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Advertising Law Trends To Watch In 2021

Legal Update

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Fredrikson attorneys John Pickerill and Courtney Thompson covered a lot of content in their Advertising Law Trends to Watch in 2021 presentation on April 1, 2021. Here are a few of the highlights:

FTC Enforcement

In late 2019, the Federal Trade Commission (FTC) challenged Google regarding its compliance with the Children's Online Privacy Protection Act, including levying a \$170 million fine. In 2020, the FTC launched the CBDeceit Program and challenged CBD companies making unsupported health claims. In 2021, the FTC is expected to scrutinize big data companies and continue the CBDeceit Program.

Force Majeure Clauses

Although once a boilerplate provision, force majeure clauses are under increased scrutiny as parties try to secure excuses to performance or delayed performance in the wake of COVID-19. When reviewing these clauses, consider whether pandemic-related events are covered or whether a catch-all phrase such as "act of God" is used. The latter is typically narrowly interpreted by courts.

If the contract does not have a force majeure clause, a party may look to other theories to determine if it has an excuse for non-performance or delayed performance such as impossibility, impracticability and frustration of purpose.

In 2021, parties hotly negotiate what constitutes a force majeure event, what evidence is required to substantiate a force majeure event and the impact on the contract when a force majeure event is triggered.

Waivers & Releases

Companies and advertisers rushed to put in place written liability waivers and releases during COVID-19, which will continue in 2021. Parties should have preparedness plans and safety procedures for all in-person gatherings, for example, health screens and mask requirements. It is advised that companies and advertisers confirm their insurance coverage before hosting or sponsoring in-person events, activations and production.

Trademark Modernization Act

The Trademark Modernization Act establishes an ex parte procedure for expunging registrations that have never been used in commerce. This procedure may be initiated by anyone (not just interested parties) or the U.S. Patent and Trademark Office itself. This procedure will be available for registrations that are between three and ten years old and will help clear the register of dead trademarks.

The Trademark Modernization Act also establishes an ex parte procedure for reexamining registrations that were not used in commerce prior to the relevant registration date. This procedure may be initiated by anyone (not just interested parties) or the U.S. Patent and Trademark Office itself. This procedure will be available for registrations that are less than five years old and, like the expungement procedure, will help clear the register of dead trademarks.

Copyright Alternative in Small-Claims Enforcement Act

The Copyright Alternative in Small-Claims Enforcement Act of 2020 establishes a three-officer panel within the U.S. Copyright Office to hear claims for copyright infringement, a declaration of non-infringement and claims for misrepresentations in Digital Millennium Copyright Act takedown notices and counternotices. Parties may not seek more than \$30,000 in one proceeding. This small-claims tribunal provides a less expensive and quicker forum for copyright disputes.

Counterfeit Issues

U.S. Customs and Border Protection (CBP) has seized unprecedented levels of counterfeit products at U.S. ports during COVID-19. In fact, last fiscal year, CBP seized 26,503 shipments containing infringing goods. The total estimated value of the seized goods, had they been genuine, was nearly \$1.3 billion.

Brands facing a counterfeit issue should consider the following steps:

1. Conduct an internal brand protection audit to determine key intellectual property.
2. Register key intellectual property where products are sold, made, assembled and shipped.
3. Routinely monitor unauthorized use.
4. Collaborate with industry groups, e-commerce platforms, government agencies and attorneys.
5. Plan, investigate and prioritize enforcement.
6. Notify consumers on how they can confirm that the product which they are purchasing comes from a legitimate source.

Takedowns & Safe Harbors

There is bi-partisan support for reforming Section 230 of the Communications Decency Act, which provides a safe harbor for websites that publish third party content. Some conservatives want the reform to restrict platform editorial discretion to create a more favorable arena for their political perspectives. Some progressives want the reform to require platforms to be less hostile toward marginalized groups. It is unclear whether conservatives and progressives will be able to arrive at a mutually agreeable reform.

Privacy Laws

With a patchwork of state laws, Congress is poised to adopt federal privacy legislation in the coming years. In the meantime, California continues to lead the way and recently passed the California Privacy Rights Act, which builds on the already progressive California Consumer Privacy Act.

Cannabis Legalization

Companies in the cannabis industry are increasingly applying for federal trademark registrations for goods containing CBD, cannabis and hemp. However, given the Controlled Substances Act and Food, Drug and Cosmetic Act, there are specific limitations that need to be entered for the description of goods, particularly to clarify that the THC level is below .3 percent on a dry weight basis, and there are even more stringent requirements for consumables like food, drinks and supplements. At the same time, President Biden had pledged to decriminalize marijuana, which suggests that additional, relevant federal laws may be forthcoming.

SAG-AFTRA

While time did not permit coverage of SAG AFTRA updates during the Advertising Law Trends presentation, it is worth noting that SAG-AFTRA issued an all-new 2021 Waiver for Influencer-Produced Sponsored Content pursuant to the Commercial Contract and a standalone 2021 Influencer-Produced Sponsored Content Agreement. The goal of both the Waiver and the Influencer Agreement is to cover content produced by an influencer under the SAG-AFTRA collective bargaining agreement. The release of these documents was a big play by SAG-AFTRA to maintain relevance in an industry that is increasingly dominated by influencer content.

For more information, contact John Pickerill and Courtney Thompson in Fredrikson's Advertising, Marketing & Trademark Group.