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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

6 Advertising Law Trends To Watch In 2019

By **Jason Gordon and Andrew Levad** (January 7, 2019, 3:26 PM EST)

Jason Gordon

Andrew Levad

2018, a year that felt like a decade and yet seemed to be over in a blink of an eye, was jam-packed with newsworthy legal and cultural developments. In the world of advertising, 2018 will be remembered as a year where the eternal tensions between advertising, privacy and honesty came to a head. From the landmark General Data Protection Regulation going into effect, to the Cambridge Analytica scandal and its impact on social media marketing, this was a year of industry wakeups and shakeups. There is far from enough room in one article to cover every topic that shaped advertising law in 2018, but here are the six trends that stood a head and shoulders above the rest and likely will continue to impact advertising and marketing for years to come.

"We've Updated Our Privacy Policy" — GDPR Quakes the Industry

Although it was announced back in 2016, the General Data Protection Regulation took effect on May 25, 2018. In a nutshell, GDPR is a piece of legislation by the European Union that applies to organizations that process, or hold, the personal data of subjects residing in the EU. In short, the law seeks to return to EU citizens the full control of their personal data by requiring websites to seek consent to use such data, and carries stiff penalties for organizations that breach the new rules. However, the law's impact extends far beyond the geographic bounds of the EU, because it applies to organizations that hold EU subjects' data regardless of where the organizations themselves are located.

The tracking of online behavior forms the crux of modern digital advertising; data generated by tracking cookies as individuals navigate the web builds highly specific user profiles that marketers use to serve advertisements. It created a tangled ecosystem of advertising technology groups that act as middlemen between ad agencies and publishers, and user data was shared at all levels of the process with little oversight. GDPR, however, requires the compliance of the entire supply chain and everyone could be punished if one link is noncompliant. To combat the risk of noncompliance, companies across the board have updated their policies to be explicit in how they plan to use information and seek customer consent to do so.[1] Under the new rules, the personal data they collect must be only for "specified, explicit and legitimate purposes" and "relevant and limited to what is necessary in relation to the purposes for which they are processed."[2] The aim is to minimize unnecessary data tracking and sharing, and to allow consumers to make informed decisions regarding whether to allow certain companies to store or use their data.

The implementation of such a massive legal overhaul has rocked the advertising industry, with some experts denouncing it as the harbinger of doom for programmatic advertising and others hailing it as a much-needed first step away from destructive industry practices and stale data. On one hand, GDPR's reduction to the sheer volume of available user data at all levels of the digital advertising space may make serving ads to the best customers more difficult. However, forcing opt-ins at every level of the digital advertising process will make tactics like retargeting and remarketing (think of that banner ad that seems to bounce around to every website you visit) less pervasive and annoying. The U.K. issued its first GDPR enforcement notice in late October against a Canadian data analytics firm, AggregateIQ, requiring erasure of all personal data held by the firm that related to U.K. individuals and threatening it with the maximum penalty for noncompliance.[3] In June, the

California governor also signed into law the California Consumer Privacy Act, which contains many themes and provisions similar to GDPR and becomes effective in 2020.[4] Although it is far too early to predict exactly how GDPR's influence will play out, its impact on every level of the global advertising industry makes it our top trend to watch in 2019.

Social Media Advertising Post-Cambridge Analytica

"Facebook stole my data!" If that's what you're hearing after the Cambridge Analytica scandal, you're right… and you're wrong. Much of the media's coverage of Facebook's scandal involving political data firm Cambridge Analytica was centered around a "theft" or "breach" of private data when scandal hit headlines on March 17.[5] What actually happened is a bit more nuanced; in 2014 a researcher developed a personality quiz app for Facebook, which about 270,000 users installed on their Facebook accounts and provided consent to have their data harvested ostensibly for "academic use." As was Facebook's policy back then (though it has since been changed), the researcher received access not only to those users' data, but also that of those users' Facebook friends. The information was then saved into a private database instead of deleted, and was handed over to Cambridge Analytica. In total, private information from the profiles of over 50 million users of the social media giant was scraped and funneled into Cambridge Analytica's coffers, largely without those users' knowledge or express consent.[6] Such information included details on their identities, friend networks, and "likes," and was intended to map those users' personality traits and target audiences with digital ads, including political ads. This revelation, fueled by further accusations of political wrongdoing by Cambridge Analytica executives and the hiring of the data firm by President Trump's 2016 election campaign, put Facebook and other data-driven companies in the hot seat for much of 2018.

After investigations by the American and U.K. governments, tightening of data regulations, drops in stock prices, and public outcry, Facebook began rolling out features in 2018 designed to help prevent nonconsensual harvesting and sharing of user data. The most pertinent change already affecting digital advertisers is the removal of Facebook's "Partner Categories." Previously, Facebook let advertisers target people using data from various sources, including the data that Facebook collects from user activity and profiles, data that the advertisers had collected themselves, and data from third-party data aggregators like Experian and Axciom (and Cambridge Analytica). These third-party data sources were a treasure trove to advertisers because they allowed ad targeting based on offline behavior — such as the purchase of a home or car, shopping in offline stores, political and religious affiliation, income, socioeconomic status and much more — without having to deal with data brokers. But, in removing Facebook's partner categories, advertisers no longer have cheap, roundabout access to that data in their Facebook advertising campaigns; they must purchase the services of data firms from the firms directly.

This change illustrates a symptom of the larger shift in social media marketing in the wake of Cambridge Analytica, namely, that social media users want to know exactly what personal data they have consented to share, to whom their data is given and why. Although Facebook's removal of partner categories is but one of many changes implemented in 2018, it may signal the end of the age of fast-and-loose data sharing in social media advertising. As such, the Facebook-Cambridge Analytica data scandal and the industry ripples generated therefrom land a spot in the top trends to watch in 2019.

FTC Rebukes Imported Patriotism

In the tumultuous political times of 2018, the only thing as American as apple pie became the phrase "Made in America" splashed proudly across the labels of consumer goods. Purveyors of goods across the market spectrum have attempted to capitalize on well-meaning Americans' surging desire to display their patriotism and support for local economies by "buying American." The Federal Trade Commission sets forth a requirement that in order for a product to be called "Made in America" or claimed to be of domestic origin without qualifications or limits on the claim, the product must be "all or virtually all" made in the United States.[7]

However, wherever a hot market opens up, unscrupulous business is sure to follow. To combat consumer deception in this space, the FTC embarked on a campaign to crack down on fraudulent "Made in America" claims. Starting in January, the FTC approved a final consent order against the Bollman Hat Company and its subsidiary, SaveAnAmericanJob LLC, when it was revealed that more

than 70 percent of those companies' hat styles were in fact imported as finished products, and the remaining styles contained "significant" imported content in violation of FTC requirements. Later, the FTC settled with hockey puck maker Patriot Puck and recreational equipment sister companies Sandpiper and PiperGearUSA regarding their similarly false "American Made" claims after it came to light that nearly all of their products were imported from China and Mexico.

The FTC's settlements with these accused sellers of snake-oil patriotism outline largely the same remedies: stop all deceptive use of "Made in America" certifications and marketing materials, and stop providing others the means to make similar deceptive country of origin claims unless they can be adequately substantiated. But, according to FTC Commissioners Chopra and Slaughter, injunctive relief alone may not be harsh enough to prevent such abuses of consumer trust. In dissenting and concurring statements in the Patriot Puck and Sandpiper cases, they advocated for more aggressive remedies, including redress, admissions of guilt, refunds, corrective advertising and other monetary penalties.[8] 2019 likely will see the first applications of these toothier FTC enforcement options, making them a top trend to watch in the coming year.

Artificial Intelligence, Real Results

Although we discussed the implementation of artificial intelligence in programmatic advertising in **our Expert Analysis piece from last year**[9] the advances in artificial intelligence and machine learning technologies seen in 2018 warrant an update. If the past decade or so was the infancy of artificial intelligence in the advertising space, then 2018 represents the shift into its adolescence.

To refresh your recollection, "programmatic ad buying" is the process of using software to buy digital ads; instead of drudging through human negotiations and inserting orders for ads on digital platforms, media buyers use software to navigate an auction-based process to have their ads served in their desired networks. Buyers use customer data — often harvested and aggregated by data firms — to target their most valuable audience by age, gender, location and various other characteristics. From there, buyers enter an auction process and choose whether they will pay the price for an ad to be seen by this specific audience at that moment. Artificial intelligence and machine learning take the burden off the media buyers by replicating aspects of human intelligence in machines and training them to make cognitive, data-based decisions.

But, because machines are not bound by many of the memory and variable-juggling limitations of their organic counterparts, AI-powered advertising systems can do so much more than just crunch numbers. Advances in machine learning have provided computers with the ability to use data to learn more about how to perform a task, improving its knowledge and efficiency in the same way a human brain does, and allowing them to diagnose, predict and plan. In advertising, machine learning algorithms can use consumer data to pinpoint correlations and draw conclusions with accuracy that even the most experienced media buyers could not fathom. For example, although historical performance of a product may indicate "women age 25-30 in Manhattan" to be a good audience for an advertisement, AI-powered analysis of the data may reveal the actual ideal audience to be something like "women age 27-29 with Android devices who have visited coffee shops in SoHo at least three times in the past week" and then allow the advertisers to target that hyper-personalized demographic alone. Moreover, the analysis may also correlate price, sales trends, inventory and other variables to generate the ideal prices to set for the advertised product, and the ideal days, times and locations in which to serve the advertisement.

As outlined above, increased scrutiny of consumer data aggregation and sharing may clamp down on some of advertisers' more freewheeling data practices, but the underlying technologies will continue to shape the industry by reducing costs, generating better campaign analyses, and making it easier for advertisers to experiment with audiences and implement results to optimize their campaigns in real time. With advertising technology's intelligence growing at an exponential rate, machine learning maintains its spot as a top trend to continue watching through 2019.

Ready Player "Won" — Fantasy Clashes with Real-World Gaming

Is this the real life? Is this just fantasy? For football players Akeem Daniels, Cameron Stingily and Nicholas Stoner, the line between real life and fantasy ran too close for comfort when fantasy sports providers FanDuel Inc. and DraftKings Inc. used their names, statistics and images in online fantasy sports games and related advertisements. Specifically, they alleged such use violated their right of

publicity under Indiana law. The "right of publicity" is an individual's right to control and profit from the commercial use of his or her name, likeness and other indicia of personal identity, and although it garners no protection at the federal level, nearly every state recognizes the right of publicity in statutory or common law. Because fantasy teams operate wholly on sports players' real statistical performance, a legal finding of those players' right of publicity over those statistics and likenesses could devastate the fantasy gaming industry. Could have devastated it, that is, were it not for the dramatic interplay between the Indiana federal and state courts that finally reached a resolution at the end 2018.[10]

In the protracted case initiated by Daniels and Stingily and joined by Stoner, the fantasy sports operators argued that their use of the players' real names, statistics and images fell under the Indiana right of publicity statute's enumerated exception for "material that has ... newsworthy value."[11] Although the district court agreed with the fantasy sports operators and dismissed the players' suit, on appeal the Seventh Circuit was not so sure. It certified the question of "[w]hether online fantasy-sports operators ... need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both," to the Indiana Supreme Court. After seven months of tense litigation, the Indiana Supreme Court answered in favor of the fantasy operators, holding that the statute's exception for material with newsworthy value "includes online fantasy sports operators' use of college players' names, pictures, and statistics for online fantasy contests."[12] This answer in hand, the Seventh Circuit promptly terminated the players' suit.

What does this mean for advertising? We see two trends likely to emerge. First, fantasy sports operators and others in industries that rely on real-world people's identities and information may see the Indiana courts' decisions as their blessing to use such content scot-free. Advertisers could use the Seventh Circuit's newsworthiness holding as an arrow in their quiver to take down future right of publicity suits targeted at their advertisements. On the other hand, the subjects of those advertisements, emboldened by Daniels, Stingily and Stoner's decision to sue FanDuel and DraftKings, may double down on their challenges under right of publicity laws in other — possibly more favorable — jurisdictions. After all, Daniels v. FanDuel Inc. involved only the Indiana statute, and each state has its own interpretation of the right of publicity. Furthermore, 2018 also saw other examples of viral stars suing content creators for appropriating their real-life works, such as former Fresh Prince of Bel-Air actor Alfonso Ribeiro, rapper 2 Milly, and "Backpack Kid" Russell Horning suing Epic Games for incorporating their signature dances into the video game Fortnite.[13] With Daniels v. FanDuel, Inc. invigorating both sides of the battle, we are sure to see more litigation coming out of this space in the future, making it another top trend to watch in 2019.

Consumer Appetite — 2018's Spike in Food Labeling Litigation

Finally, as the demand for healthful, "natural" foods has increased, so has the exercise of false advertising and consumer protection laws in the food and beverage space. 2018 saw high amounts of food labeling litigation, founded mainly on accusations of false labeling, mislabeling products as "all natural," and inappropriate amounts of slack fill, i.e., the difference between the actual capacity of a container and the volume of a product contained inside.

In particular, accusations of companies mislabeling their products as "all natural" took center stage, as consumers sought to find any deviance from naturalness upon which to hang their lawsuits. For example, the plaintiffs in Berger v. MFI Holding Corp. et al.[14] accused Post Holdings Inc.'s of falsely labeling its prepackaged mashed potatoes as "made with real butter" — even though they admit that the product does contain real butter — because it also contains some margarine. Post urged the court to reject the plaintiff's alleged attempt to recast the case as an "all natural" case, though the court's decision remains pending. Similarly, in Wong v. Trader Joe's Company et al.,[15] the putative class plaintiff accused Trader Joe's of mislabeling its sour gummies as "naturally flavored." Although the candies' label disclosed the ingredient "malic acid," which is in fact natural, laboratory testing of commercial samples of the product showed some presence of the compound's "d-l" form, a synthetic petrochemical that is the center of many "all natural" suits. Due to the lack of regulatory guidance around the term "natural" on food products, the word continues to be a bullseye for false labeling suits, and plaintiffs appear to be increasingly nitpicky around any artificiality present in foods they perceive to be advertised as "natural."

Slack fill litigation also saw an increase, with complaints accusing companies of underfilling everything from ice cream containers, cake mixes, candy packages, pasta containers, and — of

course — bags of chips. Notably, the plaintiff in Kamal v. Eden Creamery LLC[16] accused the maker of Halo Top ice cream of "routinely underfill[ing] its pint containers," "short-changing" the members of its "cult-like following." However, in California, the jurisdiction that sees the most slack fill litigation, a new 2018 statutory amendment provides some additional protections to companies accused of violating slack fill regulations. The question in all slack fill cases is whether the empty space in food containers is "nonfunctional," and federal and California law provide six exceptions in which the empty space is not considered "nonfunctional."[17] The new California amendment includes four additional exceptions: (1) where the consumer can see the dimensions of the product or immediate product container through the packaging; (2) where a clear and conspicuous depiction of the actual size of the product or immediate product container appears on the outside container; (3) where a product fill line or other indication on the container demonstrates the minimum amount of product; and (4) where the mode of commerce does not allow the consumer to view or handle the physical container or product.[18] Applications of this new law in California, and plaintiffs' expanded attention to food labels nationwide, make false advertising litigation in the food space our final top trend to watch in 2019.

The Bottom Line

2018 was a bear of a year in the advertising world and beyond. The recurring overall theme, however, appears to be honesty. Consumers are catching onto how valuable their information is, and they want to be in control of how it is collected and used. They, and the agencies that protect them, have started to crack down in increasingly harsh ways to punish wanton or dishonest use of data, as well as perceived dishonesty in other aspects of commerce. With the lid slowly being pried away to expose how companies have been studying their customers, customers have begun studying the companies in return. And, as the technologies used in advertising grow smarter and smarter, all eyes are turned to the future. Here's to you, 2019, we'll be watching.

Jason W. Gordon is a partner and Andrew M. Levad is an associate at Reed Smith LLP.

[1] Ivana Kottasová, Your inbox is being flooded with emails about privacy. Here's why, CNN Business (May 1, 2018) https://money.cnn.com/2018/05/01/technology/gdpr-data-privacy-email-consent/index.html?iid=EL

[2] General Data Protection Regulation, Art. 5, https://gdpr-info.eu/art-5-gdpr/

[3] Information Commissioner's Office, Action we've taken, Enforcement, Aggregate IQ Data Services Ltd., (Oct. 24, 2018) https://ico.org.uk/action-weve-taken/enforcement/aggregate-iq-data-services-ltd/

[4] Paresh Dave, California lawmakers approve data-privacy bill opposed by Silicon Valley, Reuters (Jun. 28, 2018), https://www.reuters.com/article/us-california-privacy/california-lawmakers-approve-data-privacy-bill-opposed-by-silicon-valley-idUSKBN1JO35Y

[5] Matthew Rosenbetg, Nicholas Confessore, Carole Cadwalladr, How Trump Consultants Exploited the Facebook Data of Millions, New York Times (Mar. 17, 2018) https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html

[6] Kevin Granville, Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens, New York Times (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html

[7] Federal Trade Commission, Complying with the Made in USA Standard, https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard

[8] See In the Matter of Underground Sports Inc., doing business as Patriot Puck, et al.,

https://www.ftc.gov/enforcement/cases-proceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al; In the Matter of Sandpiper of California, Inc. et al., https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter

[9] Jason Gordon and Andrew Levad, 5 Advertising Law Trends To Watch In 2018, https://www.law360.com/articles/1000694/5-advertising-law-trends-to-watch-in-2018 (Jan. 12, 2018)

[10] See Daniels v. Fanduel Inc., 909 F.3d 876 (7th Cir. 2018)

[11] Ind. Code § 32-36-1-1 (c)(1)(B)

[12] Daniels v. FanDuel, Inc., 109 N.E.3d 390 (Ind. 2018)

[13] Gil Kaufman, Can You Copyright a Dance Move? The 'Fortnite' Lawsuits, Explained, Billboard (Dec. 20, 2018), https://www.billboard.com/articles/news/8491166/fortnite-dance-lawsuits-explained

[14] Case No. 2:17-cv-06728 (S.D.N.Y. Nov. 17, 2017)

[15] Case No. 3:18-cv-00869 (S.D. Cal. May 4, 2018)

[16] Case No. 3:18-cv-01298 (S.D. Cal. Jun. 15, 2018)

[17] (1) to protect of the contents inside the package; (2) a result of the machines used to enclose the contents; (3) a result of unavoidable product settling; (4) when necessary to perform a specific task; (5) if the food is packaged in a reusable container where the container is a part of the presentation and also serves a useful purpose independent of the function to hold food; and (6) when unable to increase the contents or reduce the package size (such as to discourage shoplifting); 21 C.F.R. § 100.100; Cal. Bus. & Prof. Code § 12606

[18] AB-2632 Packaging and labeling: containers: slack fill (Signed Sep. 19, 2018)
