Katten

KATTISON AVENUE

Advertising Law Insights From Madison Avenue and Beyond

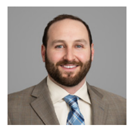
Spring 2023 | Issue 10

Letter From the Editor

The warmer weather and spring blooms aren't the only cause for celebration. We are also celebrating our 10th issue of Kattison Avenue. In this issue, we take a look at a wide range of advertising issues involving intellectual property, digital assets, generative AI and advertising regulation. We start this issue with a piece from partner Michael Justus, who discusses the implications of registering trademarks for digital assets such as non-fungible tokens (NFTs) and virtual goods. He emphasizes the importance of having a genuine intention to use the trademark in commerce. I follow Mike with a timely piece on the latest in Bored Ape Yacht Club's battle against copycats, including a recent decision siding with BAYC's parent on claims of false designation of origin and cybersquatting. And even though we're also wary of yet another ChatGPT story, there's no denying that generative AI is creating a frenzy of activity in creative and intellectual property circles. Here London senior associate Sarah Simpson and associate Tegan Miller-McCormack provide an overview of how the UK is responding to issues raised by ChatGPT. Partner Chris Cole then shares an update about how the National Advertising Division is now accepting "implied" claims in "short-form" advertising, such as social media posts. Chris offers practical guidance for advertisers on how to avoid misleading consumers. Finally, Sarah, Tegan and Chris examine the intersection of fashion, advertising and ESG, addressing challenges faced by fashion brands when it comes to sustainability claims. Thank you for reading and don't hesitate to reach out with questions about the latest developments in advertising law.

Jessica G. Kraver

Do You Really Intend to Offer NFTs, Digital Collectibles and Virtual Goods? If Not, No Trademark



By Michael Justus

The NFT explosion has led to a "gold rush" of thousands of new US trademark applications covering NFT-based digital files, digital collectibles and the like.

There are offensive and defensive motivations for brand owners to join in the NFT trademark frenzy. Offensively, they may see NFTs as a legitimate business opportunity for which they have concrete plans to capitalize. Defensively, brand owners may be concerned about preventing unscrupulous third parties from using or registering brands without authorization. But are the owners of those trademark applications actually using the marks for those items, or have a *bona fide* intent to do so? If not, the trademark filings may not be worth the paper they're written on.

At the time of filing a US trademark application, you must either: (a) already be using the mark in US commerce for the listed goods and services or (b) possess a *bona fide* intent to use the mark for such

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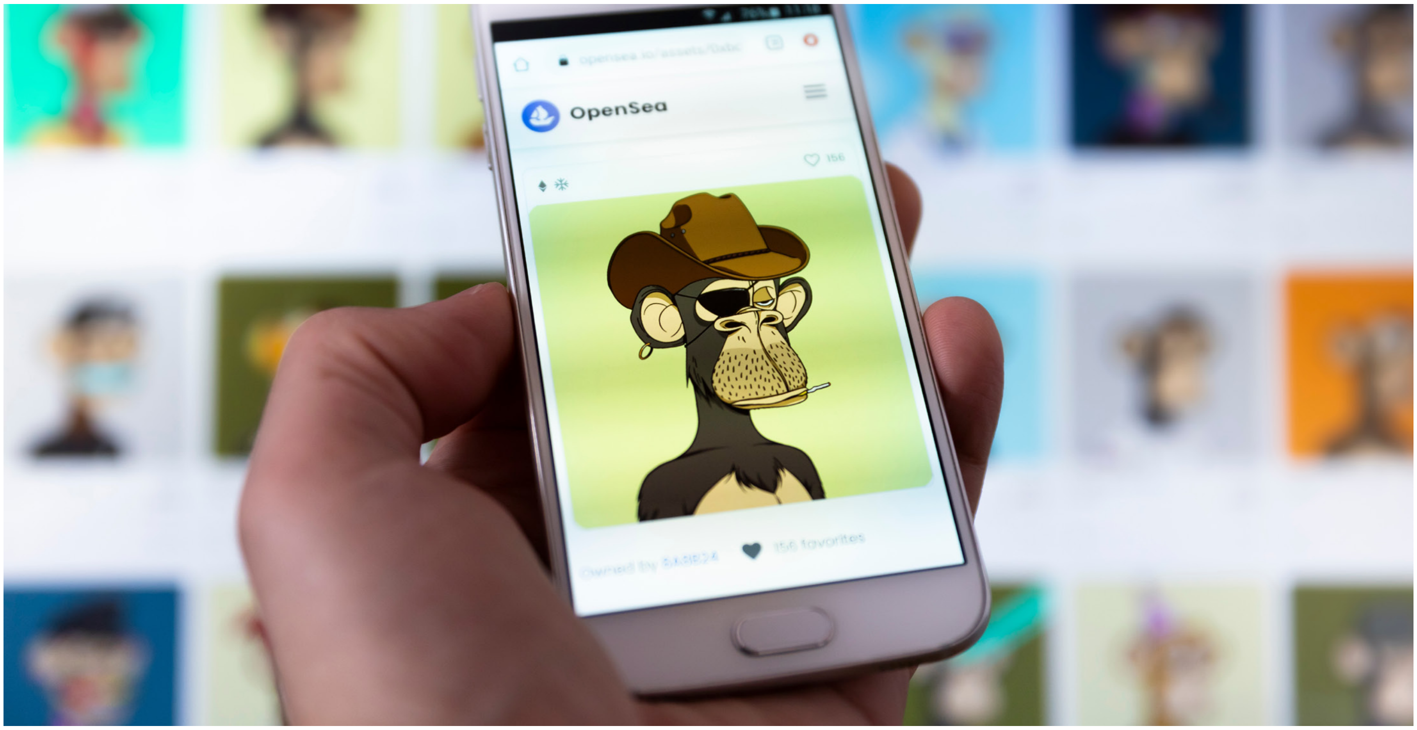
products or services. Absent use or intent to use, the application is void. 15 U.S.C. § 1051; *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2008-09 (TTAB 2015) (application void for lack of bona fide intent to use).

Third parties can challenge trademark applications or registrations for lack of use or lack of *bona fide* intent. In such challenges, the Trademark Trial and Appeal Board (TTAB) will look for objective evidence of use or a firm and demonstrable intent to use the mark for the covered products or services. Some TTAB cases have required *documentary* evidence of plans to use the mark (i.e., a big idea in one's head may not count). *See, e.g., Swiss Grill Ltd.*, 115 USPQ2d at 2008-09. Certainly, a purely "defensive" trademark application — with no use or intent to use, but rather only the intent to block third parties from registering the mark — is insufficient under US law. Likewise, a purely opportunistic trademark application to "plant a flag" in case the applicant may someday decide to offer the listed products or services — absent *bona fide* intent to use — is insufficient.

Given the intense "gold rush" of NFT trademark filings and the unique challenges of actually entering the NFT ecosystem, it seems likely that use and intent-to-use challenges will follow. At the time of writing, we did not locate any reported TTAB decisions addressing lack of use or intent to use for trademark applications covering NFT products and services. But that is likely to change — and soon.

For more content on NFTs, check out this recent article on NFTs and the Enduring Allure of Digital Collectibles.

This article first appeared April 20, on katten.com as part of a special NFT Thought Leadership Series.



Bored Ape Yacht Club NFT Drama Isn't Boring At All

By Jessica Kraver

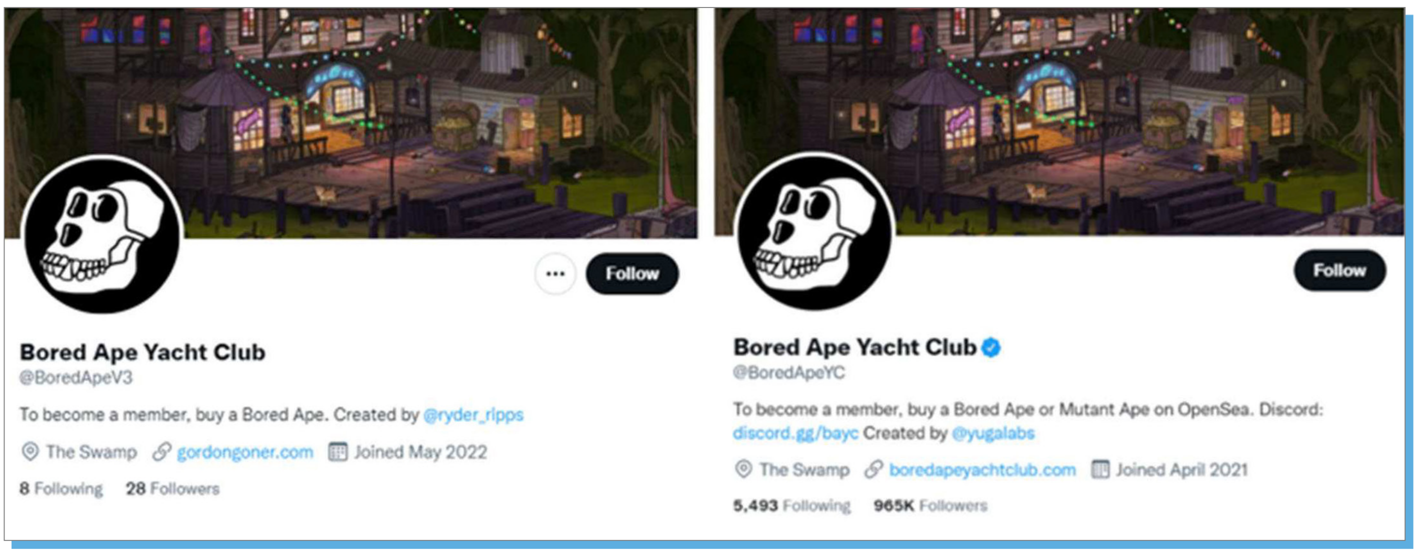
NFTs are a new medium that embodies traditional forms of intellectual property, including trademarks and copyrights. NFT creators can be simultaneously accused of infringing both trademark and copyright rights. In 2021, Yuga Labs, Inc. (Yuga Labs) launched a collection of NFTs featuring graphic images of apes — known as the Bored Ape Yacht Club (BAYC). The collection garnered over $2 billion in sales, finding fans among high-profile celebrities and prominent consumer brands. Part of what makes the Bored Ape NFTs so coveted is their rarity. There are only 10,000 unique Bored Ape NFTs in existence.

In June 2022, Yuga Labs filed suit against "conceptual artists" Ryder Ripps and Jeremy Cahen, alleging that their knock-off NFT collection — the "RR/BAYC" NFTs — infringed Yuga Labs' trademark rights in its BORED APE YACHT CLUB, BAYC and BORED APE marks, as well as other logo marks. *See Yuga Labs, Inc. v. Ripps, et al.*, C.D. Cal., No. 2:22-cv-04355. Interestingly, when filing the complaint, Yuga Labs asserted a claim for, among other things, common law trademark infringement (as opposed to a federal infringement claim under the Lanham Act). Fast forward, and the relationship between Yuga Labs and the defendants has become so acrimonious that Jeremy Cahen recently opposed 10 different Yuga Labs trademark applications for BORED APE YACHT CLUB, BAYC, BA YC, BA YC BORED APE YACHT CLUB and the Yuga Labs logo before the US Patent and Trademark Office Trademark Trial and Appeal Board (TTAB). *See* TTAB Oppn. No. 91283323. Cahen argued that, under the Yuga Labs Terms and Conditions, Yuga Labs relinquished its rights to the trademarks by providing purchasers of the Bored Ape NFTs "all rights" associated with the applicable NFT, which, claimed Cahen, includes any trademark rights therein that Yuga Labs may have. Cahen also alleged, among other things, that Yuga Labs did not have a *bona fide* intent to use the applied-for marks in commerce when filing the applications because the Bored Ape NFTs should be classified as securities under applicable federal securities laws.

On March 21, Yuga Labs filed a motion to suspend the opposition proceeding pending the outcome of the civil litigation between Yuga Labs, Cahen and Ripps described above. The TTAB granted the motion on April 20.

As the civil litigation between the parties progressed last year, the defendants filed an answer and asserted various counterclaims against Yuga Labs last December. The second counterclaim sought a declaratory judgment that Yuga Labs is not entitled to copyright protection in the BAYC ape images because each image is "of an anthropomorphized ape cartoon that includes certain traits that are programmatically assembled with a computer algorithm." The defendants contend that there are no copyrights in the BAYC images "to the extent that they were not created by a human."

While the Central District of California denied the artists' counterclaim for a declaratory judgment of no copyright on March 17, the counterclaim does raise the timely hot topic of copyright protection in generative artificial intelligence (AI). improper takedown notices under the Digital Millennium Copyright Act. In granting Yuga Labs summary judgment on its claim for false designation of origin under the Lanham Act, the Court issued a significant finding, relying on the recent decision in *Hermes International v. Rothschild*, 590 F.Supp. 3d 647, 655 (S.D.N.Y. 2022). Importantly, the Court concluded that "although NFTs are virtual goods, they are, in fact, goods for purposes of the Lanham Act," thereby rejecting the defendants' position that NFTs should be treated as unregistered securities. The Court also determined that, despite the defendants' argument that Yuga Labs transferred "all rights" to purchasers of the Bored Ape NFTs under the Yuga Labs Terms and Conditions, Yuga only grants each BAYC NFT holder a copyright license, not a trademark license.



Under a different set of facts, if the imagery underlying the BAYC NFTs had unquestionably been generated exclusively by AI tools, the case could have presented a unique opportunity for a ruling on this landmark issue.

On April 21, the Court granted Yuga Labs' motion for summary judgment on its causes of action for false designation of origin and cybersquatting. The court also awarded Yuga Labs summary judgment on the defendants' sole surviving counterclaim alleging that Yuga Labs knowingly and materially misrepresented that the RR/BAYC NFTs infringed Yuga Labs' copyright by filing

In light of the fact that the Central District of California held that Yuga Labs owns the various trademarks that are the subject of the pending opposition before the TTAB, and that those marks are valid and protectable, it is likely that Cahen's opposition will likewise fail. We will be watching this case closely to see if the defendants appeal the summary judgment decision, as well as the determination of damages to be calculated at trial.

This article is part of a [Katten NFT Thought Leadership series on katten.com](katten.com).

Chat GPT: Let's Chat About IP and DP in the UK


By Sarah Simpson and Tegan Miller-McCormack

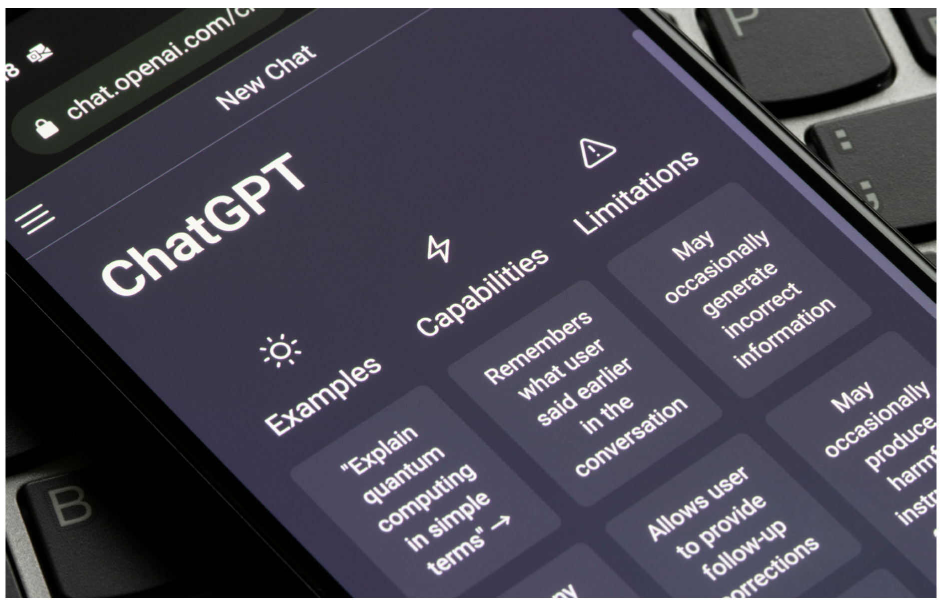
Love it or hate it, artificial intelligence, and particularly ChatGPT, has flooded the news in recent months. Whether you are a lover or a hater of artificial intelligence, the frenzy around ChatGPT has brought with it the reality that artificial intelligence is no longer for use by a select few but a tool sure to become more prevalent in our everyday lives. With that in mind, it is crucial to understand how artificial intelligence holds up in a virtual world within a legal framework developed to protect individuals' intellectual property and personal data in the physical realm.

ChatGPT and intellectual property

ChatGPT is an artificial intelligence chatbot developed by OpenAI, which has been trained and built on large language models (currently GPT-4), which allows users to ask questions or make requests of ChatGPT in return for human-like answers. GPT-4 (and other language models) uses data from books, websites and articles to provide an answer.

While there is widespread adoption of ChatGPT work product, important questions remain about information accuracy, ethics and societal connotations. For example, in academia, the International Baccalaureate (IB), a global leader in international education, gave the green light on using the software, accepting that artificial intelligence will be part of everyday life. The IB did so because it does not regard any work produced by these tools to belong to the students using it, and any use of the tools should be quoted and referenced. Such use does not raise intellectual property concerns under English law, as the use by students is private and non-commercial, meaning it is an exempt activity under the English Copyright, Designs and Patents Act 1988 (CDPA). However, it is interesting to note that the IB regards the author, and subsequently the first owner, of the work to be the chatbot rather than the student operating it.

Beyond academia, what are the implications for users of ChatGPT and other chatbots in commercial settings? There are copious TikTok hacks showing how to talk to ChatGPT to optimize its output for use at work. For example, marketing managers can ask ChatGPT to write a social media post taking into account engagement for their client. We have to ask, though, would the marketing manager be infringing copyright at any point by doing so? What if a music artist gets writer's block and asks ChatGPT to write a song, then the artist goes on to perform it for money? Who owns that copyright? Is copyright infringed at any point? If so, who infringes it?

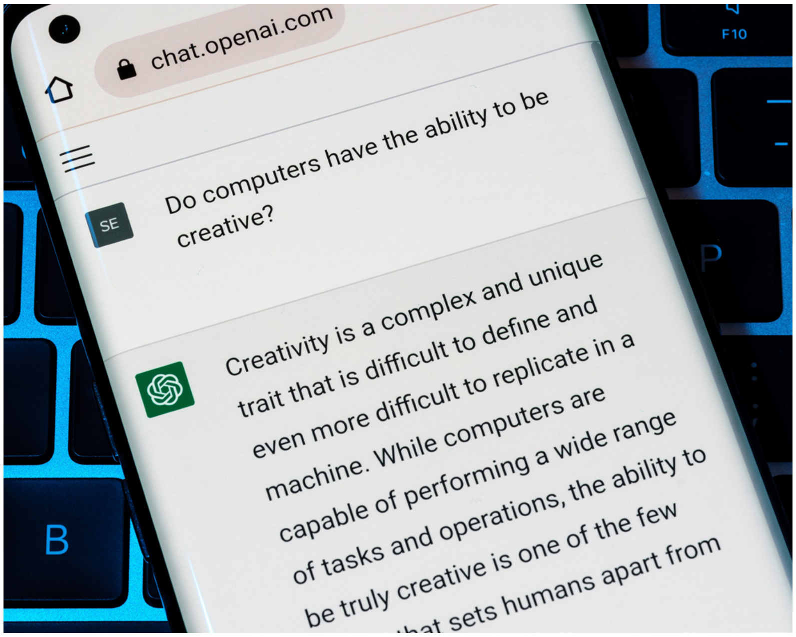


Source material

ChatGPT relies on source material for the language model and training to provide its output. This source material may be subject to certain intellectual property rights and therefore be legally protected. However, if ChatGPT is not directly copying or reproducing the source material but is simply deriving inspiration or learning from such material, can it be alleged to infringe on the intellectual property held in the source material? Some generative AI companies, such as Stable Diffusion and Midjourney, are facing legal challenges in the US by artists claiming that the AI tools have been trained to use images without the consent of their owners; these tools create images from simple text instructions by analyzing existing images including illustrations, artwork, and photographs.

Following a consultation into AI and intellectual property, the UK Intellectual Property Office (UK IPO) proposed a new exception for copyright law in June 2022. Specifically, where text and data mining systems extract data and copy works for any purpose (without a license), it would not constitute copyright infringement (TDM exception). There would be no option to allow rights holders to opt out of this exception.

However, following significant backlash from creative industries, UK government representatives have publicly suggested that the proposed TDM exception will not proceed and, instead, further engagement with the creative industry is anticipated. The Design and Artists Copyright Society, which represents



visual artists, has warned that "this change will have far-reaching detrimental consequences" and has urged the Government to "look again at how the policy objectives" of supporting AI-driven technologies "can be better met without undermining creators' rights." Given the government's intention to become a hub for digital innovation and to have an attractive regulatory framework for the industry to thrive, it is likely that we will see further developments in the law favoring AI technologies, which may be of concern to rights-holders who will want to ensure that their intellectual property is protected.

Ownership

Section 9(3) of the CDPA states, "*in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.*" This is supplemented by section 178 of the CDPA, which defines a computer-generated work as one that "*is generated by computer in circumstances such that there is no human author of the work.*" The "*person by whom the arrangements necessary for the creation of the work are undertaken,*" is still rather ambiguous and it is unclear whether the owner is the programmer, the user or both.

We, therefore, asked ChatGPT its opinion on this matter: "*Who owns the copyright of content generated by ChatGPT and on what basis?*" ChatGPT gave the following response: "*The ownership of the copyright… would depend on the specific terms and conditions agreed upon by the user and OpenAI… OpenAI would likely retain the copyright to the output generated by ChatGPT as it is the owner of the technology and the data used to train the language model. However, the specific terms of use and license agreements could vary depending on the intended use of the output and the agreement between OpenAI and the user.*"

As the platform is currently configured, each user is subject to the general terms of use. The subject of ownership of works is narrowly addressed by OpenAI's sharing and publication policy. The policy discusses "content co-authored with the OpenAI API." It states that creators wishing to publish their written content created in part with the OpenAI API have permission to do so under certain conditions, such as that the "*role of AI in formulating the content is clearly disclosed in a way that no reader could possibly miss.*"

This still raises questions about whether creating content such as marketing posts fall under this provision, and if so, does OpenAI regard this as co-authored? Moreover, if the output of ChatGPT is not edited at all, is this still co-authored? While it is likely that the intention of discussing co-authorship also implies co-ownership, the terms of use of ChatGPT are still unclear as to who owns what in legal terms. As the technology develops and the extent of ChatGPT's use in the ordinary course of business expands, OpenAI may release more extensive terms. Alternatively, perhaps the platform will implement a paywall with terms assigning ownership.

Infringement

Another matter to consider is if ChatGPT created an original work for one user (User 1) but then went on to generate the same work for another (User 2). Would User 1 be able to claim copyright infringement? Given that to establish copyright infringement, User 1 would need to prove copying and a causal link demonstrating a connection between the two works, it may be difficult for User 1 to prove infringement against User 2 if User 2 did not knowingly or unconsciously, copy their work. This still raises issues that will need to be ironed out either by the ChatGPT terms of use or by legislation, as copying of the work still may have ramifications for User 1 that would need to be addressed.

ChatGPT and data protection

ChatGPT raises various issues and questions with respect to intellectual property considerations and creates a host of concerns regarding the protection of personal data. While ChatGPT does not provide any personal data, there is a risk that it could, and there is the risk that it is still processing personal data in its training bank. In March 2023, Italy's data protection authority, Garante per la protezione dei dati personali (Garante), banned ChatGPT over data privacy concerns finding that the platform violated various articles of the GDPR, such as having no lawful basis for processing and no age verification measures. Garante has since informed ChatGPT that it can operate in Italy if certain conditions are met.

This month, the European Data Protection Board also launched a task force to investigate ChatGPT "to foster cooperation and to exchange information on possible enforcement actions conducted by data protection authorities." While countries in the EU are considering bans or EU-wide regulation, the UK Information Commissioner's Office put together "eight questions that developers and users need to ask" when it comes to generative AI:

1. What is your lawful basis for processing personal data?
2. Are you a controller, joint controller or processor?
3. Have you prepared a Data Protection Impact Assessment?
4. How will you ensure transparency?
5. How will you mitigate security risks?
6. How will you limit unnecessary processing?
7. How will you comply with individual rights requests?
8. Will you use generative AI to make solely automated decisions?

What's next?

Thousands of notable individuals, from Elon Musk to Steve Wozniak, signed an open letter to call on AI labs to immediately pause the training of AI systems more powerful than GPT-4 for at least six months. The letter states that "*powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable.*"

Indeed, data privacy concerns and intellectual property issues raised are the tips of the iceberg. Technology is developing at an exponential rate and, at the same time, is creating a web of legal challenges. Generative AI is a space that needs regulation and codes of practice. While the government is focused on the need to make legislative changes, the pace at which those changes are implemented is often much slower than technological development. It is likely, therefore, that many of these issues will be put to the test and left to the courts to determine how generative AI fits within our current protections.

Hayley Rabet, a Katten Muchin Rosenman UK LLP trainee, contributed to this article.

NAD Will Now Accept Implied Claims in SWIFT

By Christopher Cole

NAD has revised its SWIFT challenge rules to accept simple "implied" claims. The cases, for now, must still involve a single issue, and the implied claims must be very obvious, akin to "necessary implication" matters.

If you plumb the NAD case report archives from its early days, you may be surprised at the brevity of the written decisions. The case reports are often less than a page in length and include a bare-bones recitation of the issues and findings. At the time, this was not satisfying to many advertisers, who clamored for more rigorous analysis and guidance. Over time, NAD decisions became longer and more lawyerly and, consequently, took longer to issue. The growing time lag between challenge and decision became a sore spot.

In an effort to address these concerns, in 2020, NAD launched a truncated case track known as "SWIFT," which rendered decisions on cases involving "simple" claims within 20 business days of filing.

Until recently, NAD's rules had limited SWIFT challenges to cases involving express claims falling into three categories:

1. Cases involving "the prominence or sufficiency of disclosures including disclosure issues in influencer marketing, native advertising, and incentivized reviews;"
2. "Misleading pricing and sales claims;"
3. "Misleading express claims that do not require review of complex evidence or substantiation such as clinical or technical testing or consumer perception evidence."

The third category proved to be the most controversial. And many parties took advantage of a procedural opportunity to challenge jurisdiction.

While the rule said the SWIFT track was limited to "express claims" and NAD typically declined SWIFT treatment for challenges of implied claims, the rule has now been expanded to include both "Misleading express and implied claims." NAD announced this change in an online bulletin. Many advertisers and counsel had not seen this announcement.

The change proposed by NAD will reduce the number of challenges to SWIFT jurisdiction involving whether the challenged claim was "express" or "implied."

In a recent public meeting, NAD Director Laura Brett suggested that the only implied claims accepted into SWIFT will be those that are "necessarily implied," which she characterized as implications akin to "you know it when you see it." However, under the relevant case law, "necessary implication" claims are considered a subset of express claims in which, when considering the advertisement in its entirety, "the audience would recognize the claim as readily as if it had been explicitly stated." Moreover, "a message can only be literally false if it is unambiguous." So, if the claim reasonably implies more than one meaning, it is ambiguous and cannot be "necessarily implied." For this reason, necessary implication cases are rare, and indeed, one would expect SWIFT cases falling into the implied track to be similarly rare.

A major concern is that NAD's preliminary, jurisdictional decision regarding whether or not to accept a challenge into

SWIFT Fast Track is effectively outcome-determinative and may not be appealed. In virtually every published SWIFT decision, the advertiser either withdrew the claim or lost. Advertisers who unsuccessfully protest acceptance of their matter into the SWIFT timeline are almost certainly going to lose on the merits. They cannot appeal the NAD's determination to include their matter in SWIFT.

It is no wonder then that challengers find SWIFT attractive. SWIFT already constitutes nearly 20 percent of NAD's docket. NAD's decision to broaden SWIFT to include implied claims will likely increase that proportion.

Due to the inclusion of implied claims into SWIFT, it seems likely that the percentage of SWIFT cases will grow. Using SWIFT presents the challenger with a faster timeline and procedural advantages that are not present in a standard challenge. This will further advantage challengers, who already enjoy a very significant win rate. However, it could incentivize more challenges, while reducing the thought and analysis embodied in the traditional track.

A good example of the complexities inherent in the new SWIFT process involves comparing two recent SWIFT decisions, and their subsequent appeals: *Molson Coors* (Case #7183) and *Verizon* (Case #7171).

In the *Molson Coors* case, NAD concluded that an advertisement featuring fictional athletes pouring generic, "Extremely Light" beer on their heads, constituted denigration of Michelob Ultra as tasting like water. NARB affirmed this finding, despite no record evidence that the beer can in the ad resembled the Michelob Ultra can.

In the *Verizon* case, NAD recommended discontinuance of an ad featuring Cicely Strong and Paul Giamatti as Scrooge complaining that his phone could "barely get reception," followed by an appeal to subscribe to Verizon mobile service. NAD concluded that the ad was also comparative: "despite the comically negative demeanor of Scrooge, the commercial conveyed the message that Verizon offers superior network reception than other wireless carriers." On appeal, however, NARB disagreed and reversed, holding that the fanciful setting and fleeting nature of the challenged claim meant the statement was mere puffery and not a claim at all.

It is hard to reconcile the two cases. Factually, each case involved a strawman comparison of the advertised product to an unnamed competitor. However, in *Molson Coors*, the NAD and NARB found that the fictional comparison could be construed as a comparison between two real products. While, in Verizon, NARB concluded that there was no such claim conveyed. The NARB's conflicting decisions reflect the difficulty in applying the doctrine of puffery, essentially analyzing implied claims, in the SWIFT context, resulting in inconsistent self-regulatory guidance. Alas, this may be the future we can expect under SWIFT.

A version of this article first appeared on March 8 on katten.com.

Save the Date

Inaugural Katten Ad Chat

May 10, Webinar

Host and Katten partner **Chris Cole** will welcome pioneering ad-industry watchdog Claire Atkin, of checkmyads.org. The two will discuss the relationship between online disinformation and advertising dollars and how companies can better monitor where their investments in digital advertising go.

More info on registration.

Spring Greens in Fashion – From Runway to Regulation

By Sarah Simpson, Tegan Miller-McCormack and Christopher Cole

From New York to London, Paris and Milan, a color that tends to make a regular resurgence on spring and summer runways is a classic fresh green. Who could forget the amazing Christian Siriano voluminous bubble gown in lime green during New York Fashion Week Spring/Summer 2022, reminding us that green shoots were well and truly on the way!?

As we look forward to the lighter nights and the official start of a London spring, it's safe to say that green is also back in vogue here, not just in the fashion world but in the legal and political world, too. With commitments to lower carbon emissions by 45 percent in 2023 and to reach net zero by 2050 in accordance with the United Nations Climate Action, the UK government and European Commission (EC) are tackling climate change head-on, with a particular focus on the fashion and retail industries.

Fashion brands from couture to mass market have answered this call to action by claiming they have reached "green targets," often using green labels to amplify this claim. As a result, brands are trying to entice shoppers with environmental, social and governance (ESG) crusades that give the appearance of implementing environmentally-friendly manufacturing lines, providing better working environments and pay for workers, and using sustainably-sourced materials. But in reality, this is not always the case.

While some consumers may have (literally) bought this, the UK Competition and Markets Authority (CMA) and EC have been skeptical for quite some time. Following the CMA's investigation into three large and high-profile UK retailers, the EC announced its "Directive on Green Claims" on March 22. Alongside the CMA and EC, consumers are becoming more environmentally conscious and savvy about such matters and are no longer naively "green."

CMA investigation

Last year the CMA said it would focus its greenwashing investigations on the fashion sector, and it is cracking down on some well-known retailers, including Asda (part of the Walmart group), as a result. The investigations are still at a relatively early stage, and the CMA has not arrived at a conclusion on whether these brands have breached their consumer protection legal obligations. If any of the brands is found to be in breach of its duties, it could face fines of up to 10 percent of its global annual turnover, amongst other penalties.

EU green claims rules

The EC's Directive on Green Claims proposed a new set of rules calling for companies to demonstrate and prove their environmental claims. This new directive attempts to protect consumers from "greenwashing," where companies inflate their sustainability statements by offering unclear and often deceptive information about their products.

Consumers are starting to lose faith in fast fashion giants that have released green collections, alleged to be misleading, and brands that make claims about their t-shirts being made from recycled plastic bottles when in reality, only one percent (or less) of the fabric is made in this way. Deceiving customers can undermine trust, which can take a short time to destroy and a lifetime to recover.

To combat this, the proposed Green Claims Directive recommends penalties including fines, confiscation of revenue of up to four percent and temporary banning of up to a year from public procurement processes and public funding, enforced by national authorities. The draft proposal also recommends that, where companies want to promote their products as being "natural," "climate neutral," or "having recycled content," they must first carry out a science-based calculation that assesses all material environmental impacts to verify that their products match these labels, or have such labels verified under an environmental labeling scheme. An accredited verifier that is independent of the company would then need to verify the claim before the company can use it in the public domain.

However, environmental campaign groups have slated the proposal as weak, with the non-governmental organization Environmental Coalition on Standards (ECOS) saying the proposal is still unclear on how it will be implemented and "too vague" to have a positive effect. Margaux Le Gallou, the program manager of ECOS, claims that the Commission "*…got so much pushback that they removed everything that was concrete, left the principles and left a scene-setting for more to come…It's too vague with too much left to later.*" Carbon Market Watch and the European consumer organization, BEUC both stated that the only way to combat the problem of "carbon neutrality" claims is to ban companies making unsubstantiated claims and/or their products entirely.

However, it is clear to see that more is being done to battle greenwashing, particularly in the fashion and retail sectors, and the CMA's actions and EC's Green Claims Directive are positive steps forward to regulating companies' ESG obligations. We'll be closely watching this space.

What should brands think about when making green claims?

Our top five tips for brands wanting to make green claims are:

1. Don't base a green claim on one aspect of your product's journey. Think it through from design to delivery. Your claim may be branded "misleading" if it doesn't take into account the product's lifecycle.
2. Have clarity in your claim and steer clear of any words that are too general and unqualified – such as "sustainable," "eco," "green," or "environmentally friendly" – unless you provide details of what those words mean.
3. Where you want to caveat or qualify any of the claims, you must make this clear to consumers. The words need to be noticeable and in close proximity to the claim so that consumers effortlessly absorb any caveats or qualifications. Small print or tiny type won't wash!
4. Where you make any comparisons as part of your claim, be sure to do so honestly, meaningfully and on a like-for-like basis.
5. Keep records of your claims, making certain that all claims are backed up by strong, reliable and current evidence that you can prove prior to making the claim.

All that's left to say is it appears that green isn't just for spring but for life!

Hayley Rabet, a trainee in the Intellectual Property practice, contributed to this advisory.

A version of this article was first distributed as a client advisory on April 4.

News to Know

Copyright Office Launches New Artificial Intelligence Initiative

On March 16, the US Copyright Office launched an initiative to examine copyright law and policy issues raised by artificial intelligence (AI), including generative AI such as ChatGPT.

The Copyright Office said in a statement, "This initiative is in direct response to the recent striking advances in generative AI technologies and their rapidly growing use by individuals and businesses. The Copyright Office has received requests from Congress and members of the public, including creators and AI users, to examine the issues raised for copyright, and it is already receiving applications for registration of works including AI-generated content."

The initiative came the same day the agency published new guidance to clarify that some AI-generated artistic works may be copyright eligible. According to the guidance, applicants have a duty to disclose the inclusion of AI-generated content in works submitted for registration. The guidance includes steps for disclosure of AI-generated content, details on how to update pending applications, and explains how to correct already registered claims.

The Copyright Office began holding public listening sessions, beginning with literary works, on April 19. Upcoming sessions and topics cover:

- Visual Works: 1 p.m.-4 p.m. ET on Tuesday, May 2
- Audiovisual Works: 1 p.m.-4 p.m. ET on Wednesday, May 17
- Music and Sound Recordings: 1 p.m.-4 p.m. ET on Wednesday, May 31

Read the guidance.

Read about the new AI initiative.

What Marketers Need to Know About the FTC's Updated Guidelines on Health Claims

Strong scientific research is needed to support marketing claims, and vague terms like 'may' are inadequate

Chris Cole, partner and chair of Katten's Advertising, Marketing and Promotions practice group, shared his thoughts with *The Wall Street Journal* on the Federal Trade Commission's (FTC) new guidance for marketers and sellers of health-related products.

The FTC's "Health Products Compliance Guidance," released in late December 2022, is an update to its 1998 guidance, "Dietary Supplements: An Advertising Guide for Industry." Among several significant changes is the new title, which reflects the FTC's intent for the guidance to have a broader reach overall health-related claims – not just for supplements. Chris noted that the new guidance is a formalization of the FTC's earlier efforts to expand the scope of its prior guidance.

"They consider anything that has some claimed benefit for human health to be a health product," Chris said. "Over the years, there's been some mission creep, the FTC has sought to apply some of the same standards to other types of products [beyond supplements]. And I think this just sort of formalizes the fact that it's going to do that."

The updated guidance expands on the level of substantiation for health-related claims, which will need to be in the form of human clinical testing that is randomized and controlled. *The Wall Street Journal* noted that some feedback has indicated that the change could be the "most significant—and controversial—piece of the updated guidance, given the additional work that brands may have to do to make claims."

"It seems [like] overkill for a lot of the more routine types of claims...and I don't know that it's really necessarily that helpful in every case," Chris told *The Wall Street Journal*, explaining that human clinical trials are very expensive and difficult to do. "The FTC has tried to impose a really draconian view here."

Read the article.

Katten's Advertising, Marketing & Promotions Practice

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