KATTISON AVENUE & The Katten Kattwalk®

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Letter From the Editors

We're delighted to welcome in 2023 with our second crossover edition of *Katten Kattwalk/Kattison Avenue*. In this combined winter issue, we cover top issues affecting brands in fashion, retail and advertising.

On the hot topic of ESG (environmental, social, and governance) issues, our lead article covers greenwashing and sustainability claims. Next, we introduce you to our new colleague and a pro in this space, Chris Cole, who has deep family ties to the fashion industry and whose practice centers on bringing and defending false advertising claims. We follow with Chris's take on the potential National Advertising Division enforcement of advertising that portrays "negative harmful social stereotyping, prejudice or discrimination."

In the UK, we look at bad faith trademark applications, an issue playing out in a case involving Hasbro's MONOPOLY mark. Speaking of fun and games, we cover Dungeons & Dragons' new proposed content license and its potential impact on third-party creators of D&D-related podcasts, TV shows and novels. And for those wondering how severe GDPR enforcement can be, Meta got a mega fine by the Irish Data Protection Authority. We review the €390 million (more than $422 million) fine and its import.

Finally, there's a bit of good news out of DC that a brand's sustainability advertising, if clearly aspirational, isn't a consumer protection violation.

We hope you enjoy this issue and look forward to receiving your feedback. Until then, happy reading.

Karen Artz Ash and **Jessica G. Kraver**

The 'Clock Is Ticking': Is Fashion Ready for Increased Demand for and Scrutiny of Sustainability?

By Cynthia Martens

Sustainability is trendy. Amid shifting consumer sentiment and mounting criticism in the press, international legislation is forcing change in how companies make and market their products.

On December 14, 2022, the Federal Trade Commission (FTC) voted unanimously to update its Green Guides for the Use of Environmental claims and announced that it was seeking public comment on the subject. First introduced in 1992, the FTC Green Guides provide guidance on avoiding unfair or deceptive environmental marketing claims under Section 5 of the FTC Act, 15 U.S.C. § 45.

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"People decide what to buy, or not to buy, for all kinds of reasons. One of those reasons increasingly seems to be environmental impact. Before making a purchase, many American consumers want to know how a product contributes to climate change, or pollution, or the spread of microplastics. Businesses have noticed," Lina Khan, Chair of the FTC, said in a statement. "Walk down the aisle at any major store — you're likely to see packages trumpeting their low carbon footprint, their energy efficiency, or their quote-unquote 'sustainability.'"

Stressing the need for the Green Guides to "keep up with developments in both science and consumer perception," Khan said the FTC was especially keen to receive comments on "relatively emerging environmental topics." Comments remain

"I'm not sure that people realize how quickly the clock is ticking." — James Fallon, editorial director at *Women's Wear Daily*.

open until February 21, 2023, though the Consumer Brands Association has requested a 60-day extension on behalf of itself and various other trade groups.

Tougher marketing guidelines are imminent in the European Union, too. Under the Strategy for Sustainable and Circular Textiles, which the European Commission adopted last year, the EU has been steadily hammering out new legal requirements related to sustainable business practices and increasing transparency in manufacturing and marketing.

"There's not a lot of time. And I'm not sure that people realize how quickly the clock is ticking," said James Fallon, editorial director at Women's Wear Daily, in an interview for *Katten Kattwalk* and *Kattison Avenue*. He said fashion companies appear slow to appreciate the imminence and strictness of upcoming requirements. "I think they're moving, but I'm not sure that they're moving as rapidly as they need to be," he said. Much of the industry, he added, "tends to focus on what each individual company is doing in its own bubble" rather than on the multi-year process of moving from the raw materials stage to product design to sales. Yet that timeframe, he suggested, adds urgency to any changes in business practices and marketing.

"You're really looking at a pipeline that's probably going to take you well into 2025, and we're in 2023," Fallon said.

Of course, to stop "greenwashing," which the EU has defined as "companies giving a false impression of their environmental impact or benefits," businesses first need to take stock of their ecological footprint.

That's easier said than done. How much of a garment must be made of recycled fibers for a company to tout its greenness? Is accepting the return of old clothes or adding a resale category inherently sustainable? And is farming exotic animals for leather a boon to biodiversity and better for the environment than faux leather — or a step in the wrong direction on both accounts?

The fashion industry can't afford to be passé, but claiming the moral high ground requires a nuanced analysis of the issues. Here, we look closely at several key legal and business debates.

A Global Attack on Misleading Green Claims

The term "greenwashing" is said to have originated in the mid-1980s, when an environmentalist wrote an essay criticizing hypocritical practices in the hotel industry. These days, greenwashing is everywhere — in advertising and law.

In the US, current FTC guidance addresses general environmental benefit claims (such as "green" and "eco-friendly"); the use of seals and certifications that provide, or appear to provide, an endorsement of a product's environmental bona-fides; claims about waste (such as "recyclable"); claims about a product's impact or toxicity (such as "non-toxic" or "ozone-friendly"); and claims about the impact of manufacturing (such as "made with renewable energy" or "carbon neutral").

Updates will likely address claims related to carbon offsets and the thresholds guiding marketers on claims that products are "recyclable" or made of "recycled content."

The EU Commission has introduced several amendments to the Unfair Commercial Practices Directive, which, if adopted, will prohibit companies from making vague, unsubstantiated claims about environmental performance and using eco-labels on products that are not either government-issued or based on third-party verification. Such practices would be part of the commercial practices "blacklist."

In an attack on planned obsolescence, proposed amendments to the Consumer Rights Directive would require consumers to be "informed about the guaranteed durability of products" and sellers to "provide relevant information on repairs" and, where applicable, software updates. The Commission is also drafting revisions to the EU Waste Framework Directive to improve management of textile waste, in keeping with the EU Strategy for Sustainable and Circular Textiles.

The proposed amendments require the approval of the Council of the European Union and the European Parliament to become law.

Various European countries have also been implementing green laws at the national level. France's Anti-Waste and Circular Economy law went into effect on January 1, 2020, cracking down on single-use plastics and misleading environmental claims in marketing. Effective January 1, 2023, Germany introduced granular supply chain reporting requirements for companies doing business in the country under its Supply Chain Due Diligence Act.

Sergio Tamborini, president of Sistema Moda Italia (SMI), Italy's fashion and textile trade federation, which represents an estimated 50,000 companies and nearly 400,000 employees, said during an interview that the textile industry is facing "increasing market and government pressure to guarantee transparent information about its environmental impact."

"It's a paradigm shift, from a commercial view of sustainability to a mission that encompasses all facets of a business, from governance and compliance to ethics," he said. He highlighted the Italian fashion industry's recent efforts to use blockchain technology to trace products back to their original batches, improving supply chain transparency and boosting the profile of "Made in Italy" as shorthand for quality and ethics. Italy's Ministry for Economic Development has worked with SMI on implementing the new technology throughout the textile sector; ICE, the Italian Trade Agency, introduced its TrackIT blockchain program in 2022.

"Traceability across the entire supply chain helps fight greenwashing," Tamborini said, noting Italian fashion companies that are implementing sustainable practices perceive greenwashing as a form of unfair competition.

Is Secondhand Fashion Green?

The fashion industry is reckoning with the remorse many consumers feel when purchasing disposable apparel and accessories. In a 2022 report by resale platform ThredUp, focused on Gen Z (roughly speaking, the cohort of individuals now aged 16 to 26), 72 percent of those polled admitted to shopping for fast fashion over the past year. Yet most expressed a desire to shop more sustainably, citing an awareness of the environmental impact of manufacturing and an interest in supporting more "ethical" brands.

For some businesses, the uptick in consumer interest in sustainability has prompted an investment in resale, with secondhand shopping marketed as a guilt-free way of scratching the fashion itch. But to avoid claims of "greenwashing," companies should tread carefully.

"Brands have to find their unique point of view for launching resale, 'sustainability' just doesn't cut it," said Graham Wetzbarger, founder and chief executive officer of Luxury Appraisals and Authentication LLC, which advises companies and investors on authentication best practices. Instead, he said, companies need to connect resale to their specific mission, focus and clientele, whether by offering archival pieces or a lower price point for aspirational customers.

Fashion businesses making green claims related to resale must also contend with the environmental impact of product packaging and transit. "Currently, the logistics behind shipping and processing resale merchandise nullifies any carbon savings from not having to manufacture a new garment," Wetzbarger told us.

Further, resale comes with two kinds of authenticity concerns: product and branding. On the one hand, counterfeit merchandise has been a recurring legal headache for secondhand retailers. On the other, consumers are sensitive to any whiff of inauthenticity in marketing, especially when it comes to environmental claims. A study by the UK's Advertising Standards Authority found that "the tendency for brands to declare their environmental achievements" elicited cynicism in many participants.

"Authenticity is extremely important for trust building," said Wetzbarger, suggesting that fashion designers and manufacturers should "start incorporating sustainable second life assets to their products," including "dissolvable thread, easily removable hardware elements, single fiber fabrics, and removable dyes."

Repair services are another possibility. Companies that approach resale with an eye on authenticity will have an easier time making accurate claims about the sustainability of their products.

Are Exotic Skins Sustainable? Will California Ban Them?

On January 1, 2023, California's contentious ban on the sale and manufacturing of new animal fur products, Assembly Bill 44, took effect. California is not an outlier: many European countries have banned fur farming, and in June 2021, Israel became the first country to ban the sale of animal fur.

Over the past several years, luxury fashion has scurried away from the use of fur, largely in response to a change in consumer perception — and to the effectiveness of social media campaigns. For many brands, any loss in fur-related revenue pales in comparison to the goodwill generated by going fur-free.

The global fur industry has sought to counter this narrative by emphasizing that fur is a natural, and therefore more sustainable, product than fake fur, an argument also present in the market for exotic leathers, such as alligator, crocodile, python, lizard and ostrich skins. In September, *Business of Fashion* highlighted "a marketing battle that stretches from leather to diamonds as sustainable fashion becomes big business and upstart alternatives challenge established materials."

California enacted an amendment to Penal Code § 653o, a ban on exotic skins, in 2020, but the statute has been ensnared in legal challenges since 1970, with plaintiffs asserting that it is pre-empted by federal regulations. The subject continues to provoke feverish discussions between animal rights and environmental organizations, such as the Center for Biological Diversity and Human Society of the United States, on the one hand, and stakeholder groups such as the Louisiana Department of Wildlife and Fisheries, on the other.

Bruce Weissgold, an independent consultant who spent 25 years working at the US Fish and Wildlife Service (FWS), told us that debates surrounding the ethics and sustainability of farming crocodiles, alligators and pythons, in particular, have "been raging for decades," with one side adopting the precautionary principle — "don't harvest unless you can demonstrate that it's not detrimental to the species in the wild" — and the other side promoting "sustainable utilization."

Weissgold said the acquisition by some major fashion companies of alligator and crocodile farms — partly a reaction to trafficking concerns — has improved transparency in the supply chain for those particular skins. As a whole, however, "I don't think there's a lot of interest right now in developing a traceability system for exotic reptile skins," he said, notwithstanding the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

The treaty requires exotic crocodilian skins to be tagged to move across borders. "In the US, we supply the tags to the state wildlife agencies, who sell them to hunters and alligator farms. The tag is supposed to be applied at the point of harvest," he explained. But applying tamper-proof tags that will survive the leather-tanning process is no mean feat, and Weissgold suggested that people are adept at manipulating tags.

While FWS officials examine permits and tags before clearing exotic skins for import and export, "at best, all those regulation and enforcement efforts are keeping the trade majority legal," he said, because "smart traders can take advantage of weak enforcement." In his estimate, that makes a holistic view of the ethics and sustainability of exotic skins almost impossible.

Fashion brands should heed changes in consumer perception of this product category, as well as supply chain risks associated with sourcing exotic leathers, cautioned PJ Smith, Fashion Policy Director at the Humane Society of the United States. In the last five to ten years, he said, surveys consistently show high consumer engagement with animal welfare, especially for Gen Z, and "the perception of luxury has changed to being what is more sustainable, what is more innovative, what is more ethical."

Fur and exotics are "just not where consumers are anymore," he said, adding that various well-known retailers "are looking to get out of exotic skins," meaning "the markets are closing."

Still, he expressed frustration that exotic skin bans have yet to get the traction seen with fur. "For five-plus years, there was a fur-free announcement every quarter, and we just haven't seen that with other materials — down or exotic skins — but I always thought exotic skins were next, primarily because these are wild species, similar to fur, and no one's eating the pythons or crocodiles, so it's not considered a by-product of meat production. And it's a huge risk to the brands because of the illegal wildlife trade," Smith said.

Back in California, legal developments are pending in two cases, *April in Paris v. Becerra*[1] and *Louisiana Wildlife and Fisheries Commn. v. Becerra*[2], centered on the constitutionality of California's exotic skins ban. Lawyers for plaintiffs and defendants presented oral arguments on the merits last spring.

A Changing Storefront

Market economies struggle with externalities such as the negative environmental costs of fashion. As new legislation addressing sustainability claims and practices goes into effect, consumers may soon find "walking down the aisle at any major store" — to quote Khan from the FTC — a starkly different experience.

(1) *April in Paris v. Becerra*, 219CV02471KJMCKD, 2020 WL 2404620 [ED Cal May 12, 2020].

(2) *Louisiana Wildlife and Fisheries Commn. V. Becerra*, 219CV02488KJMCKD, 2020 WL 2404830 [ED Cal May 12, 2020].

Q&A With

Christopher A. Cole

Partner and Chair
Advertising, Marketing and Promotions
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| BACKGROUND |

Before law school, your academic history shows a strong interest in science, with a bachelor's degree in biology from Yale University and a masters in marine biology from the University of Miami. Why did you decide to pursue the legal profession?

I grew up across from the marina and spent every free moment on the water or next to it. That's probably why I went to Miami to study marine biology. It was predestined.

However, I always had a strong interest in public policy. My interest in science – especially marine stuff – motivated me to find ways to protect what I was studying. While scientists are critical, so are lawyers and policymakers. I felt I'd be a better lawyer than scientist at the end of the day, and could probably have a bigger impact on what I cared about by becoming a lawyer. I think that has been true and, for someone like me who has pretty broad interests, it keeps me interested perpetually.

| LEGAL PRACTICE |

You have a varied practice that touches on multiple industries. Tell us about your practice and the types of matters you handle.

I can shorten it – I help companies say what they want to say and protect themselves from those who would try to hurt them by lying. In practice, my matters range from bringing and defending false advertising lawsuits (whether competitor lawsuits or class actions) to advising companies on how best to communicate and support their product claims. Along the way, I have become a sort of "Mr. Fix-It," helping companies navigate complicated regulatory issues about their (or competitors') communication issues that don't necessarily fit neatly into a single bucket. More recently, that has involved a lot of environmental, social and governance (ESG) work, which is a quintessential interdisciplinary topic.

Have the skills you developed through your scientific studies contributed to your practice, in terms of helping understand and address some of the technical aspects of your cases?

Many lawyers are technophobes, which is too bad. I was trained from undergraduate into graduate school on how to read scientific studies, the fundamentals of "good science," and in statistics. All of these things are crucial to any science-based case, whether advertising, patent or even economics. Another thing that has helped me is that I truly like and appreciate scientists, who are often our experts. Experts are people too! I get along with them and am typically viewed on any case team as a sort of "expert whisperer." The most important characteristic is to be curious about everything – don't be afraid to ask even seemingly stupid questions and let them teach you.

Many of your clients are big-name brands that are featured on ads that are widely seen by the general public. Is there a matter that stands out for you because of its impact on other advertising-related cases or disputes?

Some of the big false advertising Lanham Act cases that I have been involved in have made law that has been important to industry in general and this area of the law in particular. For example, in a variety of cases for AT&T, we have established the industry rules governing how to communicate properly about coverage, reliability and data speed performance – all of which are used in just about every ad you see for a phone or cable company these days. For Molson Coors (and Miller Brewing before it), we have established some law that cements liability for literally false claims, even ones that are corrected pretty quickly.

I have also been quite active in the American Bar Association's (ABA) Antitrust Law Section, which is a venue for thought leadership in the area, that brings together a "who's who" of practitioners, scholars and regulators. I have written chapters on Lanham Act law and on claims substantiation for leading ABA treatises. I also work closely with one of the world's leading experts on sensory substantiation (for example, "tastes better" claims) and, through a course sponsored by the expert, together we have helped train about a decade's worth of professionals in the field on claims support and the law.

| LOOKING AHEAD |

The advertising industry is an ever-changing landscape. From your perspective, have laws and regulations kept up with shifts in the industry? And do you anticipate any noteworthy legal developments in this area in the upcoming year?

I love working in this area because it is dynamic and relevant to our everyday lives. However, the law always seems to be a step or two behind this ever-changing landscape, which is perhaps inevitable when you have all of these talented, creative and imaginative people working to advance business. So, part of what we try to do is peer around corners and anticipate risks for our clients.

In terms of what to expect in 2023, my best guesses include the following:

- Class actions will continue to increase, which will touch every consumer-facing industry.
- The Federal Trade Commission (FTC) will become even more aggressive, seeking to publish new rules and bring new enforcement matters as the FTC eyes a potential change of administration in 2024 and tries to rush as much through as it can in the next two years.
- There are likely to be changes to Section 230 of the Communications Decency Act, which broadly speaking immunizes internet platforms from liability relating to the posting of user-generated content. This question takes on added urgency given the political importance of Twitter, Facebook and Instagram, among others.

Brands and companies are increasingly prioritizing ESG initiatives, which is an area in which you have considerable experience. What ESG-related issues are you seeing in the advertising industry and, looking ahead, what emerging issues do you foresee?

The FTC will be updating its Green Guides in 2023 and 2024. Those are fundamental to the ad industry. I expect we will see at least changes to definitions of "recycling," "carbon offsets" and "sustainability." Further, companies relying on carbon offsets for support of their net-zero pledges need to pay close attention, as that will be closely reviewed by the FTC and others.

The number of ESG-related class actions continues to tick up. I predict we will see many more in 2023, as the rules of the road are in flux.

| PERSONAL SIDE |

Your father, Richard Cole, was a longtime executive in the fashion industry. Notably, in the late 1960s, he was named president of Lady Manhattan, where several top designers got their start, including Donna Karan, Tommy Hilfiger, Halston and Perry Ellis. Did your father share any lessons from his profession that have influenced your career path and practice through the years?

My dad spent a career in the fashion industry and indeed married a model (Ms. Sweden), my mother, Birgitta, who is still alive today. Of the many things I admired about my father was his dedication to honest-dealing and integrity, and his early and broad acceptance of people in the industry who were LGBTQ. He was an early proponent of equality for everyone, even though he came from a generation that largely didn't agree with that.

In my early years in the law, I would visit our New York office and always have lunch with my dad in the Garment District. It struck me how he seemed to know everyone by name, and they knew him – from the guy pushing the rack of clothes down Broadway to the waiter in the little Chinese restaurant we would always visit. He prided himself on knowing the guys on the loading dock who could tell him whether the shipment was really on time, and if not, exactly why not. It's trite, but that always impressed on me the importance of appreciating the contributions of everyone, not just the top of the company.

What are your passions outside the office?

I am an avid amateur chef. What can I say, I like to eat. And, to work off that food, I am a workout fiend and dedicated squash enthusiast. I have three boys, all of whom are in college or just graduated. I love seeing how they are flourishing into adults.

Kids Ad Watchdog Cases Hint at Future of NAD Enforcement

By Christopher Cole

In a rule update designed to bring the scope of its advertising review jurisdiction in line with those of international self-regulatory organizations and enforcers, the National Advertising Division (NAD) has expanded its authority so that it not only covers the truth and accuracy of national advertising, but also advertising that portrays "negative harmful social stereotyping, prejudice or discrimination."

NAD is now adapting its review to encompass challenges to ads that may cause social harm based on stereotypical or discriminatory portrayals.

Laura Brett, NAD's vice president and New York office leader, explained to me that NAD and BBB National Programs felt the "time was right" for NAD to implement this change in light of ongoing national concerns over social issues involving gender, race and related stereotypes.

In a blog post explaining the change, Brett cited research by Meta Platforms Inc. and the United Kingdom's Advertising Standards Authority (ASA), cataloging the harms that can be caused by various forms of stereotyping in online and mass media advertising.

For an example of how this might work, we can look to the UK ASA 2017 "Depictions, Perceptions and Harm" report, which defines gender stereotype as "an image or idea of a group or individual based on their gender."

Examples might include advertisements portraying women as poor business executives, or men as bad at child rearing. Such gender stereotypes, when magnified through national advertising, can harm individuals who share those gender characteristics.

NAD's sister organization, the Children's Advertising Review Unit (CARU), already exercises expansive authority to review advertising that could be deemed inappropriate for children.

This includes advertising content that contains gender stereotypes. In fact, CARU has recently decided two cases that address gender stereotypes — Primark US Corp., involving gender-based slogans on childrens' clothing, and Moose Toys, involving dolls that featured stereotypical portrayals of women and girls — and give us an idea of where NAD might head with this newly expanded authority.

Primark

In June, CARU reviewed Primark's advertising for girls' and boys' clothing. The clothes, which differed by gender, had various slogans printed on them.

The girls' clothes featured slogans such as "Be Kind, Be Happy," "Kindness always wins," "Always Perfect," "Grateful, humble and optimistic," and "Be good, do good."

The boys' clothes, by contrast, included phrases such as "Change the game," "Born to win," "Power," "Champion," "Total Icon" and "Awesome Adventures."

Applying its ad guidelines, which state in relevant part that "[a]dvertising should not portray or encourage negative social stereotyping, prejudice, or discrimination," CARU concluded that the slogans and ads featuring them violated CARU requirements and recommended that Primark:

> Modify the Primark Products and their associated advertising messages so that they do not portray or encourage negative social stereotyping, prejudice, or discrimination and that its advertising be respectful of human dignity and diversity.

Although Primark stated its disagreement, the retailer agreed to comply and informed CARU that it had begun an internal review to take corrective measures where appropriate.

Moose Toys

In August, CARU reviewed Moose Toys' advertising and packaging for "Fail Fix," a doll in which half of the doll is shown "in a bathrobe holding a face mask with smeared makeup and extremely messy hair, including shoes tangled within their hair," while the other half is portrayed as "glamorous," with "perfect hair and makeup."

The advertising encourages little girls to "fix the fail" by grooming the messy doll to restyle its messy hair and makeup.

In concluding that advertising for the product violated CARU guidelines, CARU said:

> The depiction and characterization of a girl with imperfect makeup and messy hair as a failure and the subject of public embarrassment is likely to perpetuate negative and harmful stereotypes about girls, and specifically, that they must look perfect to feel good about themselves.

As CARU further reasoned, "[b]ased on the totality of the claims conveyed, CARU determined a child viewing the dolls' advertising could reasonably take away the messages that: (1) girls with imperfect hair and makeup will be seen as 'crazy' and unfit to be seen in public; and (2) girls should, and indeed do, feel like failures when their beauty standards do not meet stereotypical ideals of perfection."

Predictions for the Future

The Primark and Moore Toys decisions have provoked concern among industry that CARU is beginning to apply a more aggressive review of gendered products, not just advertisements.

Now that NAD has promised to follow suit with respect to advertising for adults, there is some concern that NAD will begin to exercise broad and expansive discretion and apply a more socially conscious lens to its review of diversity issues that are of increasing importance to national political discourse.

While NAD does not currently have any open cases invoking these new provisions, Brett told me that it might invoke its self-monitoring authority to do so in the future.

Although glasshouse issues might deter major advertisers from challenging each other on these grounds, Brett told me that challenges might be filed with NAD by nongovernmental organizations or activists, perhaps requesting filing fee reductions or waivers to do so.

The true impact of these changes to NAD jurisdiction remains to be seen. While some have voiced concern about NAD's newly expanded jurisdiction, such initial fears may be overblown.

Most reputable national advertisers have already cleaned up their ads to reflect changes in public sentiment. Television network advertising clearance guidelines have long afforded the networks with discretion to reject advertising based on matters of taste. Most other publishers also reserve such authority to reject ads.

In addition, since NAD's ultimate enforcement authority rests on Federal Trade Commission (FTC) referrals as a backstop against advertisers refusing to participate or failing to comply with its recommendations, the FTC itself is constrained by the First Amendment.

This differs from the ASA. Thus, at least initially, only the more egregious and serious cases may end up before NAD.

A version of this article was first published by Law360 on November 14, 2022.

Bad Faith Games – Hasbro Rolls and Loses

By Sarah Simpson

For EU and UK trademarks, there is a five-year grace period following the issuance of a registration, during which the trademark owner must use the mark in connection with the goods and/or services covered by the registration before it can be challenged (and potentially ultimately revoked) for non-use with such goods and/or services. Some trademark owners have tried to take advantage of this by re-filing their previously registered trademarks for exactly the same goods and/or services just before the five-year grace period ends as a means of extending this grace period. This is commonly referred to as "evergreening."

In *Hasbro v EUIPO*[1], the General Court has upheld the EUIPO Board of Appeal's decision that repeat filing of trademarks can result in bad faith applications. While it is true that evergreening doesn't always mean bad faith, where it can be demonstrated that an applicant's intention for filing a trademark application is to dodge showing genuine use of a mark more than five years old, then bad faith may be established.

Bad faith?

In legal terms, "bad faith" goes back in time and considers a trademark owner's intention at the time it applied for the trademark. If the intention was to weaken the interests of third parties or obtain a trademark registration for reasons that are unrelated to the trademark itself, then this might result in bad faith. In *Hasbro*, the question of whether the board game conglomerate acted in bad faith hinged on whether Hasbro's repeat filings of the MONOPOLY trademark, to avoid showing genuine use of the mark, amounted to bad faith.

Hasbro v EUIPO

When Hasbro filed its MONOPOLY trademark yet again, specifying goods and services near-identical to its earlier filing, the General Court said the application was made in bad faith, as Hasbro's intention was to prolong the five-year grace period allowed for establishing use.

Although the case was initially rejected by the Cancellation Division of the EUIPO, the EUIPO Board of Appeal partially invalidated Hasbro's EU Registration for the MONOPOLY mark. A key factor of the General Court's decision supporting the EUIPO Board of Appeal's verdict was Hasbro's admission that its motivation for re-filing was to avoid potential costs that would be incurred to show genuine use of the MONOPOLY trademark.

Impact

The *Hasbro* case is setting precedent in both the European and UK courts. Although the Hasbro case came along post-Brexit, it is still considered "good law" in the English courts.

In a recent dispute between the two supermarket chains Tesco and Lidl[2], Tesco argued that Lidl's wordless version of its logo should be invalidated, as the mark had never been used and Lidl was periodically re-filing it to avoid having to prove genuine use. Tesco's counterclaim was struck out in the High Court as Tesco had not made a clear-cut case for bad faith. However, the Court of Appeal allowed Tesco's appeal and maintained that it was possible bad faith had occurred. This forced Lidl to explain its intentions when filing the mark, which is consistent with the *Hasbro* case. Tesco's bad faith allegation will now be assessed at the substantive trial later this year. This will be watched closely by brand-owners and practitioners hoping for further guidance on evergreening and specifically where re-filings amount to bad faith.

In *Sky v SkyKick*[3], the Court of Appeal said that a trademark applicant can have both good and bad reasons for applying to register trademarks. However, trademark filings that are submitted underhandedly, particularly where dishonesty is the main objective of filing the application in the first place, should be invalidated.

Bad faith beware!

The *Hasbro v EUIPO* decision has resulted in brand owners and trademark lawyers taking greater care when re-filing trademarks. It is important to highlight though, that re-filing a trademark is allowed. It is only when it can be established that an applicant's intention at the point of re-filing the mark was to skirt use requirements, that bad faith can be found.

Brands looking to file new, or re-file existing, trademarks, should ensure they have a clear trademark strategy. Also consider retaining and recording: (1) evidence of genuine use of your marks; and (2) your reasons for re-filing any existing trademarks.

(1) 21/04/2021, Case T-663/19, ECLI:EU:T:2021:211 *(Hasbro, Inc. v European Union Intellectual Property Office)*

(2) *Lidl Great Britain Limited v Tesco Stores Limited* [2022] EWHC 1434 (Ch)

(3) *Sky Limited (formerly Sky Plc), Sky International AG, Sky UK Limited v SkyKick, UK Ltd, SkyKick, Inc* [2021] EWCA Civ 1121, 2021 WL 03131604

Not-So-Open Gaming License: Dungeons & Dragons Publisher Tries to Tighten Grip on Third-Party Content

By Rachel Schaub

It's an agreement that fans and content creators have been operating under for years: use Dungeons & Dragons (D&D) as the base system for your podcast, tabletop roleplaying game system (like Pathfinder, or Adventures in Middle Earth), or TV show and the game's publisher, Wizards of the Coast, will not require royalties or pursue legal action if you follow its open licensing agreement.

And the agreement has value on both sides. Third-party creators can use the System Resource Document, which lists some D&D concepts (such as the name Dungeons & Dragons and proper nouns used within the game) as proprietary, but allows other concepts to be licensed under the current Open Game License, or OGL. The current OGL licenses basic D&D information about gameplay structures (or how to play the game), as well as character, species, and equipment information (or how to build a character and prepare them to play the game) as open game content.

In return, D&D has experienced a Renaissance in recent years. Streaming platforms such as Dropout, YouTube, and Twitch host live-plays of one-shots — a D&D game started and finished in one sitting — and campaigns — longer stories told and played across multiple sessions. Podcasts detailing campaigns are not only popular in their own right but have led to a graphic novel series already on its fifth installment and a TV series now in its second season. And third parties are not the only moneymakers. A D&D movie starring Chris Pine is set to premiere in March, and Paramount+ ordered a D&D live-action series in January.

But recent leaks show that Wizards of the Coast may be changing the rules.

The new OGL, version 1.1, was set to accompany the release of a new edition of D&D rules currently termed OneD&D. But a leaked version of OGL 1.1 drew fire from fans and third-party creators alike.

The new OGL made sweeping changes, separating its license into a Commercial and Non-Commercial Agreement depending on the use a licensee is making of the System Resource Document and if the licensee is profiting from that use. Under the leaked draft, a licensee making over $750,000 from its work owes Wizards of the Coast, a company whose sales topped $816 billion in 2020, 20-25 percent of its revenue over $750,000.

Creators and users also balked at OGL 1.1's license-back provision, which granted Wizards of the Coast a "nonexclusive, perpetual, irrevocable, worldwide, sub-licensable, royalty-free license to use" licensees' content "for any purpose." A broad reading of this clause would grant Wizards of the Coast a right to use all fan-created content and the ability to profit off it without any obligation to credit or pay the creator.

The original OGL granted a "perpetual, worldwide, non-exclusive license" to open game content to licensees and said that licensees "may use any authorized version of this License to copy, modify and distribute any Open Game Content originally distributed under any version of this License." But OGL 1.1 de-authorized the original OGL and says "unless otherwise stated in this agreement, any prior agreements . . . are no longer in force."

Putting aside questions of whether this change would pass the smell test with a court, this news immediately threw third-party creators into crisis mode. Tens of thousands of frustrated users canceled their subscriptions to Wizards of the Coast's online platform, D&D Beyond.

Wizards of the Coast had previously walked back its open license system and experienced similar backlash. In 2008, the company released a new license agreement called the Game System License alongside the fourth edition of D&D. Perhaps unsurprisingly, creators and users didn't use that edition as a result. The company returned to the OGL with its fifth edition, and it is that edition that has spurred the various recent successes. For longtime D&D users, the leaked OGL is just the latest in the saga of Wizards of the Coast cutting back on its promise of an open game system.

Given the uproar around the open game system, it's worth noting that only some elements of a game such as D&D are able to receive copyright protection. In its factsheet on games, the US Copyright Office noted that "the idea for a game, its name or title, or the method or methods for playing it" cannot be copyrighted. And as soon as a game is made public, others may develop another game "based on similar principles" without running afoul of copyright law. While Wizards of the Coast may copyright instructions or directions to protect all copyrightable elements of the game, it cannot copyright the idea underlying it.

But third parties are not waiting for a court case to make changes to their operations. Paizo, publisher of Pathfinder and Starfinder game systems and D&D's biggest competitor, published its first edition using the original OGL and many of its products still bear the original OGL license language. Paizo issued a statement on January 12 noting that it is prepared to pursue legal action "if need be" and announcing a "new open, perpetual, and irrevocable Open RPG Creative License (ORC)." At the time of its announcement, five other publishers had already agreed to participate in the ORC license, which will initially be owned by Paizo's intellectual property law firm but the company plans to provide ownership to a "nonprofit with a history of open source values." Other publishers announced their moves away from Wizards of the Coast and the OGL, with indie publisher The Rook & The Raven confirming its withdrawal from licensing negotiations with Wizards of the Coast and its parent company Hasbro.

On January 13, the day after Paizo's announcement and after a week of radio silence following the OGL 1.1 leak, Wizards of the Coast walked back its OGL 1.1 plans. It stated that "it's clear from the reaction that we rolled a 1." (Rolling a 1 in D&D leads to sometimes catastrophic results; it's the worst outcome of a dice roll.) The company promised any new OGL would not include royalty structures or any license-back provision that would give Wizards of the Coast any ownership of third-party created content. Further, the company promised that the new OGL would only cover content for TTRPGS (tabletop RPGs), excluding livestreams, cosplay, and other uses.

After that announcement fell flat, the company issued a fresh apology January 18. Wizards of the Coast said it would share a new and (hopefully) improved OGL for users' review and feedback coupled with a survey to gauge their reaction. Then the company committed to "compile, analyze, react to, and present back what we heard from you." Finally, the company listed all areas that will not be covered by the new OGL, including video content, any accessories such as novels, apparel, and dice, contracted services (some Dungeon Masters, or DMs, run games not only for fun but as a first or second job). The company reiterated that "[t]here will be no royalty or financial reporting requirements" and "[y]ou will continue to own your content with no license-back requirements."

Creators and fans are still awaiting a new OGL draft from Wizards of the Coast; however, Paizo has not walked back their open license announcement. And multiple video creators already announced their movement away from D&D for future campaigns. Trust in Wizards of the Coast is still shaken, with some dismissing the company's latest statement as a mere PR move.

In any event, changes are coming to Wizards of the Coasts' OGL, and any such changes might be too late to keep users on the company's system.

You Meta Believe the GDPR Penalties Are No Joke!

By Sarah Simpson and Tegan Miller-McCormack

On January 4, Meta Ireland Limited (Meta Ireland) was fined €390 million (€210 million in respect of Facebook and €180 million relating to Instagram) by the Irish Data Protection Authority (Irish DPA). As a result, Meta Ireland has been directed to bring its data processing operations into compliance within three months of the decision. Meta Ireland was slapped with these eye-wateringly high fines because it failed to comply with its obligations found at the heart of the GDPR, specifically that personal data must be processed lawfully, fairly and transparently, for a suitable legal basis.

The Irish DPA undertook its investigation into Meta Ireland as a result of two complaints filed on May 25, 2018 (the day the GDPR came into force!). The complaints centered on the platforms' terms of service, which users were required to agree to before using the platform. These terms contained language enabling the processing of personal data for "personalised services and behavioral advertising." The complaints suggested that because the terms had to be agreed to, the basis of the processing was consent, not performance of a contract as suggested by Meta. This consent was "forced" and in breach of the GDPR's rules that consent must be freely given and affirmative, rather than automatic.

The final decision issued concluded that (i) Meta Ireland had not provided sufficient clarity to users around what processing operations were being carried out on users' personal data, for what purposes and on what legal basis; and (ii) Meta Ireland was not entitled to rely on the "contract" basis for processing personal data for behavioral advertising.

You can't please everyone

Meta has commented in a public blog post that it is disappointed by the decisions and intends to appeal both the rulings and substance of the fines. In the post, the social media giant also tried to reassure its users and businesses who pay to advertise on its social media platforms in the EU that they can continue to benefit from personalized advertising. Meta argues that its approach is consistent with the EU GDPR but the debate and lack of clarity around legal bases that have occurred since the implementation of the GDPR plagues businesses trying to comply with data protection law.

Interestingly, even the Supervisory Authorities themselves could not reach a cohesive decision. The Irish DPA originally found that Meta did not rely on user consent as a lawful basis for personal data processing and complaints of "forced consent" could not "be sustained." However, following the disagreement of 10 of the 47 concerned Supervisory Authorities, the European Data Protection Board (EDPB) stepped in and issued binding determinations on the matter. These determinations led to the final decision and substantive fines that the Irish DPA handed to Meta.

The EDPB additionally directed the Irish DPA to conduct a new investigation into all of Meta Ireland's processing operations and use of special category data. However, there are questions around whether the EDPB has jurisdiction to instruct and direct an authority to engage in an "open-ended and speculative investigation." The Irish DPA has indicated that it may pursue legal action against the EDPB before the court of the Justice of the European Union for this regulatory "overreach." As the age-old saying goes, "you can't please everyone," and it certainly seems like that is the case here.

What lies ahead?

Anyone who goes online will have experienced targeted advertising at some point. Sometimes it can seem intrusive, other times, targeted ads really are spot on (recently, after receiving a targeted ad, the co-author bought herself some great new gym leggings after hunting high and low for a good pair, a win for her, and a win for the advertisers!). However, this ruling highlights that adtech-focused businesses need to carefully consider whether their business models are privacy friendly (and compliant). Businesses should review their models and check that where consent is relied upon, users give consent in a GDPR-compliant way (i.e., freely given, specific and informed), or if consent is not relied upon, the legal basis is clear and transparent.

It looks unlikely that this is the end of the matter for Meta or others heavily embedded in the data privacy world. With what looks to be a big year in the data privacy space, there are sure to be more challenges ahead. While there may be some relief for businesses with the proposed EU-US Data Privacy Framework potentially progressing further this year, the seemingly certain plan to reform UK data protection law could leave the UK's adequacy decision from the EU hanging in the balance. Businesses may also need to contend with US privacy regulators, as the California Privacy Rights Act comes into effect this month, which reforms the California Consumer Privacy Act and brings a new era to data privacy in the USA.

A version of this article first appeared in the Katten's monthly Data, Privacy and Cybersecurity newsletter, Quick Bytes.

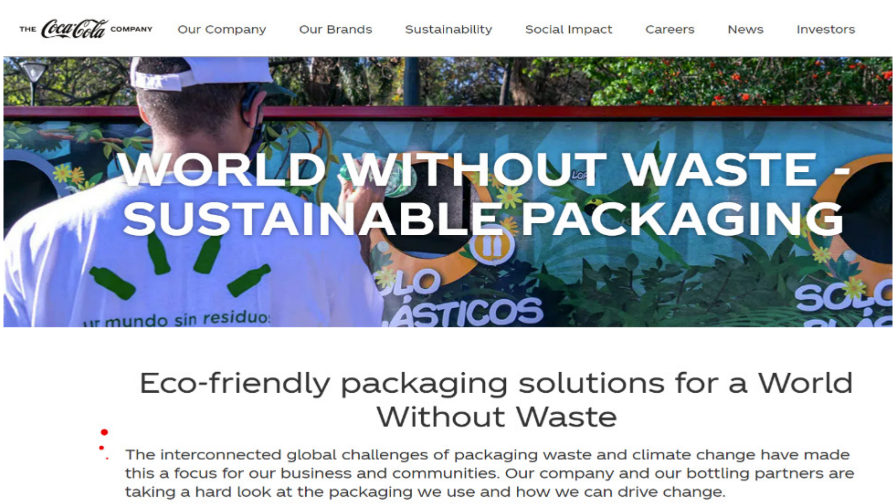
Advertising Sustainability Aspirations Do Not Violate DC Consumer Protection Procedures Act



By Catherine O'Brien, Chris Cole and Johnjerica Hodge

The Coca-Cola Company succeeded in dismissing an environmental advocacy group's complaint claiming the beverage giant's sustainability claims violated the District of Columbia Consumer Protection Procedures Act (CPPA). This decision is important precedent in the consumer protection space, which has seen an influx of complaints from activists attempting to use the CPPA to litigate corporate environmental policies and practices.

With the growing concern for the health of our planet and "sustainability" of current business practices, consumers are choosing to spend their money at businesses they perceive as "environmentally friendly." This rise in consumer demand for sustainable goods and services means businesses have a direct incentive to include sustainability claims in advertisements and labeling. Investors are also seeking out companies that have perceived better environmental and social practices. Indeed, virtually all of the world's largest companies now issue a sustainability report and set sustainability goals.



In its June 4, 2021 complaint against Coca-Cola, environmental advocacy group Earth Island Institute alleged that Coca-Cola engaged in false and deceptive marketing by representing itself as a "sustainable" and environmentally responsible company despite allegedly being one of the largest contributors to plastic pollution in the world.

The Superior Court for the District of Columbia dismissed the complaint on Coca-Cola's motion to dismiss, holding that (1) the statements were aspirational in nature and thus did not violate the CPPA, (2) the statements were not tied to a "product or service," and (3) disparate ads could not be combined to allege one general misrepresentation.

The CPPA may be triggered if there is a deception involving specific "goods or services," such as representing that goods or services are of a particular standard, quality, grade, style, or model, if in fact they are of another. Key to the dismissal of Earth Island's case was that Coca-Cola's statements were not only aspirational and not provably false, but none of the statements were alleged to have appeared on any product label. Instead, the statements were made on various corporate communications, including Coca-Cola's website, social media accounts, and in its Business & Sustainability report.

The Coca-Cola Co.
@CocaColaCo

Scaling sustainability solutions and partnering with others is a focus of ours.

Learn how we're accelerating our progress and investing in sustainable packaging platforms to reduce our carbon footprint: CokeURL.com/aqmyj #UNGA75 #RecoverBetter pic.twitter.com/FspIZ4bxrJ

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Earth Island argued that Coca-Cola's statements need not be made on the product label itself for the CPPA claim to survive because the statements were designed to further the sale of Coca-Cola products. The court disagreed with this reasoning, holding that "[i]ncluding corporate ethos, hopes, and philosophies, represented by statements on various corporate communications, but not on the product label, cannot be considered as part of the product itself."

In the final nail in Earth Island's complaint, the court rejected the plaintiff's argument that Coca-Cola's statements, taken together as a "general impression" and a "mosaic of representations," are sufficient to mislead a reasonable consumer as to Coca-Cola's sustainability as a matter of law. The court reasoned that because the statute provides a cause of action for a misleading "material fact," a CPPA claim cannot be based on "a bungle of different statements" pulled from various documents at different times. The representations at issue here differed, according to the court, from those at issue in Earth Island's prior complaint against BlueTriton Brands, which survived a motion to dismiss.

Although both Coca-Cola and BlueTriton made claims about moving to 100 percent recyclable packaging, leading sustainability efforts, and conducting business in a sustainable way, the court found Coca-Cola's carefully worded representations to be less "concrete" and thus not actionable. For example, the court viewed as "aspirational" Coca-Cola's statement that it would "collect and recycle a bottle or can for each one [sold] by 2030," but saw BlueTriton's statement that it would "keep plastic out of landfills, waterways, and oceans" as an actionable concrete promise.

The court also boldly suggested Coca-Cola is simply too big to be sued for the various sustainability claims it made. In holding that a plaintiff cannot make a CPPA claim on the basis of a "general impression" or a "mosaic of representations," the court reasoned that the sheer size of a company like Coca-Cola would render discovery and trial unwieldly, as the parties would inevitably "cherry-pick" sustainability claims made by Coca-Cola all over the world over several decades to state or negate how it represented itself.

The dismissal of Earth Island's complaint may show the court's willingness to probe CCPA allegations more deeply and may signal that the court is becoming less hospitable to allegations of false advertising regarding aspirational sustainability claims. Nevertheless, businesses should remain vigilant to carefully craft their sustainability claims given the proliferation of similar lawsuits in DC and nationwide.

Save the Date

28th Annual Conference of the Forum on Communications Law

February 2-4, New Orleans

Learn more about the conference.

6th Annual Legal, Regulatory, and Compliance Forum on Advertising Claims Substantiation

February 9–10, New York

Learn more about the forum.

WWD Beauty Sustainability Summit: The Road to 2030, Promises vs. Progress

April 25

Learn more about WWD events.

2023 WWD Beauty CEO Summit

May 9-10, New York

Learn more about WWD events.

INTA 2023 Annual Meeting Live+

May 16-20, Singapore (In-Person)

June 27-29 (Virtual)

Learn more about the INTA Annual Meeting.

Recognitions/Events

Variety Honors Scott Cutrow on 2022 'Hollywood's New Leaders' List

Entertainment and Media partner **Scott Cutrow** was recognized by Variety in its 2022 class of "Hollywood's New Leaders," which features emerging leaders across multiple fields in the entertainment industry. Scott works with entertainment and media clients on a broad range of transactional matters across the film, television and digital sectors. Read *Variety*'s Hollywood's New Leaders of 2022.

U.S. News – Best Lawyers® Nationally Ranks Key Katten Practice Areas

Katten's Trademark, Intellectual Property Litigation, Entertainment Law (Motion Picture & Television and Music), and Media Law practices were among 28 practice areas recognized nationally in the 2023 edition of *U.S. News – Best Lawyers* "Best Law Firms." Rankings are based on professional excellence as reflected in consistently impressive ratings from clients and peers. Achieving a ranking signals an exceptional combination of quality work and breadth of legal knowledge in a particular practice area. Read the full list of recognized Katten practices.

Brand Activation Legal Committee Meeting

Several Katten attorneys presented during the ANA Brand Activation Legal Committee Meeting in November. Advertising, Marketing and Promotions partner and chair **Christopher Cole**; Intellectual Property Litigation national co-chair **Kristin Achterhof**, partners **Michael Justus** and **Jessica Kraver**, and associates **Matthew Hartzler** and **Rachel Schaub**; and Privacy, Data and Cybersecurity partner **Trisha Sircar** provided updates on recent NAD decisions, class action and Lanham Act case updates, and updates on Privacy Law and FTC Enforcement Actions. Learn more about the ANA Brand Activation Legal Committee Meeting.

Defense Bar Food Litigation Forum

Christopher Cole, partner and chair of the Advertising, Marketing and Promotions practice, spoke on "The Troubling Evolution of Greenwashing: How to Avoid Costly Litigation and Consumer Backlash" in November. Forum topics included the perils of greenwashing claims and their many forms, revisions to the FTC's Green Guides, and trends in the application of federal and state laws to claims of alleged greenwashing. Learn more about the Defense Bar Food Litigation Forum.

2022 WWD Apparel & Retail CEO Summit

Katten sponsored and **Karen Artz Ash**, partner and co-chair, Trademark/Copyright/Privacy Group, and Intellectual Property associate **Cynthia Martens** attended the WWD Apparel & Retail CEO Summit, "An Era of Agility: The Path Ahead," in October. The summit provided a forum for industry leaders to access focused business intelligence on the critical issues of the day, gain a sense of future issues and direction, and hear case studies and real solutions from CEOs inside and outside of the industry.

Katten IP Attorneys Named to NY Super Lawyers List

Partners **Karen Artz Ash** and **Ilana Lubin** were among the 2022 class of attorneys named to the 2022 New York Super Lawyers list, which features outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. See the complete list.

World Trademark Review 1000 Recognizes Katten Partners

Four Intellectual Property attorneys were recognized in the 2022 edition of WTR 1000 – The World's Leading Trademark Professionals, which is a research directory that solely focuses on trademark practices and practitioners. Katten Chairman **Roger Furey**, **Karen Artz Ash** and **Floyd Mandell**, partners and co-chairs of the firm's Trademark/Copyright/Advertising/Privacy practice group, and partner **Kristin Achterhof**, national co-chair, Intellectual Property Litigation, received individual distinctions and accolades in the areas of "prosecution and strategy" and "enforcement and litigation." Members of this group have consistently been recognized by *World Trademark Review* for more than a decade. Read about Katten leaders in the WTR 1000 (2022) – The World's Leading Trademark Professionals.

Katten IP Group Makes Legal 500 United States 2022 Guide

Several Intellectual Property attorneys and two IP practices were selected for inclusion in The Legal 500 United States 2022 guide. Among those recognized in the copyright category were **Karen Artz Ash** and **Floyd Mandell**, partners and co-chairs of the firm's Trademark/Copyright/Advertising/Privacy practice group, and **David Halberstadter**, partner, Litigation. **Karen** and **Floyd** were also recognized in the Trademarks Litigation category, along with **Kristin Achterhof**, national co-chair, Intellectual Property Litigation, and partner **Terence P. Ross**. Read the full list of recognized Katten attorneys and practices.

In the News

EU-US Transborder Data Flows to be Reviewed by the European Data Protection Board

On December 13, the European Commission published its draft adequacy decision recognizing the essential equivalence of US data protection standards, laying the foundations for finalization of the European Union (EU)-US Data Privacy Framework and unhampered cross-border data flows between the EU and the US.

Read the alert.

'Value' Claims Require Support Too

An article by *AdAge* quotes top ad agency executives as saying that advertising about "value" is likely to be important in 2023: "[consumers] care about value as we continue to see inflationary pressure, so there will be a lot of marketing focus on how can you communicate the value that a brand or product provides." Can an advertiser simply assert that its product is a "good value?" Context is key.

Read the post.

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

Partner Christopher Cole, chair of Katten's Advertising, Marketing and Promotions practice group, spoke with the *Wall Street Journal* about the Federal Trade Commission's (FTC) new guidance for marketers and sellers of health-related products. The FTC's "Health Products Compliance Guidance" is an update to its 1998 guidance, "Dietary Supplements: An Advertising Guide for Industry." Among significant changes is the new title, which reflects the FTC's intent for the guidance to have a broader reach to overall health-related claims – not just for supplements.

Read the article.

Minimizing the Rising Risk of Biopic Defamation Suits

In an article for *Law360*, Litigation partner David Halberstadter wrote about the potential peril of defamation claims in connection with documentary-style productions and docudramas. The article discussed the recent "explosion in defamation lawsuits" arising from the depiction of real people in creative works. Reviewing measures for minimizing the risk of litigation, the article cites several steps creators can take and key questions producers and their counsel should strive to address.

Read the article.

Federal Trade Commission Releases Guidance to Merchants That Offer Buy Now/Pay Later (BNPL) Options to Customers

Katten partners published a joint Corporate and Intellectual Property advisory about the September 26 FTC guidance advising merchants and others to undertake a Buy Now/Pay Later compliance check.

Read the advisory.

Katten

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