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KATTISON AVENUE

Advertising Law Insights From Madison Avenue and Beyond

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Letter From the Editor

Though we recently turned our clocks back, the Fall 2020 issue of *Kattison Avenue* is looking forward… to the growing implementation of Augmented Reality technology in retail, to certain streamlined filing processes introduced by the US Copyright Office, to the new ways in which the Federal Trade Commission and National Advertising Division are monitoring social media engagement and to the benefits (and risks) of conducting commercial co-ventures. The contributors to *Kattison Avenue* continue to find meaningful ways to learn and connect in a virtual world. We hope that you learn something new from this issue and that you will take a moment to connect with us and share your feedback. Stay safe and healthy and enjoy the holiday season!

Jessica Kraver

In This Issue

2020 NAD Annual Conference Highlights Continued Regulation of Influencers, Social Media and Consumer Reviews

by Michael Justus

The National Advertising Division (NAD) Annual Conference took place virtually this year from October 5 to 7 via Zoom. While perhaps not quite as fun as the usual in-person version in New York, the substantive legal content from the virtual rendition was excellent. In particular, discussions regarding recent NAD and Federal Trade Commission (FTC) cases highlighted the continued regulation of advertising issues involving influencers, social media and consumer reviews.

The NAD recently addressed influencer marketing on the TikTok and Instagram social media platforms as part of its routine monitoring program in *The Procter & Gamble Company (Bounty Paper Towels)*.[1] In that case, the NAD raised concerns with Procter & Gamble's influencer marketing videos for its Bounty paper towels. The TikTok videos featured influencers engaging in a "dance challenge" while a voiceover sang that it's time to "clean up your life." Bounty paper towels appeared in the background of the videos. All of the TikTok videos included the hashtag "#BountyPartner" to disclose the "material connection" between the influencer and Procter & Gamble (i.e., the paid influencer relationship). The NAD was concerned that the hashtag disclosures in the TikTok videos did not always appear when the videos were shared on other platforms like Instagram. As such, consumers who viewed the influencer videos on Instagram would not see the disclosures and thus may not understand the videos were actually paid advertisements. The NAD cited the FTC Influencer Disclosure Guide, which advises that endorsement disclosures made in videos should be embedded in the video and not simply in the description

that is uploaded with the video.[2] Procter & Gamble explained that it was not aware that the disclosures would not transfer to Instagram despite transferring to other platforms like Facebook, and it committed to ensure that the disclosures in TikTok videos going forward would be embedded in the video itself to transfer to all platforms. The NAD determined that Procter & Gamble's efforts to ensure that such disclosures will be embedded in videos going forward were appropriate. This case illustrates how technical differences in how social media platforms operate can lead to advertising law issues when sharing content across platforms, even when the content was compliant as originally posted.

The FTC addressed the legality of a company's responses to negative consumer reviews on the Yelp platform in *Mortgage Solutions FCS, Inc.*[3] The FTC alleged that Mortgage Solutions FCS publically responded to consumers who posted negative reviews on Yelp by revealing the consumers' credit histories, debt-to-income ratios, taxes, health, sources of income, family relationships, first and last names and other personal information in violation of the Fair Credit Reporting Act (FCRA) and other laws. For example, in response to one negative Yelp review, the owner of Mortgage Solutions FCS stated: "Your credit report shows 4 late payments from the Capital One account, 1 late from Comenity Bank which is Pier 1, another late from Credit First Bank, 3 late payments from an account named SanMateo. Not to mention the mortgage lates. All of these late payments are having an enormous negative impact on your credit score." The FTC warned that companies should not post credit reports and scores on the Internet to embarrass or punish consumers. To settle the case, Mortgage Solutions FCS and its owner will pay a $120,000 penalty for violating the FCRA, and the company is prohibited from misrepresenting its privacy and data security practices, misusing credit reports and improperly disclosing personal information to third parties.[4] While brands may choose from a number of options for lawfully engaging with customers who post negative reviews on the Internet, shaming the customers based on their credit history or other protected personal information is not one of those options.

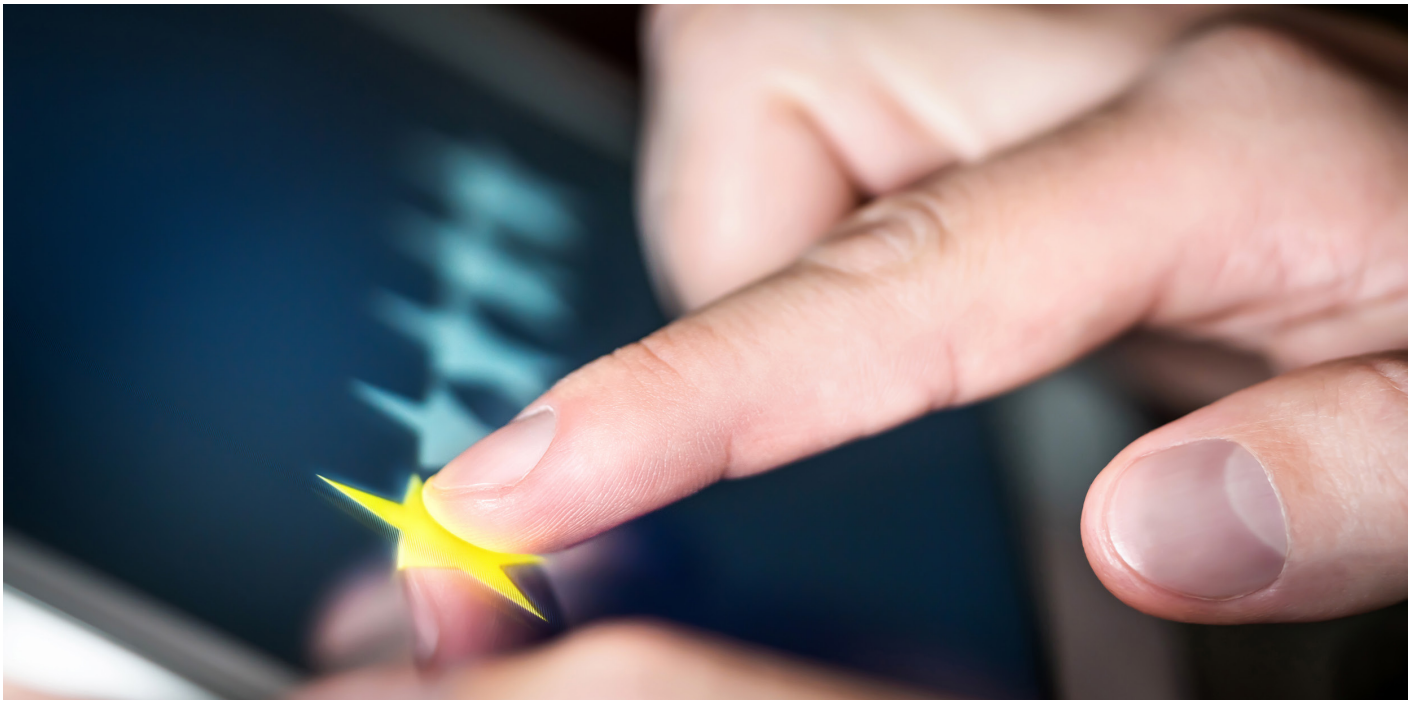
As these cases illustrate, the usual advertising law principles continue to apply in the online marketplace, and the NAD and FTC have no problem wading into issues on new and emerging platforms. Wherever consumers go, and marketers chase, the NAD and FTC are sure to follow.

(1) NAD Case Report No. 6403 (Aug. 28, 2020).

(2) *See* https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf.

(3) *U.S. v. Mortgage Solutions FCS, Inc.*, Case No. 4:20-cv-00110 (N.D. Cal.)

(4) *See* https://www.ftc.gov/news-events/press-releases/2020/01/mortgage-broker-posted-personal-information-about-consumers.



Mirror, Mirror on the Wall, Who's the Fairest of Them All? AR Retailing in the 21st Century

By Dagatha Delgado and Kate Motsinger


In our last two editions, we discussed how brands can leverage augmented reality (AR) to reach their customers in new ways, the legal issues that may arise with the use of AR and the compliance considerations for businesses subject to the California Consumer Privacy Act (CCPA).[1] In this edition, we take a deeper look at AR's potential privacy risks.

The Shift to AR During COVID-19

For all of those who drooled over Cher's Mis-Match program that put outfits together with ease in *Clueless*, now is the time to be alive: her closet has become a virtual reality. Since the start of the coronavirus pandemic, retailers have been increasingly shifting their attention to AR in an attempt to offset losses due to forced store closures. However, it also appears that AR (through virtual try-ons) has helped to improve return rates for online purchases. One virtual fitting room app has indicated that return rates for partnered retailers dropped from 38 percent to about two percent (whereas overall return rates for clothing and shoes bought online are at about 40 percent).[2]

At the same time, businesses implementing COVID-19 safety precautions in reopening stores may find that AR can increase customer safety while maintaining some elements of the experience customers expect. As closed-off fitting rooms and restricted use of test products become the new norm, in-store AR mirrors allow customers to try-on products virtually without physically trying anything on.[3] For customers hesitant to shop in physical stores (or wait in lines that wrap around the block), AR can help reduce in-person interactions and time spent in stores by simplifying in-store navigation through a customer's device.[4]

In addition to customer safety applications, AR has the potential to increase customer engagement — for example, by connecting the mirrors to social media and providing a more interactive personalized experience. Certain AR mirrors already have the capability of recognizing items brought into fitting rooms and displaying suggested items on the mirror's screen that may be of interest to the customer.[5] Those mirrors can also enable customer requests, lighting changes and even checkout.[6]

Making Use of Data

While retailers have long been collecting information about their customers, AR has the potential to collect vast amounts of additional and often very-detailed personal data from users. For instance, retailers can get a better understanding of their customer base through "facial analysis" — i.e., the process of

classifying users' faces according to personal characteristics, such as age, race or gender.[7] For example, men in their twenties typically gravitate toward shampoo or body wash that has a minty or woodsy scent, whereas men in their forties prefer unscented products. (Not captured in the statistics: men who borrow their partner's body wash and smell like mango and bergamot all day.)

Computer vision algorithms can also analyze facial expressions and identify changes in facial muscles that indicate an individual's emotions.[8] This would be particularly useful, for example, for businesses that sell perfumes or scented body products. (A scrunched nose means get it off the shelf!) Additionally, research has shown that pupil-dilation (which can be measured through eye-tracking technology) can reveal

an individual's level of interest in whatever product that person is viewing.[9] In fact, eye-tracking has been hailed as "advertising's holy grail" and seems to be the next best metric for understanding how users interact and engage with certain content.[10]

The combination of this data with existing customer data (e.g., purchase history, interests, preferences, etc.) could be used for many different purposes, including creating comprehensive customer profiles and targeted advertising and marketing. Retailers can also leverage AR to improve overall customer service and satisfaction by understanding how customers generally feel about certain products, as well as how interested a specific customer is in the product they are trying.

Understanding the Regulatory Landscape

While businesses using AR will likely have to comply with applicable comprehensive privacy laws — such as the CCPA and General Data Protection Regulation (GDPR) — businesses should also investigate whether any other regulations apply.

Biometric Privacy Laws

AR apps and devices that use facial recognition or eye-tracking technology may collect certain data that would be considered biometric information under biometric privacy or data breach laws. Currently, three US states — Illinois,[11] Texas[12] and Washington[13] — regulate how companies collect, disclose and retain biometric information and impose certain notice and consent requirements for the collection and use of such information. While there is no universal definition of biometric information, the term is typically defined as information based on or derived from an individual's unique biological characteristics that is used for identification or authentication purposes.

There is also one law specifically regulating the use of facial recognition (outside the scope of general biometric laws). The city of Portland, Oregon, in September, passed a local ordinance prohibiting private entities from using facial recognition technologies in public places within Portland (though the ordinance makes an exception for face detection services in social media apps).[14] The ordinance will take effect on January 1, 2021.

While there is no federal law regulating biometric information, this has certainly been on Congress' agenda. In August, Senators Jeff Merkley and Bernie Sanders introduced the National Biometric Information Privacy Act of 2020 (S. 4400).[15] Although politicians on both sides of the aisle agree

that a comprehensive federal privacy scheme is needed — and that it must address biometric information — partisan politics and the urgency of the COVID-19 pandemic have caused such bills to stall. In the meantime, without a federal law regulating biometric information, businesses using AR are left with a patchwork of overlapping and inconsistent obligations.

What Brands Can Do Now

Retailers considering launching AR projects should do their due diligence to ensure that they are implementing AR responsibly. Importantly, retailers should ensure that they understand (1) how the specific AR technology will function, (2) what type of data will be collected or generated, and (3) how the business will use such data. Retailers should carefully review agreements with vendors (including developers and device manufacturers) to understand how vendors will use any data and to restrict vendors' ability from further using any data for unlawful purposes.

1) *See* Katherine Motsinger, *I Want You to Want Me: Augmented Reality Edition*, Kattison Ave. (Spring 2020), https://katten.com/files/795900_kattison_newsletter_spring_2020.pdf; Katherine Motsinger, *Augmented Reality Marketing Campaigns and the California Consumer Privacy Act*, Kattison Ave. (Summer 2020), https://katten.com/files/866503_kattison_newsletter_summer_2020_revised_3.pdf.

(2) Abha Bhattarai, *Virtual Try-Ons Are Replacing Fitting Rooms during the Pandemic*, The Washington Post (July 9, 2020), https://www.washingtonpost.com/business/2020/07/09/virtual-try-ons-are-replacing-fitting-rooms-during-pandemic/.

(3) *See id.*

(4) *10 Applications of AR/VR that can Transform Your Retail Sales Completely. Find out How!*, [x]cube LABS (May 22, 2020), https://www.xcubelabs.com/blog/10-applications-of-ar-vr-that-can-transform-your-retail-sales-completely-find-out-how/.

(5) Hilary Milnes, *'VR Isn't Scalable': Bursting the In-Store Digital Tech Bubble*, DIGIDAY (Apr. 19, 2016), https://digiday.com/marketing/retailtech2016-vr-isnt-scalable-bursting-the-in-store-digital-tech-bubble/.

(6) *R/GA Ventures and Westfield Labs Announce the 10 Companies in the Connected Commerce Accelerator*, R/GA Ventures, https://www.rga.com/about/r-ga-ventures-and-westfield-labs-announce-the-10-companies-in-the-connected-commerce-accelerator.

(7) *See* U.S. Gov't Accountability Off., GAO-20-522, Facial Recognition Technology: Privacy and Accuracy Issues Related to Commercial Uses 13 (2020), https://www.gao.gov/assets/710/708045.pdf.

(8) *See 10 Emerging Applications of AR Face Recognition*, Banuba (April 29, 2020), https://www.banuba.com/blog/10-emerging-applications-of-ar-face-recognition; *see, e.g.*, http://zugara.com/augmented-reality-and-virtual-reality-technology/facial-recognition

(9) *See* Avi Bar-Zeev, *The Eyes Are the Prize: Eye-Tracking Technology Is Advertising's Holy Grail*, VICE (May 28, 2019), https://www.vice.com/en/article/bj9ygv/the-eyes-are-the-prize-eye-tracking-technology-is-advertisings-holy-grail.

(10) *See id.*; *see also*, Ben Dickson, *Unlocking the Potential of Eye Tracking Technology*, TechCrunch (Feb. 19, 2017), https://techcrunch.com/2017/02/19/unlocking-the-potential-of-eye-tracking-technology/.

(11) 740 Ill. Comp. Stat. 14 (2008).

(12) Tex. Bus. & Com. Code § 503.001 (2009).

(13) Wash. Rev. Code § 19.375.010 (2017).

(14) Portland, Oregon, City Code § 34.10.030. "Facial Recognition Technologies" is defined as "automated or semi-automated processes using Face Recognition that assist in identifying, verifying, detecting, or characterizing facial features of an individual or capturing information about an individual based on an individual's face"; "Face recognition" is defined as "the automated searching for a reference image in an image repository by comparing the facial features of a probe image with the features of images contained in an image repository (one-to-many search). A Face Recognition search will typically result in one or more most likely candidates—or candidate images—ranked by computer-evaluated similarity or will return a negatives result." Portland, Oregon, City Code § 34.10.020(A), (B).

(15) National Biometric Information Privacy Act of 2020, S. 4400, 116th Congress (2020) (https://www.congress.gov/116/bills/s4400/BILLS-116s4400is.pdf). "The term "biometric identifier"(A) includes (i) a retina or iris scan; (ii) a voiceprint; (iii) a faceprint (including any faceprint derived from a photograph); (iv) fingerprints or palm prints; and (v) any other uniquely identifying information based on the characteristics of an individual's gait or other immutable characteristic of an individual".

A Look at Commercial Co-Ventures with 2020 Vision

By Jessica G. Kraver

2020 has been a year fraught with dark moments, from the rapid, worldwide spread of COVID-19, to the tragic deaths of Ahmaud Arbery, George Floyd, Breonna Taylor and others, to the loss of institutional guiding lights, including John Lewis and Ruth Bader Ginsburg. As is often the case during times of crisis, various events this year have inspired companies to raise awareness and funds for particular charitable causes through the sale of certain products and services. While motivating consumers to make a purchase by promising that a portion of the proceeds from such sales will be donated to charity seems like a noble and worthy endeavor, doing so may inadvertently subject both the company and the charity to certain obligations and liabilities.

Cause-related marketing is an increasingly popular form of Corporate Social Responsibility, in which a for-profit entity engages in a marketing campaign with the parallel goals of increasing profitability and supporting a charitable mission. Often, the campaign will involve a donation to a charitable organization that is tied to a consumer's purchase of goods or services. This arrangement is also known as a commercial co-venture (CCV).

Numerous studies have shown that consumers are guided by ethics when making purchasing decisions, which has flourished during the pandemic. For instance, in a recent pre-COVID-19 study, nearly two-thirds of respondents said they believe it is a company's responsibility to give back and to have a moral or ethical viewpoint.[1] In a survey completed in March, 62 percent of respondents across various markets said that their country will not make it through the coronavirus crisis without brands playing a critical role in addressing challenges related to the pandemic.[2] And approximately 70 percent of US consumers surveyed in April said that they will stop buying products or services if they learn of a company's irresponsible or deceptive business practices during the pandemic.[3]

Accordingly, companies are incentivized to publicly promote their support of charitable and social causes. Not only can cause-related marketing cultivate trust and brand loyalty in existing customers, but it can attract new customers by appealing to a shared desire to engage in positive societal change.

During 2020, a number of companies have raised funds for important causes by donating a portion of the proceeds from sales of their products or services to those causes. But, before a business launches a cause-related marketing campaign, it is important to bear in mind that at least 22 states have laws governing CCVs and other charitable fundraising activities. Further, the uptick in cause marketing related to the COVID-19 pandemic has triggered closer scrutiny of such campaigns by state attorneys general.

As CCV laws vary from state to state, brands running national promotions will have to comply with all state requirements, some of which require early planning. Marketing and advertising teams should consider the following requirements, among others, before commencing a cause-related marketing campaign:

- **Registration.** Many states require companies to register with the state in advance of engaging in any solicitation activity. There are often registration fees and renewal requirements. Charities supported by the cause-related marketing campaign may also need to register (and such registration may need to be signed by authorized individuals of the charity). Moreover, the charity's registration often needs to predate the company's registration.
- **Written Contract With Charity.** Many states require a written contract between the company and the charity prior to solicitation. Generally, the contract must be in writing and may need to be signed by authorized officers of the company and/or charity. The contract should describe the respective obligations of the parties with respect to the campaign and may need to include particular provisions, such as a description of the goods or services to be offered to the public. A copy of the contract may need to be filed with certain states within a certain time period prior to solicitation. Some states require the company to file a copy of the agreement, while others require the charity to file.
- **Required Advertising Disclosures.** Many states require the company conducting the cause-related marketing campaign to make certain disclosures in its advertising materials, such as the dollar amount or percentage of the sale that will benefit the charity and sometimes the name, address and phone number of the charity. Some states require specific disclosure statements to be included in the advertising (e.g., New York and West Virginia).[4] If solicitation is done over the radio, television, telephone or any other means not involving direct personal contact with the person solicited, additional disclosures may be required.
- **Other Requirements.** Some states require documentation to be filed before the promotional campaign begins, such as organizational instruments and financial statements for the latest fiscal year. Certain states may require the company to post a bond or file notices of promotion and solicitation or licensure of the charity prior to solicitation. During the promotion, some states may require the company to either maintain a separate account to be controlled by the charity or to transfer funds to the charity periodically. Some states also require certain disclosures during the promotion, such as the name and address of the charity and the company. After the promotional campaign is over, some states require the company to file a final accounting or an annual financial report. Many states also require the company to retain records relating to all solicitation activities for at least three years after the promotional campaign ends.

When consumers reflect back on 2020, there will be an opportunity for socially-conscious brands to stand out as a bright spot. Just ensure that the positive light on your business isn't dimmed by subsequent enforcement action by state authorities for failing to comply with the applicable state requirements.

Special thanks to summer associates, Aileen Tan and Hanna Nunez Tse, for their contributions to this article.

(1) https://www.mintel.com/press-centre/social-and-lifestyle/givingtuesday-73-of-americans-consider-companies-charitable-work-when-making-a-purchase

(2) https://www.edelman.com/research/covid-19-brand-trust-report

(3) https://www.porternovelli.com/wp-content/uploads/2020/04/COVID-19_Tracker_WaveII_Infographic_V4.pdf

(4) N.Y. Exec. Law § 174-b; W. Va. Code § 29-19-8.

Good Copyright News for Social Media Influencers and Potentially the Companies That Hire Them

By David Halberstadter

Effective August 17, the US Copyright Office amended its regulations to establish a new "group registration" option for what it describes as "short online literary works." This is very good news for social media influencers and other online bloggers. As a general rule, a copyright registration covers an individual work, and an author is required to prepare a separate application and submit a separate filing fee for each work he or she wants to register. The output of social media influencers and bloggers typically consists of frequent but short posts. Until now, both the administrative burden and cost of registering each post or blog has been prohibitive, so many influencers and bloggers simply did not register their works, and therefore were unable to protect them in the event of infringement.

To qualify for this new group registration option, each work must contain at least 50 but no more than 17,500 words. This means that a short tweet will not qualify for protection, even if it is as creative as, say, a haiku poem. Tweets are limited to 280 characters which, as a general rule of thumb, converts to about 55 words, depending on word length. For purposes of context, Elizabeth Barrett Browning's famous sonnet, "How Do I Love Thee?", comprises only 37 words and, therefore, would not have been eligible for group registration as a "short online literary work" had it been first published in a tweet. A tweet, therefore, would have to come close to this character limit in order to be eligible for the new group registration. (A piece of trivia to consider: according to several sources, the current average length of a tweet is between only 28 and 33 characters or five to seven words.)

The fact that each work must contain at least 50 words also means that there will not be copyright protection (nor should there be) for the kind of short Instagram or Facebook posts that typically accompany photographs and videos. Such posts will be disqualified from protection, even if they contain the requisite creative authorship, like "Sipping [insert branded beverage] at sunset in Cabo, imagining sailing ships from days gone by, with the rumble of eternal waves the only sound interrupting the peaceful evening."

All of the works must be created by the same individual or jointly by the same individuals, and each creator must be named as the copyright claimant or claimants for each work. In other words, the author cannot submit an application in which another person or a company is listed as the copyright claimant. The works must all be published online within a three-calendar-month period. If these requirements are met, the applicant may submit up to 50 works with one application and pay a single filing fee. The US Copyright Office will examine each work to determine if it contains a sufficient amount of creative authorship, and if the

office registers the claim, that registration will cover each work as a separate work of authorship.

One arguable downside for influencers and other bloggers to the group registration for short online literary works is that the registration will only cover "text." Yet, many influencers and bloggers combine textual commentary with photographs, videos and even music. The US Copyright Office will accept "deposit copies" of the works to be registered, even if they contain text combined with another form of authorship, so at least an applicant won't have to strip out his or her other content in order to register the text. However, the issued registration will only cover the text.

A blogger's published photographs can be protected collectively by a *separate* group registration. One of the already-existing exceptions to the general rule requiring individual registrations for individual works covers photographs. One application (and one application fee) may be submitted for a group of published photographs that meets criteria similar to those now required for short online literary works. Among other things, all of the works in the group must be photographs, all of the photographs must be published in the same calendar year, the group must include no more than 750 photographs, the photographs must be created by the same author, and the copyright claimant for each photograph must be the same person or organization as the author. Unlike an application for short online literary works, however, the US Copyright Office will *not* accept an application that combines photographs with text or other forms of authorship.

Ultimately, in order for a social media influencer or other blogger to fully protect his or her multimedia posts — *i.e.*, a combination of text, photographs, video and music — he or she has no option other than to submit separate applications for each post.

Although this new registration procedure primarily affects individual influencers and other bloggers, it could have a secondary impact on businesses that engage their services. Large retailers with popular brands may have the negotiating leverage to require influencers to grant all rights of copyright in their posts to the company.[1] The company's standard influencer agreement might provide that the results and proceeds of the influencer's services (*i.e.*, his or her social media posts) are considered a "work made for hire" under copyright law, meaning that the company/employer is considered to be the author of the work for copyright purposes. But, the new process does not allow for registration of works made for hire.

Alternatively, the influencer agreement might provide (either on a standalone basis or in addition to work-for-hire language) that the influencer grants or assigns all of his or her rights of copyright in the "results and proceeds" of his or her services to the company. Under this circumstance, however, a retailer whose influencer agreement was made prior to the implementation of the new registration scheme could end up being assigned unregistered works. The retailer would then face the choice of spending time, effort and money to register such posts or forfeit the potential recovery of statutory damages and attorneys' fees should it be required to commence litigation against infringers. (This is because the Copyright Act of 1976 makes registration a condition for commencing an infringement lawsuit and entitles a copyright plaintiff to seek recovery of statutory damages and attorneys' fees only if the issuance of a registration precedes the alleged infringement.)

- Accordingly, if a retailer's influencer agreement contains work for hire language or an assignment provision that does not require the influencer to register his or her posts, a revision or amendment may be in order. There does not appear to be any prohibition against bloggers assigning their rights of copyright to another *after* receiving a registration. So a retailer might consider revising its influencer agreements to both require its influencers and bloggers to apply for registration of their posts and assign their rights in those posts following registration.

(1) See David Halberstadter, B*est Practices for Social Media Influencer Contracts*, Kattison Avenue. (Spring 2020), https://katten.com/files/795900_kattison_newsletter_spring_2020.pdf

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