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Annual Holiday Guide 2023

Hogan Lovells Retail & Fashion Sector

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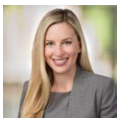
Introduction

Amidst the hustle and bustle of holiday shopping, retailers are continuing to herald digital mediums to spread holiday cheer to shoppers worldwide. The Hogan Lovells Retail and Fashion team is delighted to bring you our festive Annual Holiday Guide, packed with articles from all corners of the world and on all of the topics that matter while serving as an essential resource on the legal intricacies of digitalization during the holiday rush.

Happy Holidays from the
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Safer online shopping: New rules for online marketplaces to protect their customers



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Year after year, we find ourselves gathering presents for our loved ones at the very last minute. Fortunately, the selection of exciting gifts on online marketplaces is ever-growing: Every second consumer in Europe is planning to buy more from online marketplaces during the holiday season, with Italian consumers being most likely to do so (78%).

Those in a rush for last-minute presents may not be as attentive and careful with regard to what they buy and from whom. Online sellers know that very well, as do fraudsters and counterfeiters. More generally, the sale of counterfeits or otherwise infringing products remains a challenge in the online environment, not only during the holiday season.

In light of this ongoing challenge, lawmakers in the EU and the UK have come up early with two very special gifts this year: The EU Digital Services Act (DSA) and the UK Online Safety Act (OSA). Among other goals, both new laws aim to create a safer online

shopping experience for consumers and, to this end, ambitiously overhaul the rules for online marketplaces, in particular when dealing with possibly illegal goods.

The DSA, often dubbed as “Europe’s new constitution of the Internet”, is already in force since August for the largest online platforms, including Amazon’s EU Stores, AliExpress and Zalando. For all other online platforms and marketplaces operating in Europe, the new rules will apply from 17 February 2024. While the DSA maintains the liability principles and privileges for online platforms from its predecessor,

the e-Commerce Directive, the new law introduces detailed rules and mandatory procedures for the moderation of third-party online content (including listings from independent sellers). Online marketplaces will need to vet the sellers before allowing them to list on their platforms, and to conduct checks in official databases to identify illegal products. Once becoming aware of illegal products (such as counterfeits), providers will also need to proactively inform the consumers who purchased these products about the illegality and the consumers' redress options.

The OSA, the UK's answer to protecting users from illegal online content, imposes obligations on online platforms, including marketplaces, which are accessible to UK users, to protect those users from illegal content and activity which amounts to a criminal offence. This includes requirements to take steps to remove illegal goods, such as drugs and weapons, being sold on the platform. In certain cases, the OSA also requires platforms to take proactive measures to protect consumers, such

as automated scanning of the service, to tackle certain types of fraudulent content and activity that can occur on online marketplaces, such as phishing scams and credit card fraud.

All of this is just a glimpse of what this year's holiday season has in store for brand owners, consumers and online intermediaries alike. We are happy to advise you on the frameworks and their interplay with existing and upcoming laws of the moving legal landscape.

Happy holidays – and happy shopping!



E-commerce returns in the United States



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Holiday shoppers are already making their lists and checking them twice, and most are filling their carts from home. In a recent press release, the National Retail Federation (NRF) forecasted that holiday spending will reach record levels this season, with online sales expected to climb up to \$278.8 billion.

But what happens when the holiday whirlwind settles? Wrong size, wrong color, or wrong gift entirely, shoppers will be looking to make exchanges or returns. In 2022, NRF reported that holiday return rates are typically around 18%, making returns big business for U.S. retailers.

While many retailers accept returns to maintain goodwill with consumers, there is no federal law requiring retailers to do so, and many U.S. state laws defer to retailers' policies rather than imposing affirmative requirements.



To the extent e-commerce retailers decide to accept returns and/or provide refunds, such return and refund policies should be clearly and conspicuously displayed at or prior to the point of purchase and should include the following:

- Any limitations/exclusions on the merchandise that can be returned (e.g., “final sale” items).
- The time period that returns/exchanges will be accepted.
- Whether proof of purchase is required and if merchandise must be in a particular condition (e.g., original packaging).
- Whether a refund or store credit will be offered.
- Where/how returns can be made (e.g., whether returns are accepted at a physical location or must be made by mail).
- The time period for processing returns/exchanges.
- Any fees associated with returns/exchanges (e.g., shipping and handling).
- A clear return and refund policy can save retailers and consumers alike from some of the hassle and headache of holiday returns.



Harnessing the power of GenAI this holiday season



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As the holiday season approaches, many consumers are turning to AI chatbots for holiday shopping ideas. For consumer businesses, generative AI has a wide range of use cases, from product conception and advertising to personalized customer service. With AI, brands and retailers can create limited edition designs, tailored marketing campaigns, personalized recommendations, virtual try-on experiences, chatbots, and more – all at the click of a button.

While AI is an incredibly useful tool, brands and retailers should be aware of its intellectual property (IP) implications, and are well-advised to consider the following questions:

- How is the AI tool trained? In many cases, the data used to train AI is subject to third party IP rights such as copyright, and the AI developer may or may not have obtained the permission of the rights owners.
- Who will be liable in the event AI-generated output infringes on third party IP rights, or if an AI chatbot misleads consumers?

- Can you own or obtain IP protection for AI-generated output? What degree of human input is required to obtain copyright or patent protection where you operate?
- What are the disclosure requirements relating to AI use, and AI advertising in particular?

There is still not much clarity on these issues in many jurisdictions. This holiday season, businesses will help ensure all stay jolly by keeping apprised of the legal and regulatory landscapes and developments in AI, and by ensuring strategic and informed use of this exciting technology.

1. [NRF | 2023 Holiday to Reach Record Spending Levels.](#)

2. [2022 Consumer Returns in the Retail Industry \(nrf.com\).](#)

3. Some states, however, do regulate merchandise returns and refunds. See California ([Refund Policies | State of California - Department of Justice - Office of the Attorney General](#)); Connecticut ([Returns and Exchanges \(ct.gov\)](#)); Florida ([Statutes & Constitution :View Statutes : Online Sunshine \(state.fl.us\)](#)); Hawaii ([Department of Commerce and Consumer Affairs | Refunds and Exchanges \(hawaii.gov\)](#)); Maryland ([Consumers' Frequently Asked Questions \(marylandattorneygeneral.gov\)](#)); Massachusetts ([A Massachusetts Consumer Guide to Shopping Rights | Mass.gov](#)); Minnesota ([Sec. 325F.80 MN Statutes](#)); New Jersey ([refund-policy-disclosures \(njconsumeraffairs.gov\)](#)); New York ([Refunds, Rebates, and Rainchecks | Department of State \(ny.gov\)](#)); Ohio ([Refund Policies and Restocking Fees - Ohio Attorney General Dave Yost](#)); Rhode Island ([webserver.rilegislature.gov//Statutes/TITLE6/6-27/6-27-9.htm](#)); Utah ([Utah Office of Administrative Rules](#)); and Virginia ([Virginia Consumer Protection Act](#)).

ARSHOP

 Add to Basket

Add to Wish List



Retail insolvencies: Doing business with troubled retailers



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Retail industry performance in 2023 has been defined by cautious consumers. This trend is expected to continue during the holiday shopping season. Many predict that customers will focus on more essential items and cutting back on discretionary spending. A poor holiday showing can break distressed retailers, with many historically filing for bankruptcy in the first quarter of the following fiscal year.

A company's bankruptcy poses significant risks to its business partners, imposing an automatic stay on acts that would impact a debtor's property, meaning a supplier will be unable to collect on any outstanding debt or cease performance under an ongoing supply agreement once bankruptcy is commenced. Outstanding debts are classified as unsecured claims and may receive only cents on the dollar (if anything at all). A bankruptcy filing can also expose suppliers to potential clawback claims for preferential transfers.

So how can a business mitigate these risks? The most important precaution you can take is to be alert for the early

warning signs of a distressed customer. These can include:

- Requests to adjust contractual payment terms to enhance liquidity;
- Delayed and/or partially fulfilled deliveries;
- Corporate shakeups, including replacing key management, engaging turnaround specialists or layoffs;
- Fundraising activities, particularly at-the-market transactions or expensive new debt; or
- Selling off parts of business/closing sites.

If you notice these warning signs, you should take steps to protect yourself. Although each situation is unique, strategies may include:

- Getting familiar with the customer's financials. Review public filings, if available, or demand financial reporting as a condition to continued shipments.
- Demanding cash on delivery for new shipments or services, which alleviates both credit risk and preference exposure.
- Examining supply agreements and considering termination or modification of those agreements in advance of a bankruptcy.
- Requesting payment of outstanding invoices (possibly at a discount) prior to fulfilling any future shipments.

- Advocating to be treated as a “critical vendor” in the event of a bankruptcy (which will provide some payment of pre-bankruptcy invoices in exchange for providing credit in bankruptcy).

Most importantly, keep the lines of communication open with a distressed customer. The more information you have, the better you will be able to navigate a difficult situation. Happy Holidays!



Fake reviews and how to avoid Santa's naughty list



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When it comes to the holiday season, online shopping is an obvious choice. Armed with the insights provided by consumer reviews, purchasing the perfect gift is only a click away. But what happens when consumer reviews become a target for abuse? Less holiday cheer, and more holiday fear: customer trust and brand reputations are suddenly at risk.

Fake reviews are in focus for regulators and legislators around the world. There is increasing regulatory and legislative pressure on platforms that host fake reviews, as well as the businesses who manipulate and sell them.

The UK has been behind the curve in terms of consumer protection law in this area. That, however, is set to change, with the UK government recently announcing a clampdown on fake reviews, following investigations by the Competition Markets Authority. The government proposes to add practices relating to fake reviews to the “blacklist” of automatically unfair

commercial practices under the Digital Markets, Competition and Consumers Bill (announced earlier this year). If it does so, actions including submitting or facilitating fake reviews, as well as hosting consumer reviews without first checking they are genuine, will be treated as an automatic breach of the relevant law. In turn, the relevant regulator, the Competition Markets Authority (“CMA”), will be able to take enforcement action directly (as opposed to the current state of play which requires action through the courts). Notably, the CMA’s heightened powers include the ability to impose penalties of up to 10% of global turnover.

Review summary

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1,542 Reviews summary

Our gift to you? These tips:

- If you host consumer reviews, be aware of the responsibilities you may have to prevent fake or misleading reviews, and to remove them from your platforms.
- Be aware of your options in fighting fake reviews, when your products or services are targeted by someone on Santa's naughty list.

On both fronts, we're here to help.

Who knows you better? Santa or AI?



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“Dear Santa, this year I have been very good and have been thinking that I would like you to bring me 1) an astronaut suit; 2) a dog; 3)...”.

This is the beginning of a typical letter to Santa Claus. But what if, instead of the letter, AI tells you which are the perfect gifts for your friends and family – or even for yourself?

Probably this holiday season many people will experiment with what seems to be the last frontier of AI: through data collection, this new technology could offer tailored recommendations and perfect gift suggestions, and find what matches anyone’s wishes.

While the features described are undoubtedly impressive, it is important to note that, even in the realm of virtual reality, the IP issues that may arise from using these tools are very much real.

Let’s take some examples. What if AI –

1. Suggests a vinyl as a gift by playing a song without having the artist’s consent? A copyright infringement claim could be raised.
2. Suggests that the user buy a specific brand of product, without disclosing the existence of a collaboration between the brand and the AI provider? This could be in breach of advertising laws!

Italian Authorities are vigilant in monitoring the market regarding such new tools, so companies should also monitor their rights and remember that infringements in the virtual world are even more likely to happen when using this new technology.



Checking it twice: using paid endorsements and product reviews in U.S. advertising



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The United States Federal Trade Commission (FTC) **stepped up scrutiny** of online advertising by releasing **revised Endorsement Guides** and a **proposed rule on fake reviews** earlier this year.

As the holiday season approaches, retailers should assess their practices for online reviews and paid endorsements (including endorsements by social media influencers) to ensure that they are truthful and non-misleading, including by:

- Reviewing guidelines and any written agreements for endorsers and influencers: Endorsers must disclose their material connection with advertisers clearly and conspicuously (make it hard to miss!) and communicate the nature of the connection (e.g., “paid ad”).
- Managing risk from endorsers: Advertisers may be liable for misleading or unsubstantiated

statements made by their endorsers or made by unconnected third parties and reposted by the advertiser. Think twice before sharing a consumer’s post to make sure it is not deceptive, and monitor posts by endorsers to ensure they are not making misleading statements. Consider providing a “Do’s” and “Don’ts” list of best practices for endorsers.

- Exercising caution with advertisements directed at children: The FTC indicated that advertisements directed at children are of special concern, and practices permitted in adult-directed advertising may come under greater scrutiny when advertising to kids.



- Taking care when editing/censoring product reviews: Procuring, suppressing, and/or boosting product reviews should not distort or misrepresent consumer experiences. The FTC proposal would prohibit advertisers from hijacking reviews, posting fake reviews, buying positive or negative reviews, or claiming that reviews are representative when they are not.

Taking these proactive steps will help herald a happy New Year.

Getting ready for a fully immersive lifestyle experience



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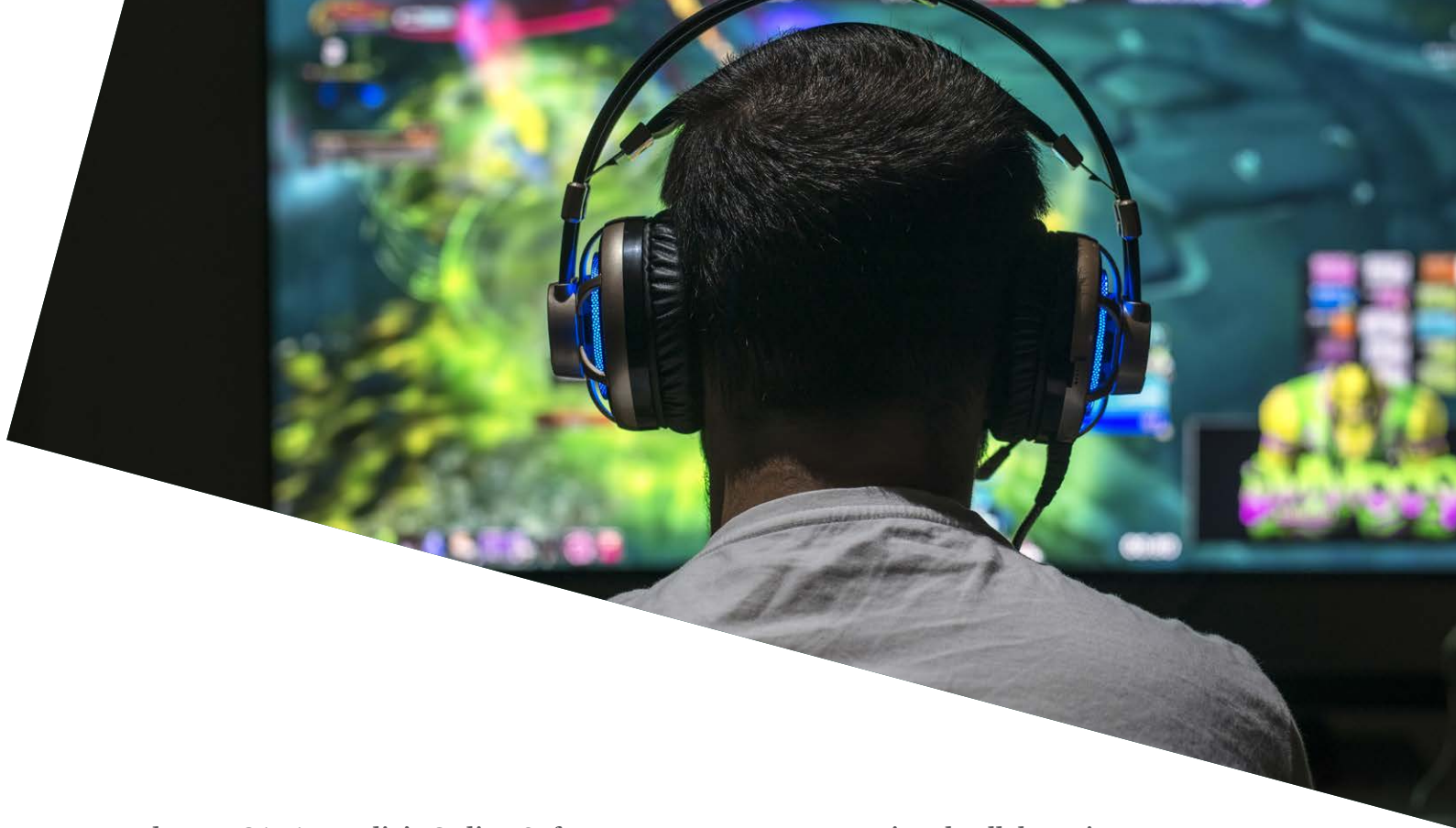
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As I sift through the clutter in my daughters' shelves, I find myself thinking with excitement about the day when their Christmas wish-list will feature a new pet for their avatar.

While we are buying our loved ones gifts in the cute little bookstore on the corner, browsing on Amazon or potato-stamping kitchen towels with our kids for the grandparents, Gen Z is ready for the next level: A fully immersive lifestyle and shopping experience that is fast pervading gaming and social media and blurring the lines between real and digital. According to **Roblox's latest guide**, over half of Gen Z say that styling their avatar is more important to them than styling themselves in the physical world. Users bought nearly 1.6 billion digital fashion items on Roblox in 2023. Digital self-expression through customizable avatars and digital creation is also growing fast on Snapchat, Facebook, Instagram and Reddit, to name just a few. And newly emerging gaming experiences like **EVERYWHERE** join the ranks of **Decentraland** and **The Sandbox** to widen the limits of digital experiences from test-driving a new prototype car to enjoying a rock concert and ordering your pizza in the game, for it to be delivered to your real-life doorstep.

While these trends come with immense opportunities of user-engagement and identification, a fully immersive digital experience also brings responsibility and challenges: In a digital context, with multiple stakeholders – the platform operator, its users, and the brands and advertisers engaging with them – clearly defining ownership and how it is transferred is critical. Equally vital for the sustainable success of an immersive experience are its interactive components: Users identify through interaction, and through the creation of user-generated content (UGC). And for them to be able to freely do so, platforms must create an environment characterized by deep trust and user safety. We have explored these principles in more depth in our **Digital Trust whitepaper**, and the following are some of the cornerstones of a trustful and safe digital environment:

- Robust content moderation under the auspices of the EU Digital Services Act (DSA), the UK's Online Safety Act (OSA),



the DMCA, Australia’s Online Safety Act and Singapore’s Code of Practice for Online Safety (you can also browse our piece on platform regulation in this Guide for more details on digital content **compliance**).

- Strong safeguarding of minors and other vulnerable user-groups, as governed by the EU Audiovisual-Media Services Directive, the OSA, COPPA and China’s Regulations on the Protection of Minors in Cyberspace.
- Clear, transparent and fair Terms of Use that serve as the constitutional cornerstone of the platform ecosystem.
- Increasingly rigorous data privacy protection around the world.
- Prevention of misleading online advertising, reinforced by regulations such as China’s Measures for the Administration of Internet Advertising.

- International collaboration to promote AI safety (an example is the signing of the **Bletchley Declaration** by 28 countries and the European Union).

As we prepare to embrace a fully immersive digital lifestyle, these laws and regulations will continue to evolve, paving the way for growth and creativity. It is crucial to create a digital environment that is inclusive and safe for all, allowing companies to innovate and compete fairly, all while protecting the rights and interests of consumers.

With the holiday season upon us, it’s a perfect time to reflect on the incredible potential of these digital landscapes. Who knows? Maybe next year, instead of potato-stamping kitchen towels, we’ll be creating festive digital snowflakes for our avatars.

Carrying consumer relationships into the New Year – Evolving privacy frameworks



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The holiday season is a key opportunity to engage and establish relationships with new customers. The first-time shopper of this year’s holiday season can become a valued loyal customer in the future. To establish and maintain that relationship, you likely need to collect and process personal information—such as names, email addresses, payment information, phone numbers, shipping addresses, preferences, and purchase histories.

The processing of personal information associated with U.S. consumers is subject to an increasingly complex patchwork of state privacy laws. There are currently four states with comprehensive privacy laws—California, Colorado, Connecticut, and Virginia. And by January 1, 2025, there will be at least four more. And some states (e.g., Washington) have adopted consumer health privacy laws that define “consumer health data” broadly enough to encompass data that retailers may collect in the ordinary course of business—such as biometric information

and precise location information that could reveal an individual’s attempt to acquire or receive health services.

Therefore, while retailers and other consumer-facing brands may be focused on engaging with and fulfilling their transactions with consumers, they may well benefit from taking the time to assess how they can address compliance obligations under the patchwork of U.S. state privacy laws, such as notices, consents, and consumer rights processes.



China's livestreaming turnover keeps increasing in the face of additional regulation



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Livestreaming has continued to pick up steam in China's e-commerce sector. During a typical livestreaming session in China, products are demonstrated in real-time to consumers via social media platforms, sometimes hosted by famous influencers and many times by ordinary sales people. Livestreaming has become particularly common in China since the beginning of the COVID-19 pandemic, when consumers had to stay indoors, but has not lost its momentum since then.

Recent reports show that the turnover achieved in China by livestreaming throughout the first three quarters of 2023 has reached no less than RMB 1.98 trillion (approx. USD 270 billion), i.e. a 60.6% increase compared to last year. Now that China's shopping season has kicked off strongly after the "double eleven festival", a yearly e-commerce shopping spree held on November 11th, there is no doubt that livestreaming will continue to be a significant driver of e-commerce sales throughout the

shopping season, which typically lasts until the end of the Chinese Lunar New Year holiday, in February 2024.

However, with the rise of the economic importance of livestreaming in China, the practice has become subject to an increasing amount of regulation, aimed at promoting a healthy and high-quality business environment. In the course of 2022 and 2023, various new laws and regulations were issued at different governmental levels aimed

at clarifying the legal liabilities of the relevant parties in the livestreaming business. Most importantly, in March 2022, the Supreme People's Court of China released its very first judicial interpretation regarding internet purchase disputes, in its Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases of Disputes over Online Consumption (I). These Provisions contain several articles regarding the liabilities of livestreaming marketing platforms and livestreaming studio operators, providing specific rules for when the consumer's interests are harmed during or after the acquisition of products via livestreaming marketing. Furthermore, in February 2023, the State Administration for Market Regulation issued its Measures for the Administration of Internet Advertising, which sets out the liabilities of livestreaming studio operators and marketeers resulting from false or misleading advertising conducted during the livestreaming marketing

activities. For instance, the Measures stipulate that a livestream marketer who makes a recommendation or certification of goods or services in his or her own name may be considered an endorser, resulting in the application of the rules for endorsers provided by the Advertising Law (and related regulations) to such activities.

Nevertheless, the increased scrutiny and regulation of the livestreaming business has not diminished its enormous economic potential in China. Foreign advertisers should consider using this hugely popular method of commercialization of their products, while staying compliant with the increased regulation. We have assisted various clients with advice on their advertising policies, and would be happy to advise your company on any livestreaming compliance questions you may have.

Have a great China sales season!



No cart left behind: Indonesia's social commerce shutdown



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Social media platforms have become popular channels for online shopping in Indonesia since the COVID-19 pandemic. In 2023, the social commerce industry in Indonesia was expected to grow by 31.0% on annual basis to reach USD\$8.2 billion. Furthermore, Indonesia had the fourth-highest share of social commerce shoppers (79%) in the Asia-Pacific region in 2022.

On September 26, 2023, the Indonesian Government stepped in, issuing a new regulation that effectively banned the operation of e-commerce on social media platforms. The Minister of Trade Regulation Number 31 of 2023 prohibits social media companies from facilitating direct payment transactions, which essentially bars social media platforms from acting as e-commerce platforms that sell goods to customers. As a result, social media platforms have promptly shut down their e-commerce services.

The ground-breaking regulation has significant implications for social commerce platforms such as TikTok, Facebook, and Instagram, which have been growing rapidly in the Indonesian market. In response, TikTok is said to

be exploring potential local e-commerce partnerships while building a separate app for its e-commerce services. The Director General of Domestic Trade of the Ministry of Trade reported that Facebook and Instagram have applied for an e-commerce license to promote goods on their apps without engaging in direct e-commerce transactions.

The new regulation does not mean the end of social media e-commerce in Indonesia, but the beginning of a new era. Social commerce platforms will have to adapt their business strategies to comply with the regulations and avoid sanctions, which will result in more features and options that will enhance the future online shopping experience.



Holidays, brands, advertising, and cultural heritage



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Renowned cultural landmarks like the Colosseum or Chichén Itzá, together with traditional motifs and patterns, often form a backdrop for global holiday campaigns, clothing, and accessories, making people wonder about festive magic in far-away paradises.

Brands should know that local laws may protect these assets, and prior authorization may be needed before they are used for retail and advertising purposes. Although “cultural appropriation” is not a new concept, consciousness about the sensitivity of cultural heritage has become a relevant aspect at both a legal and regulatory level.

In Italy, for example, the law provides that entities that incorporate cultural heritage in advertising grant authorization for the reproduction of such marketing content for commercial purposes and determine the applicable fees.

In Mexico, the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities aims to recognize and guarantee the right of ownership

and the intellectual property rights of Indigenous and Afro-Mexican peoples and communities over the elements that make up their cultural heritage, their knowledge, and their traditional cultural expressions. This establishes special protection for their spiritual and religious traditions, sacred places, and cultural symbols.

As the holiday approaches, brands need to ensure that in the desire to form an authentic connection with people of different cultural backgrounds, they do not over-step the mark. We wish you a happy holiday season, no matter where you are celebrating.



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