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E-Commerce Retailer LEGAL GUIDE

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Dear E-Commerce Retailer:

I'm about to make what the FTC would characterize as an "earnings claim," but it's not deceptive because the claim is true, not misleading, and has substantiation. If you take a few hours to read this playbook, you could literally save yourself and your business millions of dollars. You will better understand how to protect your business from regulatory action, consumer class actions, and competitors. You will be better positioned to make money and sleep well at night.

This can be a challenge. If you're selling products or services direct-to-consumer and have enjoyed any success, you know you can never stop learning – especially now. Generative AI has revolutionized technology, content creation, and consumer communication. The FTC is issuing new advertising rules and filing aggressive enforcement actions almost every week. The states have complicated compliance, with new laws governing subscription billing, telemarketing, and data monetization. It can be hard for anyone to keep up.

The good news is that we address all this and more in this latest edition, we're providing real world practical guidance, and we're providing this for free. So if you want to build your business on a strong foundation and are serious about wanting to achieve success, you should read this, circulate it within your business, and refer to it often. If knowledge is power, you'll have a competitive advantage.

Sincerely,

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One Easy Way To Avoid Class Actions

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IMAGINE THAT RIGHT NOW, a litigious, opportunistic consumer is diligently searching the Internet. He goes from one e-commerce website to the next. At each, he doesn't stop to study the product images or features. He doesn't care about the product, the product claims, or the testimonials. But he knows what he wants to find. He keeps moving his mouse, clicking the hyperlinks, visiting the checkout page, and scrolling down the website terms. Halfway through the terms, he frowns. But he clicks away, goes to the next website, and keeps searching. He knows he'll find what he wants soon enough. And finally, he hits pay dirt. He has found an e-commerce website that does not have a clickwrap contract, a mandatory arbitration provision, or a class action waiver provision. He buys the most expensive product on the website and then takes a lunch break. He'll start working on his class action lawsuit in the afternoon. This fact pattern is fiction, but it could be real and it could be your website.

Many smart and driven e-commerce retailers spend countless hours sourcing their products and optimizing their website. This is very important of course. But somehow another very important, and extremely easy, part of building a successful brand too often goes overlooked. Including a clickwrap agreement on your checkout page and mandatory arbitration and class action waiver provisions in your website terms can literally save you millions of dollars.

A clickwrap contract is an online contract between a retailer and a consumer. But it isn't fancy. It is only a sentence next to an unchecked checkbox or above an "I Agree" button displayed in the body of the checkout page. And the sentence is simple—something like "I agree to the website terms of sale" or "By clicking 'I Agree' below, I agree to the website terms of sale" with the words "website terms of sale" hyperlinked to the complete terms. Where a consumer affirmatively checks the unchecked checkbox or clicks the "I Agree" button before completing a purchase, courts consistently find that the consumer is bound by and has agreed to the website terms of sale.

A browsewrap contract is very different, if it is a contract at all. A browsewrap contract is where the footer of a webpage contains the hyperlinked words "website terms of sale." Unlike a clickwrap contract, a consumer does not take affirmative action to agree and may not even see the hyperlinked words in the footer at all. Thus, courts typically hold that a browsewrap contract does not bind a consumer to anything, as consumers are typically unaware that any terms were even offered, must less that continued use of the website demonstrates acceptance of those terms. So while

it is good to have the hyperlinked words "website terms of sale" in the footer, you should not rely on a browsewrap contract. You need to use a clickwrap contract to obtain the consumer's acceptance of the website terms.

This brings us to mandatory arbitration and class action waiver. Applying the Federal Arbitration Act, the U.S. Supreme Court has consistently held that well-drafted mandatory arbitration and class action waiver provisions in website terms, where agreed to by the consumer, are generally enforceable to require arbitration and bar class actions, regardless of any state law to the contrary. This is one of the reasons it is so critical to use a clickwrap contract to obtain the consumer's acceptance of the website terms. You need the consumer's acceptance of the website terms to make the website terms, including mandatory arbitration and class action waiver provisions, enforceable against the consumer. Without acceptance, your website terms—even if brilliant—can be entirely useless. However, with acceptance and well-written mandatory arbitration and class action waiver provisions, you will have substantially insulated your business from any class action liability. And remember – if you amend your website terms to include important provisions like a mandatory arbitration and class action waiver clause, you may want to use a clickwrap contract again. An "e-mail blast" to your subscribers, no matter how well it explains changes you've made to website terms, may not be enough to prove that your subscribers had actual or constructive notice of those changes.

That said, this would only protect you from class action liability arising from sales on your website. It would not protect you from class action liability for products sold away from your website, such as on Amazon or at a brick and mortar store. For these types of sales, and while the law is less settled here, you should include mandatory arbitration and class action waiver provisions in a packing insert placed inside your product retail boxes. This is known as a shrinkwrap agreement. It is important that the shrinkwrap agreement contain a notice that, by opening the box and then using the product, the consumer consents to the shrinkwrap agreement, including its mandatory arbitration and class action waiver provisions.

Now back to the hypothetical, but with a change. You've now worked with experienced counsel to make sure you have an enforceable clickwrap contract and enforceable website terms of sale, including mandatory arbitration and class action waiver provisions. The litigious, opportunistic consumer visits your website, is bummed by what he sees, and clicks away in search of another target. The end.

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Three Things (And More) That All Subscription Retailers Must Know

RYAN M. POTEET · STEPHEN J. FREELAND · SAM STEIN · CLAIR WISCHUSEN · GRAHAM REYNOLDS

YOU OWN A SUCCESSFUL "Cigar of the Month" subscription business. A while back, you signed up to receive FTC alerts by email, but you've never really read them. At most, you skimmed them for a split-second. Over several weeks though, you realize that you seem to be skimming the exact same FTC alert every time. You think maybe the FTC is spamming you, sending the same FTC alert again and again. Going back and searching your past email, you then have a realization—"no, each of these FTC alerts is about a different FTC case, and the FTC keeps shutting down and taking millions of dollars from subscription retailers." You take a long pause because you're a subscription retailer. As you read more, you discover that in case after case, the FTC is proving violations of something called "ROSCA." And subscription retailers selling everything from health and beauty products to golf balls and lingerie have been targeted and crushed. You immediately go to your website's checkout page and ask yourself, "am I violating ROSCA?"

Subscription billing has been around for decades—from phone service to newspapers to milk delivery. More and more though, consumers count on subscription goods and services to save time and simplify life. One quick transaction and consumers can receive regular delivery of their favorite foods, vitamins and supplements, fashionable clothing, or a lifestyle subscription box. No doubt, a subscription product or service can help improve people's lives. But regulators, the credit card brands, and consumers have become increasingly frustrated with subscription retailers who aren't following ROSCA.

Getting Right with ROSCA

ROSCA is the acronym for the Restore Online Shoppers' Confidence Act, a federal law enforced by the FTC. In large part, ROSCA is about protecting consumers from being billed on subscription without their consent. The FTC aggressively prosecutes subscription retailers who fail to comply with ROSCA, especially those who advertise a "trial offer." In those cases, the FTC has historically gone to court *ex parte, i.e.,* without the defendants' appearance or even knowledge of the case, and obtained a court order freezing the business and the business owner's assets and appointing a receiver to take control of the business and its assets. While asset freezes are things of the past, the FTC frequently relies on ROSCA to obtain civil penalties in excess of $50,0000 per violation to combat deceptive subscription billing practices

Although the consequences of violating ROSCA can be draconian, it is easy to comply. ROSCA imposes requirements on e-commerce retailers who sell goods or

services via a subscription billing or "negative option" plan. This is a billing model where, after an initial payment, a consumer will continue to be charged and continue to receive a good or service indefinitely unless and until they take affirmative action to cancel. ROSCA has three requirements:

1. The retailer must clearly and conspicuously disclose all material terms of the subscription offer before obtaining the consumer's billing information;
2. The retailer must obtain a consumer's express informed consent the material terms of the subscription offer; and
3. The retailer must provide a simple and easy mechanism for a consumer to cancel.

What does this mean? For the first element, a retailer must disclose the amount the consumer will be charged, the frequency of those charges, the deadlines for taking action to avoid charges, that the charges will continue unless and until the consumer cancels, and how to cancel. Retailers should also disclose any limitations related to a consumer's ability to use their subscription (*e.g.,* early termination fees and other restrictions). These disclosures must be easy to understand and in a conspicuously sized font and location so that the consumer can't miss them. As the FTC recently explained in a rulemaking on the issue, the disclosures must be "unavoidable" and located immediately adjacent to the mechanism that the retailer uses to get consent to those terms.

For the second element, a retailer should use an unchecked checkbox accompanied by the billing and cancellation terms, with the consumer required to check the checkbox and affirmatively agree to the terms before payment. While there may be alterative approaches, the FTC's most recent rulemaking strengthens this requirement and strongly suggests that a checkbox may be the only defensible way to get a consumer's consent to terms of the subscription offer.

For the third element, the retailer must provide consumers an easy way to cancel their subscription (*e.g.*, by calling customer support, sending an email, or accessing their account online). It is likely that the FTC will soon require retailers to give consumers an online method to cancel their subscriptions and even prohibit retailers from attempting to "save the sale" or down sell consumers absent consumer's express consent to those attempts.

A subscription retailer that buries the billing and cancellation terms in fine print or on the bottom of a checkout page will find itself in hot water. Likewise, a subscription retailer who uses a pre-checked checkbox or scatters the material terms of the subscription offer across it website will likely violate ROSCA because consumers are unlikely to have provided affirmative express consent to those terms, as opposed to the offer more generally. Subscription retailers that frustrate consumers' attempts to cancel their subscription by imposing barriers (*e.g.,* call-in requirements, long hold times, etc.) or using aggressive save the sale tactics will also be found to violate ROSCA.

To be sure, the FTC has made prosecuting subscription retailers who advertise a "free" trial and otherwise violate ROSCA an enforcement priority. However, the FTC

has also prosecuted many subscription retailers who do not advertise a "free trial," did not intend to deceive anyone, and instead intended to comply and thought they complied with ROSCA. In some cases, the FTC has alleged that the billing and cancellation terms are too long or confusing, not in large enough font, or too low or not in an obvious place on the website checkout page. In other cases, the FTC has alleged that text disclosing the terms above a "PURCHASE" or a similar button, in lieu of an unchecked checkbox, does not constitute express, affirmative consent by a consumer. In other cases, the FTC has alleged that, although the initial checkout page may have complied with ROSCA, a retailer then violated ROSCA when using a "one-click upsell" to sell a second product on subscription without again clearly and conspicuously disclosing the terms or again obtaining the consumer's express, affirmative consent to the upsell terms.

But Wait, the States Have Something to Say

In addition to ROSCA, many states including California, D.C., North Dakota, Vermont, and Virginia, regulate subscription billing. Similar laws became effective in Delaware, Colorado, and Illinois on January 1, 2022. In Vermont, for example, the businesses must provide a separate opt-in mechanism for any auto renewal terms.

California has the California Automatic Renewal Law (Cal. Bus. & Prof. Code § 17600). This mirrors ROSCA, but adds several requirements. First, subscription retailers must send consumers a post-transaction email that reiterates the billing and cancellation terms of the subscription offer. Second, subscription retailers who complete transactions online must provide the consumers an immediate online method of cancellation. This may include a prominently located direct link located within a subscriber's account or providing consumers an immediately accessible, preformatted email that a consumer can send without additional information. Third, when a business operating in California enrolls a customer in a subscription with a free trial or gift, or an initial discount period longer than thirty-one days, it must notify the consumer in writing or electronically three to twenty-one days before the expiration of the applicable period. And for subscriptions with a term of one year or longer, businesses will have to give written or electronic notice to consumers in a retainable form fifteen to forty-five days before the renewal date. These renewal notices must clearly and conspicuously disclose that the subscription term will automatically renew unless cancelled along with the length of any additional renewal terms.

Many leading, brand-name subscription retailers have also been found liable in consumer class actions for violation of the California Automatic Renewal Laws and other similar state statutes. The consumer class actions often address what some would view to be minor technical statutory violations, for instance, not disclosing how to cancel on the checkout page but instead having a "how to cancel" hyperlink that, when clicked, leads to a pop-up box. Like the billing terms (how much the consumer will pay), the cancellation terms (how the consumer can cancel) should be displayed on the checkout page, without the consumer having to click anything to see them.

Visa and MasterCard Too

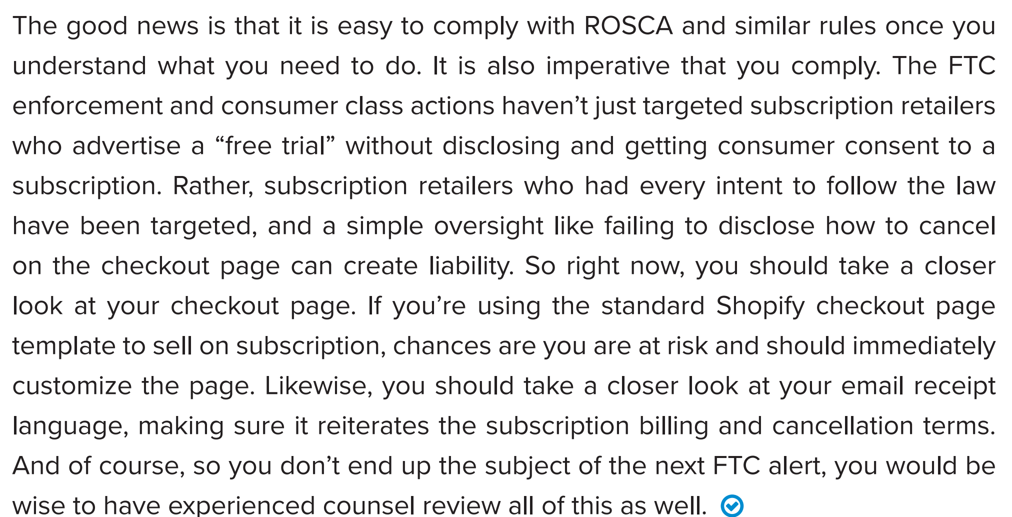
Visa and MasterCard also joined the effort to ensure consumers understand and agree to subscription billing and cancellation terms before purchase and are reminded about them after purchase.

In April 2019, MasterCard implemented rules mirroring ROSCA, but added requirements for subscription retailers to send post-transaction notifications to consumers about billing and cancellation terms. MasterCard's rules apply only to physical products and not digital products. MasterCard has instructed that subscription retailers who sell physical products must use MCC code 5968 (Direct Marketing—Continuity/Subscription Merchants) and TCC T (non-face-to-face) to identify all non-face-to-face negative option billing transactions, advising that these transactions and their merchants will be classified as high-risk.

In April 2020, Visa implemented new rules for subscription retailers who sell physical or digital products and who offer a free trial or introductory offer that rolls into a subscription if not canceled. Along with mirroring ROSCA, the new Visa rules require post-transaction electronic notice to consumers about all billing terms, as well as a link or other simple mechanism to cancel. The new Visa rules further require an electronic reminder notification with a link to online cancellation at least seven days before initiating a recurring transaction.

Visa and MasterCard have made clear that they are closely monitoring subscription retailers, especially those who advertise a "free trial." Perhaps as much as the FTC, Visa and MasterCard have the power to end a business. Though card brand rules do not have the force of law, a subscription retailer who violates them could end up on the MATCH list and lose credit card payment processing.

Your Next Steps



The good news is that it is easy to comply with ROSCA and similar rules once you understand what you need to do. It is also imperative that you comply. The FTC enforcement and consumer class actions haven't just targeted subscription retailers who advertise a "free trial" without disclosing and getting consumer consent to a subscription. Rather, subscription retailers who had every intent to follow the law have been targeted, and a simple oversight like failing to disclose how to cancel on the checkout page can create liability. So right now, you should take a closer look at your checkout page. If you're using the standard Shopify checkout page template to sell on subscription, chances are you are at risk and should immediately customize the page. Likewise, you should take a closer look at your email receipt language, making sure it reiterates the subscription billing and cancellation terms. And of course, so you don't end up the subject of the next FTC alert, you would be wise to have experienced counsel review all of this as well.

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How To Add Value To Your Brand With Trademarks

SUSAN MEYER · SEAN FLAHERTY · HAZEL PANGAN · HOWARD N. SHIPLEY · HANNAH BROWN

THE NAME FOR YOUR clothing brand came to you in a flash of genius late one night. Within months of product launch, sales were exploding. You thought about applying for trademark registration but figured that could wait because, right now, you're just focused on making money. Then one day, a friend mentions she saw your brand's clothing online at a much lower price than she thought you charged. Running a quick search, you discover a competitor is selling clothing like yours with a brand virtually identical to yours! Even worse, you then check out your BBB profile and see complaints from consumers who didn't even purchase from you but instead from the competitor! Realizing you need to take action fast, and wishing you'd done this earlier, you pick up the phone, call your lawyer, and ask "how do I stop this?"

You need to protect your brand. You brand is your company's lifeblood—it's how consumers recognize and identify your services and products over your competitors. Some of the world's biggest companies thrive on the strength of their trademark portfolio and consumers' recognition of the marks. Trademarks are like reputations—the stronger they are, the more well-received and credible the services and products offered under them will be. A strong mark translates into strong consumer recognition, and, in turn, strong sales and revenue.

Apply for Trademark Registration

A trademark is a source identifier: it lets consumers know a good or service is authentic. Trademarks don't have to be registered and are protectable under common law once a business uses a mark—that is, as long as it is distinctive and the first to be used on that particular type of good or service. However, a business can also apply for a federally-registered trademark. This requires application to and approval by the U.S. Patent and Trademark Office ("USPTO"). If you seek to enforce your trademark against others, it is far better to have a federally-registered trademark than merely a common law trademark because a federally-registered trademark carries the presumption that you have priority over others across the country for that good or service.

Although the term "trademark" is sometimes used to refer to both types, there are two types of marks: trademarks and service marks. Trademarks are for goods, like shoes and athletic apparel by Nike®, high-fashion apparel and accessories by Chanel®, and computers by Dell®. Service marks are for services provided to consumers like fast food by KFC®, air travel by United®, and online search engine and advertising

by Google®. But don't fret—you don't have to be famous to get a registration! The only requirements are actual use (*i.e.*, sales of goods or rendering the services to customers) across state lines or importing such goods or services into the U.S. The U.S. even allows you to reserve a mark you intend to use through an "intent to use" application.

There are major benefits of registration. A registration provides public notice of the ownership of a mark and the legal presumption that the mark is owned by that business nationwide in connection with the goods or services listed in the registration. You have the ability to bring legal action against an infringer in federal court and to record the registration with customs authorities to prevent importation of infringing goods. Your mark is listed on the USPTO database, which is searched by third parties when looking at new marks, thus discouraging accidental infringement. You can also use your U.S. registration as a basis for registration in other countries.

Selecting a good mark is important because the USPTO will not register generic marks, like "beer" or "sweatshirt," and will not register merely descriptive marks, like "Beer House" or "California Sweatshirt," without showing the public recognizes that mark as yours already. You should also ensure that the mark you're thinking of using is not already being used by someone else for the same or a similar type of goods or services.

Before the registration is issued, a business should always use the TM indicator to show that you claim rights to the mark. Once the mark is registered, you should consistently use the registration symbol ®.

Enforce Your Rights In Your Mark

You've worked very hard to create and build your brand, so it's very important that you take steps to protect your mark and take action against those who infringe upon it. Failure to take steps to stop the use of a similar mark in commerce potentially weakens your mark, risking the loss of the substantial goodwill that you've built in your mark, not to mention all of the hard work and money you've invested in promoting and advertising your brand, and developing and selling top-quality services and/or products under it.

Failing to protect your mark against infringing uses and allowing them to coexist can be deemed acceptance of those uses and diminishes your ability to challenge infringing uses. This is especially important in light of the new Trademark Modernization Act (TMA), which introduced two new "nonuse" cancellation procedures – expungement and reexamination. And with the proliferation of "metaverses," virtual spaces where users can interact and connect with each other, brand owners must consider how to develop their virtual marketplaces with appropriate trademark registrations. If you operate in the virtual world, having a registration that makes reference to virtual goods in some way could potentially strengthen your rights. Plus, consumers who buy knockoff services or products under a copycat mark with the mistaken impression that they are buying your products could have a negative impact on your brand. Think about those misdirected negative reviews!

So, What Exactly Do You Need to Do?

First, after conducting a proper trademark search and selecting your mark, you should apply to register your mark as soon as you intend to use or begin using it in commerce. You should then, implement a program to monitor the use of your mark in the marketplace. This means checking the internet for potential infringing uses by conducting a Google search and searching social media. Next, you should sign up for a trademark watch service which monitor thousands of new federal trademark applications published by the USPTO in the *Official Gazette* each month. The service will alert you when another party applies to register the same or a similar mark in the same class of services of goods as your mark. You can then file an opposition to stop the registration of the other party's mark.

If you need to litigate to protect your trademark rights, you must prove protectable rights in a mark (a valid trademark registration is *prima facie* evidence of this, and conversely, failure to enforce your rights against infringers weakens the validity of your mark) and that the infringer's use creates a likelihood of confusion to the consuming public about the origin of the infringer's goods or services. Likelihood of confusion is measured by eight factors:

- the similarity in the overall impression created by the two marks (be it in how the marks look, their phonetic similarities, or their underlying meanings);
- the similarities of the goods and services involved, as well as their marketing channels;
- the strength of the trademark owner's mark;
- any evidence of actual confusion by consumers;
- the intent of the infringer in adopting its mark;
- the physical proximity of the goods in the retail marketplace;
- the degree of care likely to be exercised by the consumer; and
- the likelihood of expansion of the product lines.

The available remedies for trademark infringement include lost profits, disgorgement of the infringer's profits, injunctive relief, and, in some cases, attorney's fees. If you prevail in a claim for counterfeiting, where the standard is whether the infringing product and use of the mark are "nearly identical" to the trademark owner's product and use of the mark, you can recover between $1,000 to $200,000 in statutory damages per counterfeit mark, per type of goods or services sold. If the counterfeiting was willful, you may also be able to recover treble damages and attorney's fees, or up to $2,000,000.

Use UDRP Proceedings to Seize Infringing Domain Names

If an infringer uses your trademark as part of their domain name, you can also take swift action to stop this. The Internet Corporation for Assigned Names and Numbers ("ICANN"), the organization responsible for coordinating and maintaining standards and procedures for domain name registration, instituted the Uniform Domain-Name Dispute-Resolution Policy (referred to as the "UDRP") to resolve disputes regarding domain names. While trademark owners can still request that a court transfer a

domain name as part of a lawsuit, UDRP arbitrations can effectuate a transfer cheaper and faster—usually within two or three months.

The arbitration organizations most widely used by U.S. trademark owners are the National Arbitration Forum (the “Forum”) and the World Intellectual Property Organization (“WIPO”).

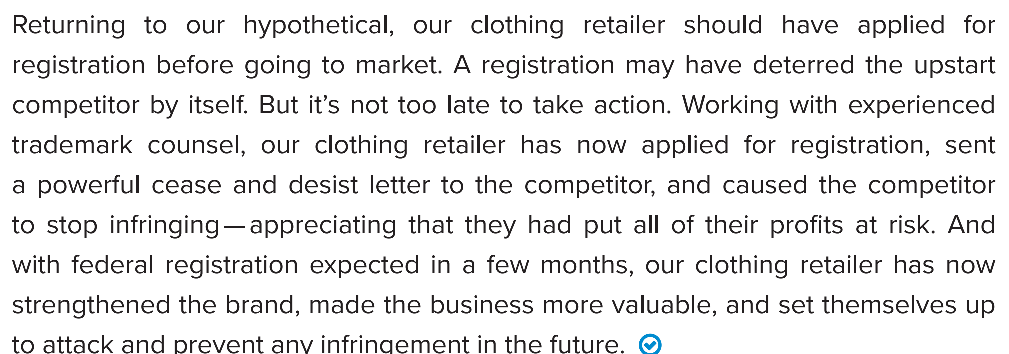
A UDRP complaint must provide facts and legal argument supporting that:

- The complaining retailer owns the trademark at issue;
- The trademark was distinctive (or famous) at the time the domain name was registered;
- The domain name is identical to or confusingly similar to (or dilutive of) the trademark; and
- The registrant acted with a bad faith intent to profit from the mark.

While many registrants now keep their information private, the email addresses listed in the registry will still forward emails to the email address the registrant provided. Moreover, such privacy measures do not protect registrants from UDRP actions. Trademark owners can simply file the UDRP action against the domain name. The registrar will then be ordered to provide actual registration information, and the trademark owners will be given the opportunity to amend the complaint with this new information.

While UDRP actions may be faster and cheaper than litigation, they do have some limitations. An arbitrator can only determine who should own the domain name in dispute; they cannot stop the infringer from putting the infringing mark on the product packaging, nor can they stop the infringer from registering another confusingly similar domain name—at least, not until you file another action targeting the new domain name. UDRP actions also only apply to the domain name, so an arbitrator cannot adjudicate subdomain infringement or infringement anywhere other than in domain name. So if your infringer uses a subdomain like yourmark.nonfringingterm.net, or a webpage like www.noninfringingterm.net/yourmark, a UDRP action will not provide relief.

If You Haven’t Yet, Apply for Trademark Registration Now



Returning to our hypothetical, our clothing retailer should have applied for registration before going to market. A registration may have deterred the upstart competitor by itself. But it’s not too late to take action. Working with experienced trademark counsel, our clothing retailer has now applied for registration, sent a powerful cease and desist letter to the competitor, and caused the competitor to stop infringing—appreciating that they had put all of their profits at risk. And with federal registration expected in a few months, our clothing retailer has now strengthened the brand, made the business more valuable, and set themselves up to attack and prevent any infringement in the future.

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How To Protect Your Ad Copy With Copyrights

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YOU'RE PROUD OF YOUR advertising and your "Maximize Your Mindset" business coaching website. You've optimized and split-tested all of it. Consumers click the ads. Consumers follow down the funnel. Consumers then convert and give rave reviews. Your ad copy, your website, your coaching content, all of it is perfect. But it's not just consumers who are impressed. So are others looking to ride your coattails, take advantage of your hard work and creativity, and copy, *i.e.,* infringe your creation. You begin seeing competitor advertising using your photos and text, competitor website funnels that do the same, and even blatant copying of your code. It's like you trained hard for a marathon, running it with determination and a sense of accomplishment, looking forward to your medal, and someone jumped out of the subway and onto the course in front of you. You're pissed.

You can fight back. You own the copyright in your creative work. As a copyright owner, this means you hold the exclusive right as the creator of a creative work to reproduce the work. Advertising is protected by copyright, just like a book, song, or drawing. If you want to go after your infringing competitor for ripping your advertising, website, or content, or just want to be fully prepared in case this ever happens, you want to do this.

Apply for Copyright Registration

Copyright arises automatically, the moment you create a work of original authorship. The degree of originality does not need to be much. It doesn't even need to be very good. It just needs to be original. You can put © 2019 Acme Coaching Co. on your ads and your website without anyone's permission. That said, if you take pride in your original work and want to prevent others from infringing or go after them if they do, you should absolutely register with the U.S. Copyright Office. It's not expensive or onerous. The fee is only $55 and the one-page form is fairly easy to complete.

Perhaps the biggest reason to apply for copyright registration is because it is a prerequisite for suing in court. But beyond this, it is important to apply for copyright registration soon after publishing a work. This is because a timely registration is needed if you want to have all available remedies when you sue for infringement.

If you apply for copyright registration within three months of the work's publication or before the infringement occurs, you can elect to recover either actual damages or statutory damages of up to $150,000 per infringement, plus attorney's fees. By

contrast, without a timely registration, statutory damages are not available and your only option is actual damages—typically, either lost profits, a reasonable royalty, or disgorgement of the infringer's profits which can be nominal and difficult to prove.

The bottom line is because statutory damages may be higher and require far less proof than actual damages, you should register your work with the U.S. Copyright Office and do this as quickly as possible after the work is published.

Pursue Infringers for Compensation

Copyright infringement is the use of works protected by copyright law without permission. In a copyright infringement case, it is not necessary for a copyright owner to prove that an alleged infringer made an exact or identical copy of the copyright owner's original work. Rather, the test is whether the alleged infringer's work is "substantially similar" to the copyright owner's original work.

To be sure, this test is not always clear-cut, exact, or precise. Because there is an element of subjectivity and perception with the "substantial similarity" test, reasonable people can disagree as to whether or not a work is "substantially similar" to another. The courts will also consider how much of the copyright owner's original work has been copied—the less that has been copied, the less likely a court is to find copyright infringement and vice-versa. Finally, an alleged infringer may assert various defenses, such as parody or fair use (*e.g.*, educational purposes). The "fair use" defense can apply where the alleged infringer's use of the work was "transformative."

When you encounter infringement, you should promptly demand that it cease and should often demand compensation. If you have a timely registration and the copying is "substantially similar," you are in strong position to demand compensation because the alleged infringer is exposed to either actual damages or statutory damages, as well as attorney's fees. Although courts have pushed back against certain litigation tactics by "copyright trolls," a copyright infringement case can be expensive for an alleged infringer because they may end up paying not only their own attorney's fees but ultimately also the plaintiff's. For smaller disputes under $30,000, there is also a new voluntary alternative dispute resolution process for infringement disputes before the U.S. Copyright Office. Claims of infringement, declaratory relief, and misrepresentation in connection with Section 512 of the Digital Millennium Copyright Act (DMCA), among others, may all be brought before the Copyright Claims Board. The Board will attempt to facilitate settlement of the claim or resolve it on the merits, but in an expedited procedure.

Pursue Infringers with DMCA Takedowns

The Digital Millennium Copyright Act (DMCA) protects website owners and online service providers from copyright infringement liability based on third-party content. But this protection requires that the website owners and online service providers comply with the DMCA's "safe harbor" rules and take down infringing content upon receipt of a lawful DMCA takedown notice. Notably, a copyright owner does

not have to have a copyright registration to send a DMCA takedown notice. For a copyright owner that is facing infringement on Facebook, YouTube, or a website, a DMCA takedown notice can be an efficient tool for effective relief.

Comply with DMCA "Safe Harbor" Rules Yourself

If others can post third-party content on your website, you are at risk of being sued for copyright infringement. To avoid this, you should comply with DMCA "safe harbor" rules yourself. Among other things, this requires that you designate an agent to receive DMCA notifications; have the agent's name, address, phone number, and email on file with the U.S. Copyright Office and available on your website; promptly remove or block access to infringing materials after copyright owners give appropriate notice; and have adopted and reasonably implemented a policy to block posting by repeat infringers in appropriate circumstances.

If Not Done, Apply for Copyright Registration Now

Returning to our hypothetical, the same week he learned of the copyright infringement, our business coach applied to register his advertising, website, and coaching content. He paid an extra $800 fee for each of three applications for expedited processing so he would get the registration more quickly. The same week, he sent a properly-completed DMCA takedown notice to the competitor's web hosting company which caused the competitor's website to be taken down, and sent another DMCA takedown notice to Facebook, which caused the competitor's Facebook page to be taken down. He has since demanded that the competitor cease any further infringement and pay either $150,000 in statutory damages or disgorge all of its profits, whichever is higher, to settle the matter. This competitor has been stopped in its tracks. The message has also made its way to others in the industry—this is one business coach you better not copy.

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How To Create Engaging And Compliant Advertising

SAM STEIN · RYAN M. POTEET · ELISA A. NEMIROFF · CLAIR WISCHUSEN · JASON KALKIRTZ

YOUR HAIR GROWTH SHAMPOO product is amazing and you want the world to know. You also see competitors selling similar products and making outrageous claims about the product benefits. You know these claims are false but also persuasive, which is frustrating. Thinking about it, you decide you want to make the boldest product claims you can but without running afoul of advertising law—knowing this should be the best way to ensure customer satisfaction, build a strong and trustworthy brand, and also avoid regulatory or consumer class actions. You think, "I'm okay if my product claims go up to the line, but I don't want to cross it." But then you ask yourself, "where is that line?"

To protect consumers, Congress enacted the Federal Trade Commission Act ("FTC Act"), which empowers the Federal Trade Commission ("FTC") to investigate and prosecute businesses that engage in false and deceptive advertising practices that harm consumers. When the FTC brings an enforcement action against a business, the consequences can be severe and can include an asset freeze, disgorgement of all revenues, injunctive relief, and sometimes personal liability for the business owners. A business can also face attacks for false or deceptive advertising from state attorneys general, local district attorneys, the Better Business Bureau, consumer class action counsel, and competitors, as well as consumer groups and the media. But before you become too frightened, please know that you can advertise aggressively and creatively while still complying with advertising law.

Have Substantiation for Your Product Claims

Advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based. Thus, one of the most basic advertising rules is simply that, when you make a claim about your product, you must have substantiation to prove it. Here are some examples of common product claims and the minimum type of substantiation you should have.

PRODUCT CLAIM	STRONG PROOF OF CLAIM
"Product Certified by Doctor"	A certification by a licensed doctor in the relevant field that your product works as advertised and based on appropriate tests or evaluations
"I Lost 2 Inches in My Waistline in 4 Weeks"	A statement from your actual customer who actually lost 2 inches in her waistline as a result of using your product

PRODUCT CLAIM	STRONG PROOF OF CLAIM
Before and After Testimonial with Photo	A statement from your actual customer that these pictures were actually taken before and then after using your product and the difference arises from use of your product
"Made in the USA"	Documentation from product suppliers establishing that "all or virtually all" of the product is made from U.S. sources and assembled in U.S. facilities.
"Tests prove that [brand name] does [X]"	Requires "competent and reliable scientific evidence" to support the claim, *e.g.*, double-blind, placebo controlled clinical studies of the product by qualified experts using accepted methods

It is important that the substantiation for product claims be compiled before—not *after*—making the product claim. Once compiled, you should maintain a file that contains substantiation for each of your product claims. If the FDA, the FTC, or a state attorney general demands substantiation for a product claim, the regulator will not be impressed if you ask for additional time to respond. By itself, the request could be incriminating since you should have already had the substantiation on file.

Have Prominent and Accurate Disclaimers

A common misconception is that an otherwise unsubstantiated product claim is okay if the claim is followed by a disclaimer. Courts have consistently found that disclaimers are ineffective and will be disregarded if a disclaimer contradicts or significantly limits the product claim. To be effective, a disclaimer must be clear and conspicuous, in close proximity to the product claim, and may not change but rather can only explain or qualify the product claim. For instance, suppose a dietary supplement advertiser wants to use before and after photos to support a claim that the supplement will help consumers lose weight. The supplement can help people lose weight, but the featured results are not typical. The advertiser would need to include a disclaimer near the photos that explains the weight loss claim (*e.g.*, "These results are not typical, and most consumers who use our product and also exercise regularly should expect to lose [XXX]."). Here, again, the advertiser must also have evidence to support the product claim in the disclaimer. And what about claims made in radio ads or on television? The same rules apply. For video advertising, you must include disclaimers on the screen during the video at the time you make any claims.

Avoid Testimonials at Odds with Substantiated Product Claims

Another common misconception is that if a customer provides a testimonial that truthfully recounts their experience and belief, the testimonial can be used without any further concern. This is not correct. The testimonial is still part of the retailer's advertising. Testimonials and endorsements cannot be used to make a claim that the

retailer itself cannot substantiate. As such, the retailer cannot introduce a product claim through a testimonial that the retailer could not otherwise make themselves.

For instance, if a customer said, "If you take Millionaire Mike's 'Make Money Flipping Homes' course, I guarantee you'll hit six figures in six months just like me," the customer may believe this to be true but the retailer cannot use the testimonial because this would not be typical and cannot be substantiated. If the retailer nonetheless used it, they would expose themselves to regulatory and consumer litigation, including from consumers seeking to enforce the guarantee.

Likewise, if a customer said "I'm sure this tooth whitening product will make your teeth two shades whiter, just like it did for me," the retailer could not use the testimonial unless it had substantiation for the product claim that this was a typical result. Again, the customer may really believe the product did this for her, and the product may have actually made her teeth two shades whiter. But you need much more than anecdotal consumer feedback to make this claim.

This issue often arises in the context of dietary supplements and cosmetics. A customer may truthfully believe that a product helped cure their disease. The retailer may believe its product can do the same for the others. But unless the product has received FDA approval as a drug, the retailer cannot make disease claims. So the retailer cannot use the "cure disease" testimonial regardless of the customer's truthful belief.

Use Social Influencers But Disclose Any Connection

In recent years, we've seen an explosion in the use of social influencers in advertising. This type of advertising can be highly effective, but is also highly scrutinized. The key here is that, if the social influencer (or, for that matter, anyone who provides an endorsement or testimonial) has some "material connection" to the retailer (for instance, receiving money, receiving free product, or being an employee of the retailer), this connection must be disclosed. There are at least two reasons for this rule.

First, with social influencers' Instagram or other social media posts, the FTC wants consumers to understand when a post is in fact an advertisement. Second, because an influencer could be biased because of a material connection with a retailer (*e.g.*, compensation), the FTC wants consumers to know when a connection exists so that consumers can take this into account with their purchasing decisions. Words like "#ad, #sponsored, or #[brand name]ambassador" should be used—or even something with a passionate tone like "I'm thrilled to be a brand ambassador for [brand name]." There is room for creativity here. Further, the disclosure should be clear and conspicuous. For example, a disclosure might be insufficient if consumers have to click a link labeled "more" in order to see it.

Use Puffery

A final word about puffery. Puffery is advertising that makes exaggerated or boastful statements about a product that are not statements of purported fact, capable of being proven true or false, but rather are in the nature of subjective opinion. Puffery is allowed in advertising law, although the line between puffery and false advertising law can be thin and sometimes blurry. For instance, in selling a hair growth product, the statement "Women will love the way you look!" would be considered puffery, whereas the statement "Four out of five women will love the way you look" could be considered false advertising.

You Can Be Creative, Aggressive, and Compliant

This is a very high-level summary of advertising law. There are many complexities and finer points. Although not addressed here, the risks of violation can also be severe, including FTC and state attorney general action, consumer class action, and competitor lawsuits. And at the same time, a retailer that can smartly go up to the line, but not cross it, is in a strong position to build goodwill and customer loyalty. Many lawyers understand the law but not necessarily marketing. Working alongside experienced counsel who understands both, you can craft advertising that is creative, engaging, and also compliant.

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The Basics All Dietary Supplement And Cosmetic Retailers Must Know

RYAN M. POTEET · STEPHEN J. FREELAND · JASON KALKIRTZ · KAI PETERS · YAN REN · SAM STEIN

A FEW WEEKS AGO, YOU asked your copywriter for a VSL for a new Vitamin D-3 product. Your copywriter comes back and says, "You're gonna love this! We're gonna crush it!" Excited, you open up the script and see the headline "Vitamin D-3 Cures COVID-19!" Whoah! Not so fast, you think. You don't doubt that the copywriter is correct—the VSL will lead to massive traffic and conversions. It will crush it. But you have a strong sense that you and your company could get crushed in the process. You're right. You decide to tell the copywriter to start over, but you realize he needs some guidance and so do you.

Muscle pills, weight loss pills, Vitamin C, Vitamin D3, Vitamin B12, curcumin, glucosamine, magnesium, calcium, probiotics, fish oils, detox teas, skin creams, workout gels, essential oils, and the list goes on. All of these products are very different. But they have one thing in common—online advertisers have long been tempted to market them by making drug or disease claims or otherwise unsubstantiated claims.

A quick Internet search will reveal dietary supplements and cosmetics advertised to, among other ends, reduce the risk of cancer, prevent heart disease, treat erectile dysfunction, and eliminate fat deposits or as substitutes for prescription drugs or medical procedures. While the words "this product is not intended to diagnose, treat, cure, or prevent any disease" may appear on the product advertising or website, this is not enough. At any moment, the FDA and FTC could knock on the retailer's door, declare that the product is being marketed as an unapproved drug, and enforce false advertising claims. Don't let this happen to you.

If you're selling dietary supplements or cosmetics and are informed, smart, and creative, you can have effective, attention-grabbing advertising copy that will both convert and not land you in trouble.

Dietary Supplement, Cosmetic, or Unapproved New Drug?

The FDA determines whether a product is a drug or a dietary supplement based on the product's intended use. Dietary supplements are products intended to supplement the diet and contain one or more ingredients such as vitamins, herbs, amino acids, or other nutrients. Cosmetics are intended to be applied to the human body for cleansing, beautifying, promoting attractiveness, or altering one's appearance. On the other hand, drugs are products intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease, as well as products intended to affect the structure or function of the human body.

Importantly, dietary supplements and cosmetics do not require FDA approval to bring the product to market. That's not the case for drugs and is the reason why the drug-dietary supplement/cosmetic distinction is so important.

The FDA will consider a variety of direct and circumstantial evidence when determining whether your cosmetic or dietary supplement is actually a drug. This may include claims made in product labeling, websites, endorsements, or testimonials. The FDA may also evaluate consumers' perception of a product (*i.e.*, what do consumers expect the product to do) and whether the product contains ingredients with well-known therapeutic use. So, the answer to whether a product is a dietary supplement, cosmetic, or unapproved new drug really turns on your advertising.

Dietary Supplements — Drug or Disease Claims Are Prohibited

Dietary supplement advertisements may not contain drug or disease claims — statements suggesting that a product is intended to diagnose, cure, mitigate, treat, or prevent disease. Broadly speaking, a disease is any condition in which a part of the body does not function properly (*e.g.*, cardiovascular disease) or any state of health that leads to that dysfunction (*e.g.*, hypertension).

Prohibited drug or disease claims may be express or implied. An express claim is one in which the claim directly links the product to a medical condition (*e.g.*, "Use Product X and reduce the risk of developing bowel cancer."). On the other hand, an implied drug/disease claim is an indirect statement about a product or ingredient that requires the consumer to make an inference to understand that the product is intended to diagnose, cure, treat, or prevent a particular disease. For example, an implied disease claim may result from copy that refers to the typical symptoms of a disease or cites to a study suggesting a product's ingredient prevents a disease or its symptoms. Drug/disease claims are also likely to arise when an advertiser claims that a dietary supplement is a substitute for a drug, plays a role in the body's response to a disease, or mitigates the adverse effects associated with an FDA-approved therapy.

The prohibition against making drug/disease claims also applies to testimonials and endorsements. Advertisers commonly use endorsements from healthcare providers to promote a product. Despite the provider's qualifications and genuine belief that a supplement can help treat a particular disease or condition, the advertiser cannot use that endorsement to promote a supplement. Similarly, consumer testimonials purporting to describe how a supplement helped the consumer recover from a medical condition are prohibited.

Dietary Supplements — The Exception for Structure/Function Claims

Drugs, by definition, include products intended to affect the structure or function of the human body; however, dietary supplement advertisers can make such claims so long as certain labeling and notification requirements are satisfied. Structure/function claims describe the role of a nutrient or dietary ingredient intended to affect the normal structure or function of the human body. The most common example is "calcium builds strong bones." Structure/function claims may also characterize

the means by which a nutrient or dietary ingredient acts to maintain normal (*i.e.*, healthy) structure or function. Claims like "fiber maintains bowel regularity," "Vitamin K promotes healthy liver function," and "antioxidants maintain cell integrity" are examples of permissible structure/function claims. The primary focus of a structure/function claim is to explain how a supplement or ingredient supports or maintains proper bodily functions. Importantly, none of these claims describes how the supplement will take a person from a diseased state to a non-diseased state or otherwise implies some type of disease prevention or symptom relief. Instead, these claims focus on the supplement/ingredient's role in maintaining the proper function of a specific organ, system, or the body, generally. The vast majority of compliant dietary supplement claims fall into this category.

Cosmetics — No Drug/Disease Claims or Structure/Function Claims

Cosmetics are intended to beautify or alter a person's appearance. Like dietary supplements, cosmetics cannot make drug or disease claims. Unlike dietary supplement retailers, however, cosmetic retailers cannot make structure/function claims. Advertisers frequently run afoul of the structure/function prohibition when making age-related claims and promoting a product as a way to permanently remove wrinkles (*i.e.*, altering the structure of function of the skin). Similarly, hair restoration solutions that purportedly regrow hair may cross the drug/disease-line because the product is either intended to be a substitute for a drug (*e.g.*, prescription hair loss medication) or affects the structure or function of the scalp. The FDA has also found that claims to reduce cellulite, treat varicose veins, or regenerate cells are generally drug claims. The key here is to refrain from any implication that a cosmetic will permanently alter a person's skin or body. Instead, the focus should be on improving how a person looks and feels when using a product.

But wait, there's more. Any cosmetic manufacturer must now also comply with the Modernization of Cosmetics Regulation Act, known as "MoCRA," which took effect December 29, 2023. MoCRA is intended to boost safety and consumer confidence in the beauty and personal care industry. In sum, here's what it requires:

- **Reporting Adverse Events:** Manufacturers must keep records of any health-related issues for six years (three for small businesses) and inform the FDA about serious issues within 15 days.
- **Facility Registration and Product Listing:** Cosmetics makers must register their facilities with the FDA by July 1, 2024 and list their products and ingredients in the registration.
- **Safety Assurance:** Manufacturers must prove their products are safe and meet U.S. safety standards.
- **Labeling and Allergen Transparency:** Product labels must include domestic contact information for reporting adverse events and list fragrance allergens.
- **Enforcement:** The FDA can suspend facility registrations, access records, and enforce recalls.

At least twenty states, including California, Colorado, Florida, Hawaii, Illinois, Iowa, Maryland, Minnesota, Montana, Mississippi, Nevada, New Jersey, New Mexico,

New York, Ohio, Oregon, Vermont, Virginia, Washington and Wisconsin, have also enacted laws regulating chemicals in cosmetics, including 1,4-dioxane, cadmium, color additives, formaldehyde, mercury, parabens, PFAS, phthalates, methyl alcohol and methyl methacrylate.

These laws apply not just to the manufacturer but to any "responsible person," which MoCRA defines to include a distributor of a cosmetic product whose names appears on the label. So even if your business is not the manufacturer or is simply selling a "white label" product provided by a third-party contract manufacturer, it is essential that you and your manufacturer comply. You don't want an ugly blemish on your face, your brand, or your business.

Claim Substantiation

Along with not making drug/disease claims (as well as structure/function claims for cosmetics), advertising claims must be truthful, not misleading, and properly substantiated.

Dietary supplement advertisers must be able to support their claims with competent and reliable scientific evidence. When considering whether a claim is properly substantiated, the FDA and FTC will ask what experts in the relevant areas of study would consider adequate. Well-controlled, human clinical trials are the most reliable form of evidence. Animal and in vitro studies may also be helpful, but they may not satisfy the substantiation requirements unless such studies are widely considered an acceptable substitute for human research or human research is not feasible. It is important to keep in mind that simply finding a study that evaluated an ingredient in your product is not enough. You must demonstrate that there is a strong relationship between the ingredient being studied and your product claim. Important factors include: similarities in formulation; serving size; route/method of administration; length of exposure; and, frequency of exposure. The quality of the evidence is always more important than the quantity.

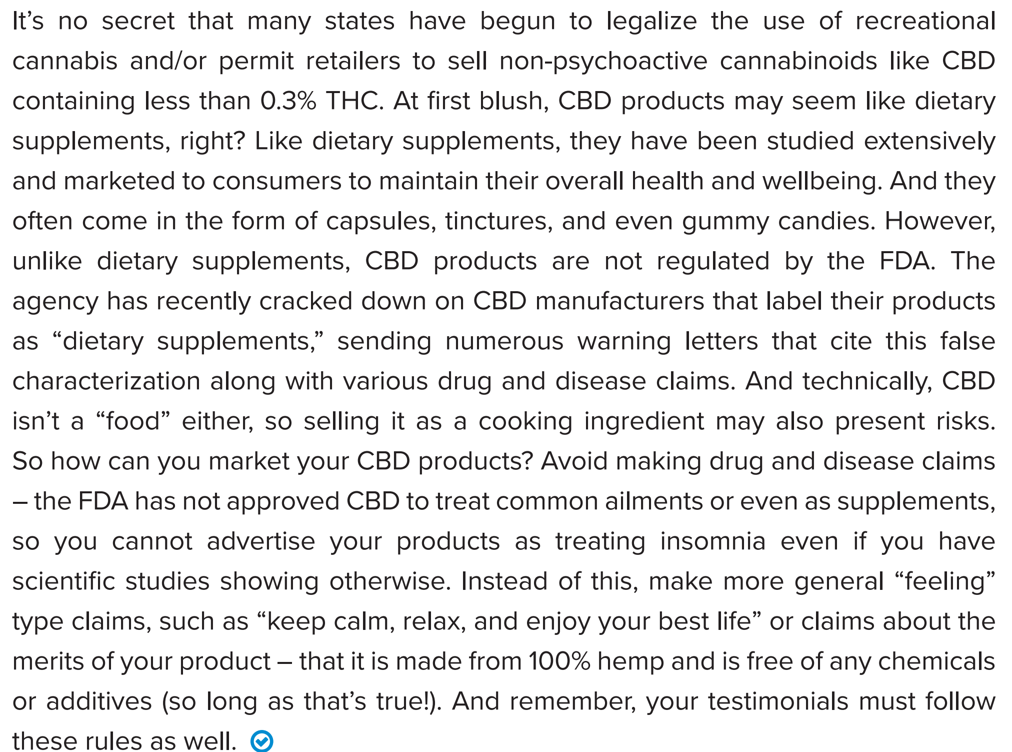
The substantiation requirements for cosmetics are easier to satisfy and do not generally require scientific proof. Cosmetics claims can be substantiated in a variety of ways, including product surveys, testimonials, and endorsements, among others. The rule of thumb is that you must have a reasonable basis for any claim that you make about a product.

The most successful health and beauty product retailers are creative, understand the science behind their products, and likewise understand the need for good counsel to identify the legal lines and how to avoid crossing them. It is possible to create high-converting advertising copy to sell dietary supplements and cosmetics without exposing yourself to FDA and FTC enforcement risk. An attorney with in-depth knowledge of these lines, who also understands marketing and your business needs, can review, redline, and offer recommendations to avoid advertising pitfalls, is worth the investment.

A Word About COVID-19 Advertising

We can keep this brief. If you’re selling dietary supplements or cosmetics and you’re thinking about discussing COVID-19 in your advertising, don’t. You will be putting a target on your back. You will also be subject to the attack that your advertising could lead consumers to not take safety precautions or the vaccine. The FTC and FDA view just about any dietary supplement or cosmetic ad copy that mentions COVID-19 to be an unsubstantiated drug and disease claim. They have brought and will continue to bring fierce enforcement action against those who cross this line.

And What About Cannabis?



It’s no secret that many states have begun to legalize the use of recreational cannabis and/or permit retailers to sell non-psychoactive cannabinoids like CBD containing less than 0.3% THC. At first blush, CBD products may seem like dietary supplements, right? Like dietary supplements, they have been studied extensively and marketed to consumers to maintain their overall health and wellbeing. And they often come in the form of capsules, tinctures, and even gummy candies. However, unlike dietary supplements, CBD products are not regulated by the FDA. The agency has recently cracked down on CBD manufacturers that label their products as “dietary supplements,” sending numerous warning letters that cite this false characterization along with various drug and disease claims. And technically, CBD isn’t a “food” either, so selling it as a cooking ingredient may also present risks. So how can you market your CBD products? Avoid making drug and disease claims – the FDA has not approved CBD to treat common ailments or even as supplements, so you cannot advertise your products as treating insomnia even if you have scientific studies showing otherwise. Instead of this, make more general “feeling” type claims, such as “keep calm, relax, and enjoy your best life” or claims about the merits of your product – that it is made from 100% hemp and is free of any chemicals or additives (so long as that’s true!). And remember, your testimonials must follow these rules as well.

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The Basics All Business Coaches And Financial Publishers Must Know

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YOU'RE USUALLY THE FIRST one logged into the company Slack, but today there's already a thread going. The company's copywriters are abuzz: "Did you see what happened to Grumpy Goat?" Grumpy Goat is your competitor in the financial publishing industry. You run a quick Google search. The FTC just hit Grumpy Goat and its owners with an enforcement action in federal court targeting its "future earnings" claims. Back on Slack, a copywriter says: "I always like those guys and their ad copy. I don't think they ever GUARANTEED future earnings, but just said things in ads like 'you COULD make a 70% return' or 'it's POSSIBLE to triple your investment.' We say similar stuff. They just got crushed. Are we next?" You wonder, is this our company's fate?

It may be, especially if you don't do everything possible to quickly get your house in order. Among other things, you need to review, and either take down or substantially recalibrate non-compliant ad copy to reduce your risk of an enforcement action. With an enforcement initiative launched December 2020, called "Operation Income Illusion," the FTC announced that it is cracking down on those making false or misleading promises to consumers about income and financial independence. Operation Income Illusion is focused on any vertical that is advertised using earnings claims—business coaching, multi-level marketing, real estate flipping, internet marketing, and financial publishing among others. Illustrating the FTC's mindset, Andrew Smith, Director of the FTC's Bureau of Consumer Protection, recently warned: "If someone promises you guaranteed income, but then tells you to pay them, tell the FTC right away so we can work to shut them down."

There are three common claim types that need immediate review:

1. Earnings claims;
2. Testimonials; and
3. Material claims that have no substantiation.

The FTC Frowns on Unsubstantiated Earnings Claims

Earnings claims are claims that set a consumer's expectation of future profits, claims that some outcomes are what a consumer should expect, or claims that the consumer will see a certain level of earnings with little experience or effort. Ad copy that makes quantifiable or purported statements of fact must be substantiated. Because you don't have a crystal ball, future earnings claims are impossible to substantiate at the time the claim is made. Therefore, the FTC frequently deems advertising that tells or suggests to a consumer that he or she "will" or even "may" earn "x" in the future

as deceptive. Another type of earnings claim is a "past earnings claim." These can be substantiated (the earnings really occurred), so they generally have less risk than a future earnings claim. However, if you fail to disclose that the past earnings claim highlights an atypical result and you fail to disclose what your typical results actually are, the FTC may also attack your past earnings claim as deceptive.

Earnings claims can be express, for example, "Learn how to double your money in just one week," "Earn thousands working only 2-3 hours per week," and "Flipping houses is easy and will make you millions." Earnings claims can also be implied. For example, the FTC contends that displaying images of "guru's mega-mansions, yachts, and sports cars can all reasonably be interpreted by consumers as what consumers should expect to achieve. Earnings claims can also be implied through charts, tables, or even mathematical calculations that demonstrate possible results. The FTC may also take issue with claims that "no experience is necessary" and that consumers can easily replace traditional income.

To avoid earnings claims, you can use puffery in your ad copy. Puffery is a promotional statement or claim that expresses subjective rather than objective views, which no "reasonable person" would take literally. Or as the FTC has explained, a "term frequently used to denote the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." For example:

- "This course will give you the nuts, bolts, and tools to take your business through the ceiling and the roof"; or
- "You can go slow like a sloth or you can lead like a lion"; or
- "We've had outrageous mind blowing success using our premium investing strategies."

Like puffery, there is more flexibility with opinions which (unlike facts) are not capable of being proven false. But opinions can still present risk because advertising law focuses on the "net impression" to consumers and therefore a statement that is literally true may still be deemed deceptive.

This can be confusing for copywriters who may think they can simply restate a factual claim as an opinion. There is a nuanced and compliant way to do this, and it is often done the wrong way. For example, "I believe you will double your earnings with this program" will always be high risk. Other times, a copywriter will try to use words like "could" or "possible" as in "you could 3X your business." Even though literally true, the FTC focuses on the "net impression" to the consumer and contends that such claims are future earnings claims and therefore deceptive and prohibited.

And these rules are always evolving. In February 2022, the FTC voted to issue an advance notice of its proposal for a new rule addressing the unfair and deceptive use of earnings claims. In addition to other topics, the FTC plans to address whether earnings claims made by agents or others acting on a company's behalf are ripe for enforcement action and whether disclosures are automatically required for certain types of earnings claims. The rulemaking is in its infancy, but it shows the

FTC's commitment to expanding its civil penalty authority and pursuing deceptive earnings claims.

Testimonials Must Follow the Rules Too

Testimonials are effective because they stand out in your copy as candid and unbiased accounts of how well your offer works. However, the testimonials you use constitute your advertising. This means that, at minimum, the testimonial must be honest and accurate. And for the same reason, you cannot guarantee future earnings. For instance, it would be a mistake to use a testimonial like "I promise that you'll scale your business to six figures a month if you take this course."

Importantly, the FTC expects that testimonials will either be representative of a typical consumer's results or expects that the business will clearly and conspicuously disclaim that the testimonial is an outlier. However, disclosures do not have to be long or in legalese and can be easily worked into ad copy. For example, before introducing several testimonials in a video sales letter or other ad copy, you might say: "Check out what our most motivated, highest-performing students have to say about their achievements." This sounds like ad copy, but is also a disclosure.

Finally, you must obtain the endorser's permission to use their name, likeness, and testimonial as well as a representation that the testimonial is true and accurate. This can be done in a stand-alone release agreement or via a clickwrap agreement which includes key provisions about user-generated content in the hyperlinked terms.

Have Substantiation for Your Performance Claims

What is required to substantiate a claim depends on the claim being made. If an investment guru states that he or she made $10,000 on a single trade, the FTC would expect to see brokerage account records that show a $10,000 profit from a single trade. If a coaching program states that students doubled their income within two weeks of starting the program, the FTC would expect to see something like survey data showing student income at the beginning of the program and additional data two weeks later. The best practice is to maintain a folder with documentation substantiating each claim in your ad copy.

Other Claims That Are Closely Scrutinized

- "Total Value" Claims – It may be misleading to advertise offers for a total value that is dramatically higher than what the customer will actually pay. You should always be able to substantiate that you've sold the service for the listed price or that a competitor has sold a similar service for the listed price.
- "Free" Claims – According to the FTC, "free means free" so anything offered for free means the customer must not be charged any amount for the product or service. And if there are any material limitations to the offer, they must be disclosed to the customer.
- "Superiority" Claims – "Us versus them" claims that convey your product or service is superior to your competitors should be based on objective data

compared to similar offerings. Or for a safer alternative, stick to puffery like "our services are the best in the business."

- "Limited Offer" Claims – Ever see a claim that an offer will expire in thirty seconds unless you "click now"? Those offers must be factually accurate or else they may create a false sense of urgency.

The Time to Review Your Ad Copy is Now

With Operation Income Illusion, any business that makes money by selling how to make money should reevaluate its ad copy and marketing practices. Often, there can be resistance with some business people fearing that becoming compliant will have a negative impact on sales. However, your ad copy can be aggressive and engaging without putting a target on your back. To be sure, this requires working with experienced and creative advertising counsel. Many attorneys can spot FTC compliance issues in ad copy, but some don't understand that simply saying "don't do this" and "don't do that" isn't helpful to a copywriter who wants to understand how to create compliant ad copy and still have a thriving business. With experienced counsel who understands both the law and marketing, you can craft engaging, creative, and compliant advertising to evolve from the next Grumpy Goat into a long term Cash Cow.

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How to Make Green Going Green

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YOU OWN A DIRECT-TO-CONSUMER household cleaning product business. Although your products are super effective for eliminating grease and grime, "greener" products are taking more and more of your market share. Your brand needs a facelift and you have a line of plant-based bathroom cleaners ready for market entry. Your team insists the products are basically "non-toxic," "environmentally friendly," and "biodegradable" even though the products can cause skin rashes on contact, have ingredients that might harm aquatic life, and come in plastic bottles. Your copywriter wants to make these "green" claims on the labels and in ad copy, along with a logo for the product line that includes an Earth symbol. Seems too good to be true? It might be. You might need some guidance.

More than ever, consumers are looking for "greener" products that are safe for our environment and our health. According to a Unilever study, 33% of consumers choose to buy from brands based on environmental and social impact, even if it may mean paying a premium. So it's fair to say you can make a lot of "green" going "green."

But…you need to do it right. When done wrong, green marketing can be attacked as "greenwashing" and lead to crushing regulatory enforcement actions, consumer class actions, and lawsuits by competitors asserting that your marketing campaign undercuts their profits. But when done right, green marketing gives you access to new customers, a competitive advantage, and a positive, conscientious brand image. You want to do it right.

At a high level, the keys to effective green marketing are making sure your claims are truthful, substantiated, and specific. At a more granular level, effective green marketing requires following the FTC's "Green Guides." Here, we break down the three general types of green marketing claims contemplated by the Green Guides:

1. How a product or package is made;
2. How to dispose of a product; and
3. "Free Of" claims.

Claims About How the Product or Package Is Made

Recycled Materials: Let's go back to the story above. As part of your commitment to environmental consciousness, you've committed to using plastic bottles made with recycled content. Unfortunately, the cost associated with manufacturing bottles from 100% recycled materials is prohibitive. You can only afford to use 70%. Your marketing team wants to label the product as being "made from recycled materials." This is technically true, right? Well, it's technically only 70% true, and the FTC

routinely goes after companies for omitting material information when its absence leads to consumer confusion. If your package isn't made from 100% recycled materials, the label should disclose the actual percentage. Using a clear and prominent qualifying percentage like "made from 70% recycled materials" is truthful, omits no material information, and still communicates that your product is greener than those using no recycled materials.

Renewable Materials: What about products made with renewable materials and/or renewable energy? It's no secret that manufacturing processes naturally expend resources, so consumers are inclined to purchase products made from renewable materials. Therefore, it is important to specify which materials are renewable and why. For example, "our pillow cases are made from 70% bamboo fibers and 30% cotton, and the bamboo we source grows at the same rate as we use it" communicates which portion of the product is made from bamboo, and clarifies that the bamboo supply naturally replenishes itself to offset what is lost during manufacture.

Claims About a Product Is Disposed

A common way consumers look to benefit the environment is through mindful waste disposal. Marketers understand this desire, and in turn encourage companies to tout the "recyclable," "biodegradable," and "compostable" aspects of their products. The Green Guides set forth clear guidelines for advertisers using these claims.

Recyclable: An advertiser can say its product is "recyclable" if a substantial amount of people who purchase it can recycle it. This means the product must be able to be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing another item. Unqualified "recyclable" claims are only permitted where at least 60% of consumers with access to the product also have access to recycling facilities. Otherwise, the claim must be qualified (*e.g.,* "this product may not be recyclable in your area"). Further, if only certain components of the product are recyclable, the claim should be qualified as to those components only.

Biodegradable: "Biodegradable" refers to items that break down and decompose into elements found in nature when exposed to sunlight, air, moisture, certain bacteria, or other organisms. Unfortunately, most trash ends up in landfills that are designed to shut out these biodegradation catalysts. The FTC's position is that only those products that completely decompose within one year after customary disposal may be labeled with unqualified "biodegradable" claims. Going back to the story above, your bathroom cleaning products are made from a plant-based formula, and you have competent and reliable scientific evidence that the formula will break down and decompose shortly after disposal. The plastic packaging,

however, takes hundreds of years to decompose in an anaerobic landfill environment. Therefore, an unqualified "biodegradable" claim would be misleading. A qualified "biodegradable formula" claim, however, would likely not be deceptive.

Compostable: "Compostable" claims refer to a product's ability to break down into, or become part of, usable compost such as mulch or other soil-conditioning materials in a safe and timely manner, whether in a composting facility or in a home compost pile. Similar to recycling claims, advertisers should clearly and prominently qualify compostable claims if facilities are not available to a substantial majority of consumers or communities where the item is sold and/or if home composting is not possible. These claims are also misleading if any byproduct released during the composting process results in the compost being unusable. Importantly, states like California also require "compostable" products to comply with specific labeling requirements so that consumers know how to dispose of the products appropriately.

"Free Of" Clams

In addition to purchasing products that are "green" manufactured and/or "green" disposable, consumers have a strong interest in products formulated with ingredients safe for human and environmental health. When companies claim their product is "free of" a chemical or ingredient, they must be able to demonstrate that the product contains no more than a harmless trace amount of the ingredient, and is free of any other ingredient that causes the same kind of risk. These claims run the gamut from "free of volatile organic compounds" to "non-toxic," among others.

VOCs: Volatile organic compounds (or "VOCs") are found in paints, cleaners, polishes, and other common household products. They are released into the air as gasses and may cause smog by contributing to low level ozone formation. They can also have negative effects on your health. The FTC has brought several enforcement actions against retailers touting "low" or "no VOC" products that in fact had VOCs. In some cases, the FTC has also accused retailers of marketing their products with environmental "seals" without disclosing that they created the "seals" and purported certification themselves – a practice the FTC describes as a "selfie seal."

Non-Toxic: "Non-toxic" is perhaps the most common green marketing claim used today. To qualify, a product must be safe for both humans AND the environment. But what does "non-toxic" actually mean? Arguably, any product can be rendered unsafe if misused. A fix for that issue is to state "non-toxic when used as directed" and provide clear and conspicuous directions for use so consumers can avoid the particular bodily contact that may result in injury. Especially because the courts and regulators have yet to settle upon a precise definition of "non-toxic," it is especially

important to be cautious in making the claim. In the story above, a "non-toxic" claim on plant-based cleaners that may cause minor skin rashes and/or harm to aquatic life could be misleading to consumers and expose an advertiser to liability.

Green with Envy

Returning to our story, it's three months later and business is booming. With the benefit of product testing and substantiation, as well as experienced compliance counsel, you're able to advertise that your plant-based bathroom cleaning product has a "Biodegradable Formula," is "Non-Toxic When Used As Directed," and is made from "Compostable" materials. Although you can't make these claims with all of your products, you've identified several where you can claim "A Simpler Cleaner" or "A Gentler Cleaner" to communicate product benefits without violating the Green Guides. You and your employees love that you're helping protect the environment, that consumers love this too, and that everyone is seeing more green in their wallets. What's good for the planet can be good for business. And, as for your competitors, they wish they were you.

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A Primer on California's Proposition 65

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YOU OWN A SUCCESSFUL business selling meal kits direct to consumers. They contain smoothies and snacks that customers love because they're healthy, shipped fast to their doors, and easy to prepare. You're also considering new product lines, including "superfood powders" from cacao, acai, turmeric, and others that your customers can toss into their smoothies for an extra kick of nutrition. Your marketing team thinks California consumers will "eat up" your products, especially your superfood powders. Because you care about consumer safety, you send your new superfood powders to a lab for testing only to learn that some contain heavy metals that were not added during processing or packaging. A quick Internet search reveals that the heavy metals appear on something called California's "Proposition 65 List." If you want to sell in California, you might need to put a conspicuous "Proposition 65 Warning" on the label informing consumers that heavy metals can cause cancer or reproductive harm. You're a bit bummed out but know you better figure this out!

What is Prop 65?

In 1986, California passed The Safe Drinking Water and Toxic Enforcement Act, more widely known as Proposition 65, to protect California citizens and water supplies from toxic materials. While Proposition 65 addresses any possible exposure, such as at home or at work, it is particularly important in the sale of consumer products (including the superfood powders mentioned in our story). More specifically, Proposition 65 states that "no person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." Today, Proposition 65 requires businesses to post warnings if exposure to toxic materials is possible through the sale of consumer products to any one of more than 900 listed chemicals.

When is a Warning Required?

Warnings are not required on products in three situations: (1) when federal law governs the warnings, preempting state authority, (2) when an exposure takes place less than one year after the listing of the chemical, or (3) when lifetime exposure to the chemical does not pose a significant risk.

To guide businesses in determining whether a warning is necessary or whether discharges of a chemical into drinking water sources are prohibited, the Office of

Environmental Health Hazard Assessment (OEHHA) has developed safe harbor levels for many Proposition 65 chemicals. A safe harbor level identifies a level of exposure to a listed chemical that does not require a Proposition 65 warning. If exposure to a chemical occurs at or below these levels, a business does not need to provide a warning. OEHHA safe harbor levels come in two forms: No Significant Risk Levels (NSRL) for chemicals listed as carcinogens, and Maximum Allowable Dose Levels (MADLs) for chemicals listed as reproductive harm, such as birth defects. OEHHA has more than 300 safe harbor levels for listed chemicals.

Fortunately for retailers, and unfortunately for packagers, importers, suppliers, and manufacturers, including our meal kit provider, Proposition 65 designates fault for failing to provide clear and reasonable warnings to upstream entities. Under Proposition 65, a retailer will typically only be responsible if they knowingly cause a listed chemical to be included in the product, or hides/avoids posting the warning provided by the manufacturer.

What Happens If You Fail to Warn?

Failure to comply may result in enforcement actions by regulators, the California attorney general, local district attorneys, and private citizens operating in the public interest. Companies found to be in violation of Proposition 65 can be assessed a penalty of up to two thousand five hundred dollars ($2,500) per day for each violation, which is measured by looking at the nature and extent of the violation; the number of, and severity of, the violations; the economic effect of the penalty on the violator; whether the violator took good faith measures to comply with this chapter and the time these measures were taken; the willfulness of the violator's misconduct; and the deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.

Companies may even be required to pay the plaintiff's attorneys' fees. As you can see, the costs of not providing a simple warning may be great when compared to how important it is to comply and protect consumers.

California citizens may bring private actions against businesses that violate Proposition 65 so long as that citizen gives notice to the company and the attorney general at least 60 days prior to filing a lawsuit. These notices are common occurrences. There have been over 7,000 60-day notices for lead alone. So, if you do receive one of these notices, the best course of action is to confirm whether you are in fact violating Proposition 65, and take steps to remedy the violation. This is especially important because your liability insurance may not cover the costs of Proposition 65 litigation.

You do have defenses. Some include:

- Proving your labels carried the warning before you received the notice.
- Having less than 10 employees.
- Challenging the 60-day notice itself. A flawed notice may fail to adequately identify the individual exposed to the alleged toxins or describe how they were exposed.

- Raising issues with plaintiff's "Certificates of Merit" required to show there is a reasonable basis to bring an action after consulting with experts. You can attack the certificate if your manufacturer warrants that exposure to the alleged toxins is too limited to violate Proposition 65.
- Testing the levels of Proposition 65 chemicals in your products. If you're below the exposure limits for chemicals identified in the notice, you have a defense. If you're above the exposure limits, you can reformulate to go below the threshold.
- Naturally occurring chemicals may not violate Proposition 65. For example, if a food product tests positive for a heavy metal, you may have a defense if the substance is derived from naturally occurring sources. This is a difficult defense because even a single yield from the same farm may hold different amounts of heavy metals – some below safe harbor limits, and some above it.

What Does a Warning Look Like?

Proposition 65 warnings can be provided though labels on consumer products, notices in mailing for water customers, or placing notices in public news media. Originally, the warnings said "WARNING: This product contains a chemical known to the state of California to cause [cancer/reproductive harm]." Most of these warnings did not identify the chemical or provide specific information about exposure.

If you live in California, you've seen these warnings more times than you can count. It's on food labels, plastered on the entryway and on the floor of every aisle of the hardware store, and even posted on signs in parking garages. Like our meal kit provider, businesses must be aware of Proposition 65 warnings as well. If the warning is required on your product labels, you can't legally sell your products to the nearly forty million consumers living in California until you comply with applicable requirements.

New regulations recently changed the "safe harbor" warnings. They now include the name of at least one listed chemical, the Internet address www.P65Warnings.ca.gov, and a triangular yellow warning symbol, illustrated by example at right:

California's Proposition 65 website provides businesses with sample warnings they may choose from depending on the type of product and potential risks of harm. *See Sample Warnings and Translations For Businesses - Proposition 65 Warnings Website (ca.gov)*.

Businesses are not required to use the new Proposition 65 warning to comply with the law. However, using it is an effective way to protect against Proposition 65 enforcement actions because the new warnings are deemed compliant with the law's requirement for clear and reasonable warnings.

A business providing a "safe harbor" warning would have to provide a warning on or with the product through any one of these four methods:

1. A product-specific warning provided on a **posted sign, shelf tag, or shelf sign,** for the consumer product **at each point of display** of the product.
2. A product-specific warning **provided via any electronic device** or process that automatically provides the warning to the purchaser **prior to or during the purchase** of the consumer product, **without requiring the purchaser to seek out the warning.**
3. A warning on the label that complies [**the yellow triangle and warning listed above**].
4. A short-form warning on the label **no smaller than the largest type size** used for other consumer information on the product and at a minimum of 6-point type.

Proposition 65 and the Internet

Proposition 65 has very similar compliance guidance for products purchased over the internet. If your product has a Proposition 65 warning and is sold online, you may opt to provide a clearly marked hyperlink to the warning (using the word "WARNING") on the product display page, or a photograph of the warning label used on the product instead of using the four methods above. This warning must be prominent, so it should be large enough for consumers to easily see it without digging through fine print on your label.

Growing Enforcement Concerns

PFAS (per- and polyfluoroalkyl substances) are a class of thousands of "forever" chemicals, and they are found in many different consumer, commercial, and industrial products. PFAS can impart oil, water, stain and soil repellent barriers, chemical and temperature resistance, and surfactant properties to products, some of which are considered essential to health, safety, or modern life. But their usefulness in consumer products will take center stage on the Proposition 65 landscape, both from a litigation and regulatory perspective.

Perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) were identified by California as reproductive toxins and added to the Proposition 65 list in 2017. On December 31, 2021, the state added perfluorononanoic acid (PFNA) to the list. Following a one-year grace period, enforcement for PFNA began on January 1, 2023. California is also considering several other PFAS to the list: PFHxS and PFDA.

The rapid addition of these forever chemicals to the Proposition 65 list, and intense consumer concerns about the presence of these substances in everyday products, led to 45 PFOA and PFOS notices violations being filed in the first quarter of 2024. This explosion of "forever chemical" Proposition 65 enforcement actions should put businesses on notice of the importance of implementing a comprehensive Proposition 65 compliance program to mitigate liability risk.

Proposition 65 and You

Our meal kit company now understands why Proposition 65 warnings are required. And because customers come first, they took the time to investigate compliance requirements. Although the heavy metals in their products occur naturally, and some batches contain none at all, they understand that some might exceed the limits. As a result, they decided to affix Proposition 65 warnings to all of their California-shipped products so that consumers are informed and the business is protected. At first, they were worried the warnings could scare away customers and crush sales, but soon saw customers throughout the Golden State order tons of their superfood powders and subscribe for monthly delivery. Remember, Californians see the Proposition 65 warnings every day! Proposition 65 isn't there to punish businesses like our meal kit company, but to allow consumers to make informed choices. And studies have shown that for some, the warnings don't make a difference. So don't feel like your product is doomed because you have to include a warning. Californians are used to seeing it everywhere.

The Keys To Successful Influencer Marketing

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YOU'VE SEEN HER PROFILE on Instagram, and she seems perfect for you: beautiful, funny, engaging, articulate, and refreshingly up-front and transparent about who she is and what she stands for. Judging by her eye-popping follower count, she's adored and trusted by many; people seem to relate to her, identify with her, and enjoy engaging with her online. In short, she's everything you could want in a partner…a marketing partner, that is. She's a social media influencer, and she just might be exactly what you need to take your health and beauty product business to the next level.

Identifying, selecting, and wooing your influencer of choice is just the beginning, however. You'll need to ensure the influencer's posts and comments about your product are consistent with your company's brand, messaging, and values. You'll want some control over the nature and style of the posted content, as well as the volume, frequency, location, and duration. You'll want clarity on the amount, timing, and manner of the influencer's compensation. And, of course, you want as much protection as possible in the event the relationship turns sour or the influencer makes a mistake. In short, you need an influencer marketing agreement.

If You're Not Using Influencer Marketing, You Probably Should

As the name implies, "social media influencers" are a byproduct of the exponential growth of online social networking sites and apps worldwide. Since 2010, Facebook's number of active users has jumped from 500 million to over 2.7 billion monthly active users in 2020. TikTok, undoubtedly the most popular social media app among younger users (ages 16 to 24), now has more than 800 million active users worldwide, just four years after its initial launch. Overall, social media users have passed the 3.8 billion mark, with almost three-fourths of the U.S. population using some type of social media as part of their daily lives.

As social media apps go, however, Instagram—with its visually-based platform and advertiser-friendly algorithm—remains the preferred choice for influencer marketing. Influencers find Instagram particularly well suited for native advertising, where sponsored content mimics the format of the platform on which it appears. Influencers posted more than 3.7 million ads on Instagram in 2018, and that figure was projected to exceed 5 million ads last year. These posts yielded an unrivaled level of customer engagement; in 2019, for example, engagement with brands on Instagram was 10 times higher than on Facebook and an astonishing 84 times

higher than Twitter. In general, Instagram has been shown to give brands 25% more engagement than other social media platforms.

The proliferation of social media influencers is also a response to millennials' general distrust of celebrity endorsements and other traditional advertising techniques. A Deloitte study revealed that 47% of millennials are influenced in their purchases by social media influencers, compared to 19% for all other age groups. The same study found that 40% of millennials made a purchase after seeing a product on YouTube, Instagram or Twitter. About half that number also have shared influencer content, driving further exposure and engagement.

And you may not need a sponsored post by a celebrity with millions of followers to gain traction. "Micro-influencers" with localized impact are a powerful conduit to promote brand visibility.

In sum, advertising through social media, particularly through the use of influencers, continues to grow more popular and brands should capitalize on this trend.

But Make Sure You're Complying wth the Law and Have a Strong Agreement

Because a brand can be liable for an influencer's activity, it is up to you to ensure that your brand's influencer content complies with advertising and intellectual property laws. This begins with a written contract, which specifies what the influencer can and cannot do in promoting your brand. A contract also allows you to better control the posted content, protect your confidential information, limit the influencer's ability to simultaneously promote your competitors' products, detail compensation terms, limit your potential liability, and more. You can even include a clause requiring the influencer to cooperate with you in the event a regulatory authority starts investigating. This is especially important with micro-influencers, who may have less familiarity with FTC requirements. And remember, an influencer's claims about the performance of a product or service must still have adequate substantiation, and their experience with the product should represent what typical consumers generally can expect if they use the product as well. Finally, if your influencer is an expert, they must be qualified to render an expert opinion about product features. For example, only a licensed dietitian should give scientific endorsements about a weight loss supplement.

Sponsored Advertising

The FTC requires a clear and unambiguous disclosure if the influencer has received money, gifts, or anything else that could affect how users view their mention of a brand or product. The disclosure must be simple, clear, and "hard to miss," and hashtags like #ad or #sponsored are favored. Relying solely on a "See More" link is likely to be insufficient, as consumers routinely ignore or fail to click on such links. While the FTC advises influencers that it is their responsibility to make these disclosures, everyone involved in creating and posting sponsored content—whether the brand, a third-party media company or advertising agency hired by the brand, or the

influencer contracting with the brand—is expected to understand and comply with this requirement. Indeed, the FTC has already indicated that, should enforcement of the FTC Act be required, the FTC's focus will be on the brand or (where applicable) its "middle man" PR firm, rather than the individual influencer. A carefully drafted influencer marketing agreement can spell out exactly what steps the influencer must take with respect to properly tagging/identifying sponsored content, and what steps the brand may take (*e.g.*, withholding payment or terminating the contract) if the influencer fails to comply.

Intellectual Property

It is also important that the influencer's content not use, without authorization, another's copyrighted works, trademarks, and/or a person's name and likeness. In the U.S., a brand can be secondarily liable if it had constructive knowledge of its agent's unauthorized use of another's intellectual property.

The Copyright Act protects "original works of authorship," like photographs, videos, written text, artwork, sound recordings, and other creative materials and literary works. The owner of the copyright has certain exclusive rights which exist from the moment of a work's creation, even if the owner/author has not taken formal steps to register the work with the U.S. Copyright Office. For willful copyright infringement of a registered work, a defendant can be liable for up to $150,000 in statutory damages plus attorneys' fees and costs.

Trademarks, such as brand names and logos, are intellectual property used to identify the source of goods and services and to distinguish those of one seller from those of another. The Lanham Act and related state laws prohibit the use of third-party trademarks in a way that is likely to confuse consumers. Unless a trademark owner has given permission, an influencer should not use the trademark owner's name, logo, or product in a way that suggests there is some connection, sponsorship, or affiliation between the trademark owner and the brand.

A person's name, image, voice and/or likeness can be protected by state "right of publicity" laws, which grant an individual the right to control the use of his or her identity for commercial purposes. As with copyrights and trademarks, influencers should have permission before displaying anyone's name, image, voice and/or likeness for commercial purposes in a sponsored post.

Your written agreement with the influencer should include a representation and warranty that the influencer will abide by all advertising and intellectual property laws and that she will own or have a license to use all content included in her posts for your brand. The contract should also include limitation of liability and indemnification provisions whereby the influencer acknowledges that your company's liability is limited and the influencer agrees to indemnify you in the event of any damages or penalties arising out of the influencer's failure to abide by such laws.

Compensation

The agreement should spell out compensation in a specific way. Will the influencer be paid a flat fee, or a monthly fee, for an ongoing engagement? Will the influencer's compensation be tied to results, whether in terms of clicks/traffic, converted sales, or some other metric? If so, how will such performance be tracked/measured? How will payments be delivered or transferred to the influencer? What rights will you have to reduce or withhold payment in the event of the influencer's failure to comply with some portion(s) of the contract?

Procedures for Selecting, Reviewing, and Posting Content

An effective influencer marketing agreement will also include clear procedures governing the process by which posts are designed, selected, reviewed, uploaded, and maintained/preserved on the influencer's page(s). Such guidelines can prevent disagreements over how much discretion the influencer may exercise with respect to, say, choosing hashtags or writing captions, while affording you a reasonable degree of editorial control over every post promoting your brand. To that end, is important to generally preserve the influencer's opinion or experience and present it in accurate context.

Morals Clauses/"Conduct Unbecoming"

Your brand's public image and authenticity are vital to your credibility and long-term success. As such, you may find yourself in a position where you must distance yourself from the influencer due to her actions/statements that you view as inconsistent with your company's mission and core beliefs. A strong influencer marketing agreement will include an "escape hatch," whereby you can terminate the engagement prematurely in the event the influencer says or does something that could bring negative publicity to your brand, damage your reputation, or otherwise hurt your business.

This Could Be a Match Made In Heaven, But Only Fools Rush In...

Incorporating influencer marketing into your social media strategy could be exactly what your brand needs to rapidly build trust with your target audience, enhance overall awareness of your brand, and generate more revenue across both the short- and long-term. Chances are, your competitors have already seized on this trend (or at least, they soon will), as advertisers in the U.S. are believed to have spent more than $5 billion on influencer marketing in 2020 alone, with much more to come in 2021 and beyond. But while a "perfect pairing" between your brand and your chosen influencer might be cause for exciting optimism, you can be far more optimistic if you have a strong influencer marketing agreement.

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The Keys To Successful Text And Telemarketing

STEPHEN J. FREELAND · THOMAS C. BLATCHLEY · RYAN M. POTEET · SAM STEIN · GRAHAM REYNOLDS

YOUR ESSENTIAL OILS PRODUCT launched a month ago. You're getting hundreds of daily visitors to your website. But after filling out the name, address, and phone number fields, too many click away and don't convert. Comparing notes over drinks at an e-commerce mastermind, a friend says you should follow up with those "partials" by phone and text so you don't leave money on the table. Another friend chimes in, "be careful…I tried that, got sued for violating the TCPA, and had to pay almost $1,500 for every text." And then a third friend says, "you might be fine…I think the Supreme Court just issued a decision that could protect you against TCPA claims." You order the next round of beers for your buddies, while thinking "who's right?" The short answer is they all are.

Facebook's Big Win

For years, many courts have broadly interpreted the definition of an "automatic dialing system" a/k/a an "autodialer" under the Telephone Consumer Protection Act ("TCPA"). Given this and the TCPA's statutory damages provision ($500 to $1,500 per violation), many TCPA plaintiffs and their lawyers have made small fortunes suing e-commerce retailers who have not obtained "prior express written consent" from consumers before calling or texting them about promotions. The law has now dramatically changed.

On April 1, 2021 (yes, April Fool's Day), the U.S. Supreme Court decided *Facebook v. Duguid* and resolved a split between the lower courts as to what constitutes an "automatic dialing system" under the TCPA. Siding with Facebook, the Court held that to qualify as an "automatic dialing system," the technology must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. At bottom, the Court's decision supports that technology that facilitates calling or texting numbers from a stored list is not an "automated dialing system" and therefore "prior express written consent" is not required from consumers before calling or texting them about promotions. This is great news for all e-commerce retailers that text or call consumers.

That said, *Duguid* did not impact TCPA liability involving prerecorded messages, ringless voicemail, or persons on a "Do Not Call Registry," and these lawsuits are still being filed in courts across the country every day. Further, several states have amended their "mini-TCPA" statutes in an effort to provide greater protection to consumers post-*Duguid*. Oklahoma amended its mini-TCPA statute to expansively define an autodialer under state law, whereas Florida's recently amended statute

requires a platform to both automatically select and dial numbers to trigger liability. Washington's state law also imposes some unique requirements. First, the caller must identify themselves, the company they're calling from or on behalf of, and the purpose of the call within 30 seconds. If the called party indicates they want to end the call, the caller must do so within 10 seconds. Finally, if the called party says they don't want to be called again, the caller must state the party's contact information will be removed for one year, end the call within 10 seconds, and not call the party for one year.

Additional states have either amended their existing mini-TCPA's or enacted brand new ones, further causing industry confusion as marketers are forced to keep up with the ever-changing patchwork of requirements. For example:

- **New Jersey:** New Jersey's amended mini-TCPA goes into effect December 2023. Dubbed the "Seinfeld Bill," New Jersey's amendments add new disclosure obligations. Similar to Washington, telemarketers have to identify themselves within the first 30 seconds. They also have to disclose their mailing addresses on any websites that they own or operate and in any written communications to consumers. The Seinfeld Bill also adds that any violation is also a disorderly person offense, which carries up to six months in jail and a fine of up to $1,000.
- **New York:** Amendments to New York's mini-TCPA went into effect on March 3, 2023. Telemarketers making calls to New Yorkers have to identify themselves and provide an option to be placed on a company specific "do-not-call" list at the beginning of every call. They also have to inform consumers of the purpose of the call and the goods or services being offered.
- **Maryland:** Maryland's mini-TCPA goes into effect in 2024. Maryland requires, among other things, express written consent for any prerecorded or automated marketing call made using an "automated system." However, the term "automated system" is undefined, meaning the door is open to arguments that any dialing or texting platform could qualify even if it does not fit the federal definition of an "autodialer." Telemarketers also cannot conceal their identity, cannot display a different number than the one the call originates from, must call between 8AM-8PM, and can only make 3 calls per 24-hour period.

Additionally, there are other parts of the TCPA that *Duguid* did not touch and can still trap unsuspecting marketers.So this leads to the question…what exactly does the TCPA prohibit and require? And then the follow up question…what are best practices?

Comply with Do Not Call Requirements

You must comply with Do Not Call requirements. The TCPA prohibits telemarketing calls to anyone who has registered their telephone number on the national Do Not Call registry. In addition to the national list, many states also have registries of numbers that do not wish to receive telemarketing calls. Moreover, under the TCPA, business and telemarketers must maintain records of consumer requests not to receive future solicitations and must honor those requests for ten years.

Another TCPA requirement is often overlooked but still very important. The TCPA requires that telemarketers, whether within a business organization or hired as outside vendors, maintain written policies for developing and updating their Do Not Call list and that employees are trained to use the list. When faced with FCC inquiry or enforcement action (or the inevitable lawsuit), the policies and lists should be readily available for review.

Facebook v. Duguid did not change or address any of these requirements. Importantly, even if there is a continuing business relationship between the caller and the consumer, if the consumer has asked to be placed on the Do Not Call list, the business must honor the request unless and until the customer gives written consent to start receiving telemarketing calls. A handful of states also maintain their own Do Not Call lists and telemarketers must comply with those lists as well. Given the above, it is critical that you scrub your phone number lists to remove anyone on federal or state Do Not Call lists so that you do not send them promotional calls or texts unless you have received their consent.

Obtain Prior Express Written Consent

Notwithstanding the favorable *Facebook v. Duguid* decision, you must still obtain prior express written consent before sending prerecorded messages, ringless voicemail, or marketing calls or texts to persons on a "Do Not Call Registry." You must also obtain prior express written consent before sending marketing calls or texts to persons residing in a state (*e.g.,* Florida, Oklahoma, and Washington) that have adopted their own definitions of "automated dialing systems." This consent must be evidenced by a signed, written agreement, whether in printed or electronic format, which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed.

On a website lead form, this is typically done with an unchecked checkbox that then has language such as:

> I agree to receive automated calls, text messages, and prerecorded messages via an automated dialing system about promotions from or on behalf of [______] at the telephone number I provide and I understand consent is not a condition of purchase.

For text messages, the consent should also include:

> Message and data rates may apply. Text "STOP" to [short code] to unsubscribe; text "help" for help. Terms & Conditions / Privacy Policy: [LINK TO FULL TERMS & CONDITIONS].

The consent language must be "clear and conspicuous"—it cannot be buried within form contract language. Florida's newly amended mini-TCPA clarifies that acts such as checking a box or responding affirmatively to receiving a text message demonstrate express consent. Florida's amended statute also requires consumers to notify solicitors they do not want to receive texts by replying "STOP," and allows solicitors up to fifteen days to cease sending texts.

Finally, while not required under the TCPA, businesses should strongly consider a "double confirm" or "double opt-in." This means the consumer enters their mobile number, and then receives a text message asking them to confirm their subscription. The message requires the mobile device owner to reply "Y" or "YES," to confirm their enrollment into the marketing program. If the mobile device owner does not reply to this text message, they will not be added to the list. The confirmation message should include the business name, the type and amount of messages a consumer will receive each month, a statement that no purchase is required, a warning that standard message and data rates apply, and instructions for how to opt-out. For example:

> "Thanks for joining [______] offers & updates! [Number] msg/mo, no purchase req'd. Std msg&data rates apply. Text "HELP" for help, "STOP" to unsubscribe."

Definitely Obtain Prior Express Written Consent for Pre-Recorded Messages

Although *Duguid* was a big win, it did not address artificial or pre-recorded voice messages such as ringless voicemail. The TCPA and state telemarketing laws have a separate provision that generally prohibits pre-recorded messages about promotional offers without prior express written consent. Because *Duguid* did not change this requirement, you should definitely obtain prior express written consent for pre-recorded messages.

Don't Call or Text After Hours and Treat Cell Phones Like Residential

Keeping with its genesis in the protection of consumer privacy, the TCPA also prohibits telemarketers from calling residential telephone subscribers before 8 a.m. or after 9 p.m. (calls to Florida numbers cannot be placed after 8 p.m., and the same will be true in Maryland in 2024). Similarly, the use of prerecorded or artificial voice messages calls to residences are prohibited. But what constitutes a "residential subscriber"? How does the TCPA deal with those individuals who choose to use their cellular telephone as their primary telephone to the exclusion of a traditional landline? While the FTC has not issued guidance on this point, most courts have held that cellular telephone numbers are considered "residential" if the subscriber uses the number primarily for personal communications that are not associated with a business or commercial purpose. Increasingly, state statutes (Florida for example) cease to draw a distinction between residential and cellular telephone numbers and, instead, apply the same telemarketing restrictions to both kinds of telephone numbers.

The Consequences of Violating TCPA

The TCPA provides two separate private rights of action for aggrieved consumers. These allow someone to sue if they did not provide prior express written consent to receive a call or text from an automated dialing system or an artificial or pre-recorded voice message; or if they received more than one telephone call within

any 12-month period by or on behalf of the same company in violation of Do Not Call prohibitions. A defendant can be subject to $500 in statutory damages for each violation or up to $1,500 for a "knowing violation." Amended mini-TCPA statutes like Florida's impose the same penalties, while others such as New Jersey's newly amended statute impose criminal penalties. The penalties for noncompliance can be financially devastating, especially in class action litigation where marketers often face liability for hundreds or thousands of calls, texts, or pre-recorded messages.

What If You Want to Buy a Phone Number List?

As with almost all business transactions, you should have a written agreement and you should have confidence that the other party will honor the agreement. In the agreement, you should have the seller represent and warrant that they are not re-selling someone else's list, that they directly collected the phone numbers from consumers, and ideally that they obtained prior express written consent from consumers who expressed an interest in receiving the type of information, product, or service you provide. You may also want to require that the seller indemnify you from any TCPA liability or any other liability arising from the seller's acts or omissions. Finally, you could require that your company be named as an additional insured on the seller's insurance policy. To be sure, all of these provisions could increase the purchase price when buying a list, and none of these provisions will prevent a consumer lawsuit. Nevertheless, these provisions could help to mitigate the pain if you are sued.

Your Next Steps

So should you text and call your partials about your essential oils product? Yes. As long as your text and telemarketing are a "well-oiled machine," you should feel as relaxed as if you just used your product. The most important issue here is obtaining prior express written consent. If you do this, and otherwise comply with the TCPA and state mini-TCPA statutes, you should avoid liability. If you do not obtain prior express written consent, it will be essential that you not send prerecorded messages, ringless voicemail, or marketing calls or texts to persons on a "Do Not Call Registry" and also that you avoid marketing calls or texts to persons in states with broad mini-TCPA statutes. In all events, before calling, text messaging, or sending pre-recorded messages, you should consult with experienced counsel so you can avoid the stress and anxiety of TCPA liability and instead have an improved mood and greater feeling of calm relaxation.

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The Keys To Successful E-Mail Marketing

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AFTER THREE QUARTERS OF booming sales of your hangover recovery product, your marketing now seems drowsy and sales are on the decline. Feeling a little hungover yourself, you visit your competitor's website and enter your email on the landing page. You then receive an email. Based on the content, you're sure it's from the competitor, but the "From" line says "Party Animal" and uses a different domain than your competitor's website. The "Subject" line also says "Free Amazon Gift Card" although you're sure your competitor isn't associated with Amazon or giving away free gift cards. You also don't see a business address or unsubscribe link at the bottom of the email. You don't like what you're seeing, but you also realize you need to start email marketing yourself. At an e-commerce mastermind, you once heard someone complain that they had to pay a greedy plaintiff's lawyer $50,000 to settle a "17529" email marketing case. You only want to pay a lawyer money if they're working for you. So you decide to talk to a lawyer.

Both federal and state law regulates sending emails to consumers. The laws are intended to stop unwanted and deceptive emails, including by requiring disclosure of the actual source of the email. The good news is that compliance can be easy. The bad news is that penalties for non-compliance can be severe.

Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act 15 U.S.C. §§ 7701-7713)

The CAN-SPAM Act applies to emails from your business where the primary purpose is commercial content or advertising. To a lesser extent, the CAN-SPAM Act also applies to emails relating to a transaction or a relationship with an existing customer if the email contains advertising. In all events, the email must not be false or misleading.

Although it has a criminal sounding name, this federal law may be enforced in a criminal, regulatory, or civil action. It also is not so much about pornography, but rather about "spam" email. Among its requirements, the CAN-SPAM Act prohibits sending commercial email to a recipient with: (1) false or misleading header information, (2) false or misleading contact information, or (3) deceptive subject lines that mislead the recipient about the content of the email. The FTC has provided these pointers on how to comply with the CAN-SPAM Act:

- **Don't use false or misleading header information.** Your "From," "To," "Reply-To," and routing information — including the originating domain name and email address — must accurately identify the person or business who initiated the message.

- **Don't use deceptive subject lines.** The subject line must accurately reflect the message content. It should be clear, concise and relevant.
- **Don't use deceptive messaging. Remove any false or misleading Information from your email message. Ensure that all claims are supported by factual evidence.**
- **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must clearly and conspicuously disclose that your message is an advertisement.
- **Tell recipients where you're located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you've registered with the U.S. Postal Service, or a private mailbox you've registered with a commercial mail receiving agency established under Postal Service regulations.
- **Tell recipients how to opt out of receiving future email from you.** Your message must clearly and conspicuously explain how the recipient can opt-out of future emails.
- **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days. You can't charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. You can't sell or transfer their email addresses, even in the form of a mailing list, except that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.
- **Monitor what others are doing on your behalf.** Even if you hire another company to do your email marketing, you can't contract away your legal responsibility to comply with the law. The company whose product is promoted and the company that sends the message may be held legally responsible.

The CAN-SPAM Act's requirements apply whether the email originates from you or a third-party sending email on your behalf. The FTC investigates and enforces the CAN-SPAM Act, and a private right of action may be brought by an internet service provider (ISP). It is important to comply because each separate email that violates the Act can result in penalties of up to $50,120 per email. In a government enforcement action prosecuting aggravated violations, there is also the potential for imprisonment.

Restrictions on Unsolicited Commercial Email Advertisers (California Business & Professions Code §§ 17529-17529.9)

Like its federal counterpart, California's "anti-spam statute" restricts the ability to send commercial advertisements originating in California or which are sent to a California email address. A commercial email advertisement is unsolicited if the recipient has not provided direct consent or does not have a preexisting or current business relationship. Unlike the CAN-SPAM Act, the California statute can give rise to a private right of action by the recipient of the email against the sender.

The statute applies to any U.S.-based company that sends emails to California consumers. It contains three categories of unlawful spam email that give rise to liability for advertisers and senders of commercial emails:

- the use of a sending domain name without the permission of the owner of that domain name;
- the use of false, forged or misrepresented header information, which includes the From email address, From name, and IP address of sending mail server; and
- the use of a misleading subject line; it should clearly relate to the actual contents of the message.

Additionally, courts reviewing the law have considered the body of the email to determine whether "From" line misrepresents the identity of the sender or the and subject lines are misleading. You can protect yourself by making sure the email message has a hyperlink to your website along with a clear "unsubscribe" link. The statute generally allows individuals (not just ISPs) to sue for statutory damages of up to $1,000 per email. However, if you have established and implemented well-documented procedures to prevent the sending of unlawful commercial email (*e.g.*, "opt-out" and "unsubscribe" mechanisms that are clearly communicated and actually work), the court may limit damages to a maximum of $100 per email.

Working with an Agency or Network

You can be exposed to liability even if you have engaged an email marketing company to send emails on your behalf. For example, California's Anti-Spam Statute requires that the sender – not just the advertiser – be readily ascertainable. A vast majority of "nuisance" litigation under § 17529 involves this technical requirement. It is common for an agency or network to send an email advertising a product or service from a privately registered domain. While these emails disclose the identity of the advertiser in the body of the email or in the linked content, the sender is never identified and consumers are unable to locate the entity responsible for actually sending the email. Unfortunately, an agency or network's small misstep in this regard leads to expensive and unnecessary litigation against the advertiser. For that reason, it is imperative email marketing companies use a publically registered domain name or identify itself by its full legal name and properly registered postal address at the bottom of each email. The sender's corporate name, including any DBA, and contact information should match was is on file with the secretary of state in the state where the email marketing company is authorized to do business. This simple fix will save advertisers a significant amount of time and money.

To ensure you email marketing company is doing thigs right, you should "seed" your email list so you can see exactly what they are sending. You should police you marketing partners and terminate them when they run noncompliant email ads. To ensure you are protected from their missteps, it is important that your advertising services or publisher agreement contains representations and warranties the advertising agency or network – including affiliate advertisers – will comply with the CAN-SPAM Act and §17529 and require that they indemnify you for any violations.

Email marketing is a powerful tool; ensuring you marketing company plays by the rules and will pay for their mistakes is vital scaling a successful email campaign.

Next Steps

Because the penalties for violating the CAN-SPAM Act or §17529 can be severe, you should work with experienced counsel to be certain your emails are lawful and to prepare and help implement written procedures to honor opt-out requests. To be sure, competitors may be violating these laws, using emails with deceptive "From" and "Subject" lines, and making more money than you at the moment. But you're smarter than them if you recognize that an ounce of prevention is worth a pound of cure. They could end up facing an expensive consumer class action under §17529 or be sued for false advertising in violation of the Lanham Act. Although there might be good reasons to not do so, if you really want to mix it up, you could even be the plaintiff.

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How To Protect Your Tech And Confidential Info With Agreements

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AFTER YEARS AS AN affiliate marketer, you've now created something you can call your own. It's a discount buying club website selling everything from health and beauty products, to tech gadgets, to clothing, to home furnishings. You hired an independent contractor who built out cool ad tech optimizing the consumer experience. You're about to go live the very next day and can picture the money coming in!

But then you get a text. The independent contractor says, "I just want to let you know I'm taking a new gig. I really appreciate all you did and all you taught me. I'm sure it will be useful in the future. Keep in touch!" Your assistant then texts saying the independent contractor is going to work for an-other discount buying club.

A wave of anxiety hits you—you spent major time and bucks developing the ad tech, and someone else could reap the benefit of all this. Making matters worse, you never had the independent contractor sign a single document to assign any of her work to you or otherwise protect your intellectual property and trade secrets. You may not actually own what you bought. This is a miserable situation, and it could have been avoided.

Your intellectual property and trade secrets may be the most valuable asset in your company. Whether you want protection from competitors or want to strengthen your company's value in preparation for an exit, you should protect this asset. Here are some practical steps you should implement to make sure you own what you make and keep what you own.

Strong Agreements

At the outset, you should have strong agreements with all those who are creating or accessing your intellectual property and trade secrets to make sure you own and protect them. These agreements can include a work-for-hire agreement, a proprietary inventions and assignment agreement, a non-disclosure agreement, and a non-competition / non-solicitation agreement. There is no "one size fits all" for these, but this is what each should accomplish.

A work-for-hire agreement is essential to protect your company's intellectual property in the gig economy. If your company engages freelancers or independent contractors you should have them sign a work-for-hire agreement. In general, these agreements provide that the company—not the independent contractor—own the work product that is generated during the course of the relationship. This type of

agreement ensures you get to keep what you paid for when you brought on the freelancer/independent contractor.

A proprietary information and inventions assignment agreement ("PIIA") is similar to a work-for-hire agreement, and sometimes goes by other names, but is geared more towards employees, as opposed to independent contractors. This type of agreement typically requires the employee to maintain the confidentiality of the company's proprietary information and, most significantly, provides that the company owns everything that the employee invents or creates during the course of employment.

A non-disclosure agreement ("NDA") is an agreement that is designed to protect a company's non-public, confidential, proprietary, and/or trade secret information. A company can utilize an NDA with its employees and independent contractors, as well as potential business partners and vendors. NDAs typically define what constitutes confidential information and require the receiving party to promise not to disclose this information. This type of agreement is essential if your company is embarking on a joint venture with another company and also can complement the protections provided in a work-for-hire agreement or PIIA.

A non-competition / non-solicitation agreement can provide added protection for a company concerned with its employees leaving to go work with a competitor and/or poaching clients, prospective clients, or other employees of the company. The applicable law governing the enforceability of this type of agreement is very state-specific. For example, California has a statutory prohibition on the use of non-competes except in limited circumstances – and Nevada, Oregon, Illinois, and Washington D.C. have all recently implemented or amended their own laws governing these agreements. Further, President Biden has recently directed the FTC to take a closer look at agreements that may limit worker mobility. In general, it is important for non-competes and non-solicits to be narrowly defined in terms of what constitutes competing work, as well as time and geographic scope.

With all of these agreements, it is important to consider the logistics and mechanics of enforcement. These strategic decisions can have a significant impact on your options should you find yourself in a position where you believe there is a breach of the agreement. For example, if keeping a dispute out of the public realm is important to your company, a mandatory arbitration provision should be considered. The applicable law and available remedies are also of paramount importance. To that end, thoughtful planning of how you may enforce the agreement if things go sideways can reduce the level of uncertainty and risk. For example, you may consider language that provides for the ability to seek a preliminary injunction in court, without a bond, if you find there has been unauthorized use of your company's property or a violation of a non-solicit.

Security Measures

Outside of agreements, you should implement these security measures to protect your intellectual property and maintain your competitive advantage:

- If you are providing confidential information to anyone, it should be clearly and unambiguously identified as confidential (*i.e.*, a watermark or stamp identifying the information as "CONFIDENTIAL").
- Implement written policies that reinforce the spirit of the non-disclosure agreement and be sure to review them on a yearly basis and update as necessary.
- Restrict the universe of people who have access to trade secrets.
- Implement security standards for network access (*i.e.*, encryption software, ability to remotely wipe company information, logins/passwords, etc.).
- Restrict independent contractors and employees' use of personal devices or make such use conditional on a person's consent to your ability to remotely wipe company information and inspect the device.
- Implement a personal device policy.
- Prohibit file-sharing applications while on the company's network.
- Establish and implement a data security policy.
- Terminate network access immediately upon given notice by departing employee.
- Conduct exit interviews with departing independent contractors and employees to take stock of what company devices and information is in their possession.
- Consider having a departing employee's email account and devices forensically examined to determine whether there has been any data migration.

Copyright Protection

Another avenue to protect your company's proprietary information and inventions is found in federal copyright law. In general, copyright protects original works of authorship, from artistic works to computer software. You can copyright your software code by submitting the first and last twenty-five pages of source code to the U.S. Copyright Office for registration. However, it is important to note that these source materials are public and are not considered trade secrets. The benefit to copyright protection is your exclusive rights to sell your work. Should someone infringe on your copyright, and you are able to prevail in court, you may be entitled to actual damages, disgorgement of the infringer's profits, or statutory damages, as well as attorney's fees.

Potential Claims

With the above protections in place, you've done much to discourage anyone from stealing your intellectual property and trade secrets, and you're also well-armed if you ever have to sue to protect your intellectual property and trade secrets.

How To Protect Your Tech And Confidential Info With Agreements
(CONTINUED)

If an independent contractor or former employee asserts that they, not you, own your intellectual property or trade secret, you can sue to enforce the work-for-hire or proprietary inventions agreement. If an independent contractor, former employee, or potential business partner has misappropriated your trade secrets, you can sue for breach of the non-disclosure agreement or assert a claim for violation of federal or state trade secrets statutes. If someone is using your copyrighted work without permission, you can sue for copyright infringement. The remedies can include disgorgement of profits, lost profits, injunctive relief, and attorney's fees.

The hope is that you never have to sue. But if you have the above protections in place and never have to sue, this does not mean that the protections were in vain. It means the protections worked, and you added value to your company.

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What You Need To Know About Privacy Policies

RICH GREEN · RYAN M. POTEET · EVAN M. ROSING · GRAHAM REYNOLDS

YOUR NEW "CBD INFUSED COFFEE" monthly subscription club has taken off. No sooner had you set up your website and started some marketing campaigns than customers from up and down the East Coast started signing up. Now, you're thinking big. You want to take things to Europe and the U.S. West Coast. You recently found a potential partner to help you launch that expansion. After an exciting first meeting, they're all buzz kill when they inform you that you'll need to be CCPA-ready before you can get started in California and fully GDPR compliant before you begin selling into Europe. At first, you're dismissive. After all, this all sounds like it's "just compliance stuff." Your new business partner tells you that fines can reach up to four percent of gross global revenue, and EU regulators fined Google $57M for breaching the GDPR! You realize these fines are serious, and you had better be too.

These laws are serious and complex. But with good counsel working with your business, you can get on top of it all. Here's the deal—

GDPR

The General Data Protection Regulation or "GDPR" went into effect on May 25, 2018, replacing Europe's Data Protection Directive from 1995. The GDPR provides individuals with certain rights and control over their personal data. "Personal data" is defined broadly under the GDPR to mean any information relating to an identified or identifiable natural person and includes things such as name and email address, but it also includes location data and online identifiers (such as IP addresses). The GDPR applies to any company, whether located in the EU *or* outside its boundaries, if that company processes (*i.e.,* collects, stores, uses, discloses, alters, etc.) the personal data of individuals in the EU.

The GDPR applies to companies in one of two ways. First, if they are "established" in the EU, meaning they have an office, branch, agent, etc., regardless of whether they process the data in the EU. Second, if a company is not established in the EU but offers goods or services to people who are in the EU or if they monitor the behavior of people in the EU (*i.e.,* tracking online or profiling individuals). For companies that match either of those criteria, the specific GDPR obligations imposed will vary depending on whether the company is considered a "controller" or a "processor." Controllers are the companies who determine what to do with the personal data they receive, while processors are those who process personal data

on behalf of controllers. Processors do not make decisions about why the data is being processed.

Under the GDPR, controllers must ensure:

- personal data is processed lawfully;
- adequate security measures are in place to protect the data; and
- rights of individuals are protected.

Those individual rights include providing certain notices to data subjects, correcting or amending the data if it is inaccurate, deleting it under certain circumstances, and providing data subjects with a copy of their data. Controllers are also responsible for monitoring those processors with whom they share personal data and binding them to written contracts that contain certain provisions prescribed by the GDPR.

Since the GDPR's enactment, supervisory authorities (the governing bodies in each EU member state responsible for enforcing the GDPR) have brought numerous enforcement actions. There are two different tiers of GDPR fines. The one that applies to a particular situation depends on the nature of the violation. The first tier can see financial penalties reach €10M or up to 2% of a company's gross annual global revenue. Under the second tier, those figures can reach €20M or up to 4% of gross annual global revenue.

U.S. STATE PRIVACY LAWS

▶ California

Experts debate whether the enactment of the GDPR was the result or the start of a global ripple in new data security and privacy laws. Whatever the case, the United States was part of that global wave of new regulations. The most noteworthy of these new GDPR-like regulations is the California Consumer Privacy Act or "CCPA," which went into effect on January 1, 2020, and its successor, the California Privacy Rights Act or "CPRA," which includes significant amendments to the CCPA went into effect on January 1, 2023.

The CCPA governs the use of the personal information of California residents. Personal information is defined broadly under the CCPA to include name, postal address, email address, IP address, social security number, biometric information, geolocation data, and internet activity information (*i.e.,* browsing history and search history). The law applies to all for-profit companies doing business in California if they hit one of three triggers based on the volume of data collected or revenue. Like GDPR, the CCPA grants California residents certain rights, including the right to know what's been collected about them and how it's been shared. Companies must provide notice of their data collection, use, and disclosure to California residents at or before the time of collection and again if requested by the data subject.

The CCPA provides several exemptions for information already governed by the Health Insurance Portability and Accountability Act, the Gramm-Leach-Bliley Act, and the Fair Credit Reporting Act. The exemptions for personal information collected

in the employee-employer and certain businesses-to-business contexts expired in 2022, meaning that more businesses than ever are grappling with their data privacy obligations.

In terms of penalties and fines, the CCPA provides statutory damages ranging from $100 to $750 per data subject per incident. Penalties can be awarded by either a regulator or as the result of a court ruling if a breach of unencrypted personal information occurs due to a company's failure to implement and maintain "reasonable" security practices. This is often referred to as the CCPA's private right of action.

▶ Additional U.S. States

Several states, such as Florida, New York, and New Jersey, are expected to vote on privacy bills this year. Other States, such as Utah, Connecticut, and Colorado, have already passed privacy laws that will go into effect in the coming months. More recently, Virginia's privacy law went into effect on January 1, 2023. While these laws largely align with the CCPA's requirements, businesses should be aware of the idiosyncrasies of each state's data privacy framework. For example, in Virginia, businesses must collect opt-in consent from their customers before beginning to use sensitive data. The CCPA contains no such requirement.

YOUR PRIVACY ACTION PLAN

Complying with the GDPR, CCPA, and the numerous other newly proposed data security and privacy laws in the U.S. may seem daunting at first. While it's true that there are variations among these laws, by focusing on their common themes, a pattern of basic building blocks for compliance begins to emerge, including:

- adopting a written risk-based technical and administrative data protection program,
- telling your employees and customers what you're doing with the data you collect about them and why,
- giving your employees and customers some degree of access to and autonomy over that data,
- keeping a close eye on third parties (including vendors) with whom you share that data, and
- responding swiftly to, and being honest with those affected by, unauthorized use when it occurs.

The GDPR and CCPA are two data privacy regulations that receive a lot of publicity, but from Canada's PIPEDA to New York's SHIELD Act, global and local governments are taking data security and privacy seriously, with ever-increasing obligations and penalties for non-compliance. For instance, as of February 2023, sixteen other countries, including Japan, China, Singapore, Brazil, and the Cayman Islands, have passed their own comprehensive data privacy regulations. Most state legislatures in the U.S. have also introduced data privacy legislation to give consumers greater control over their personal information. This expanding patchwork of global and

domestic data privacy regulations portends the regulatory actions and consumer protection litigations to come.

Fear not, however, because close collaboration between counsel, technologists, and business teams, and the use of the building blocks referenced above, can make for cost-effective and flexible compliance programs that adapt to the ever-changing data security and privacy law landscape.

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A Different Kind of Cookie Monster — Protecting Your Business from Wiretap Lawsuits

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IMAGINE OWNING AN E-COMMERCE platform "Heavenly Home Décor" offering home goods. In order to boost online consumer engagement, you decide to enhance the customer experience using technology such as cookies for advertising and chatbots for customer service. You are thrilled that these technologies give you valuable information about your customers (and potential customers), while streamlining the shopping experience and reducing friction with customer service. Someone recently told you about a wiretapping lawsuit but you dismissed it as pure nonsense because you are not secretly bugging customers' phones. Unfortunately, there is a cookie monster out there that is just waiting for you to make a mistake, and he wants dough instead of cookies.

The digital era has seen businesses leverage technologies like cookies and chatbots extensively. The benefits of these technologies cannot be understated. However, the plaintiffs' bar is nothing if not creative when it comes to looking for an easy paycheck. Seemingly out of nowhere, the plaintiffs' bar began asserting that the use of cookies and chatbots constitutes wiretapping or eavesdropping in violation of the Federal Wiretap Act and state laws like the California Invasion of Privacy Act ("CIPA"). Elegant pleading has allowed many cases to survive a motion to dismiss, meaning that the cost of defense goes up exponentially. Unfortunately, this causes many companies to make a difficult business decision and ultimately settle these frivolous lawsuits, often for millions of dollars.

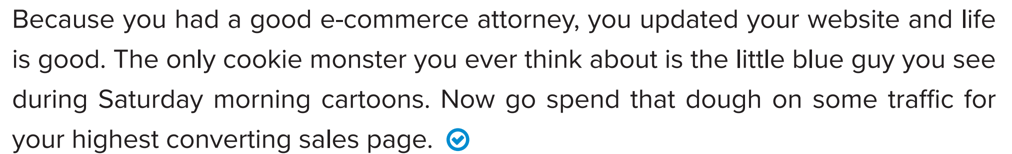
Protective Measures

Thankfully, businesses can avoid hearing from these opportunistic cookie monsters by updating their website notices and increasing transparency:

1. **Clear Notice and Consent:** Implement a visible cookie banner or a hyperlink to your privacy policy, clearly outlining the nature of data tracking and collection. For chatbot interactions, inform users that their conversations may be recorded or transcribed.
2. **Explicit User Consent:** Obtain user consent through affirmative actions like clicking an "I Accept" button when starting a chat bot or collecting sensitive personal data. This consent should be documented as evidence of agreement. Ensure that users cannot proceed to potentially recorded interactions without acknowledging and consenting to these terms.

3. **Comprehensive Privacy Policy:** Detail in your privacy policy how user data is collected, used, and shared. Make sure this policy is easily accessible and understandable.
4. **Arbitration Agreement and Class-Action Waiver:** Include a comprehensive arbitration agreement in your website's Terms of Use. The agreement should cover all potential disputes and include a waiver for class-action suits. Users must have actual notice and affirmatively acknowledge this agreement.

These simple and easy-to-implement measures enable your business to use cookies and chatbots effectively while safeguarding against potential lawsuits.



Because you had a good e-commerce attorney, you updated your website and life is good. The only cookie monster you ever think about is the little blue guy you see during Saturday morning cartoons. Now go spend that dough on some traffic for your highest converting sales page.

Avoiding Website Accessibility Suits

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YOU'VE SPENT MONTHS DEVELOPING your website, the enrollment paths and checkout pages, and invested tons of money on copywriters and campaign managers to help you market and sell your products. Your new website is beautiful; you've split tested some ads and dialed in everything that you can. Now it's time to sit back, relax, and start paying off those dev expenses. But before you can even pay your first affiliate commission, you receive a "demand letter" from some law firm across the country. The letter says that your website is "insufficiently accessible" by the firm's visually impaired clients and that your beautiful new enrollment path wreaks havoc with end users' screen reading software. The lawyer demands that you immediately remedy the barriers to access and write a large check to avoid a class action lawsuit for violating Title III of the Americans with Disabilities Act ("ADA") and state and local accessibility laws. You thought the ADA only applied to businesses with a physical presence. Unfortunately, you could be wrong and now it's time to call the dev team – again.

Unfortunately, this scenario is not just a hypothetical, and suits of this nature have risen at a staggering rate over the last few years. By the end of 2022, industry groups reported that ADA lawsuits were being filed across the country at the rate of approximately 100 per week. While large companies, such as Domino's Pizza and Dunkin' Donuts, were the initial targets of these suits, some litigants have begun targeting much smaller e-commerce retailers. While ADA claims have rightly been used to encourage website accessibility for those with disabilities, some law firms and their "tester" clients use abusive tactics to force small businesses into settling dubious claims. Some businesses choose settlement because litigation is expensive, and the ADA's fee-shifting provisions make the prospect of paying the plaintiffs' attorney fees not worth the risk.

Title III of the ADA prohibits discrimination against individuals with disabilities by denying "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." In the retail sphere, a physical storefront is usually a place of public accommodation; however, courts across the country have interpreted the ADA to apply to a wide variety of websites and mobile applications (including those that do not engage in commerce). Some jurisdictions, like Massachusetts, New York, and Illinois, say that even businesses that are Internet-only – without any physical location – can face Title III liability for website inaccessibility. Others, such as California, Pennsylvania, Florida, and Michigan, say that a website must be connected to a physical brick-and-mortar location of a business in order to be subject to Title III liability. For example,

in California, Domino's Pizza was found liable for failing to make its mobile app screen reader compatible because it was connected to the services of a physical location (the pizza store). This lack of uniformity among jurisdictions over a physical connection makes the issue of website accessibility even more complicated – especially because websites can be accessed from anywhere in the world.

How Do I Comply?

Unfortunately, there is little formal guidance on how a website can achieve compliance with the ADA. While not required by any statute, the Web Content Accessibility Guidelines ("WCAG") published by the Web Accessibility Initiative of the World Wide Web Consortium ("W3C") are the most commonly accepted compliance standard. The WCAG guidelines are also the most consumer-friendly and onerous to implement.

At a basic level, the WCAG framework identifies benchmarks for website accessibility, ranging from A (lowest) to AAA (highest). The WCAG standards have evolved as websites become more immersive and challenging to navigate for the visually impaired. Since 2018, WCAG Version 2.1 has been the generally accepted standard, with litigants arguing that website owners must satisfy the AA benchmark to comply with state and federal accessibility laws.

Regardless of the applicable version, the WCAG standards are designed to achieve four objectives so that content is accessible to all consumers. For example, compliant website formats (or interfaces) and content delivery technologies should be:

1. **Perceivable** – Information and user interface components must be presentable to end users in ways they can perceive.
    - Methods used to comply with this principle include, but are not limited to: providing text alternatives for most non-text content, providing captions for most prerecorded audio content, creating content that can be presented in different ways (such as a simpler layout) without losing information or structure, and making it easier for users to distinguish content including separating foreground from background.
2. **Operable** – User interface components and navigation must be operable.
    - Methods to comply with this principle can include: making all functionality available from a keyboard; providing users enough time to read and use content; not designing content in a way that is known to cause seizures or other adverse physical reactions; providing ways to help users navigate, find content, and determine where they are; and making it easier for users to operate functionality through various inputs beyond keyboard.
3. **Understandable** – Information and the operation of user interface must be understandable.
    - Methods to comply with this principle include: making text content readable and understandable; enabling users to select the default language, and by helping users detect and correct input errors.

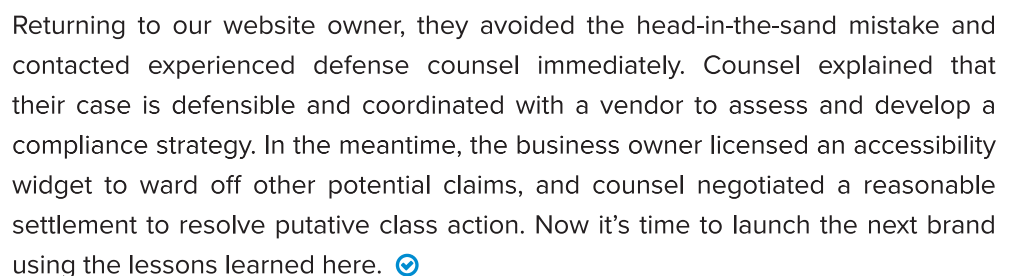
4. **Robust** – Content must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.
   - Methods to comply with this principle include: maximizing compatibility with current and future user agents, including assistive technologies – such as screen reader technology.

If You Haven't Already, Check On Your WCAG Compliance

Returning to our scenario, ideally, our website owner would have taken the necessary steps to ensure that its website was WCAG-compliant prior to launch. It would have been even better to start discussing website accessibility with website designers and the development team before creating the website. Experience is key to achieving the best outcomes and avoiding unnecessary risk. If a web designer asks, "What is WCAG?" or worse, "What is the ADA?" – you should probably keep looking. To evaluate whether web designers have sufficient experience with compliance issues, companies should ask for proof – check out their recently designed websites and apps and see if they are accompanied by accessibility statements. Go a step further and see if those websites and apps have been the subjects of lawsuits.

Post launch, there are generally two options for bringing an existing website into compliance and reducing litigation risk. The first option is to retain a vendor to review the website and conduct an accessibility audit. The audit report will identify areas of the website that require remedial development to comply with applicable law. If your company has the necessary experience in-house, the audit report can serve as a blueprint for your engineers to implement the necessary fixes. If not, the vendor or a website design firm can remediate the problematic code and functionality. Retaining an experienced vendor is the best way to ensure a website is accessible to visually impaired consumers.

The second option is to use a "widget." Widgets are commercial tools or accessibility plug-ins that may be added to a website. These tools do not remediate the underlying code or interface so that the website complies with the applicable WCAG standard. Instead, widgets operate on top of the existing website infrastructure and provide shortcuts to visually impaired consumers to make the content more accessible. Because widgets do not resolve the underlying coding problems, widgets are sometimes viewed as a temporary solution while website owners evaluate how to implement more extensive design fixes. Although rare, widgets can sometimes increase accessibility barriers because of integration errors. That is why it is essential to assess a widget's functionality after installing it on your website.



Returning to our website owner, they avoided the head-in-the-sand mistake and contacted experienced defense counsel immediately. Counsel explained that their case is defensible and coordinated with a vendor to assess and develop a compliance strategy. In the meantime, the business owner licensed an accessibility widget to ward off other potential claims, and counsel negotiated a reasonable settlement to resolve putative class action. Now it's time to launch the next brand using the lessons learned here.

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Telemedicine — Side Effects May Include

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YOU ARE RESTLESS AFTER your last exit and you need something new to scratch that entrepreneurial itch. Nothing you can think of sounds remotely interesting or challenging enough to keep your interest. Then one restless night your Instagram feed is packed with paid ads and influencer content promoting prescription drugs and "instant" access to doctors for anything from hair loss and depression to dissatisfying bedroom experiences. So long as you have a smartphone, you can treat almost any ailment with the click of a button and have prescription medications delivered to your front door. You relish the thought of drafting creative that crosses the feared drug/disease line *compliantly* when promoting a product. But then you think "I'm probably out of my mind. I'm not a doctor, can't practice medicine, and don't even own a white coat. Should I even look into pursuing this?"

Keep in mind that the practice of medicine (and its rules) existed long before the Internet and the Federally-declared COVID Public Health Emergency (the "PHE")

Before the PHE, telemedicine was typically reserved for patients in rural communities with inadequate access to care. Even still, regulators and public and private payors (government and private insurance programs) imposed rules requiring patients to travel to a clinic to attend a virtual visit with a provider in a distant urban location. Under the PHE, virtually overnight every provider started treating patients via telemedicine. A "make it work" attitude permeated the atmosphere and many held the image of building a plane midflight in their heads. Regulators and payors alike relaxed their respective licensing and reimbursement requirements so that healthcare providers could satisfy the titanic demand for care and use telemedicine to meet patients' most basic healthcare needs.

Upon the lifting of the PHE, some fear regulators and payors will completely revert to the telemedicine dynamic that existed before the PHE that some argue was on balance worse for the patient. While this is unlikely, we do expect regulators and payors to define the parameters for the appropriate use of telemedicine. The key, regardless of what happens to the reimbursement and licensure particulars, is to never lose sight of the fundamentals that existed before the PHE. For example, the fundamentals of establishing the physician-patient relationship, obtaining informed consent, authenticating patient identity, establishing the patient's medical history and any contraindications to any particular drug or treatment, and protecting patient data. In other words, the overall lesson is that just because telemedicine rules have and continue to be relaxed to some extent, it is not a free for all.

The perception among many regulators is that many telehealth networks are essentially tech companies that function with a disruptive model and desire the higher returns that the health care industry may promise. In their opinion, this can lead to quality issues for the patient when the tech mindset of "move fast and break things" is laid over a preexisting and highly regulated environment such as health care. Often a surprise to market entrants, in health care the act of incentivizing the generation of health care business is often illegal under many regulators' theory that such "drumming up of business" increases health care expenses for the overall population. Importing sales methods from other industries into health care can be extremely risky for those not familiar with health care's unique regulatory scheme.

Typical Issues That Come Up with Telemedicine Joint Ventures

A number of legal issues often pop up when new market entrants establish provider networks and join forces with licensed providers. To list a few:

- **Corporate Practice of Medicine ("CPOM").** More than 30 states have CPOM laws that aim to preserve the integrity of medical practice by prohibiting corporations or non-physicians from engaging in medical decision-making or hiring or employing physicians (and close to all 50 states have some type of judicial case law or executive guidance on point). Violating CPOM regulations can result in disciplinary actions against doctors who relinquish professional autonomy or ownership to non-professional entities or business interests and can also result in misdemeanors and cease and desist orders against non-professionals. This means you must build a solid foundation and carefully evaluate the appropriate corporate structure to avoid regulatory risk.
- **Choose a Low Risk Corporate Structure.** There are multiple structures that can be used to compliantly reduce CPOM risk by building in appropriate safeguards depending upon the situation. These include but are not limited to development of a network with multiple participating providers licensed in multiple states, utilizing a management services organization ("MSO") operating in multiple states serving the discrete practices of physicians in multiple states, and developing an MSO supporting one physician licensed in multiple states with discrete practices in those states. When appropriately structured to maintain professional control over the practice of medicine, these models (when successful) often include three key elements: a professional entity owned by licensed physician(s), an MSO owned, in part or whole, by non-physicians, and compliant agreements between them.

  The professional entity directly provides medical services to patients, employing or contracting with physicians and licensed healthcare professionals. The patients pay the professional entity for services rendered, often enrolled with Medicare, Medicaid, or third-party payors. The management entity offers a range of services to support the professional entity, including development services, advertising and marketing services, leasing real property, information technology support, and more. In exchange for these services, the professional entity pays

the management entity a fair market value fee for non-professional services the MSO actually performed (and not, for example, a percentage of professional fees or a “success fee”).

- **Fee Splitting / Patient Brokering Fees.** In some instances, marketing companies or other non-medical entities may receive a percentage of professional fees generated or a “success fee” for each patient referred to a telemedicine network. Such arrangements can raise concerns about potential conflicts of interest and typically violate state laws prohibiting fee splitting and patient brokering. Again, this is why a solid foundation is key to success in this industry.

- **Licensure.** The rapid growth in consumer demand for telemedicine is a good thing, but it can present challenges when companies attempt to scale, especially when it comes to provider licensure. Telemedicine practices typically adhere to the principle that the patient’s location dictates where the services are provided. That means that the provider giving medical advice and prescribing medications must be licensed in the state where the patient is located. Ensuring that you have not only enough providers, but that the providers are licensed in the states where the telemedicine practice operates is essential to avoiding disputes concerning the unauthorized practice of medicine.

- **Prescription Drugs and DEA Rules.** Telemedicine companies must navigate regulations governing prescription drugs, especially controlled substances. Compliance with DEA rules is crucial, particularly concerning cross-border prescription of controlled substances. Failure to adhere to these regulations can result in criminal liability. A solid legal team can really help here.

- **Asynchronous Telemedicine and Patient Safety.** Inappropriate use of asynchronous telemedicine and over-reliance on patient questionnaires can jeopardize patient safety, reimbursement, and provider credibility. When used properly however, patient questionnaires are a great way to prequalify patients and develop engagement with patients concerning the scope of the services available to them through the telemedicine practice. Asynchronous telemedicine when used properly (one form being text communications with providers) is also a good way to ensure patients quickly connect with providers and achieve a high level of patient satisfaction. That said, both have their limits and cannot be used as a substitute for providers meeting with patients.

- **HIPAA and Patient Privacy.** Despite not always being direct healthcare providers, telemedicine companies must comply with HIPAA regulations to safeguard patient privacy and avoid penalties. Operating under the misconception that they are exempt from HIPAA due to an often perceived non-provider status can result in severe conse-quences for privacy breaches.

Telemedicine — Side Effects May Include

(CONTINUED)

Enforcement Priorities

In addition to all of the above state enforcement, we have seen recent Federal criminal enforcement in the area of alleged Medicare fraud schemes involving marketing com-panies. A couple cases involved such companies aggressively selling durable medi-cal equipment ("DME") and genetic testing services through the process of collecting insurance information and relaying the same to DME and laboratory companies that utilized a very loose network of physicians willing to sign prescriptions and orders for patients with whom they had not established a sufficient doctor-patient relationship. Regardless of the market entrant's knowledge of the overall arrangement, they have still been swept up under the government's criminal "conspiracy" theory.

So what do you think? Could telemedicine be the prescription for your business idea to make health care better for the patient? Or is it too risky or too difficult? Nonsense. So long as you have a strong legal team, real drive, and the ability to build your business on a strong foundation, then telemedicine may be right for you. And if you experience a serious rash, dizziness, or unusual swelling of the hands or feet, consult a doctor.

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What You Need To Know About State Sales Tax

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YOUR ONLINE CUSTOM T-SHIRT printing business, "T-Shirt Depot," is a Delaware limited liability company with its principal place of business in Massachusetts. T-Shirt Depot has no retail storefront, but sells to consumers online across the country. By the end of the third quarter, T-Shirt Depot has already generated over $1,000,000 from consumers in each of New York, California, and Texas; over $500,000 from consumers in each of twenty other states; between $500,000 and $100,000 from consumers in each of fifteen states; less than $100,000 from consumers in nine other states; and no sales to consumers in Rhode Island, Montana, or Alaska. T-Shirt Depot has never collected or remitted sales tax for any state other than Massachusetts.

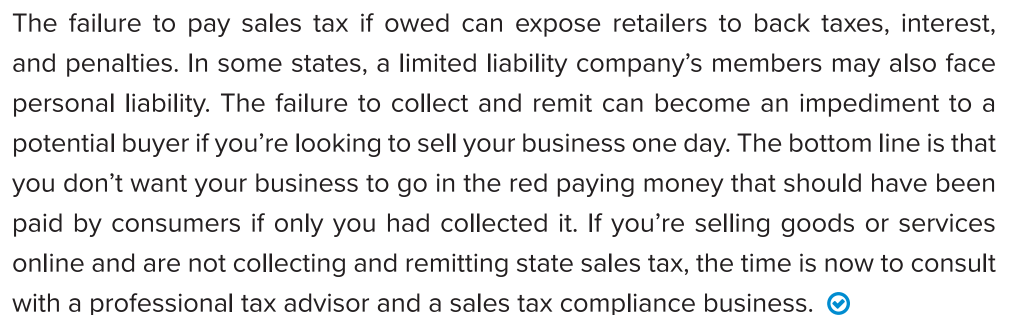
Why do these facts matter? A few reasons: T-Shirt Depot unfortunately has a large state sales tax bill. The calculation of what it owes is complicated and varies state by state. And, most importantly, T-Shirt Depot needs to start collecting and remitting state sales tax before the bill gets any larger. This is the result of a 2018 Supreme Court decision that reversed its earlier precedent. In the past, the law was that an e-commerce retailer was only required to pay state sales tax in a state where it had a physical presence, known as the "substantial nexus" test. Under that test, T-Shirt Depot would only be subject to sales tax in Massachusetts.

But this changed with *South Dakota v. Wayfair* (2018), where the Court upheld a so-called "economic nexus" statute. Now a state can impose sales tax on an e-commerce retailer if the number or amount of sales with that state's residents create an "economic nexus" with the state, as defined by that state's laws. Put differently, T-Shirt Depot must now pay sales tax in every state imposing sales tax where T-Shirt Depot has an "economic nexus."

This has created serious uncertainty and complexity for e-commerce retailers. For years, many states had sales tax statutes that, although ostensibly applying to e-commerce retailers, were rarely enforced. Nearly all of the states are now imposing and enforcing sales tax on e-commerce retailers.

In doing this, the states use a threshold to determine when a retailer is obligated to collect and pay sales tax. The thresholds are based on either the dollar amount of annual transactions (typically ranging from $100,000 to $500,000) or the number of annual transactions with consumers in that state. Given the complexity of the state sales tax laws, Avalara, TaxJar, and other businesses that provide automated sales tax compliance (*i.e.*, tracking, collection, and remittance) and integrate with an e-commerce retailer's checkout page and CRM platform are thriving.

The challenge for states is determining who owes but is not paying sales tax. While a state may not have visibility into who owes but is not paying, the states are sending questionnaires to e-commerce retailers to obtain information about revenue and transactions from the state's residents. The states are also using statistics and analytics to extrapolate and predict an e-commerce retailer's revenue and transactions from the state's residents. Finally, the states are estimating a sales tax obligation by relying on data from e-commerce retailers who pay sales tax and have comparable size or market share to similar retailers who have not paid.



The states have rapidly galvanized their sales tax collection and enforcement efforts. Today, 45 states and Washington, D.C. have adopted laws requiring remote sellers to collect and pay taxes based on sales made in their jurisdictions. Since 2018, the amount of sales and use taxes collected by remote sellers has continued to rise. States particularly saw the impacts of *South Dakota v. Wayfair* as a result of the COVID-19 pandemic, as consumers more often visited internet retailers to purchase household essentials (and non-essentials to get through quarantine, of course). State sales taxes from remote sellers grew by more than 500 percent in May 2020 compared to May of the previous year.

The failure to pay sales tax if owed can expose retailers to back taxes, interest, and penalties. In some states, a limited liability company's members may also face personal liability. The failure to collect and remit can become an impediment to a potential buyer if you're looking to sell your business one day. The bottom line is that you don't want your business to go in the red paying money that should have been paid by consumers if only you had collected it. If you're selling goods or services online and are not collecting and remitting state sales tax, the time is now to consult with a professional tax advisor and a sales tax compliance business.

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The Benefits Of Business Insurance

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FINALLY, YOUR E-COMMERCE GADGET business is up and running. Initial operations funded, employees hired and trained, website up, money coming in, and products going out. Time for just a little break. Hey, there's a football game on TV! But, man, what a lot of commercials...and what's with all these weird ads—geckos, emus, some naggy person named Florence? Wait a minute. They're all insurance ads. That's what we forgot. Don't we need insurance?

Yes, indeed you do. Running a business without insurance is as unthinkable as driving a car without car insurance, buying a home without title insurance, or raising a family without medical insurance. But exactly what kind of insurance does an online company, and specifically an e-commerce retailer, need?

Well, go full-on worst-case scenario for a moment, and imagine all the bad things that could happen to your business. A customer could eat or wear your product and contract a strange illness. An employee could get hurt on the job and sue. Bad guys could break into company premises and steal computer equipment. You could have a data breach, have your data stolen or compromised, and your customers' privacy rights violated (and guess who they're going to sue?). Your business could be interrupted by a fire, an ice storm, or an electrical outage. Your competitors could steal your software or trade secrets, take issue with your advertising, or accuse you of unfair competition. Let's face it, it's a jungle out there, with risks all around. That's why insurance got started in the first place.

This is no area for amateurs. You want to make sure your company is protected. So find a professional, licensed, established, and recommended insurance agent. A good agent, regardless of whether they work for just one insurance company or act as brokers representing many, will be able to assess your needs, obtain and compare quotes and coverages, and tailor coverage to your business. It makes the most sense to work with an agent or broker who has experience helping e-commerce retailers, so ask around (ask a knowledgeable lawyer), get some recommendations, and interview more than just one. But, at a minimum, you will want to consider the following coverages:

Commercial General Liability (CGL)

This is the standard general business insurance policy that covers property loss, business liability, and other business-related risks (*e.g.*, loss of income, employee theft, employee dishonesty, employees' personal property, and electronic data). Internet-based companies will want to ask specifically about "cyber" coverages. Make sure that you take the time to investigate the coverage limits and exclusions so you are protected. You do not want to do this after a loss, only to discover that there are gaps or exclusions in your coverage.

You should explore business interruption coverage; if something happens and your business goes down, you want to make sure there will be enough money to recover and resume operations. And critical for all companies these days is data protection — not just insurance, but back-ups, redundant systems, and secure servers.

CGL policies should also provide coverage for any accidents, related defense costs, and judgments against the business owner and employees (see also EPL, below) from third parties such as customers.

Particularly important for Internet-based companies and others whose assets focus on intellectual property (IP) such as software, trade secrets, copyrights, trademarks, and patents is so-called "Advertising Injury" coverage. This differs significantly from insurer to insurer, so make sure you read each one carefully. A good Advertising Injury clause should cover claims against you for trademark and copyright infringement, false advertising, defamation, and trade secret misappropriation. It is important to have coverage for defense costs, because it can cost millions to defend an Advertising Injury claim.

You also should consider business property insurance to protect your company's physical assets. If your brick-and-mortar facilities are located in a flood or earthquake zone, specific hazard insurance may be available (usually for physical losses only, not business interruption) as part of your general business insurance. Flood coverage is available from the federal government. Earthquake insurance is usually either an additional endorsement or a separate policy from a private insurer or, in California, from a state agency (the California Earthquake Authority, or CEA).

If you're selling products, whether online or not, you will also want to include product liability coverage. For example, some box companies sell goods such as beauty products, and will want to be sure they get the correct coverage since many CGL policies exclude them (in which case, you may need a Professional Liability policy). An e-commerce retailer may want or need coverage for themselves as both a manufacturer and distributor. As a distributor, an e-commerce retailer may find their domestic liability exposure dramatically increased without solid contracts with foreign manufacturers.

Employment Practice Liability (EPL)

Employment practice liability insurance should provide coverage — although it may be limited — for claims from employees and former employees, such as alleged wrongful termination, discrimination, and sexual harassment. The employer who does not run into such claims is lucky. This should also provide coverage for vicarious liability in case an employee gets into an accident while on company business outside the premises.

Errors & Omissions (E&O)

This is basically insurance against lawsuits alleging professional negligence, or claims that your business's conduct fell below industry standards and caused harm or loss. Related to this is "D&O"— Directors and Officers, which is specifically directed towards claims (such as shareholder or investor suits) against officers and directors of the company.

Umbrella Coverage

An umbrella policy provides additional coverage above the usual commercial policy limits, in case of liability. Businesses are often attractive targets in a lawsuit, and an umbrella policy can offset that risk. Consider how much you would need to protect the value and operations of your business. Be absolutely sure the insurance contract spells out all coverage as well as non-coverage, and your own responsibilities as the insured.

Worker's Compensation

This is mandatory in nearly all states to protect your employees if they're injured on the job. Sometimes state agencies as well as private insurers will offer coverage. A certified public accountant can help navigate through the maze of local, state, and federal tax and employment regulations and be an invaluable resource—especially if you consult them early in the process.

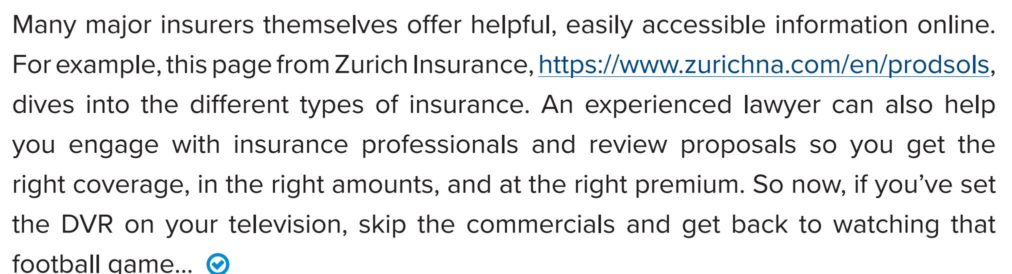
Disability Insurance

A disability insurance policy covers a specific employee in the event that they cannot perform the work they want to perform. Most plans offer different options for waiting and benefit periods. For example, a plan may not pay until after 30, 60, or 90 days of disability. Benefit periods may last for 1 year, 3 years, 5 years, or up to age 65 years. Make sure the disability plan offers the ability to increase coverage limits each year, to grow with your business's success and growing revenues. Related to this is so-called "Key Man" (or "Key Person") insurance, which specifically insures against the loss or disability of mission-critical employees.

Life Insurance and Health Insurance

You might want to consider offering these benefits to your employees. As with the insurance industry in general, these products are heavily regulated to make sure they are not unfairly weighted in favor of owners and high-income employees, so you will want to consult closely not only with an insurance professional, but also with a legal specialist in these areas.

Now Relax



Many major insurers themselves offer helpful, easily accessible information online. For example, this page from Zurich Insurance, https://www.zurichna.com/en/prodsols, dives into the different types of insurance. An experienced lawyer can also help you engage with insurance professionals and review proposals so you get the right coverage, in the right amounts, and at the right premium. So now, if you've set the DVR on your television, skip the commercials and get back to watching that football game...

Gregory T. Bryant
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Captive Insurance For E-Commerce

GREGORY T. BRYANT

WHILE ATTENDING A MASTERMIND, a new acquaintance told you about how they purchased the "Cadillac" of business insurance policies. The broker told him that premium is steep but everything is covered. Unfortunately, when it all hit the fan, your new friend explained that the policy contained riders that eroded coverage for practically everything an e-commerce or DTC business does. The broker clearly did not understand the industry and its business risks. Not only was your new friend out pocket for the steep penalties, but he had to spends a significant amount of money defending a joint FDA and FTC investigation. It was a painful learning experience for sure, but your new friend explained that he set up a captive insurance company that gives his business access to much need coverage while providing his e-commerce business significant tax benefits. It sounds too good to be true…

While conventional insurance can cover many types of business risks, e-commerce companies have many daily business risks that cannot be covered by conventional insurance. As a result, most e-commerce companies are absorbing liabilities on their balance sheets that they cannot see. Additionally, under most tax law principles, companies cannot deduct estimated reserves because they are not "liabilities in fact." This is where captive insurance becomes the solution.

E-commerce companies have numerous business risks that are unique to the industry. These include the following:

- Website cloning
- Product counterfeiting
- Credit card fraud
- Trademark infringement challenges
- FTC actions
- FDA actions
- Reputational Risks
- Better Business Bureau complaints
- Chargeback bombing
- Exchange control risk
- Supply chain disruptions
- Product quality liability risk
- Post-delivery inventory risk
- Cyber risk – mails
- Weather risk – agribusiness

Most of these risks are not covered by conventional insurance and are absorbed as they come. The costs are legal fees and sometimes settlement payments. Captive insurance allows your company to pre-fund, deduct for tax and segregate assets to better manage these risks.

A captive insurance company is a separate company under common ownership. It is a licensed insurance company and, because of that, it can deduct reserves for future claims where other companies cannot. Additionally, there are special rules for

"micro-captives." Micro-captives can set up reserves for 100% of their annual premium, up to $2.65m[1]. This means a micro-captive only pays taxes on its investment income, which it earns on its cash reserves that are invested. So, your operating e-commerce company pays a premium to your captive and deducts that premium payment on its tax return. The captive has premium revenue but an offsetting "deduction for future claims." Your company has now segregated the assets by paying the captive insurance company and those assets are protected by law.

Because your operating company gets a tax deduction, but the captive does not have taxable income, the use of a captive insurance company can generate a large annual tax savings. For example, if your company is a C corporation, its federal tax rate is 21% and the state, after federal deduction, is a rate of 4%, creating an effective tax rate of 25%. If you paid a premium of $2.65m annually, it would generate an annual tax savings of $662,500. For an S Corporation, which has a higher tax rate, the annual tax savings can be over $900,000. Additionally, you would be separating and protecting $2.65m of assets each year. In the future, as claims arise, your operating company will present claims to the captive for the costs of legal defense, responding to Better Business Bureau letters, and possible settlement payments.

In addition to getting a great tax outcome and asset segregation, the captive insurance company allows your company to better manage risk in general. As a licensed insurance company your captive can buy reinsurance, which is basically buying insurance at a wholesale price. This further increases the savings of a captive. It also allows your company to better fit traditional insurance to your business.

Set-up costs and operating costs can vary depending on the complexity of the structure. Set-up costs are on average $50,000 and annual running cost is about 10% of the annual premium. All operations are handled by an outside company that specializes in managing captive insurance, including making sure the annual premiums are properly documented and supported by underwriting. The opportunity is significant but companies must adhere to the rules, which are technical. Hiring a specialist is an important key to success.

After talking to your acquaintance a little more about their experience setting up a captive insurance company to offset common risk of running an e-commerce business, you realize that it is not too good to be true. Perhaps a little complicated, but you have good e-commerce attorneys that can take care of it. The masterminds are all about meeting the right people and it paid off yet again; you know exactly who you are going to call when you get home.

[1] 26 USC § 831(b), as indexed as of 2023.

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How To Make And Save Money In Litigation

RYAN M. POTEET · BRENT BUYSE · CLAIR WISCHUSEN · SEAN FLAHERTY · JASON C. SCOTT

FINALLY, YOUR COPYWRITER DIALED in your copy, AOVs are steadily increasing, retention is up, and it looks like you are truly about to scale. Your CFO is even in an uncharacteristically good mood now that private equity is sniffing around. The added cash is just what you need to invest in your anemic Google Ads account. But what's this? Johnny Cornhusker just filed a putative class action in the Middle District of Nowhere alleging that your company falsely advertised its products and you *personally* participated in a grand conspiracy to fleece consumers out of their hard-earned money. The complaint demands $10 million in damages. At the same time, you find out that your advertising agency is using its knowledge about your highest-performing ads and traffic data to make money for a competitor. The competitive edge that made your business so attractive to private equity is dissipating quickly. You've never been involved in a lawsuit before, and now you are named in one and need to figure out how to file another fast.

No one wants to find themselves in court defending their company or having to file a lawsuit to protect it. Litigation can be expensive. You have to pay your lawyers to defend or prosecute the case, and you may end up having to pay the other side a fair amount of money. With most business owners though, the largest ligation expense is often somewhat intangible – a time-consuming distraction that can take away from a company's core mission. Nevertheless, virtually all successful business people are involved in some kind of legal dispute at some point. When you are, how can you maximize your legal team's value and reduce legal spend while minimizing the lawsuit's impact on your daily operations? Here are several ways.

Prevention

The best way to save money, minimize distraction, and maximize your legal team's value is to take smart action before litigation. To help prevent costly class litigation, you should make sure your website terms are updated and enforceable. To help prevent unfair competition and intellectual property infringement and make it easier to pursue enforcement action, you should obtain trademark registration for your brand and copyright registration for your high-converting creative. To help prevent business disputes and strengthen your rights if they arise, you should make sure all business agreements with your service providers contain representations and warranties, indemnification, and fair limitation of liability provisions. And of course, you should make sure you do right by consumers – by making sure your advertising claims are truthful and not misleading, providing a valuable product or

service, empowering customer support to truly help consumers and give refunds when appropriate, and responding promptly and thoughtfully to BBB or other customer complaints. Simply put, the best way to prepare your business for litigation and ultimately save money is to strengthen its foundation and protect it against foreseeable areas of risk.

Evaluate Your Case and Sometimes Negotiate Early

Whether defending a lawsuit or contemplating filing one, you should objectively evaluate the strengths and weaknesses of each side's position and whether you should attempt an early resolution. This requires taking a dispassionate view of the facts and circumstances surrounding the dispute, not always an easy thing to do. If you have a strong case, consider sending a demand letter before filing suit to (hopefully) encourage meaningful settlement discussions, especially if the other side may have an interest in paying more to have their misconduct quietly resolved rather than publicly aired. On the other hand, if your company is threatened with a lawsuit or has been sued, there is almost always no downside in having your counsel engage in discussions with opposing counsel at the outset about an early resolution, including possibly mediation. There is no need to throw good money after bad or litigate a case through discovery just for the sake of it. All too often, companies pursue or defend a claim just to resolve it for slightly more (or less) than what the case could have been resolved for at the outset. Rather than fall into an ego-driven "pissing contest," you should make a pragmatic business decision driven by legal and economic realities.

Appoint a Key Individual to Liaise with the Legal Team

Okay, you are in the thick of it now. The more that you and your team can do – and do well – the less expensive the case will be. Find the person who is the most knowledgeable about the facts underlying the dispute and who has the best knowledge about where the relevant evidence can be found. This person should be tasked with coordinating with outside counsel to gather documents, arrange interviews, and track down answers to questions. Litigation is truly expensive and unnecessarily time-consuming when there is poor client communication and the legal team has a difficult time getting documents and information. Appointing one person to run point and ensure answers and deliverables are timely provided to outside counsel will drastically reduce your legal spend and maximize your legal team's value.

Conduct a Targeted Preservation and Collection

When a company reasonably anticipates litigation, it must preserve potentially relevant documents and information. This does not mean that the company's daily operations must grind to a halt and start saving every email, Slack communication, creative asset, or contract. Rather, the collection should be focused on the specific subject matter, evidence, and likely witnesses in the case. The individual you appoint to liaise with your legal team will be instrumental here, as they will be tasked with investigating who has potentially relevant information, where it is located, and

ensuring that your IT department preserves the information. A thorough investigation of the sources and locations of potentially responsive information at the outset of the case will make the discovery process more efficient and protect the company from potential discovery sanctions down the road.

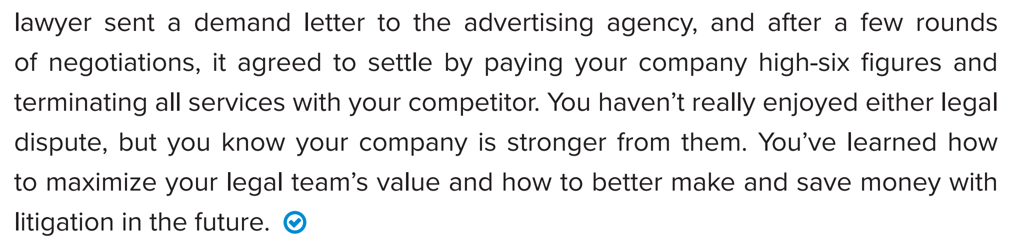
Cost Effective Decisions and Strategies

As much as possible, the legal budget should be scaled to the issues and amount in controversy. Stating the obvious, the amount of attorney's fees in a $100,000 dispute should be far less than those in a $1,000,000 dispute. But some of this is not within a party's control. If the opposing party does more or less, your attorney's fees could be more or less. Likewise, if the court does more or less, your attorney's fees could be more or less. That said, if you want to save money in litigation, the key is usually speed, since cases that move fast are usually less expensive. There is wide variation across the country between federal and state courts in the average time between filing a lawsuit, dispositive motions, and trial. If you are the plaintiff, you will want to evaluate what courts could have jurisdiction over your claims and assess the speed that each potential court moves. If you are the defendant, you may want to pursue removal to federal court or a motion to transfer venue to a more attractive court. If you are the plaintiff, you should also consider whether filing a preliminary injunction motion is a worthwhile investment. If you are the defendant, you should consider whether filing a motion to dismiss is a worthwhile investment. Sometimes, these motions may be longshots to win but nevertheless help to educate the court and streamline the issues going forward, setting the stage for a later summary judgment motion. Other times, these motions can be an unnecessary expense that can cause a case to grind when it should instead move more quickly into the discovery phase.

Clear Communication

Ultimately, you and your legal team need to have clear communication. Is this a "bet the company case" that could have major ramifications for your company's future? If so, you will need to dedicate a large legal budget and have close, regular communication with your legal team about case developments and action items. Or is this a "nuisance" case that should be quickly settled or handled on a "shoe string" budget to ensure the costs of defense do not approach the amount in controversy? In either event, clear communication will help to make the legal work more efficient and cost-effective.

Turning back to our hypothetical, you and your legal team realized that Johnny Cornhusker's putative class action is a "bet the company" case. But you identified a key employee who is working closely with the legal team to gather relevant evidence and you're also holding a weekly standing meeting with the legal team, so you're able to minimize distraction, stay informed, and make informed decisions. On the other matter, you were very pleased to learn that your agreement with the advertising agency included exclusivity and confidentiality provisions. When your



lawyer sent a demand letter to the advertising agency, and after a few rounds of negotiations, it agreed to settle by paying your company high-six figures and terminating all services with your competitor. You haven't really enjoyed either legal dispute, but you know your company is stronger from them. You've learned how to maximize your legal team's value and how to better make and save money with litigation in the future.

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Artificial Intelligence & E-Commerce

GRAHAM REYNOLDS · RICH GREEN · STEPHEN J. FREELAND · SAM STEIN · JASON C. SCOTT

AS A CHILD OF THE EIGHTIES, you hear the term "artificial intelligence" and you immediately think of Sky Net from the Terminator films or some Orwellian dystopia where machines, not humans, evaluate a person's credentials to issue social credit. Thankfully, we are not there, and marketers and businesses are learning how to use this technological leap to their advantage. Every conference you attend someone is talking about using artificial intelligence to create copy, automate programmatic advertising, eliminate repetitive tasks, and more. You have even heard that some people are using it to screen job candidates. It all sounds well and good, but you know there are risks, and that an alphabet soup of government agencies is grappling with how to regulate this new technology. So, what's the deal?

Artificial Intelligence ("AI") is receiving a lot of attention right now. From President Biden's Executive Order, the European Union's approval of the Artificial Intelligence Act, calls for regulation of AI by industry leaders, proposed federal legislation in the United States Senate, state and local laws that regulate the use of AI in employment hiring decisions, and copyright infringement lawsuits — AI is a hot topic and governments and plaintiffs' attorneys are wrestling to understand it. While the regulatory and litigation landscape is rapidly evolving, businesses need to be aware of some basic pitfalls when using AI or making claims about using AI in your advertising materials.

Advertising the Use of AI and the FTC

While AI offers many potential benefits, it can also be used to engage in fraud, deception, privacy infringements, and other unfair practices, which are all areas of concern for the Federal Trade Commission ("FTC"). The FTC considers "artificial intelligence" to be a "marketing term" and is on the lookout for false or unsubstantiated claims about a product's efficacy. In particular, the FTC is focusing on products and services that claim that their use can result in increased earnings and revenues because of the AI in their product compared to a competitors. The FTC does not view claims about AI as just "puffery" and will hold advertisers accountable for false or unsubstantiated claims.

The FTC counsels advertisers to ask themselves the following questions before making claims about their AI-empowered products:

- ***"Are you exaggerating what your AI product can do?"*** The FTC could not be clearer in its guidance and warns that performance claims would be deceptive if they lack scientific support or if they apply only to certain types of users or under certain conditions.

- ***"Are you promising that your AI product does something better than a non-AI product?"*** Advertisers will need "adequate proof" for this kind of comparative claim.
- ***"Are you aware of the risks?"*** You must understand the potential risks and impact of your AI product before putting it into the marketplace.
- ***"Does the product actually use AI?"*** If your product does not use AI and you claim that it does, the FTC would consider this a false claim. Using an AI tool in the development of the product is not the same as the product having AI in it.

The FTC is serious about enforcement related to AI and fraud, deception, and other unfair practices. It has recently approved a resolution authorizing its ability to obtain documents, information, and testimony to advance FTC consumer protection investigations. As we have seen in the past, when the FTC issues guidance like this, investigations usually follow. Thus, we anticipate seeing more of these investigations in the coming years.

Copyrighted Works and Deepfakes

There has been an uptick in copyright infringement litigation relating to AI. Several high-profile lawsuits have recently been commenced where plaintiffs' claim that AI companies have used copyrighted works in their AI training datasets. These plaintiffs claim that programs like OpenAI's ChatGPT and Meta's Llama are powered by software programs called large language models ("LLMs") that are "trained" by copying massive amounts of copyrighted text. This collection of text is called a training dataset. Once a LLM has the text in its training dataset, it is able to produce naturalistic text outputs in response to user prompts through the use of the software. These plaintiffs claim that programs like ChatGPT generate summaries of their copyrighted works, which would only be possible if the training dataset contained their copyrighted works.

In response, AI companies argue that their training datasets can use copyrighted works under the doctrine of fair use. Under the Copyright Act, fair use includes such purposes as: criticism, comment, news reporting, teaching, scholarship, or research. Four factors are used to determine if the doctrine of fair use applies to a copy:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

It remains to be seen if the arguments about fair use will be upheld by the courts. However, these lawsuits are not limited to only written works. Getty Images has sued Stability AI alleging that it scraped millions of copyrighted images from the internet. Moreover, there is significant concern about "deepfakes" and the ability of AI to generate works that mirror artistic styles and characteristics. The "right of publicity" is a person's right to control the commercial use of their identity.

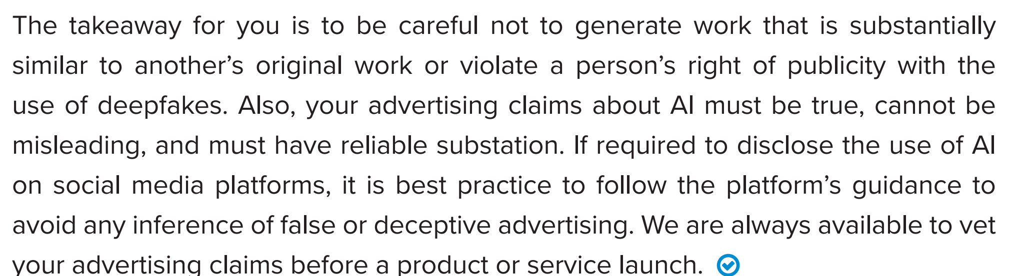
A person's identity is defined as their "persona," which is the public character of that person that has commercial value (things like a person's name, voice, image, or likeness). Generative AI has the ability to replicate these identifiable and distinctive characteristics. The key question here is whether an AI generated advertisement captures a person's distinctive persona and, if it does, is there an infringement? If the AI generated content is "transformative" in nature and transforms the person's identity to a sufficient degree, then the inclusion of the person in the work may be allowed. Issues about the right of publicity are governed by state statues and case law and generally fall under the broad category of unfair competition.

To address issues like these, companies are establishing guidelines for altered or synthetic content. For example, YouTube will be deploying disclosure requirements on videos that are altered or synthetically created. YouTube will require creators to disclose when they have created altered or synthetic content that is realistic, including using AI tools. This includes AI generated videos that realistically depict an event that never happened or content showing someone saying or doing something they actually did not. YouTube will require a new label in the content description panel or a more prominent label in the video player for sensitive topics, which includes elections, conflicts, public heath crises, or issues concerning public officials. YouTube will also allow its music partners to request the removal of AI generated music content that mimics an artist's unique voice.

Automated Decision Making

Proposed AI laws across various states in the U.S., such as California, New York, and now Washington, share common features in their approach to regulating artificial intelligence and automated decision tools (ADTs). These laws generally require developers and deployers of ADTs to conduct thorough impact assessments, provide detailed statements and documentation about the tools to deployers, and make public policies that outline how they address the risks of algorithmic discrimination. This trend reflects an increasing awareness and response to the unique challenges posed by AI and algorithmic decision-making in safeguarding privacy and preventing discrimination. We will continue to update our clients while these laws get finalized.

Key Considerations



The takeaway for you is to be careful not to generate work that is substantially similar to another's original work or violate a person's right of publicity with the use of deepfakes. Also, your advertising claims about AI must be true, cannot be misleading, and must have reliable substation. If required to disclose the use of AI on social media platforms, it is best practice to follow the platform's guidance to avoid any inference of false or deceptive advertising. We are always available to vet your advertising claims before a product or service launch.

If You Want To Win, It Helps To Know The Rules

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IT'S FRIDAY AFTERNOON. BOB is about to meet friends for happy hour, but an email just hit his company's general support account. It's from the FTC. The subject line reads "CIVIL INVESTIGATIVE DEMAND." The attached cover letter states: "You are hereby required to provide the following records, reports, and answers under oath to serve as evidence for possible violations of Section 5 of the FTC Act." From a quick Google search, Bob sees that Section 5 prohibits "unfair or deceptive acts or practices in or affecting commerce"—it's talking about false advertising. Bob curses. He's not sure if he should be angry with himself, angry with the FTC, or both.

For the past few years, Bob had been obsessed with buying traffic, optimizing his sales funnel, and increasing conversions. He was having fun and getting rich. He now remembers a conversation with an advertising lawyer who once quickly reviewed his ad copy and website and said there were several issues that needed to be fixed. Bob said "thanks so much, I'll be in touch" and then never followed up. It just wasn't his biggest priority. He wanted to make more money before he focused on compliance. He'd thought this day would never happen—telling himself there are other retailers doing far worse things, some are far bigger than him, and the FTC would certainly pursue them before him.

Bob was wrong. His life and his business are about to be turned upside down, especially if he doesn't hire good counsel. To be blunt, he's put at risk everything he's made.

Ignorance Is Bliss, Until It Isn't

Things could actually be worse for Bob. Instead of a civil investigative demand, the FTC could have filed a civil complaint and motion for a temporary restraining order under seal with the federal district court. The FTC could have asked the court to freeze all of Bob's company's assets and bank accounts, freeze all of Bob's personal assets and bank accounts, and appoint a receiver to take over Bob's company while the case is pending. The court could have then granted the FTC's motion and entered the temporary restraining order, with all of this happening before Bob and his company even had the slightest idea about the case. It would be as if a basketball or soccer game were played, Team FTC was declared the winner, and Team Bob didn't even know to show up. But this is not a game, as the consequences can be life-altering.

The best thing Bob can now do is to hire a law firm with substantial experience in FTC matters. Working closely with Bob, his attorneys will need to immediately

preserve relevant evidence, understand the FTC's concerns, begin making any necessary compliance changes, and try to have constructive dialogue—with Bob's attorneys using both advocacy and diplomacy skill—in an effort to narrow or resolve the FTC's concerns and achieve the best outcome possible. If the FTC has issued a civil investigative demand, there may be time and opportunity to resolve the matter. If the FTC has instead sued, the mission will be both massive and urgent between gathering the facts, litigating in court, and trying to change the FTC's narrative and ideally the court's view on the situation. In all events, if Bob wants to avoid crippling financial and personal repercussions, this work must be his biggest priority.

Focus So You Don't Foul Out

Don't be like Bob. Simply being a creative and dynamic marketer is not enough to achieve long term success. If you need any motivation, think of yourself as an athlete who wants to improve, ideally to play pro. A tremendously talented basketball player wouldn't make it to the NBA if they didn't understand traveling or double dribble rules or what could lead to technical fouls and expulsion from the game. A tremendously talented soccer player wouldn't make it to the MLS if they didn't understand offside or slide tackle rules or what could lead to a yellow card or red card and expulsion from the game. In the same way, you may be a tremendously talented marketer but you will never hit your full potential if you don't take the time to understand the rules at play. You could instead be expelled.

As against e-commerce retailers, the FTC often alleges unfair or deceptive advertising in violation of Section 5 of the FTC Act and unlawful subscription billing in violation of the Restore Online Shopper's Confidence Act. The issues could involve use of fake celebrity endorsements or consumer testimonials; failure to disclose "material connections" with influencers or testimonials; deceptive pricing, "free," or "money back guarantee" claims; improper "Made In USA" claims; deceptive income or earnings claims; deceptive drug or disease claims; or failure to disclose subscription billing terms, obtain consumer's affirmative consent to the terms, or provide a simple and easy mechanism for the consumer to cancel their subscription. Any one of these issues could lead to FTC enforcement action jeopardizing an e-commerce retailer's present and future livelihood.

The good news is that—with focus—you can avoid this. As much as learning how to write evocative copy, being an effective media buyer, and otherwise generating consumer excitement and high conversion, you must learn the rules in play, so you can stay in play and achieve long term success. If you've read this far into the *E-Commerce Retailer Legal Guide,* chances are you get this. If not already done, your next step should be to visit https://www.ftc.gov/news-events/media-resources, subscribe to the FTC's Press Releases and Blogs, and faithfully read them so you can learn how to avoid mistakes by others. And if not already done, your next, next step should be to contact and hire an experienced advertising lawyer to review your advertising, website, and other practices to help protect, strengthen, and grow your business. Again, don't be like Bob.

Advertising & E-Commerce Group

GORDON REES SCULLY MANSUKHANI

Advertising & E-Commerce Group

THE INTERNET HAS RADICALLY TRANSFORMED OUR ECONOMY, the way consumers buy and shop, and the way retailers capture their attention. Our Advertising and E-Commerce Group understands the unique business and legal issues that face e-commerce retailers, other online advertisers, and their service providers.

We tackle all of these issues almost every day for our clients. Many forces, including the FTC, state attorneys general, consumer class action counsel, online marketplaces, social media platforms, news media, traffic providers, payment processors, competitors, and counterfeiters, can disrupt the path from start-up to brand empire. We proactively advise our clients on best practices to avoid these disruptions, and we effectively protect and defend our clients should these disruptions arise. We take pride in guiding our clients towards smart and sustainable growth.

An e-commerce retailer that focuses only on aggressive advertising and short-term customer acquisition will not succeed. Nor will an e-commerce retailer who follows overly cautious and restrictive legal advice avoid the most remote risk of potential liability. The goal of making money and the goal of being compliant are not mutually exclusive. They can coincide with the benefit of good counsel. This is how we help clients.

OUR ADVERTISING AND E-COMMERCE GROUP PROVIDES LEGAL SERVICES IN THE FOLLOWING AREAS:

- Outside general counsel on advertising, marketing, promotions, intellectual property, data privacy, contract, corporate, tax, employment, and other regulatory and legal areas;
- Strategic advice and counsel to improve customer experience, increase customer lifetime value, and strengthen business reputation and goodwill;
- Website funnel and advertising claims review for compliance with federal and state consumer protection laws, including the Restore Online Shoppers' Confidence Act (ROSCA), Section 5 of the FTC Act, FTC Endorsement and Testimonial Guides, FTC Business Opportunity Rule, Federal Food Drug & Cosmetic Act, and Cal. Bus. & Prof. Code §§ 17200 and 17500;
- Drafting website terms of sale, website privacy policies, intellectual property license agreements, and service provider agreements, including advertiser, affiliate network, fulfillment services, and social influencer agreements;
- Brand protection, including prosecution and defense in trademark infringement, UDRP domain transfer actions, copyright infringement, DMCA takedown notices, Lanham Act false advertising, product disparagement, and trade secret misappropriation litigation;
- Compliance, incident response, and management with the EU General Data Protection Regulation (GDPR) and California Consumer Privacy Act (CCPA), as well as advice on email, SMS, and telemarketing laws;
- Avoiding and defending against consumer class actions, FTC, state attorney general and district attorney civil investigative demands and enforcement actions, consumer complaints, right of publicity claims, and unfavorable news media coverage;
- Negotiating and litigating business disputes, including between retailers, lead generators, traffic providers, payment processors, and other service providers; and
- Strategic advice and counsel to improve customer experience, increase customer lifetime value, and strengthen business reputation and goodwill.

Damon W.D. Wright

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Damon Wright heads the Advertising & E-Commerce practice group. The group represents leading brands, direct response advertisers, e-commerce retailers, lead generators, advertising agencies, fulfillment companies, technology companies, and related service providers. For each client, the work can vary but the goal is the same – to protect, strengthen, and add value to their business.

Damon has close, long term relationships with his clients and understands their business issues and operational challenges. The group's clients span almost all verticals, including food and beverage, dietary supplements, telehealth, cosmetics, financial publishing, cryptocurrency, fitness, clothing, electronics, toys, home goods, people search, and business coaching. He is relied upon as a trusted advisor on advertising, regulatory compliance, intellectual property, consumer protection law, business agreements, and acquisitions. Damon is a determined advocate when litigating FTC and state attorney general actions, business disputes, consumer class actions, infringement, false advertising, unfair competition, and other high-stakes matters.

In his over twenty-five years of practice, Damon has helped countless clients achieve sustained business growth with legal compliance. He is a regular speaker at industry masterminds, serves as outside general counsel to the Financial Publishers & Media Alliance, and previously served as outside general counsel to the Subscription Trade Association. He hosts the "Rock the Box Party" at Traffic & Conversion Summit every year. He is the only attorney ever to receive an Affy Award awarded at the Affiliate Ball in connection with Affiliate Summit.

Representative Experience

- For various e-commerce retailers, obtained dismissal of consumer class actions asserting violation of state consumer protection laws
- For online information product retailer, obtained multiple consent judgments, including substantial damages and permanent injunctions following trademark and copyright infringement by competitors
- At trial, represented newspaper in trademark infringement case and obtained permanent injunction requiring competing newspaper change its name
- Represented international online dating service in lawsuit by competitor; prevailed on motion to vacate default and obtained dismissal of competitor's false advertising, trademark infringement, and unfair completion claims, with award of attorney's fees and costs
- Represented online computer and television retailer in defense of FTC investigation, resulting in closed investigation and no enforcement action
- Represented business owners in defamation action against consumer complaint website, defeating motion to dismiss that asserted Section 230 Communications Decency Act (CDA) immunity from liability
- Represented online nutraceutical retailer in evidentiary hearing before Better Business Bureau (BBB), persuading BBB to restore client's BBB accreditation and A+ rating

Damon W.D. Wright
(CONTINUED)

- Won sanctions, summary judgment, and affirmance on appeal — with actual damages, treble damages, and attorneys' fees — in false advertising case against online sports memorabilia retailer
- For online information product retailer, obtained arbitration award for actual damages and attorney fees against a serial plaintiff consumer on counterclaim for breach of prior settlement agreement
- Represented telecom software company in breach of contract action by reseller, with court dismissing all non-contract claims and granting summary judgment on contract claim, finding reseller could recover no damages
- Obtained preliminary injunction after evidentiary hearing for online health and beauty product retailer in trademark infringement, trade dress infringement, and misappropriation case against competitor
- Won sanctions, summary judgment, and affirmance on appeal in trademark infringement, fraud, and breach of duty of loyalty case between competing government contractors
- Represented software company founders at trial, against publicly traded corporation in a securities fraud, stock conversion, and shareholder dispute, obtaining compensatory damages, punitive damages, and sanctions
- Represented several high-net-worth clients in fraud and accounting malpractice lawsuits against national accounting firm, obtaining evidence that led to partial summary judgment, favorable settlements, and federal criminal prosecution
- In several confidential matters on behalf of various web-based business clients negotiated with national media outlets to retract, narrow, or balance otherwise unfavorable media coverage

Admissions

- Virginia
- District of Columbia
- U.S. Supreme Court
- U.S. Court of Appeals, Fourth Circuit
- U.S. Court of Appeals, D.C. Circuit
- U.S. Court of Appeals, Ninth Circuit
- U.S. District Court, Eastern and Western Districts of Virginia
- U.S. District Court, District of Columbia
- U.S. District Court, District of Maryland
- U.S. District Court, Northern District of Ohio
- U.S. District Court, Eastern and Southern Districts of Texas
- U.S. Bankruptcy Court, Eastern District of Virginia
- U.S. Bankruptcy Court, District of Columbia
- U.S. Bankruptcy Court, District of Maryland
- U.S. Tax Court

Education

- J.D., George Mason University School of Law, 1996
- B.S., Political Science, *cum laude*, James Madison University, 1993

Clerkship

- Honorable Barry R. Poretz, U.S. Magistrate Judge
  U.S. District Court for the Eastern District of Virginia 1996-1997

Damon W.D. Wright
(CONTINUED)

Honors

- Affy Award Recipient, Affiliate Ball (Affiliate Summit West), 2023
- AV® Peer Review Rated by Martindale-Hubbell, 2007—Present
- Washington, DC Super Lawyers, 2012—Present
- Recognized as a "Top Rated Lawyer," *American Lawyer* and Corporate Counsel's Washington DC & Baltimore's Legal Leaders, Intellectual Property, 2013
- Recognized in *Super Lawyers Business Edition,* Business Litigation; Washington, DC, 2013
- Just The Beginning Foundation Diversity Champion, 2008
- Benjamin R. Civiletti Pro Bono Lawyer of the Year, 2007
- T. Brooke Howard Fellow, Alexandria, Virginia Office of the Public Defender, 1994
- Sigma Pi, Epsilon Mu Chapter, Graduate of the Year, 1993

Memberships

- General Counsel, Financial Publisher and Media Alliance
- General Counsel, Together We Bake
- Member, Federal Bar Association
- Member, American Bar Association
- Past president, officer, and board member, Northern Virginia Chapter of Federal Bar Association, 2007 - 2015
- Frequently writes and speaks on advertising and e-commerce law and business considerations

Community Involvement

PRO BONO

- Since 2002, has represented Freddie Woods, recently obtaining the reversal of his 1997 capital murder conviction and death sentence
- Since 2019, has represented Taurus Carroll, an intellectually disabled person facing a 2012 capital murder conviction and death sentence
- Represents Together We Bake, a job-training and personal empowerment program based on a micro-baking business and founded by his wife that helps women in need of a second chance develop employment and life skills

PERSONAL ACTIVITIES

- An avid music fan, leads a group of friends and clients to the annual South by Southwest music festival
- Manages and plays percussion in Noise In The Basement, an alt-rock cover band and three-time winner of Law Rocks-DC, an annual battle of the bands competition
- Has a daughter who works in Virginia's General Assembly, a teenage son at the University of Virginia, and a teenage son at Alexandria City High School

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