Katten

KATTISON AVENUE

Advertising Law Insights From Madison Avenue and Beyond

Spring 2024 | Issue 12

Letter From the Editor

We're thrilled to present a special Spring edition of *Kattison Avenue*, which delves into highlights and takeaways from the recent Katten-hosted Association of National Advertisers (ANA) 1-Day Conference in our New York office. The event included lively discussions on hot topics such as the rise of generative artificial intelligence (GenAI) and legal trends in retail and sports marketing.

The issue begins with a summary from the conference of GenAI updates presented by Partners **Kristin Achterhof** and **Michael Justus**, who spoke on key areas to watch in the space, including the technology's rapid development, legal challenges related to its use and numerous ongoing lawsuits to watch.

Next up, Associate **Cynthia Martens** recaps a discussion between myself, Partner and Trademark/Copyright/Privacy Co-Chair **Karen Artz Ash** and thought leaders across the music, apparel and luxury jewelry sectors about current trends and business concerns impacting the retail industry, including social media influencers, phishing websites and online advertising.

Partner **Daniel Render** then summarizes his panel with Jeff Gewirtz of BSE Global on important factors that brands, as well as sports leagues, teams and venues, should consider when entering into sports sponsorships or partnerships.

Following the special reports from our ANA conference, Associate **Lauren Eiten** examines increasingly sophisticated scams in today's era of phishing, sharing new impersonation tactics that scammers are using to trick their victims. Lauren emphasizes that individuals and businesses alike should be especially vigilant when it comes to unexpected messages in order to protect their goodwill, identities and wallets.

Next, Partner **Christopher Cole** comments on the recent dismissal of a putative class action complaint against Nike, a case that emphasized a plaintiff's ability to allege that it acted like a reasonable consumer is a crucial factor in any false advertising claim.

Then, we circle back to the topic of GenAI with an article by Associate **Amelia Bruckner** that details the new requirements under Tennessee's ELVIS Act regarding unauthorized AI reproductions of individuals' likenesses and voices, otherwise known as "deepfakes."

Finally, Senior Associate **Sarah Simpson** tells us about a recent case against Amazon that highlights risks associated with website journeys that are personalized according to users' IP addresses on international retail platforms.

As always, thank you for reading and please don't hesitate to reach out with any advertising law questions.

Jessica G. Kraver

In This Issue

Special Report From ANA at Katten

Unraveling the Legal and Regulatory Maze of Generative AI: 10 Areas to Watch


By Kristin Achterhof and Michael Justus

During the ANA Advertising Law 1-Day Conference at Katten's New York office on March 20, Intellectual Property Partners **Kristin Achterhof** and **Michael Justus**, who leads the firm's Artificial Intelligence (AI) Working Group, hosted a panel discussion about the legal and regulatory challenges of generative AI (GenAI), particularly as it relates to marketing and advertising. Kristin and Mike — along with Laura Brett, vice president of the National Advertising Division (NAD) at BBB National Programs, and Seth Litwack, senior counsel, global privacy for Interpublic Group — noted that many issues are emerging in litigation while regulators grapple with providing guidance and legislators struggle to propose laws to meet the challenges for those who advertise and conduct business across myriad industries. There are numerous developing areas that they are keeping an eye on in this space, including:

1. **GenAI and Legal Challenges**: GenAI, a subset of AI that creates new content like text, images, videos and computer code, poses unique legal and regulatory issues. The most prominent among these are copyright, confidentiality, privacy, and the right of publicity.

2. **Rapid Development of GenAI**: The technology has seen significant progress in a short period. For instance, GPT-4, an AI model developed by OpenAI, was shown to pass the bar exam near the 90th percentile after initially failing the exam the year before. This rapid development underscores the need for legal frameworks to keep pace with technological advancements.

3. **Widespread Use Across Industries**: Industries ranging from marketing and advertising to software development are increasingly using GenAI. Applications in marketing and

advertising include content creation, SEO, sentiment analysis and more. However, each use case has the potential to raise different legal and regulatory issues, such as copyright infringement or privacy violations.

4. **Legal Issues Across AI Phases**: Legal and regulatory issues can arise at different stages of AI usage. For instance, the training phase could involve potential copyright infringement if the data used for training was not legally obtained. The use of confidential or personal information as prompts could jeopardize IP protections or violate privacy laws. The ownership of IP rights in outputs generated by AI is another critical issue.

5. **Litigation**: There are numerous ongoing lawsuits related to GenAI. These include high-profile cases involving photo scraping, book copying, scraping of news article archives, legal research repositories, and the use of GenAI to create deep fakes or unauthorized celebrity soundalikes. Major court decisions may be coming in 2024, given the procedural posture of some of the GenAI copyright infringement cases.

6. **Copyright Protection for AI-Generated Content**: In the United States, there is ongoing debate about whether AI-generated content should be protected under copyright laws. The US Copyright Office currently does not grant copyright protection for entirely AI-created work, a stance that was highlighted in the recent refusal to grant copyright for AI-generated artwork.

7. **EU's AI Act**: The European Union Artificial Intelligence Act represents a comprehensive approach to regulating AI. The act classifies AI systems by their level of risk and mandates human oversight and data governance. It also bans AI systems posing an unacceptable risk, such as those used for social scoring or indiscriminate surveillance.

8. **FTC's Role in Regulating AI**: The Federal Trade Commission (FTC) has been active in regulating AI, focusing on protecting consumers from potential harm. Recent FTC actions include prohibiting the impersonation of businesses or governments in matters affecting commerce, as seen in the case against Automaters, which was accused of misrepresenting the capabilities of AI. The NAD is likely to follow in FTC's footsteps regarding truth-in-advertising issues surrounding AI.

9. **State and Local Legislation**: Several US states and local governments have proposed or implemented legislation addressing a wide range of AI issues. California's Consumer Privacy Act (CCPA), for instance, focuses on privacy rights and data protection, while Illinois' Artificial Intelligence Video Interview Act requires employers to obtain consent before using AI in video interviews. Connecticut's recent state AI Act is likely to become a model for other states.

10. **Global AI Legislation**: Other countries, including China and Canada, have also passed or proposed legislation related to AI. China's new measures on the management of AI services focus on regulating deep fakes, while Canada's proposed Artificial Intelligence and Data Act aims to protect privacy and ensure the ethical use of data. These laws demonstrate the global trend towards greater regulation of AI. Most recently, the EU has chosen to regulate AI models on the basis of their potential risk.

As GenAI continues to evolve and become more integrated into various industries, understanding the legal and regulatory landscape is crucial. Ongoing litigation and emerging legislation will likely shape the future of how we use and regulate this transformative technology.

NAD Following FTC's Footsteps in AI Regulation

During the ANA conference at Katten, Laura Brett, vice president of the National Advertising Division (NAD) at BBB National Programs, confirmed that NAD is currently reviewing AI-related advertising claims in a number of pending monitoring cases. The details of the cases are not public at this time. However, Laura confirmed that NAD is looking into truth-in-advertising issues regarding AI and Generative AI (GenAI), including claims that misrepresent the capabilities of AI or how/whether AI is used in a product or service.

Laura advised that NAD is following the Federal Trade Commission's (FTC) AI regulatory actions and guidance very closely and is thinking about how NAD can provide guidance on the self-regulatory front. For example, she pointed to FTC's litigation targeting claims of AI-powered investment strategies. She also noted the FTC's position that broad privacy policies may fail to put consumers on notice that their data will be used to train AI models.

The bottom line is that the leading regulatory and self-regulatory bodies in the United States are keenly focused on AI and GenAI truth-in-advertising issues. As explained in a previous post, the compliance starting point for advertisers is: do not overstate, understate, or discriminate.
– Michael Justus

Special Report From ANA at Katten

Retail Executives Talk Shop With Katten Attorneys at ANA Advertising Law Conference

By Cynthia Martens

Leading figures from the music, apparel and luxury jewelry sectors joined Intellectual Property Partners **Karen Artz Ash**, National Co-Chair of the firm's Trademark, Copyright and Privacy practice, and **Jessica Kraver** at Katten's ANA event to talk about the latest legal trends impacting the industry.

Special guests included David Ash, chief executive officer and general counsel of Sam Ash Music, the family-owned musical instruments and sound equipment business founded in 1924; Benjamin Harris, chief commercial officer for fashion brand Rag & Bone; and Pamela Weinstock, managing counsel, intellectual property, for Tiffany & Co., who together discussed the intersection of current legal and business concerns in retail.

The integration of physical stores with e-commerce and online marketing has become critical to retail success, the speakers noted, especially after the COVID-19 pandemic upended longstanding norms and expectations. Benjamin said Rag & Bone's customers crave the physical and social aspects of in-person shopping but also expect a "frictionless" experience online. He emphasized the company's efforts to synchronize the tone and spirit of the brand conveyed in-store and on the web. Meanwhile, David discussed Sam Ash Music's investment in providing excellent online and telephone customer service, which the company boosted after the pandemic. The three speakers shared the challenges they face with phishing sites that scrape content from the web and defraud consumers by posing as real brands or authorized retailers.

Many businesses have come to rely on social media influencers to generate goodwill for their products, but the relationship between brands and influencers comes with legal risks, especially those related to advertising and consumer protection. Pamela highlighted the importance of a diversified image strategy that relies both on shorter-term arrangements with social media influencers and on longer-term partnerships with high-profile brand ambassadors. She also said that consumers are increasingly aware of the commercial relationship between brands and influencers.

The speakers further addressed the importance of a balanced online advertising strategy and the evolution of global privacy laws as they relate to measuring online engagement.

Special Report From ANA at Katten

10 Legal Trends for Brands to Watch When Investing in Sports Marketing

By Daniel Render

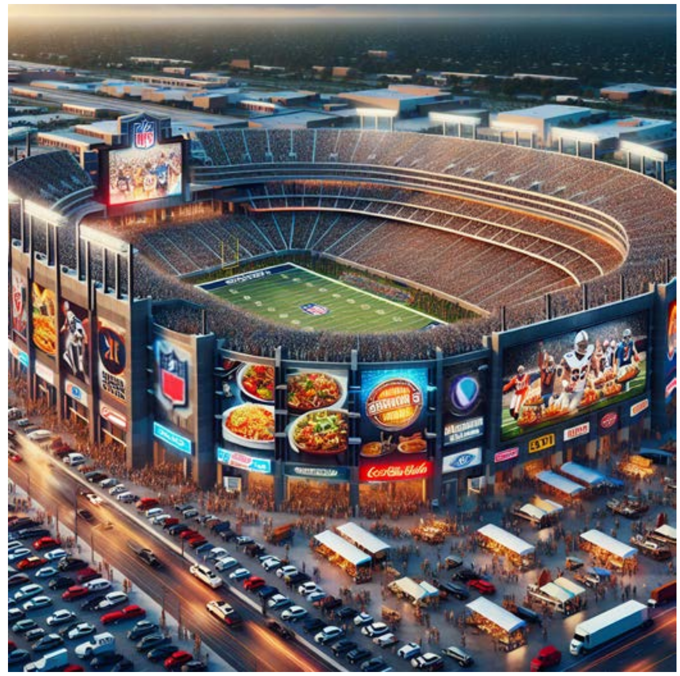
The recent ANA Advertising Law 1-Day Conference, hosted in Katten's New York office, included a panel about current legal trends in sports marketing featuring Sports and Sports Facilities Partner **Daniel Render** and Executive Vice President, Business Affairs, and Chief Legal Officer of BSE Global Jeff Gewirtz. BSE Global owns the Brooklyn Nets, the New York Liberty and Barclays Center.

Throughout the discussion, Daniel and Jeff examined how sponsorships of and partnerships with sports leagues, teams and events continue to evolve, as well as the key legal issues that should be considered by brands investing in sports, on the one hand, and leagues, teams and venues, on the other hand. Daniel and Jeff noted the following key considerations in particular:

Understanding Different Perspectives: To ensure that all parties' needs and expectations are met and that a deal is finalized in an efficient manner, it's crucial to understand both the brand and league/team/venue perspectives when negotiating sports marketing deals.

Business-Back Opportunities: "Business-back opportunities" are a significant motivator for brands to associate with sports venues. These opportunities may include, for example, the opportunity to serve a brand's beverages, have its IT systems used or have its credit cards be marketed as the preferred mode of transaction for a league/team or at a venue.

Community Engagement: Sports sponsorship is not just about advertising — it's also about fostering local community ties and support. A brand's chief marketing officer may encounter challenges when relying solely on marketing campaigns generated by ad agencies to organically create the goodwill associated with the sponsorship of a professional sports team that has a prolific track record and has fostered a lot of local pride. For example, if a regional bank wants to highlight community ties, having connections with a local team can be an excellent way to organically highlight its standing in the local community. In bigger markets, associating with one of the marquee teams or venues can also show the prestige of a brand.



Complexity of Sponsorship Alliances: Brands should understand the unique legal issues associated with different types of sponsorship alliances, which can range from global (such as the Olympic Games) to local/regional (local professional sports teams). For venues, naming rights sponsors are typically the most important source of sponsorship revenue – when a venue is being built and developed, the naming rights sponsor is usually the first sponsor in the door. For naming rights sponsors, category exclusivity is paramount, including protecting against "ambush marketing" and other forms of exclusivity infringement. Meanwhile, teams/venues seek to preserve flexibility to splice and dice categories and sponsorship inventory among as many sponsors as possible to increase revenue opportunities. The complexity of these considerations is intensified when the ownership and control of a venue differs from the owner of the team(s) playing in that venue, since those owners then have diverging sets of sponsors and economic incentives.

Note that there is an important distinction between sponsorship alliances and direct athlete endorsement alliances. Despite their affiliations with leagues, athletes typically have autonomy in terms of deals with brands related to, for example, patches, manufacturers' logos and footwear, as well as profit from those associations.

Clear Agreements: For sports leagues/teams/venues, clear drafting of the exclusivity provisions and related exceptions is needed to avoid unintentionally inhibiting future revenue generation opportunities. The level of specificity in sponsorship agreements has increased significantly over the past five to 10 years as leagues/teams/venues have become hyper-focused on revenue maximization opportunities, especially for complex categories such as water, alcoholic beverages and credit cards that can be, and often are, subdivided and negotiated.

In addition to the importance of the agreement's language itself, an agreement helps set the parties' expectations for relationships that are often set up to last a long time over different management regimes. If a league/team/venue sells a category to one sponsor and is not careful with the legal language in the agreement, even if on lucrative terms, it could unduly inhibit their ability to generate revenue in the future.

Category Exclusivity and Exclusivity Exceptions: Agreements not only need to clarify what's included in a particular category, but they should also specify what *does not* fall within that category. It can be helpful to also include examples of third parties that inhabit those exceptions. Clear drafting gives the team/venue the ability to continue to sell sponsorships to other sponsors with a clear understanding of the rules of the road.

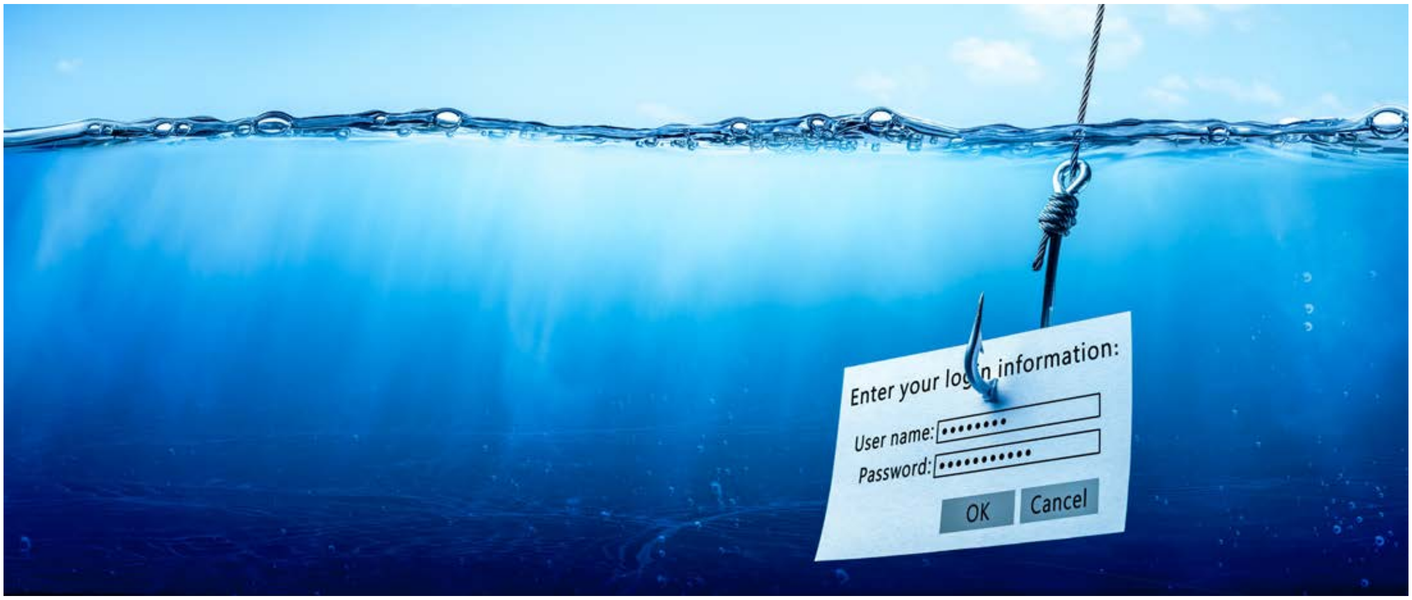
As an example: if a sponsor receives the right to be a venue's exclusive credit card provider, does this include debit cards, and how does this relate to a venue's ability to accept different forms of payment within the venue? Teams/venues need to retain the ability to explain to fans, in a factual manner, that other forms of payment are accepted without that being confused as an attempt to undercut the official credit card sponsor's exclusivity protections. In scenarios where a new sponsor's category might overlap with a preexisting sponsor's category, the new sponsor would typically be informed about this overlap. Then, the existing sponsorship agreement would be carved out as a permitted exception to exclusivity granted to the new sponsor.

Brand Perception: When negotiating category exclusivity, it's important to also consider brand perception and how the public understands the brand's meaning. In many instances, it's important to appreciate how the brand presents itself and how it's understood, particularly when it comes to exclusivity restrictions. For legal practitioners, understanding the business of the brand and that of the league/team/venue is paramount.

Changes in League Rules: All sponsorships of professional sports teams are subject to compliance with the applicable league's rules. Agreements should address how unanticipated changes in league rules that affect the sponsorship will be handled. This typically involves the team agreeing to provide equivalent replacement benefits, refunds or even termination rights if those changes result in limitations on the sponsor's ability to receive full anticipated value for its sponsorship fees. In instances where originally contemplated benefits cannot be provided, teams/vendors prefer to offer replacement benefits as the remedy as much as possible. However, brands may consider seeking termination rights in instances where the sponsor is not able to receive the fundamental sponsorship benefits it bargained for, such as when a key aspect of its sponsorship category becomes prohibited.

Morals Clauses: Sponsors typically seek to include morals clauses to protect the sponsor's reputation. Leagues/teams/venues usually resist providing these provisions or at least seek to limit their potential impact, given the high-profile nature of teams and their players.

Force Majeure and "Most Favored Nation" Clauses: These clauses have gained importance in the wake of COVID-19. Force majeure clauses dictate the parties' respective rights if circumstances outside of their control result in sponsorship benefits not being provided to the sponsor, which occurs most commonly if games are lost or played without fans due to natural disasters, epidemics or labor stoppages. Similar to changes in league rules, remedies typically involve the team/arena agreeing to provide equivalent replacement benefits, refunds or even termination rights if a force majeure event limits the sponsor's ability to receive full anticipated value for its sponsorship fees. Again, in instances where originally contemplated benefits cannot be provided, teams/vendors prefer to provide replacement benefits as the remedy as much as possible. Brands often attempt to stop paying sponsorship fees during force majeure events, while teams/venues seek to receive continued payments and will then "true up" as needed after the force majeure event ceases.



Gone Phishing – Vigilance in the New Scam Era

By Lauren Eiten

"Thank you for your order." "We tried delivering your package." We have all seen these subject lines in our inbox, but some are not so innocent. Business impersonation scams are not new, but some of their tricks are. These increasingly sophisticated scams not only present risks for individuals; they also risk harming a brand's goodwill if the business's name or marks are wrongfully used by bad actors.

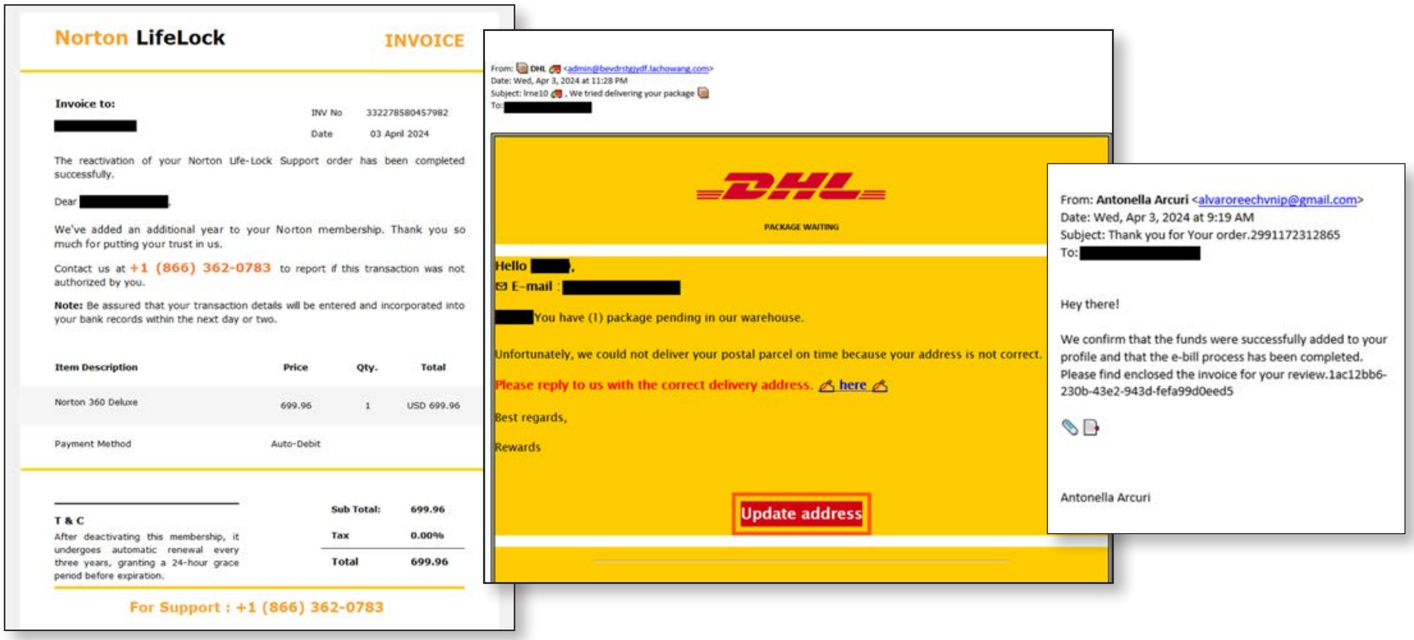
According to the Federal Trade Commission (FTC), scammers are increasingly utilizing email and text messaging, rather than phone calls, to initiate the scam.[1] In 2020, 67 percent of business impersonation scams were initiated by phone.[2] In 2023, that number dropped to 32 percent. Over the same period, email scams rose from 10 to 26 percent.[3]

In this new scam era, both individuals and businesses need to be vigilant because business imposter scams are the FTC's most reported fraud.[4] Many of us check our emails on our phone on the way to work or while we wait to pick up our kids from soccer practice. On our phones, it is easy to miss the email address that is supposedly from DHL but contains every letter in the alphabet, or that the purported Norton LifeLock employee uses a Gmail account. Scammers also utilize urgency and scare tactics to spur their victims into action before they have a chance to think twice.

These traps can also catch attorneys' attention. I recently did a double take when I received an email thanking me for an order, although I had not made any purchases recently. Apparently, the reactivation of my Norton LifeLock had been completed for the cost of $699.96. Phony subscription renewals were the second most reported scam type last year, and it is easy to see why.[5] Even though the recipient is suspicious, no one wants to pay hundreds of dollars for a subscription they did not even know they had.

Today's scams are more complex. For instance, scammers now include a phone number for the customer to "verify" or "report the transaction." Once on the line, scammers convince the individual to allow them to connect to the individual's computer, either stating it is necessary to process the refund or for security reasons.

For instance, in my case, the "Norton LifeLock" invoice stated, "Contact us at +1(866) 362-0783 to report if this transaction was not authorized by you." Other red flags included that the payment method was "auto-debit," the salutation was to my email address rather than my name, and a quick google search for the phone number resulted in zero hits. Then to triple-check, I googled "Norton" and "impersonation scam." Sure enough, there was an example of my phishing email, so into the trash it went.



Norton LifeLock INVOICE

Invoice to:
[redacted]

INV No 332278580457982
Date 03 April 2024

The reactivation of your Norton Life-Lock Support order has been completed successfully.

Dear [redacted],

We've added an additional year to your Norton membership. Thank you so much for putting your trust in us.

Contact us at +1 (866) 362-0783 to report if this transaction was not authorized by you.

Note: Be assured that your transaction details will be entered and incorporated into your bank records within the next day or two.

Item Description	Price	Qty.	Total
Norton 360 Deluxe	699.96	1	USD 699.96
Payment Method	Auto-Debit		

Sub Total:	699.96
Tax	0.00%
Total	699.96

T & C
After deactivating this membership, it undergoes automatic renewal every three years, granting a 24-hour grace period before expiration.

For Support : +1 (866) 362-0783

From: DHL <admin@bevdrstgjydf.lachowang.com>
Date: Wed, Apr 3, 2024 at 11:28 PM
Subject: lrne10 , We tried delivering your package
To: [redacted]

DHL

PACKAGE WAITING

Hello [redacted],
E-mail : [redacted]

[redacted] You have (1) package pending in our warehouse.

Unfortunately, we could not deliver your postal parcel on time because your address is not correct.

Please reply to us with the correct delivery address. here

Best regards,

Rewards

Update address

From: Antonella Arcuri <alvaroreechvnip@gmail.com>
Date: Wed, Apr 3, 2024 at 9:19 AM
Subject: Thank you for Your order.2991172312865
To: [redacted]

Hey there!

We confirm that the funds were successfully added to your profile and that the e-bill process has been completed. Please find enclosed the invoice for your review.1ac12bb6-230b-43e2-943d-fefa99d0eed5

Antonella Arcuri

Unfortunately, in this day and age, individuals should be suspicious of any unexpected email. First, trust your instincts. If your first thought is to delete it, then you are probably right. Second, slow down. Check the sender's email address and the payment method, and look for typos. Third, never click on a link or call the number listed in the email. Instead, look up the company's website and use a phone number from that site to verify the email's authenticity. Lastly, report the scam to the FTC at ReportFraud.ftc.gov.[6]

The scam industry is a billion-dollar enterprise.[7] Scammers are good at what they do and are always evolving. If you paid a scammer, you may be able to get your money back by contacting the company you used to send the money and asking them to either cancel or reverse the payment.[8] If you gave a scammer personal information, such as your Social Security number, go to IdentityTheft.gov to make a recovery plan.[9] If you gave the scammer a password, create a new, strong password for all accounts that use that password. Better yet, create multiple new, strong passwords.[10] If the scammer has remote access to your computer, update your computer's security software and delete any identified issues.[11]

Businesses also need to be on the lookout. Scammers capitalize on businesses' goodwill, and as most readers know, goodwill does not come easy or cheap. Businesses should have monitoring practices in place to quickly identify new scams. Customer service representatives should flag and escalate any incoming questions or customer reports, and businesses should quickly add information to their website, either as a blog post or under the "Frequently Asked Questions" section.

On April 1, the FTC's new Rule on Impersonation of Government and Businesses went into effect.[12] The rule states that it is a violation to "materially and falsely pose as … a business or officer thereof," or to "materially misrepresent … affiliation with, including endorsement or sponsorship by, a business or officer thereof."[13] Because of the new rule, the FTC can more efficiently recover money for consumers under section 19(b) of the FTC Act and violators can be subject to civil penalties. The new rule does not limit the rights or remedies available to trademark owners under the Lanham Act or the Anti-Cybersquatting Consumer Protection Act.[14]

Scammers are here to stay. It is on businesses and individuals to continue to stay one step ahead.

(1) *Impersonation Scams: Not What They Used to Be*, Fed. Trade Comm'n (Apr. 1, 2024), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2024/04/impersonation-scams-not-what-they-used-be.

(2) *Id.*

(3) *Id.*

(4) *Id.*

(5) *Id.*

(6) *Id.*

(7) *Id.*

(8) *What To Do if You Were Scammed*, Fed. Trade Comm'n (July 2022), https://consumer.ftc.gov/articles/what-do-if-you-were-scammed.

(9) *Id.*

(10) *Id.*

(11) *Id.*

(12) 16 C.F.R. Part 461.

(13) 16 C.F.R. Part §461.3.

(14) 89 FR 15024.

Court Dismisses Textile Greenwashing Class Action Against Nike

By Christopher Cole

In March, the United States District Court for the District of Missouri dismissed a putative class action complaint against Nike, in which the plaintiff had alleged that over 2,000 products in Nike's "Sustainability Collection" of garments were not sustainable and that the class representative alleged to have purchased some of them had been misled. *Ellis v. Nike, et al.*, No. 4-23-cv-00632 (E.D. Mo. 2024). The decision re-affirms the pleading standard for plaintiffs in greenwashing cases: plaintiffs cannot satisfy their burden by making conclusory allegations that products advertised with "green" attributes are not actually green; they must cite specific facts as to what they were exposed to, why those products are not green and importantly, how they would know that this is so.

Ameen Mohammad/Shutterstock.com

The amended complaint alleged that the plaintiff had purchased three garments from Nike's 2000+ piece "Sustainability Collection," which Nike advertises as containing recycled and organic materials and which it says supports Nike's "move to zero carbon and zero waste." The court noted that although the Amended Complaint contained numerous screenshots, lengthy excerpts from the defendant's website, excerpts from product hangtags, and even an image of a product hangtag, "the amended complaint says nothing about what Plaintiff actually read or heard about the three products she purchased before she purchased them." Nor did the amended complaint present facts suggesting that the plaintiff was a whistleblower or otherwise had special knowledge.

Instead, the complaint included a lengthy list of every Nike garment and the stated fiber content from each product label without including any allegations regarding why such representations were false. For example, the Amended Complaint did not say why a label stating that a product contains 80 percent polyester precludes the notion that some portion of the polyester content comes from recycled material.

In the key paragraph, the court's order dismissing the case states as follows: "Missouri law requires Plaintiff to plead allegations showing that she acted as a reasonable consumer would in light of all circumstances [a common attribute of all state false advertising laws]. Plaintiff seeks to skirt that requirement by being especially vague on the circumstances present here. Plaintiff saw unspecified labeling, marketing, and advertising. Did she read them? Which ones did she see? And, perhaps most importantly, what else did they say? She does not say. She supplies only fragmented excerpts from unidentified labels, marketing, and advertisements. Since she did not plead what information was available to her at the time, nor what she reviewed or did not review, the Court does not have near enough of the circumstances. She, therefore, has not plausibly pleaded that she acted as a reasonable consumer would in light of all the circumstances."

The court's opinion touches on an increasingly prevalent plaintiffs' lawyer tactic in the greenwashing litigation space – a plaintiff attempts to stitch together a narrative from a variety of disparate places, such as product labels, product and other websites, press releases, and articles in an attempt to make the communication seem collectively much worse than the label that the allegedly aggrieved consumer actually sees. The reasonable consumer is typically never exposed to all such statements in the way that plaintiffs' counsel assembles them and, therefore, cannot reasonably be said to have been misled to purchase a product based on the plaintiffs' suggested narrative.

Consider the burden of proof in consumer class actions. Plaintiffs cannot prevail merely by alleging that a claim is unsubstantiated – they must prove it false. Yet, the typical "green" claim can be difficult to assess absent obviously falsifiable representations. Thus, a claim that a product contains recycled materials or is recyclable can only be challenged with facts proving otherwise. At the margins, even claims about future carbon emissions reduction can only be challenged in court if the plaintiff can show that the defendant has no realistic action plan.

Does this mean that advertisers have a free pass to exaggerate environmental attributes so long as they make nebulous statements and/or scatter such statements widely? Certainly not, and this was clearly not so in this case. However, this decision shows that some courts will not disregard inquiry into what the reasonable consumer has been exposed to and reasonably understands, which should remain the touchstone of any well-pled false advertising complaint.

Tennessee Expands Right-of-Publicity Statute to Cover AI-Generated Deepfakes

By Amelia Bruckner

On March 21, Tennessee Governor Bill Lee signed into law the Ensuring Likeness, Voice, and Image Security Act of 2024 (the ELVIS Act) —an unprecedented piece of legislation aiming to ban unauthorized artificial intelligence (AI) reproductions of individuals' likenesses and voices. The new Tennessee law follows the current trend of federal and state lawmakers and regulators seeking to address "deep fakes" and pursuing other "anti-impersonation" measures. The ELVIS Act overtly targets AI-generated songs by imposing civil and criminal liability for reproduction of any voice that is readily identifiable and attributable to a particular individual, "regardless of whether the sound contains the actual voice or a simulation of the voice of the individual."

Importantly, the ELVIS Act extends liability to not just the end-user who creates the infringing work using AI, but also to anyone who "publishes, performs, distributes, transmits, or otherwise makes available to the public" the infringing work or "makes available an algorithm, software, tool, or other technology, service, or device" that assists in producing such infringing work. Three categories of individuals or entities can thus be targeted by the law: end-users who created the infringing work, publishers of the infringing work, and any company or individual that makes the infringement possible through technology. The text of the bill limits end-user liability to commercial uses (*e.g.*, "advertising," "fundraising," "solicitation"). The text is less clear on that point in the subsections relating to publishers, tech companies, and app developers, but the statute elsewhere includes carve-outs for First Amendment-protected activities.

The Act does require that end users and publishers have actual knowledge of infringement to impose liability. For tech companies and developers, the Act requires that the software, app, algorithm, etc., have a "primary purpose or function" of producing such infringing works. The Act also imposes liability where the publisher of an advertisement (*e.g.*, newspaper, television station) reasonably should have known of the unauthorized use of an individual's voice or likeness, meaning advertising publishers can be held liable without actual knowledge of the conduct.

The ELVIS Act received broad bi-partisan support in the Tennessee Legislature. Several industry groups also supported the ELVIS Act, including Broadcast Music Inc. and the Screen Actors Guild.

Tennessee Governor Bill Lee signs the bill into law. (Photo by Brandon Hull for the Tennessee Governor's Office.)

International Retail Platforms – Geo-Personalization, A Double-Edged Sword?

By Sarah Simpson

In the age of global consumerism, international retail brands often have different websites and functionalities tailored to customers based on where they are located around the world. Whilst this is great for customers, this can increase the risk of their trademarks being infringed. In an eagerly anticipated ruling, the Supreme Court has upheld injunctions against the sale of “Beverly Hills Polo Club” branded goods by Amazon US in the United Kingdom and the European Union.

Lifestyle Equities owns and is the exclusive licensee of a number of EU and UK trademarks relating to the “Beverly Hills Polo Club” brand. BHPC Associates LLC (a third party) owns the same US-registered trademarks and sells identical goods via Amazon’s US website to those for which Lifestyle’s UK and EU registered trademarks are registered (USA Branded Goods).

In a recent case, Lifestyle claimed that Amazon infringed its rights in its UK and EU registered trademarks by marketing and selling the USA Branded Goods on its US website because Amazon’s advertisements and offers for sale of the USA Branded Goods “targeted” UK and EU customers, which is in breach of English and European trademark laws. Lifestyle also claimed that even if such marketing of the USA Branded Goods did not target UK and EU customers in this way, Amazon still infringed Lifestyle’s UK and EU trademarks by selling and delivering the goods through its US website to UK and EU customers.

Following Lifestyle’s claim in the High Court, which was initially dismissed but then overturned by the Court of Appeal and subsequently appealed by Amazon in the Supreme Court, the Supreme Court agreed with Lifestyle and found that Amazon had, in fact, targeted, marketed and sold US goods to UK and EU customers, therefore infringing Lifestyle’s trademarks. Whilst merely accessing the Amazon US website from the UK was not sufficient to qualify as “targeting” overseas customers, the Supreme Court’s decision was influenced by the fact that UK customers visiting the Amazon US website had certain elements of their website journeys tailored for the United Kingdom despite being on the Amazon US website, such as:

- a message on the US landing page and almost all subsequent pages offering to deliver to the United Kingdom and the quote, “We ship internationally”; and
- including a “Review your order” page on the US page offering to deliver the goods to a UK address, with UK-specific delivery times and the option to pay in GBP.

Unfortunately, the Supreme Court did not address the point made by Lifestyle that even if Amazon did not target UK and EU customers, its trademark was infringed by selling and delivering goods through its US website to UK and EU customers. This would have made for an interesting judgment, as upholding the Court of Appeal’s decision on this point would have had much wider implications as to the point of sale and delivery of goods.

This decision is good news for licensees and owners of trademarks as it affords greater protection for trademarks illegally used by international online retail platforms.

International retail platforms should be careful when personalizing website journeys according to a user’s IP address. Automatic personalization to cater for the end user’s country could inadvertently mean that the website is targeting customers in another geographical region, leading to the risk of a trademark infringement.

There are ways to mitigate these risks, which the Supreme Court highlighted as helpful in Amazon’s appeal, such as having a message on the Amazon US landing page that directs UK customers toward using the Amazon UK website, or having US dollars as the default currency of payment. However, in this case, both of these examples were considered “weak,” as they were only expressed as an option, not the default position, and were not used consistently throughout the website. International retail platforms could consider automatic redirection to local websites based on users’ IP addresses and how they offer goods for sale to overseas customers, especially regarding shipping to another territory, so as to avoid risking trademark infringement.

Recognitions

Managing IP Americas Awards

During the 2024 Managing IP Americas Awards ceremony on April 25, Intellectual Property Partners **Karen Artz Ash** and **Kristin Achterhof** accepted the award recognizing Katten as US Firm of the Year – Trademark Disputes (Midwest) for our work defending and enforcing the rights of some of the world's most recognizable brands. The awards program has long recognized Katten's Intellectual Property practices and attorneys, listing Katten as a nationally ranked firm for 2023 and a Top Tier Firm in Illinois and New York, as well as designating IP Star status overall for Trademark and Trademark Prosecution and honoring the lifetime achievement of selected partners.

Billboard Names Zia Modabber to 2024 Top Music Lawyers List

Managing Partner of Katten's Los Angeles office and Entertainment and Media Litigation Chair **Zia Modabber** has once again been recognized in *Billboard Magazine*'s 2024 Top Music Lawyers. Compiled by *Billboard* editors, the list features attorneys who are making significant contributions to the music industry. Zia has a client roster that includes industry powerhouses such as Live Nation, Insomniac, Trent Reznor of the Nine Inch Nails, the Estate of Michael Jackson and André 3000. Regarding the rise of generative artificial intelligence, Zia told *Billboard* that concerned clients should "Have fun with it, just not too much fun — there's lots to figure out to make sure rights aren't trampled."

Read the article.

News to Know

UK FCA Publishes Guidance on Social Media Financial Promotions

In this article, Financial Markets and Funds Partners **Carolyn Jackson**, **Nathaniel Lalone** and **Neil Robson**, Senior Associate **Christopher Collins**, and Associates **Ciara McBrien** and **Sara Portillo** discuss the UK Financial Conduct Authority's (FCA) finalized guidance, issued on March 26, in relation to financial promotions on social media. The guidance replaces the FCA's previous guidance, published in March 2015, on social media and customer communications, and also addresses concerns that low-quality financial promotions on social media can lead to significant consumer harm due to the complex nature of financial products and services.

Read the article.

New York Attorney General Sues JBS for Alleged Greenwashing

This article by Intellectual Property Partner and Advertising, Marketing and Promotions Chair **Christopher Cole** examines the case brought by the New York Attorney General on February 28 against JBS USA Food Company and JBC USA Food Company Holdings (collectively, JBS), pursuant to New York state consumer protection laws, for alleged greenwashing regarding the company's commitment to reduce carbon emissions. The lawsuit represents the latest shoe to drop from what appears to have been a sustained, activist-driven attack against JBS's green advertising claims, particularly its previously announced "Net Zero" commitment.

Read the article.

Events

ANA Advertising Law 1-Day Conference

On March 20, Katten hosted the Association of National Advertisers's (ANA) 1-Day Conference in our New York office. The hybrid event covered various advertising and marketing law topics, including legal trends in sports marketing, hot topics in the retail industry and an update on novel issues related to artificial intelligence, with speakers from major brands and other special guests, including the chief legal officer and executive vice president, business affairs, of BSE Global, which owns the Brooklyn Nets, New York Liberty and Barclays Center.

Read about the event.

Katten's Advertising, Marketing & Promotions Practice

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

Christopher A. Cole
Partner and Chair
Advertising, Marketing & Promotions
christopher.cole@katten.com

Katten

For more information, contact: Jessica Kraver
Partner | Intellectual Property Department | Katten Muchin Rosenman LLP
+1.212.940.6523 | jessica.kraver@katten.com | 575 Madison Avenue | New York, New York 10022

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC