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6 Advertising Law Trends To Watch In 2021

By **Jason Gordon and Casey Perrino** (January 12, 2021, 5:59 PM EST)

We have been writing this "what to expect in the new year" article for several years now. This year, however, before diving in, we felt a need to say something unrelated to the law.

We are thankful that we are healthy, safe, and able to work from home. Not everyone can say that. We know many who have suffered in 2020, whether from being stuck at home, furloughs or layoffs, political turmoil, social unrest or mourning loved ones and friends lost to this terrible pandemic.

Our thoughts and support are with those who were challenged in 2020, and will continue to be challenged this year. We hear you, and we stand shoulder to shoulder with you in support — 6 feet apart, of course, and with our masks on.

The COVID-19 pandemic presented all industries and professions with unprecedented obstacles. The struggles to find toilet paper, Clorox wipes and even chicken breast at certain times this year forced us to rethink how we live our lives.

Stay-at-home orders, self-quarantines and the ongoing debate on whether Carole Baskin killed her first husband in the show "Tiger King" forced advertisers, content providers and e-commerce companies to rethink their business models.

Theme parks and movie theaters closed, or opened with limited capacity, limited offerings and constant cleaning. Pharmaceutical companies all raced to create the vaccines we are seeing this month.[1] Restaurants redesigned their stores, and partnered with delivery apps.

Content providers released Wonder Woman 1984 in theaters and HBO Max on the same day,[2] while conferences and trade shows went entirely virtual. Salons and spas were closed, or offered limited services between plexiglass.

Airlines and hotels extended loyalty program membership into 2021. Many retailers worked to create curbside pickup, touchless delivery and safe stores. And the travel, lodging and restaurant industries are fighting for their lives.

Advertisers rose to meet and overcome these hurdles in a number of creative ways. Some companies furloughed employees, and are now evaluating how to bring those individuals back.

Other brands are debating whether to require all of their employees receive a vaccine before coming back into the office. As we enthusiastically welcome in a new year and breathe a collective sigh of relief that better times are ahead, we reflect on the developments in media and advertising trends we expect to see in 2021.

1. Bring your checkbook when visiting the FTC.

Unsurprisingly, the Federal Trade Commission and the U.S. Food and Drug Administration were active in their enforcement last year.

Hundreds of companies made claims that their products and services treated, cured, prevented or reduced the spread or risk of COVID-19.[3] The FTC — alone and in conjunction with the FDA — sent warning letters to companies that were allegedly selling products such as supplements, silicone face brushes and intravenous therapies, with deceptive or scientifically unsupported claims about their ability to treat or cure the virus.[4]

The FTC also sent warning letters to multilevel marketers regarding health and earnings claims they or their participants were making related to COVID-19.[5] The letters advise the companies to cease making these claims and instruct recipients to notify the FTC within 48 hours of the actions taken to address the agency's concerns; otherwise, the FTC warned it would seek injunctions or orders requiring the companies to refund money to consumers.[6]

Some of these deceptive claims disappeared from the market, but the FTC did file a number of cases, including against a company, Golden Sunrise Nutraceuical Inc., for deceptively advertising a \$23,000 treatment plan as a scientifically proven way to treat COVID-19.[7]



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Also, at the FTC's request, a federal court issued a temporary restraining order against 25 counterfeit websites that allegedly played on consumers' pandemic fears to trick them into paying for cleaning products like Clorox that were never delivered.[8] Many of these cases are still pending, and we can expect to see additional fines and settlements this year.

These sorts of advertising claims are low hanging fruit for regulators regardless of who is in the White House, but the incoming president-elect will likely shape the FTC into a different entity than the one we saw during the Trump administration.

In particular, we expect a material and significant uptick in enforcement with regard to consumer privacy. This should come as no surprise, given two current FTC commissioners — Democrats Rohit Chopra and Rebecca Kelly Slaughter — previously made vocal statements about the direction they would like to see the FTC take.[9]

Notably, they have expressed skepticism toward the FTC's general position that consumers benefit from targeted advertising, so long as they have notice and choice about the kind of data that advertisers are sharing, and have argued that consumers do not meaningfully consent to this model of behavioral advertising, which they liken to mass surveillance.[10]

This is coming to a head in the FTC's recent investigations of various social media platforms and video streaming providers.[11] We would not be surprised if the FTC set its sights beyond the bigger platforms that have long served as targets. No matter who the next chairperson is, the balance of power will shift at the FTC and we will undoubtedly see changes.

This is all under a backdrop of the FTC's lack of funding to investigate and enforce its laws.[12] Notably, the FTC took in \$39 million below what it had expected, during the budget year that ended Sept. 30, and the current budget proposal for 2021 is to keep the FTC's funding at the same level as 2020.[13]

This will likely hamstring the FTC in its efforts to balance its continued enforcement against companies making unsubstantiated COVID-19-related claims, and the agency's desire to prioritize enforcement against companies it believes are not adequately protective of consumers' privacy.

2. California's privacy law is a moving target. Get ready, or get out of the way.

As most everyone knows, the California Consumer Privacy Act, or CCPA, went into effect on Jan. 1, 2020. Unfortunately, businesses were left waiting for many months for the California attorney general's final implementing regulations, which provide additional guidance on how to implement the CCPA's requirements.

In fact, the final implementing regulations, which took effect in August, have been modified several times. Public comments to the fourth and most recent round were able to be submitted until Dec. 28.[14]

One of the elements that is still being examined is the implementation of the "do not sell my personal information" requirement, which allows California consumers to opt out of the sale (i.e., sharing for monetary or other valuable consideration) of their personal information to third parties.[15]

To date there has been very little guidance regarding what types of sharing constitute a sale. Many advertisers took a conservative approach, assuming that sharing with third parties for certain advertising purposes would be viewed as a sale.

Accordingly, businesses spent the past year revising template agreements, or renegotiating existing ones, and implementing tools such as the Interactive Advertising Bureau's CCPA compliance framework in order to ensure compliance with this CCPA requirement. Enter the California Privacy Rights Act, or CPRA.

On Sept. 25, 2019, the group behind the CCPA filed a new ballot initiative that amends and builds on the CCPA. The final version that appeared on the November 2020 ballot was known as the California Privacy Rights Act, or Proposition 24, and was approved by a majority of voters.

The CPRA provides for new and enhanced privacy rights and requirements for businesses; in particular, it expands the CCPA's "do not sell" right to sale or sharing of personal information.

"Sharing" under the CPRA means sharing, renting, releasing, disclosing, disseminating, making available, transferring or otherwise communicating a consumer's personal information to a third party for cross-context behavioral advertising, whether for monetary or other valuable consideration.[16]

This means that while there may have been some ambiguity about sharing this information for these purposes under the CCPA, the CPRA clearly gives consumers the right to opt out of this type of sharing. The effective date of the CPRA is Jan. 1, 2023; once operative, the CPRA will apply only to personal information collected after Jan. 1, 2022.

The advertising industry will undoubtedly be developing new tools in the next two years to be ready for the CPRA's new requirements with regard to selling and sharing.

In the wake of updates to California's privacy law, and the enactment of other state privacy laws, it is possible Congress

will take up a federal privacy law.

Andrew Smith, director of the FTC's Bureau of Consumer Protection, was interviewed on CNBC's Squawk Alley recently, and was asked whether he supported a federal privacy law.[17]

Although he was unwilling to take a position, he did acknowledge that FTC commissioners have previously testified before Congress in support of federal privacy legislation. And while none of the data privacy laws proposed by legislators in the past few years gained traction, contact tracing during the COVID-19 pandemic has led to calls from companies and privacy professionals for a consistent stance for compliance.

3. Keep an eye on tweets, takedowns and safe harbor laws.

Along with a new administration in the White House, the 117th U.S. Congress will have their hands full with pending bills.

In particular, there are two new bills affecting advertisers and media companies: revisions to Section 230 of the Communications Decency Act, or CDA, and updates to the takedown provisions of the Digital Millennium Copyright Act.

Section 230 of the Communications Decency Act was passed when the internet was in its infancy, well before TikTok, Facebook, Twitter or even Google.[18] It harkens back to the days of dial-up modems, Napster and Limewire, and a CD arriving in the mail with 30 free hours of AOL.

While Congress considered updates to Section 230 several times over the past few decades, a presidential tweet in 2020 kicked the discussion into hyperdrive.[19] The original law became a key focus for advertisers in 2006, when Subway filed a lawsuit against Quiznos over certain television commercials and videos.[20]

In that case, Quiznos invited consumers to submit contest videos comparing Subway and Quiznos sandwiches.[21] Video-sharing site iFilm, a co-sponsor of the Quiznos contest, published the entries on its website for public viewing.[22]

Among other issues, the court was asked to evaluate whether Quiznos would receive immunity from liability pursuant to Section 230 of the CDA for false advertising related to the videos submitted by contest entrants.[23]

The court concluded that it was a question for the jury to evaluate whether Quiznos enjoyed CDA immunity, but acknowledged there were several factors tilting against Quiznos.[24] The parties ultimately settled without an answer to this question.[25]

This year, many bills were introduced to limit the protections of Section 230. After President Donald Trump's tweets peddling conspiracy theories about voter fraud were flagged as potentially misleading in May 2020, Trump signed an executive order attempting to curb some of Section 230's protections.[26]

The order asserts that media companies that edit content, apart from restricting posts that are violent, obscene or harassing, are engaged in editorial conduct and forfeit the safe harbor granted by Section 230.[27]

Trump's order was met with immediate and intense criticism. A number of lawsuits are pending, including one that claims the order creates a chilling effect on free speech because it puts all hosts of third-party content "on notice that content moderation decisions with which the government disagrees could produce penalties and retributive actions, including stripping them of Section 230's protections." [28]

While Section 230 safe harbors are currently being enjoyed by social media platforms in the president's crosshairs, the elimination of this safe harbor could foreclose advertisers from asserting Quiznos-style defenses in false advertising claims when those claims involve user-generated content involving competitive products.

Next, the Senate Judiciary Committee's Intellectual Property Panel is considering revising the Digital Millennium Copyright Act as part of an overhaul of the Copyright Act.[29]

Sen. Thom Tillis, R-N.C., chairman of the Senate Judiciary Subcommittee on Intellectual Property, is leading the charge by evaluating how to manage safe harbor for big versus small entities, and evaluating monitoring and takedown requirements for each type of entity.[30]

Tillis released a draft bill right before Christmas, the Digital Copyright Act of 2021, which proposes lowering the knowledge requirement for online service providers to take advantage of safe harbors, requires monitoring for infringement where that would be reasonable, and makes the register of copyrights a presidential appointee with a five-year term.[31]

The bill also adds a new section to require a copyright owner who is not the author to affix copyright management information to digital copies and to provide the author of the copyrighted work with a right of action when someone removes or alters copyright management information on digital or analog copies with the intent to conceal an author's attribution information.

Finally, it allows certain claims to be adjudicated by a copyright small claims tribunal for easier, quicker and cheaper resolution.[32] Public comment on this new bill is open until March 5, 2021.

4. Stream content legally, or face 10 years in prison.

During the pandemic, consumers have had more time than ever before to watch movies, listen to music and podcasts, and play games via streaming services.

Deloitte conducted a survey in May 2020 to see if and how media consumption has changed during this extended time at home.[33] The results revealed a growing frustration in trying to navigate different streaming options, while trying to manage costs at a time when many reported a decrease in household income.[34]

Although this subscription fatigue led to increased cancellations, the average streamer now pays for more services than ever. Subscribers now have an average of four paid streaming video subscriptions, up from three before the pandemic. [35]

One of the biggest challenges at the moment is figuring out how to retain customers once a free trial or discounted rate expires. While subscription-based options will continue, there will likely be an uptick in free ad-supported streaming in the future and post pandemic.

We also cannot discount the fact that once we are on the other side of this pandemic, consumers will likely turn their attention outside and to other activities that have been barred in 2020.

We all know people who subscribe to Netflix and exchange their logins with friends or family members who subscribe to Hulu. While most subscription services have tried to combat this behavior with multiple device subscriptions and by terminating users who violate a platform's terms of service, a new law tucked deep inside the latest COVID-19 relief bill adds a criminal component that could be used as a sword against this conduct.

The government spending bill that Congress recently passed, and the president signed after Christmas, makes the illegal streaming of copyrighted material a felony.[36] While these measures received little scrutiny before the bill was signed, they could have profound consequences.

The part of the law that addresses felony streaming provides for penalties of up to 10 years in prison, and primarily targets those who pirate for commercial gain rather than individual users.[37] It will be interesting to see the scope of enforcement to combat illegal streaming, with very little public comment on this new law.

Hopefully, sharing grandma's Disney+ subscription won't be the focus of law enforcement.

5. Legalization and enforcement of cannabis spread nationwide.

Cannabis marketing has seen a speedy shift to the digital realm to meet consumers where they are (i.e., home) as a result of the pandemic.

Historically, digital advertising for cannabis products was hindered by platforms like Facebook and Google, which reject all cannabis ads regardless of the legality of the products in the jurisdictions in which the ads are served,[38] and most marketers have accordingly relied on nondigital marketing tactics, or elected to advertise on platforms with the hope that they will not be caught.

With fewer consumers spending time in public spaces, however, the need for digital marketing and cannabis delivery services became starkly apparent this year. Cannabis businesses introduced features such as online ordering, curbside pickup and delivery, and started using programmatic advertising (e.g., display ads) to market to their consumers.

With programmatic advertising, cannabis businesses must balance regulations with business considerations such as geofencing, platforms, technologies, brand suitability and contextual relevance.[39] Additionally, as noted above, brands must exercise caution when making claims about the health benefits of CBD.

With the continued legalization and decriminalization of marijuana in new states this year, cannabis-related advertising and marketing becomes an increasingly confusing patchwork of state laws.[40]

This patchwork, coupled with cannabis companies acting like startups with little or no legal counsel, resulted in advertising claims and marketing activities that more seasoned industries would have known to avoid, such as making claims that their products treat serious health conditions.

In December 2020, the FTC announced the first law enforcement crackdown on deceptively marketed CBD products, taking action against six sellers making unsupported claims about the ability of their products to treat serious health conditions such as cancer and Alzheimer's disease.[41]

Several of these companies were ordered to pay monetary judgments to the agency.[42] Moreover, several cannabis companies were hit with lawsuits over their text-message marketing campaigns.[43]

When these companies, new to the litany of truth in advertising and related laws, engaged in various text message campaigns, the class action bar took notice, filing lawsuits against several companies for allegedly failing to obtain prior, express, written consent from consumers in accordance with the Telephone Consumer Protection Act.[44]

We expect to see more enforcement against cannabis manufacturers and dispensaries, as the FTC continues to monitor the claims made by these companies. As Andrew Smith warned the CBD industry, "Don't make spurious health claims that are unsupported by medical science. Otherwise, don't be surprised if you hear from the FTC." [45]

At the same time, the House recently passed a bill decriminalizing marijuana. [46] This landmark bill, coupled with statements by President-elect Joe Biden pledging to decriminalize marijuana, suggests that a federal law may be forthcoming. [47]

Importantly, such a bill will not reduce the volume of lawsuits brought by the class action bar for illegal text message marketing campaigns, or the enforcement by the FTC for unsubstantiated health claims.

6. 2020's favorite F-word is force majeure.

Live events were forced to metamorphosize to adjust to our new couch and kitchen table-based reality.

Concerts and sporting events — the Tokyo Olympics, NBA season and Coachella — were affected in ways few would have guessed, with cancellations, postponements and events that were wholly reinvented to take place online.

Recently, the University of Missouri dropped out of the NCAA Music City Bowl after an uptick in COVID-19 cases among its players and staff. [48] Without live events, brands missed out on live activations in stadiums on which they relied to engage with consumers.

Not all is lost, however, as companies pivoted to activations by mail and through video-streaming platforms. [49]

Additionally, esports, streaming concerts and other live stream events grew in popularity over the past year. Twitch Interactive Inc. reported nearly 210,000 more average concurrent viewers in May 2020 compared to February 2020. [50] Formula 1 launched the F1 Esports Virtual Grand Prix series this summer. [51]

As fans of traditional sports turn in droves to online gaming, brands scrambled to get in on the action. Sponsorships — league, team and individual player — and digital activations are a few ways in which brands kept themselves relevant to consumers. Even when live events are safe for mass consumption, the trend of online events will likely continue due to their convenience and accessibility.

To help engage with consumers during the pandemic, brands successfully pivoted to take advantage of these online and modified events by deploying new marketing dollars into esports, FanDuel and DraftKings, and through contract negotiation, evaluation of force majeure provisions, and in some cases, wholesale termination of long-standing sponsorship relationships.

Force majeure has been a lightning rod, as advertisers clamber to interpret their provisions in a favorable way. In rare circumstances, force majeure clauses specifically contemplated pandemics or epidemics, while others contained vague language about government action that was interpreted as a catchall for unanticipated circumstances.

Depending on how the clause is written, it may excuse both parties' or one party's nonperformance, or may list different qualifying events for each party. This has spilled over into litigation brought by businesses and frustrated consumers seeking resolution that we can expect to continue for the next few years. [52]

For new event sponsorships, partnership agreements, talent agreements with endorsers, and even traditional advertising and marketing contracts, we are seeing an increased scrutiny in force majeure clauses.

In particular, parties are fighting over what constitutes a force majeure event, what kinds of evidence are required to substantiate a force majeure event, and whether the ongoing COVID-19 pandemic might affect the performance of a contract executed during this pandemic.

Parties are also negotiating the impact of the overall contract when a force majeure event is triggered. While previous force majeure provisions were previously considered proforma or boilerplate, we now expect vigorous negotiation of these provisions to persist in 2021.

Conclusion

The pandemic created an entirely new vocabulary for many of us. The "new normal," "omnichannel retailers," "N-95," "stay-at-home stocks," "lockdown," "the 'rona," and "flatten the curve" are just a handful of words and phrases in our new vernacular.

We learned how to moderate Zoom calls, peaking into our colleagues makeshift home offices, with plenty of dog bombs or kid bombs making limited, special appearances into our work lives.

We have become home-schoolers, chefs and house managers overnight. We will see the distribution of a vaccine, and hopefully a safe return to the office, the skies and in-person visits with family and friends.

An incoming Biden administration will reshape the regulatory enforcement regime, but will also take notes from the

Trump administration to pass new legislation affecting advertisers. In short, we believe this year will be a year of change. Change for the good, and change for the better.

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