmetics, sunscreen, and pet food products. Meanwhile, the federal circuit courts have expanded on earlier precedents cautioning that a false or deceptive front-of-label cannot be “cured” by accurate back-of-label disclosures (such as the ingredients list), but back-label disclosures can eliminate any front-label ambiguity or uncertainty, making such claims non-actionable.

10

IP Clearance Remains a Thorny, Difficult Concern. Entertainingly discussed at the conference through the lens of the art of drag queens, clearing intellectual property concerns seems to get more and more difficult. Yes, it is true that the “secret to creativity is knowing how to hide your sources” (source of quote unknown, ironically), but it is also true that “there is nothing new under the sun” (source of quote: The Bible (it is true!)). There is unfortunately no easy and perfect solution to clearing IP concerns in creative

the easy, and perfect solution to creating IP concerns in creative material, as the laws of copyright, trademark, trade dress, design patent, and similar legal avenues of protection are often difficult to discern and apply, and the outcome of assertions of IP theft are hard to predict. Lawyers have kids to put through college too, you know.



As always, we look forward to next year's law conference to see what the rapidly advancing legal field of advertising law has in store for us.

For more information, please contact:

Barry M. Benjamin, bbenjamin@ktslaw.com

Laura Miller, lamiller@ktslaw.com

Evan Nadel, enadel@ktslaw.com

Jonathan W. Thomas, jwthomas@ktslaw.com

Bryan Wolin, bwolin@ktslaw.com

www.kilpatricktownsend.com

Related People



Laura C. Miller

t 336.607.7466

lamiller@ktslaw.com



Evan S. Nadel

t 212.775.8862

enadel@ktslaw.com



Bryan J. Wolin

t 212.775.8735

bwolin@ktslaw.com