Katten

KATTISON AVENUE

Advertising Law Insights From Madison Avenue and Beyond

Fall 2023 | Issue 11

Letter From the Editor

Summer has flown by in a flash, ushering in the season of cooler weather, giving thanks and the fall edition of *Kattison Avenue*. This issue examines a variety of hot topics in the advertising industry, including "junk fees," deceptive marketing tactics known as "dark patterns," and the early impacts of artificial intelligence (AI). The edition begins with an article by associate Catherine O'Brien on the Federal Trade Commission's proposed rule to combat "junk fees," in response to the Biden administration's call for more transparent pricing in the consumer marketplace. She emphasizes that this regulation has the potential to significantly impact almost all industries. Up next is partner Michael Justus' piece on key takeaways from the bellwether AI copyright case, *Thomson Reuters Enterprise Center GmbH v. ROSS Intelligence, Inc.*, which is the first summary judgment ruling on fair use of copyrighted material to train generative AI models. This decision provides insight into how an appeals court may view generative AI copyright issues, such as registration and infringement of compilations. Then, associate Matthew Hartzler discusses motions to dismiss baseless trademark infringement claims, noting that meritless cases are not easily thrown out of court, as demonstrated by a recent lawsuit between two competing children's clothing manufacturers. Finally, associate Cynthia Martens follows up Michael's AI piece with her article on the use of generative AI to create marketing copy, trademarks or logos, and whether these tools can really replace human copywriters. We wish you a joyful and healthy holiday season. Happy reading!

Jessica G. Kraver

FTC Unveils Sweeping Rule to Tackle 'Junk Fees' and Redefine Consumer Pricing Transparency

By Catherine O'Brien

In response to the Biden administration's resounding call for more transparency in consumer pricing, the Federal Trade Commission (FTC) has unveiled a proposed rule on "junk fees," setting the stage to significantly impact the consumer marketplace. The FTC is currently soliciting public comments on this proposed rule, designed to regulate what the FTC sees as pervasive unfair and deceptive practices associated with fees that consumers pay for goods and services. The potential impact of this regulation is expected to touch virtually all industries. Comments are due by January 8, 2024.

This announcement comes just a few months after several major corporations, including some of the largest ticket sellers and resellers, joined President Biden earlier this year to express their commitment to "all-in pricing," which allows consumers to see the full price for goods or services upfront, including fees. This pledge signaled progress in the battle against so-called "junk fees,"

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otherwise known as hidden or misleading fees that plague ticket purchases, hotel bookings, utility bills and more.

Last year, the FTC received over 12,000 comments in response to a request for public input on whether a rule would help to eliminate these unfair and deceptive charges. These comments raised concerns that sellers do not advertise the total amount consumers will have to pay and only disclose fees after consumers are well into purchasing transactions, hampering consumers' ability to engage in informed price comparisons. The comments further underscored that sellers frequently misrepresent or obfuscate the nature and purpose of these fees, leaving consumers uncertain about what they are paying for and fostering the belief that such charges are arbitrary.

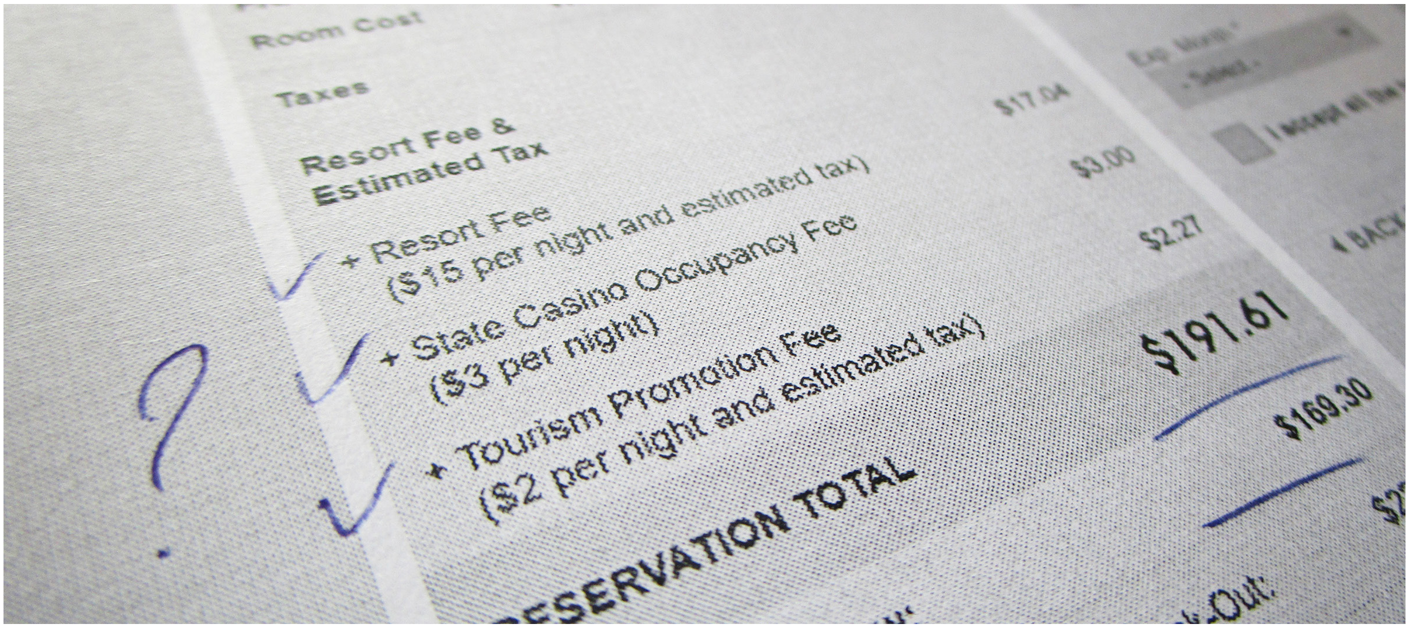
To address these concerns, the proposed rule would ban the following practices:

- **Hidden Fees:** Businesses would be prohibited from advertising prices that conceal or omit mandatory fees, including fees related to goods or services provided by a different entity. For example, if an online travel agent advertises a price for a hotel room provided by a hotel chain, the online travel agent would be required to display a total price inclusive of any mandatory fees charged by the hotel chain. Additionally, the all-in price must be displayed more prominently than any other pricing information.
- **Misleading Fees:** Businesses would be required to disclose the nature and purpose of fees, including the refundability of such fees and the identity of any good or service for which fees are charged, *before* the consumer consents to pay. Additionally, the rule would prohibit businesses from misrepresenting the nature and purpose of fees charged to consumers.

By way of example, the FTC explains that the proposed rule would eliminate "service fees" or "hospitality fees" that restaurants often add to customer bills, including automatic gratuity fees imposed on larger parties. The rule would make it mandatory for restaurants to include such fees in their menu prices. Similarly, the FTC states that hotels and home-sharing companies must prominently display the total booking price as the default upfront cost. Companies that only offer the option for customers to switch from a default price that excludes fees to one that includes them might still not be in compliance with the rule.

While unfair or deceptive fees are already unlawful under Section 5 of the FTC Act, a recent decision from the US Supreme Court in *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021), significantly limited the FTC's authority to return money to injured consumers. If enacted, the proposed rule would allow the FTC to obtain monetary redress more readily for harmed consumers in addition to seeking civil penalties against violators.

Given the Biden administration's scrutiny of "junk fees," businesses should carefully assess their fee structures and related disclosures to avoid unnecessary regulatory risk. We further encourage interested businesses to participate in the FTC's public comment process to ensure their perspective is well-represented. Interested parties may file a comment online at https://www.regulations.gov or by mail by sending your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580.



Five Takeaways From Bellwether AI Copyright Case

Published by *Law360*

By Michael Justus

Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc. is the first summary judgment ruling regarding fair use of copyrighted material to train generative artificial intelligence models, and it is a must-read.

Judge Stephanos Bibas normally sits on the US Court of Appeals for the Third Circuit, and is sitting on the US District Court for the District of Delaware by designation.

So, the decision provides an early glimpse of how an appeals court judge views key generative AI copyright issues.

In short, the case involves alleged unauthorized use of proprietary content from Thomson's Westlaw legal research database as training data for ROSS' generative AI legal research tool.

The court mostly denied the parties' motions for summary judgment, holding that "many of the critical facts in this case remain genuinely disputed" and must go to a jury. But the decision is packed with guidance that applies beyond the facts of the case.

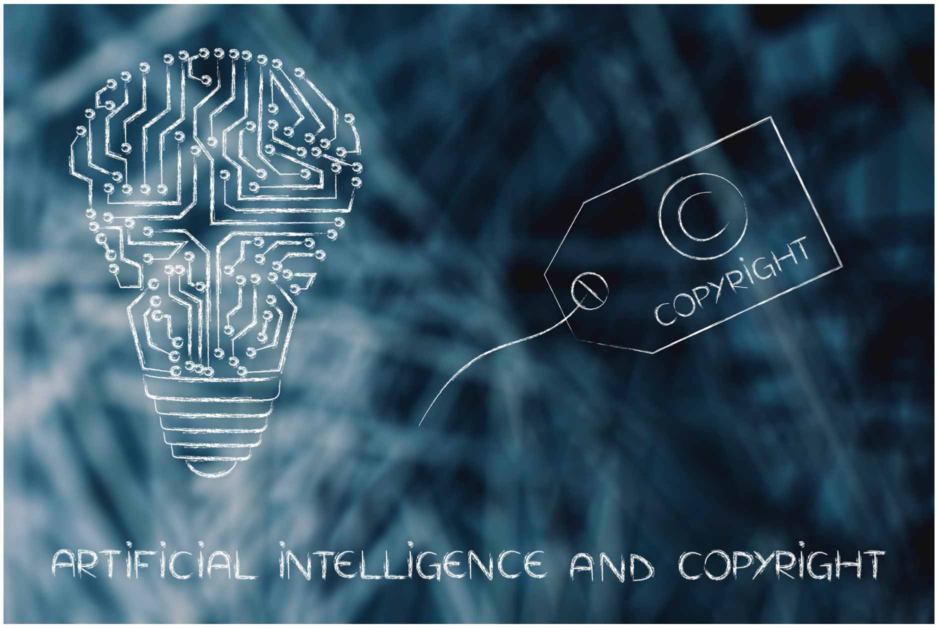
Here are five key takeaways from the decision.

First, from a 10,000-foot view, the decision previews how judges — and a court of appeals judge in particular — may view generative AI copyright issues. For example, Bibas reflected on the difficulty of deciding between competing public policy interests:

"[W]e run into a hotly debated question: Is it in the public benefit to allow AI to be trained with copyrighted material? The value of any given AI is likely to be reflected in the traditional factors: How transformative is it? Can the public use it for free? Does it discourage other creators by swallowing up their markets? So an independent evaluation of the benefits of AI is unlikely to be useful yet, even though both the potential benefits and risks are huge. Suffice it to say, each side presents a plausible and powerful account of the public benefit that would result from ruling for it. So a jury must decide the fourth factor — and the ultimate conclusion on fair use."

Second, throughout the decision, the court highlighted the crucial difference under copyright law between unprotectable facts and ideas, and protectable creative expression. That issue permeates the fair-use test.

For example, the court explained that Thomson's Westlaw's headnotes are more likely to be protected by copyright the more they differ from the underlying unprotectable judicial opinions

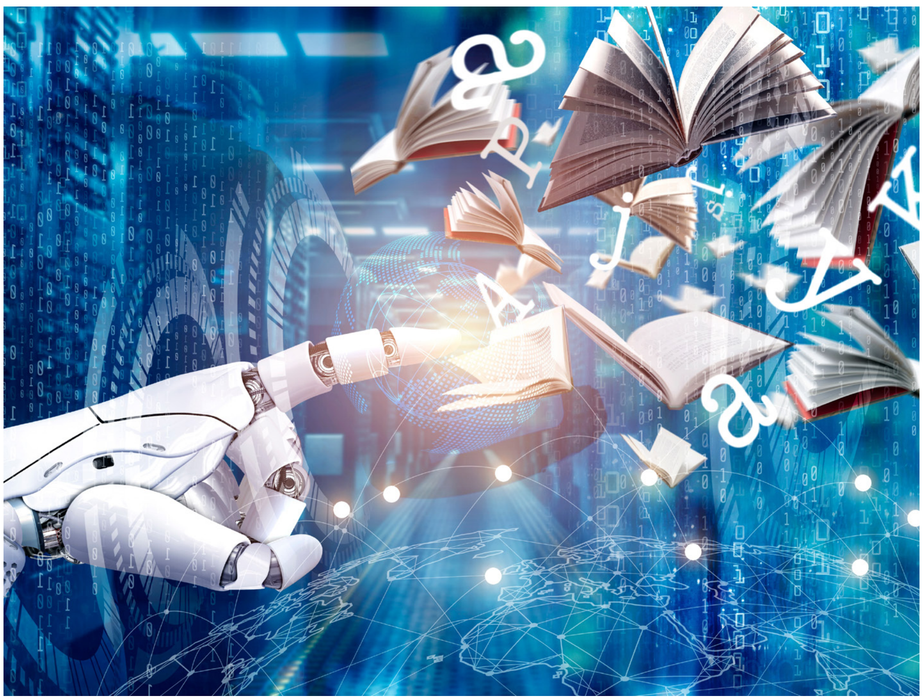


they are meant to summarize. This is a likely theme in future cases, as courts delve into complex issues regarding which specific materials were allegedly copied by generative AI tools, and whether such materials constitute protectable creative expression rather than facts or ideas.

Third, the court addressed the impact of the US Supreme Court's May 18 decision in *Andy Warhol Foundation for the Visual Arts Inc. v. Goldsmith* on the first fair-use factor. The court held that Warhol leaves room for a commercial use to be transformative:

"[In Warhol], the Court determined that the use in question was not fair largely by emphasizing its commercial nature. But I decline to overread one decision, especially because the Court recognized that "use's transformativeness may outweigh its commercial character" and that in Warhol, 'both elements point[ed] in the same direction.' Plus, just two terms ago, in a technological context much more like this one, the Court placed much more weight on transformation than commercialism. So I focus on transformativeness."

Fourth, the court parsed the "intermediate copying" case law that some commentators believe will drive the results in generative AI litigation.



In those cases, copying material to discover unprotectable information or as a minor step toward developing an entirely new product — e.g., to understand technological compatibility of software — was fair use.

Applying those cases to generative AI tools, the court suggested that both the training process and the output of generative AI tools inform a fact-specific analysis:

"[W]hether the intermediate copying caselaw tells us that Ross's use was transformative depends on the precise nature of Ross's actions. It was transformative intermediate copying if Ross's AI only studied the language patterns in the headnotes to learn how to produce judicial opinion quotes. But if Thomson Reuters is right that Ross used the untransformed text of headnotes to get its AI to replicate and reproduce the creative drafting done by Westlaw's attorney-editors, then Ross's comparisons to [the intermediate copying caselaw] are not apt. Again, this is a material question of fact that the jury needs to decide."

Fifth, the court addressed application of the third fair-use factor — the amount and substantiality of the copying — to the fact that generative AI tools necessarily require vast amounts of training data.

The court suggested that the vast amount of training data must be balanced against the practical need for the data to further a transformative purpose:

"Westlaw says Ross copied far more than it needed. Ross says it needed a vast, diverse set of material to train its AI effectively. Though Ross need not prove that each headnote was strictly necessary, it must show that the scale of copying (if any) was practically necessary and furthered its transformative goals. So the third factor hinges on the answers to these disputed factual questions which the jury needs to resolve."

The court teed up but did not decide key issues likely to repeat themselves in other cases. However, there is much to be learned from which factual issues the court focused on, and how the court telegraphed which way the legal analysis may go depending on how such factual issues are resolved by a jury.

I've highlighted only a handful of the many useful points in the decision.

Among other issues, the decision provides guidance regarding registration and infringement of compilations; the analyses for direct, contributory and vicarious infringement; the role of bad faith in the fair use test, if any; the test for market substitution or other market impacts under the fourth fair-use factor; Thomson's tortious interference claims, which will partially go to a jury; and a variety of affirmative defenses asserted by ROSS, which were dismissed.

The court indicated that a jury trial will be set for May 2024. In the meantime, the court's detailed decision provides a partial road map for litigants on both sides of generative AI copyright cases.

Motions to Dismiss in Meritless Trademark Infringement Claims: When to Roll the Dice?

By Matthew Hartzler

Brands know full well the cost of defending baseless trademark infringement allegations. Even suits that fail to pass the smell test can still lead to eye-watering fees. Winning an easy case on summary judgment still means discovery, document vendors, possibly experts, and complex briefing to analyze eight or more factors in a likelihood of confusion test. Then there is all the burdensome time and effort an organization must go through to search for documents and deal with depositions.

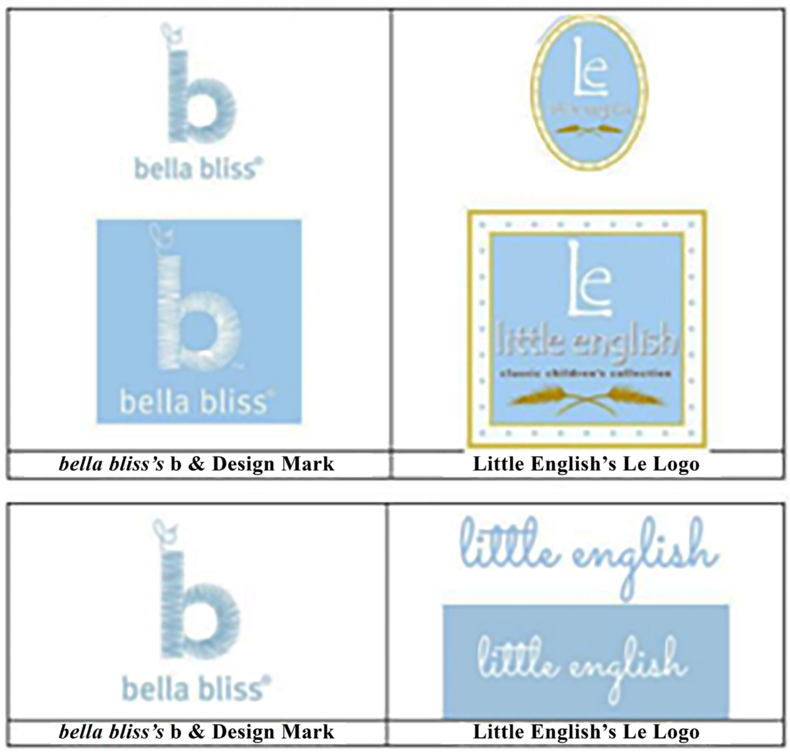
One alternative — seeking early settlement — can make the entire endeavor feel like a shakedown, with the plaintiff using the costliness and inefficiencies of the judicial system as a threatening weapon. The other — seeking a motion to dismiss — is often avoided due to the ease of satisfying notice pleading. Even after the Supreme Court raised the pleading standard in *Ashcroft v. Iqbal* in 2009, allegations merely need to be "plausible."[1] Fear of attempting the motion to dismiss is well-founded. McCarthy on Trademarks explains that in trademark infringement suits, "grants of a motion to dismiss are the exception, not the rule."[2]

This fall, a split Sixth Circuit panel in *Bliss Collection v. Latham Companies* discussed those exceptions in a case between two regularly warring children's clothing manufacturers.[3] Though the suit centered on marks that all but the most visually challenged would consider very dissimilar, the majority ultimately reversed a decision dismissing a trademark infringement suit at that early stage. Thus, the decision does not suggest that meritless suits are easily thrown out of court, but it does demonstrate the possible practical and procedural benefits for defendants in a similar situation.

In its complaint, Bliss described an encroachment over time from the two companies having distinct logos to Latham changing its branding to appear similar to Bliss's marks.

The dissenting opinion breaks down the differences between the two marks (dissimilar letters, words, sound, overall appearance, fonts and more), concluding, "Only the 'Le logo' background color — light blue, in a shade resembling 'bliss Blue' — is an arguably similar element. But the background color, by itself, cannot do the work here."[4]

The majority felt differently, and it evaluated each of the likelihood of confusion factors — the *Frisch* factors in the Sixth Circuit — and determined that more of the individual factors (*i.e.*, relatedness of the goods, marketing channels used and intent) weighed in Bliss's favor.[5] This math meant that Bliss's allegations were plausible and stated a claim for federal trademark infringement.



Bliss Collection, LLC v. Latham Companies, LLC, 82 F.4th 499, 508 (6th Cir. 2023)

Not all courts have followed this method of analyzing each and every factor on a motion to dismiss and deciding accordingly. In particular, courts in the Ninth Circuit trend more toward the tact of the dissent and see the factors as malleable in obvious cases. One Northern District of California court admitted that the standard is low, but then explained, "In some instances, however, the question of whether a likelihood of confusion exists can be determined at the pleading stage and based on a consideration of less than all of the factors, such as where the parties 'have obviously dissimilar marks' … "[6] In such cases, STATESMAN was not likely to cause confusion with CAPTAIN AMERICA, and AMERICA SPEAKS was not similar enough to AMERICA'S TALKING to pass the pleading stage.[7]

Circuits have also found that a stark dissimilarity of goods and services can be grounds for dismissal.[8] The Seventh Circuit has wrestled with cases involving films and determined that no one would confuse a rap group with a movie studio, or a software developer with a movie studio.[9]

But as demonstrated in *Bliss v. Latham*, not all cases that may appear obvious on their faces will be kicked out early, and the line between an infringement complaint stating a claim and being implausible is difficult to pin down.

Despite an early motion to dismiss having long odds of success, brands faced with an infringement allegation should consider whether early evaluation of the plaintiff's case would promote settlement — even if the motion is denied. This is particularly true when no preliminary injunction is requested, which can serve the same purpose. The court in *Bliss v. Latham* did give its initial impressions of the full set of likelihood of confusion factors, which gives each party the ability to have its vision of the case tested before launching into expensive discovery.

With this early analysis, either a baseless case might not look so baseless, which should change a brand's impression of the claim, or a case without genuine merit will indeed be dismissed.

(1) *Ashcroft v. Iqbal*, 556 U.S. 662, 679-680 (2009) ("Under Twombly's construction of Rule 8, we conclude that respondent's complaint has not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'").

(2) 6 McCarthy on Trademarks and Unfair Competition § 32:121.50 (5th ed.)

(3) *Bliss Collection, LLC v. Latham Companies, LLC*, 82 F.4th 499 (6th Cir. 2023)

(4) *Id.* at 521 (quoting *Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan Ass'n*, 651 F.2d 311, 317–18 (5th Cir. 1981) (concluding that the marks "Sun Banks" and "Sun Federal" were visually dissimilar even though both marks were orange)).

(5) *Id.* at 541.

(6) *Mintz v. Subaru of Am., Inc.*, No. 16-CV-03384-MMC, 2016 WL 5909360, at *1 (N.D. Cal. Oct. 11, 2016), *aff'd*, 716 F. App'x 618 (9th Cir. 2017) (quoting *Le Book Publishing, Inc. v. Black Book Photography, Inc.*, 418 F. Supp. 2d 305, 311 (S.D.N.Y. 2005) (determining that the phrase "Share the Love" and "A World of Love, for You and Those You Love" were entirely dissimilar).

(7) *Murray v. Cable Nat. Broadcasting Co.*, 86 F.3d 858 (9th Cir. 1996); *Marvel Enterprises, Inc. v. NCSoft Corp.*, 2005 WL 878090 (C.D. Cal. 2005).

(8) "If goods or services are totally unrelated, there is no infringement because confusion is unlikely." *Murray v. Cable Nat. Broad. Co.*, 86 F.3d 858, 861 (9th Cir. 1996), *as amended* (Aug. 6, 1996).

(9) *Eastland Music Group, LLC v. Lionsgate Entertainment, Inc.*, 707 F.3d 869, 871–872 (7th Cir. 2013) ("Eastland Music's complaint does not (and could not plausibly) allege that consumers treat it as the producer or source of the film 50/50, or treat Lionsgate as the producer of the 2003 rap album."); *Fortres Grand Corp. v. Warner Bros. Entertainment Inc.*, 763 F.3d 696, 705, (7th Cir. 2014) ("[Plaintiff] Fortres Grand has not and could not plausibly allege that consumers are confused into thinking Fortres Grand is selling such a diabolical hacking tool licensed by [defendant] Warner Bros.").

Would You Hire a Monkey to Write Your Ad Copy?

By Cynthia Martens

If you sit a group of monkeys down in front of typewriters and allow them to hit the keys at random for an infinite amount of time, you'll almost surely have the next Netflix pilot, not to mention the complete works of William Shakespeare.

The well-known infinite monkey theorem underlies many assumptions businesses are making about how artificial intelligence (AI) can cut their costs in advertising and marketing. Impressed with the speed with which AI's metaphorical monkeys can generate text, some company executives are reconsidering the need for copywriters. For one, according to a report by the Financial Times earlier this year, Google and Meta have started allowing advertisers to feed generative AI a diet of creative content, such as imagery, video and text, which the AI will then "remix" to spit out new ads targeting specific audiences. But this type of practice has proven dangerous in these early days of AI-related lawsuits, as evidenced by the high-profile copyright case Getty Images brought against AI company Stability AI.

Cutting costs on copy by relying on AI simultaneously overlooks the skill and creative savvy of many copywriters and ignores the legal risks inherent to advertising claims. For example, what statements can a brand make about its sustainability without attracting unwanted attention from the Federal Trade Commission? What facts can a company share about the origin of its textiles without misleading customers? What slogans can a marketing email reference without infringing third-party copyright or trademarks? Are all product claims in marketing copy substantiated? If text and imagery are intended for social media posts, what disclaimers are required? These considerations inform the standard pre-publication review process for advertising materials, and companies gloss over them at their own peril.

Relatedly, new programs exist to generate trademarks and logos for businesses using artificial intelligence. The website Brandmark.io, for one, pitches itself as a destination where users can "build a beautiful brand on time and on budget" by harnessing AI. While this may be a helpful brainstorming tool for design teams and entrepreneurs, it oversimplifies the process of selecting a trademark. It's not enough to think of an appealing name or develop an attractive logo; businesses also need to invest resources into researching the market for their goods and services. What brands are already out there that may either object to the company's new name or cause the US Patent and Trademark Office to refuse registration? Tellingly, the site's terms of use caution that Brandmark is "not responsible if information made available on this site is not accurate, complete or current" and "use by you of optional tools offered through the site is entirely at your own risk and discretion."

AI is a shiny new tool, and rightfully one that many businesses are eager to add to their toolbox. Using AI to generate marketing copy or trademarks without having professional human writers review what the AI produces, however, is fraught with risk. In other words: the monkeys can type, but only a human can recognize the next Hamlet.

News to Know

Katten Named 2024 'Law Firm of the Year' for Trademark Law by *Best Law Firms*

Katten was chosen as "Law Firm of the Year" for Trademark Law in the 2024 edition of *Best Law Firms* in America. Katten's Trademark/Copyright/Privacy group, which exhibits excellence that led to the firm's recognition as "Law Firm of the Year," is widely known for helping some of the world's leading businesses build and protect their most valuable assets across the globe. The team, co-led by **Karen Artz Ash** and **Floyd A. Mandell**, is renowned for its registration, licensing, and sophisticated transactional work to challenging designs and asserting or knocking out infringement claims. Our team excels at implementing business and enforcement strategies for famous fashion, tech and media brands, and other world-renowned companies in a variety of industries. Only one law firm per legal practice area received the "Law Firm of the Year" recognition, which is based on research and peer feedback.

In total, Katten was ranked in 30 national and 65 metropolitan practice areas.

Thoughts From the 2023 National Advertising Division Annual Conference

Christopher Cole, partner and chair of Katten's Advertising, Marketing and Promotions practice group, shared key takeaways from the annual legal conference hosted by the National Advertising Division of the Better Business Bureaus National Programs (NAD).

NAD touted its continuing focus on speeding up decisions, which includes the successful launch and expansion of the SWIFT track for simpler cases and its faster NARB appeal process, which has substantially cut the timeline for consideration and issuance of decisions on appeal. NAD also announced upcoming improvements to its press release and compliance challenge processes, which have been historically contentious subjects for the industry.

Some trends in NAD decisions also emerged. NAD is an important decision-maker that tends to apply FDA and FTC policies in its decisions. Thus, even if an agency fails to take enforcement action, the NAD may provide an alternative remedy. NAD is also undertaking some of the more prominent, early reviews of ESG claims and may wind up creating "law" on claims support before the FTC revises its own Green Guides.

Read the article.

Foreign Corruption in Advertising Markets: A Large and Looming Concern

This article by **Christopher Cole** discusses the potential implications of a recent police raid of the offices of WPP subsidiary, Group M, in Shanghai. The raid followed a September 2021 SEC order against WPP for alleged violations of the Foreign Corrupt Practices Act (FCPA) arising out of allegedly corrupt media placement activities in India, China, Brazil and Peru. On September 28, the SEC charged outdoor billboard agency, Clear Channel, with FCPA violations arising out of allegations that its Chinese affiliate bribed Chinese government officials to obtain lucrative placements

These actions signal a substantial risk for every US company engaging in foreign placements of advertising. It is not unusual for US companies seeking to enter foreign markets to engage agencies in overseas markets to conduct media planning and buying on their behalf. In many countries, a shadowy network of "brokers" may be used to facilitate such placements. Such brokers may not be legitimate businesses and lack the kinds of accounting controls that would be the norm within the United States. They may expose the agencies and their clients to lost and unaccounted for funds, and to allegations of bribery. This can lead not only to lost media spend, sometimes into the tens of millions of dollars, but also to criminal investigations by US and foreign authorities

Read the article.

Want to Be a Hero to Your Company? ANA Report on Programmatic Ad Fraud and Digital Ad Waste Suggests How

Christopher Cole describes a blockbuster report, revealed by the Association of National Advertisers (ANA) at the Cannes Lions Awards in France this June, that shames the programmatic advertising industry. The report aims to show that of about $88 billion spent each year by advertisers to buy ads through the digital ecosystem, as much as 23 percent (about $20 billion) is simply lost or unaccounted for. This may be partly due to ad placement on websites that exist purely to show ads, such as clickbait pages that rarely encounter human viewers, except by accident. It seems that advertisers, who pay by the CPM (cost per thousand impressions) model, have been paying for more and more impressions while also demanding lower and lower costs. The markets have gladly met their demands.

Read the article.

FTC Secures $18.5 Million Settlement and Order in Another ‘Dark Patterns’ Case

In this article by **Christopher Cole**, he discusses details of another “dark patterns” case brought by the Federal Trade Commission (FTC), following its lawsuit against Amazon.com. The FTC filed a June 26 complaint against PCH, the marketer behind the venerable Publishers Clearinghouse organization, alleging that PCH used various deceptive tactics (so-called "dark patterns") to induce consumers to pay for magazine subscriptions and other merchandise, in violation of federal law.

The bait in this long-running scheme was convincing consumers, many of whom are elderly, that they had to buy products to receive sweepstakes entries. It is a fundamental tenet of federal law (and many state laws) that one cannot condition sweepstakes entry on the need to pay any consideration. Doing so transforms the sweepstakes into an illegal lottery. It is not illegal to solicit a sale in connection with a sweepstakes, but it must be made clear to the consumer that there is a free and relatively easy-to-use alternative method of entry.

Read the article.

Katten's Advertising, Marketing & Promotions Practice

Katten represents advertisers, advertising and promotions agencies, technology developers, content producers, and media and entertainment companies, in reimagining the connection to consumers. From clearance, privacy and regulatory obligations to smooth product launches and brand integration, we address concerns in a variety areas, including: ad, marketing and promotional programs; agency-client relationships; branded entertainment; contests and sweepstakes; internet distribution; licensing and vendor agreements; litigation (comparative and false advertising, First Amendment issues, Lanham Act, unfair competition laws, etc.); privacy and data security; talent and production agreements; user-generated content; and sponsorships.

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