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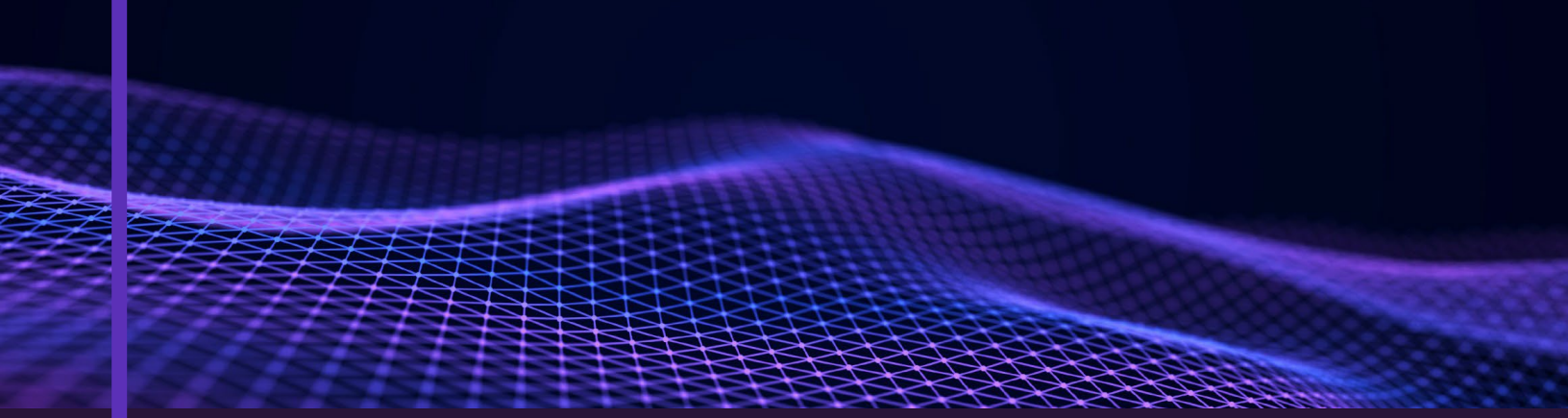
2024 ANA / BAA Conference



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Advertising, Marketing & Promotions

Our attorneys help in-house legal and marketing teams plan for and execute advertising, marketing, and promotional campaigns that comply with complex and rapidly changing state and federal laws. We also defend companies accused by consumers, competitors, or regulatory agencies of violating these laws.

Compliance with state, federal, and industry-related rules and standards is a challenge for any company with a marketing- and advertising-intensive business model. Penalties for noncompliance can be significant and include monetary damages, injunctions, and corrective advertising, together with substantial negative media coverage and damage to a brand's reputation. Our Advertising, Marketing & Promotions group helps navigate layers of complicated laws and regulations, positioning clients to avoid costly and damaging pitfalls. And, if the company does find itself defending litigation or needing to stop a competitor's deceptive advertising, our team is experienced in handling matters in federal and state courts and in front of the National Advertising Division.

Our clients include retailers, tech and gaming hardware and software companies, apparel and footwear companies, food and beverage companies, advertising agencies, mobile providers, social media networks, and e-commerce companies. Whether you are a startup or a *Fortune* 500 company, we're here to help. Perkins Coie is ranked Tier 1 nationally in Advertising Law by *U.S. News-Best Lawyers* and has been ranked Band 1 nationally for Retail Law by *Chambers USA* since the ranking's inception.

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Subscribe to the blog: www.consumerprotectionreview.com

Top Advertising Law Trends for 2024

With the first quarter of 2024 in full swing, it is a good time for brands to revisit marketing compliance strategies to minimize the risk of potential class actions, regulatory enforcement actions, and competitor challenges. This Update highlights hot topics in advertising law for 2024.

Generative Artificial Intelligence (AI) and Advertising

The emergence of consumer-friendly generative AI tools has alarmed content creators, lawmakers, and regulators wrestling with advertising transparency, intellectual property, data privacy, discrimination, ethics, and other issues. Various AI developers are currently defending against class action lawsuits alleging that they violated copyright, publicity, and privacy rights. The lawsuits often allege copyright violations and the misappropriation of personal data by companies that train generative AI models. Both the Federal Trade Commission (FTC) and Congress have hosted summits highlighting the risks and potential rewards of AI. In 2024, expect more investigations and lawsuits targeting suspected AI misuse as regulators, plaintiffs, and lawmakers evaluate the deployment and use of this technology and the related impact on consumers and rights holders.

Brands should draft an AI acceptable use policy if they have not done so yet. And if they already have one, it may be time to revisit that policy to determine whether it is consistent with current company goals and risk tolerance. Brands should also train their in-house teams, and potentially outside vendors, on their AI policies. Finally, brands should revisit vendor, agency, influencer, and other agreements to ensure that they include reasonably protective terms regarding generative AI use.

Advertising to Children and Teens

The FTC, state regulatory authorities, and state legislatures are increasingly concerned about advertising targeted towards children. The FTC, for example, is focused on advertising and data collection practices that could affect children. The agency released a staff paper in September 2023 about "blurred advertising," in which advertising and nonadvertising content is blended in a way that is likely to confuse kids and teens about the advertising nature and purpose of the content. To address that potential confusion, the FTC recommended five steps that advertisers and platforms should take to reduce harm to kids: (1) use visual and/or audio cues to clearly distinguish between advertising and entertainment content; (2) provide clear, prominent, and timely disclosures about the advertising nature of the applicable content; (3) use recognizable icons to help kids identify advertising; (4) educate parents and kids about how digital advertising works; and (5) introduce platform tools and controls to help content creators and parents identify and monitor access by kids.

The FTC also proposed changes to regulations underlying the Children's Online Privacy Protection Act (COPPA) in December 2023. The proposed changes would increase data security obligations, strengthen requirements for parental consent, and place additional limits on the data and consents that websites can use to encourage use of a website or online service. The revision to the COPPA Rule will be open for public comment until March 11, 2024. This is distinct from ongoing legislative efforts to expand COPPA's scope.

State legislatures and regulators also showed interest in children's privacy legislation and enforcement. The California Age-Appropriate Design Code Act (ADCA), which requires businesses with online services that are "likely to be accessed by children" under age 18 to implement extensive privacy and safety features, was drafted to take effect in July 2024. The ADCA will be enforced by the California attorney general and carries penalties of up to $7,500 per violation. In September of 2023, Judge Beth Freeman of the U.S. District Court for the Northern District of California issued a preliminary injunction staying enforcement of the ADCA, holding that the law likely violates the First Amendment. The California attorney general has appealed the issuance of the injunction to the U.S. Court of Appeals for the Ninth Circuit. Other state legislatures have explored banning access to various social media apps by kids under certain ages with similar legal challenges. Finally, attorneys general of numerous states brought enforcement actions against social media platforms alleging that they used design elements to unfairly manipulate kids and collect data from users under 13 without parental consent. Brands should continue to track legal developments in this area and review their advertising and digital content to manage risk.

Recurring Subscriptions

Last year, the FTC issued a Notice of Proposed Rulemaking to expand its rule regarding recurring subscription programs. The FTC is reviewing public comments, and once finalized, the updated rule is expected to establish significant nationwide standards for recurring subscription programs. In particular, the rule would require—similar to some state laws—clear and conspicuous disclosure of material subscription terms, double opt-ins for sign-ups, a simple cancellation method, and an annual renewal reminder. (See our previous Update for more detail.)

States also continue to add or amend their laws regulating recurring subscriptions. For example, new or updated laws were passed or took effect in 2023 in Connecticut, Florida, Georgia, Idaho, Illinois, Kentucky, North Dakota, and Virginia. Plaintiffs' lawyers also continue to bring lawsuits alleging violations of state recurring subscription laws.

To reduce the potential for consumer class actions and regulatory scrutiny, and to prepare for the finalized FTC rule, brands that offer recurring subscriptions should (1) clearly and conspicuously disclose material recurring subscription terms; (2) obtain consumers' express consent to the full subscription terms (and plan for the likely "double opt-in" consent as proposed in the FTC's rule); (3) provide simple and easy cancellation methods; (4) send a reminder notice before free trials convert to a paid subscription and before paid subscriptions automatically renew (as currently required by certain jurisdictions and proposed in the FTC's rule); and (5) stay current on changing laws and enforcement trends in this area.

Hidden Charges and Junk Fees

As part of President Biden's new federal consumer protection platform and attack on "junk fees," the FTC proposed a new rule in October 2023 that would require sellers to clearly and conspicuously disclose the total price—meaning mandatory fees and charges, minus shipping and government fees—of products and services in offers and advertising. The proposed rule also addresses requirements for nonmandatory fees.

States are seeking to regulate added fees as well. For example, California amended the Consumer Legal Remedies Act (CLRA) (effective July 1, 2024) in an effort to eliminate hidden fees and provide fee transparency to consumers. Similarly, Massachusetts Attorney General Andrea Joy Campbell

recently announced that her office has proposed new rules that would prohibit so-called "junk fees," including by advertising a price without clearly and conspicuously disclosing the total price of the product upfront (i.e., before checkout). In New York, a similar bill was signed into law in December 2023 requiring sellers that impose credit card surcharges to post the total price, inclusive of the surcharge. Other states—such as Arizona, New Jersey, New York, North Carolina, Rhode Island, Texas, and Virginia—have also proposed laws targeting junk fees.

Given these evolving regulations, brands should review their price disclosures for compliance with applicable laws and continue to monitor for developing junk fee-related standards at the federal and state levels.

Dark Patterns

The FTC has aggressively enforced against digital design practices that allegedly trick or manipulate consumers into making choices they would not have otherwise made (labeled "dark patterns" by the FTC and other regulators). Examples of dark patterns include false countdown timers, "confirmshaming," hidden fees, confusing and misleading text, buried disclosures, and making it hard to cancel a subscription. As discussed above, the FTC is also considering rulemaking to curb junk fees, which it views as a type of dark pattern. Consumer litigation and regulator enforcement actions regarding hidden and misleading fees are not new, but we expect to see an increase in these actions in 2024. To mitigate risk related to dark patterns and hidden fees, brands should (1) avoid using visual misdirection or deception to create pressure to complete the transaction; (2) make consumer choices easy to access and understand; (3) disclose unavoidable and mandatory fees upfront; (4) itemize different types of applicable fees at checkout for clarity; and (5) otherwise work with counsel early and often in the website, app, and digital experience design process.

Influencers, Endorsements, and Consumer Reviews

The FTC introduced two important developments on influencers, endorsements, and consumer reviews in 2023: (1) the revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (Endorsement Guides) summarized in our August 2023 Update, and (2) a notice of proposed rulemaking for a new Rule on the Use of Consumer Reviews and Testimonials.

The updates to the Endorsement Guides expanded guidance on: (1) what qualifies as an "endorser" and "endorsement," (2) who can be liable for noncompliance, and (3) how to clearly and conspicuously disclose material connections between brands and influencers. Disclosures must be "difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers" and "unavoidable" when made on social media or in other interactive digital content. The FTC also sent staff warning letters to trade associations and influencers in the beverage and sugar industries alleging failures to disclose material connections (e.g., payment and free products). Brands should review their influencer and endorsement policies, training programs, and monitoring programs for compliance with the updated Endorsement Guides.

While the Endorsement Guides include guidance on customer reviews, the proposed Rule on the Use of Consumer Reviews and Testimonials would enhance the FTC's enforcement ability in the area. The Rule would give the FTC the ability to seek civil penalties for creating fake reviews, buying positive reviews, and suppressing negative reviews. The comment period ended in September 2023, and the FTC is likely to

finalize the rule in 2024. Brands should proactively run a compliance "checkup" on their customer review programs and watch for the final FTC rule on this issue.

Sustainability Advertising

Brands continue to face potential litigation, regulatory, and reputational risks from making misleading environmental and sustainability (green) marketing claims, especially as the FTC is actively working to update its Green Guides. The Green Guides, first published in 1992, provide guidance about making and substantiating green marketing claims. While they are nonbinding and describe the FTC's views on whether a particular green claim constitutes an unfair or deceptive practice under the FTC Act, states can incorporate the Green Guides into state law, as California does.

Regulators are particularly concerned about green messaging that may convey multiple meanings, such as "sustainable," "compostable," and "recycled content," emphasizing that brands must have credible substantiation for their claims. Staying current with regulatory guidance is helpful, but brands should be mindful that green claims can trigger challenges from class action lawyers, competitors, and the National Advertising Division (NAD). Even "aspirational" claims about efforts to be more environmentally friendly in the future have been challenged. Given the evolving legal and regulatory landscape, brands should carefully evaluate their claims to ensure they are supported by competent, science-based evidence.

National Advertising Division Flags Social Media Disclosure Obligations for Wonderbelly, Its Influencers, and Investor Demi Moore

Key Takeaways:

- Disclosure of a payment or other material connection (e.g., via #Ad) must be prominent and "before the fold" for social media posts.
- Influencers must include applicable disclosures in video content (not merely in the caption that accompanies the video).
- A brand cannot repost influencer content without disclosing that the content has been paid for.
- Investors must disclose their material connections to brands in social media posts (and cannot directly contradict such disclosure with a statement that the post is "not an ad").

Haleon plc recently challenged Ginger Health Company (Wonderbelly) at the National Advertising Division (NAD) about influencer-related disclosure obligations in social media posts. In its complaint, Haleon alleged that its competitor, the maker of Wonderbelly Antacids, and its endorsers did not adequately disclose their material connections in their posts (the Federal Trade Commission (FTC)) considers providing payment and free products/services to influencers, along with employment and contractor relationships and other close connections between influencers and brands, as "material connections" that typically require disclosure). Influencers posted Wonderbelly-sponsored content on Instagram (a) with disclosure buried among other hashtags and only viewable after a user clicked the "more" link and (b) without verbal disclosure in the posted videos. Wonderbelly also reposted its influencers' content without clearly and conspicuously disclosing that the posts were from paid endorsers. Further, actress Demi Moore, an investor in Wonderbelly, made several posts about the company in which she did not disclose her affiliation with the brand. In some posts, Moore's statements included "not an ad," in contradiction of the FTC's disclosure requirements under the Endorsement Guides. In its decision, the NAD described the disclosures of Wonderbelly, its influencers, and Demi Moore as inadequate and recommended improving the disclosures to make the material connections more apparent to consumers.

CARU Issues Warning About Using AI in Child-Directed Advertising and Data Collection

Key Updates:

- On May 1, 2024, BBB National Programs' Children's Advertising Review Unit (CARU) issued a compliance warning stating that its Self-Regulatory Guidelines for Children's Advertising (Advertising Guidelines) and Self-Regulatory Guidelines for Children's Online Privacy Protection (Privacy Guidelines) apply to artificial intelligence (AI) in advertising and data collection targeted at children under 13.
- CARU warns brands that it will strictly enforce its Advertising Guidelines and Privacy Guidelines in connection with the use of AI to protect children, who are more vulnerable to advertising and whose data collection poses special concerns.

CARU recently issued a compliance warning to put advertisers, brands, endorsers, developers, toy manufacturers, and others on notice that the Advertising Guidelines and Privacy Guidelines apply to the use of AI in advertising to and collecting personal data from children under 13. A few highlights from the compliance warning follow. Brands should:

- Not mislead children using (1) AI-generated deep fakes; (2) simulated elements, including the simulation of realistic people, places, or things; or (3) AI-powered voice cloning techniques within an ad;
- Not mislead children about product or performance characteristics (e.g., product depictions including copy, sound, and visual presentations generated or enhanced using AI);
- Not use AI to mislead children into believing they are engaging with a real person;
- Not use AI-generated imagery to create unattainable performance expectations;
- Not mislead children about the inclusion, benefits, or features of AI technology in the products themselves;
- Not use AI to create the impression that a celebrity or other person has endorsed a product when they have not;
- Take measures to ensure that people depicted using generative AI reflect the diversity of humanity and do not perpetuate harmful stereotypes, prejudice, or discrimination;
- Ensure compliance with the Children's Online Privacy Protection Act, including by obtaining verifiable parental consent when collecting and operating personal data to use in or with AI systems; and
- Not use children's information in an AI system if they cannot fulfill a deletion request from a parent.

For additional information about the Advertising Guidelines, see our blog post here.

The FTC's Latest AI and Your Business

The Federal Trade Commission (FTC) recently published a new blog post within its series titled "AI and Your Business." The post emphasized the FTC's views on the importance of accuracy, transparency, and privacy as brands continue to incorporate artificial intelligence (AI) in their businesses, particularly through anthropomorphic AI chatbots and avatars.

The FTC specifically recommends that brands with these types of AI offerings:

- Be accurate and transparent about AI-related product and service capabilities. With recent inventions such as therapy bots and AI companions, the FTC is concerned about companies making false or unsubstantiated claims as well as the tools' abilities to mislead consumers regarding what they see, hear, or read.
- Mitigate the potential risk of consumer manipulation. When designing bots or avatars that are programmed to act as humans, brands should take steps to mitigate the risks that such technology could potentially manipulate consumers (particularly children) into making harmful decisions—risks that the blog post describes as inherent in that technology.
- Clearly distinguish between organic content and paid ads. The FTC's post notes that introducing advertising to generative AI services is likely to be appealing, especially because the AI technology can generate targeted ads based on user interactions. The warning about clearly distinguishing paid content is consistent with the FTC's continued focus on "native" and "blurred" advertising, namely that brands should take steps to ensure that advertising content does not appear to be organic, entertainment, informational, or other non-advertising content.
- Do not use avatars and bots to manipulate consumers for commercial purposes. Brands should not design their humanoid bot or avatar services to attempt to induce consumers to pay for additional services, steer them to affiliated businesses, or convince consumers not to cancel services.
- Carefully comply with privacy protections. Avatars and bots may collect or infer personal information to provide uniquely tailored services to their consumers. The blog post continues to emphasize the importance of brands being honest and transparent about their data collection and use of information, including when those practices change.

As AI technologies evolve, and particularly in the context of bot or avatar services designed to seem human, brands should pay close attention to how they use these technologies and take steps to avoid practices that could constitute unfair, misleading, or deceptive advertising.

FTC Finalizes Rule Banning Fake Reviews and Testimonials

The Federal Trade Commission (FTC) recently finalized its Rule on the Use of Consumer Reviews and Testimonials (Rule) to combat fake reviews and testimonials. The finalized Rule comes after the FTC reviewed 100 public comments to its Notice of Proposed Rulemaking on the Use of Consumer Reviews and Testimonials in June 2023. Violation of the Rule will allow the FTC to seek civil penalties of up to $51,744 per violation, along with other relief, such as injunctive relief. The Rule is effective on October 21, 2024. Many brands seek, host, or otherwise use customer reviews and testimonials and should therefore review the Rule and tune their compliance as needed to avoid unwanted FTC scrutiny. Highlights from the Rule include:

- **False consumer reviews, consumer testimonials, or celebrity testimonials.** The Rule prohibits brands from writing, creating, or selling consumer reviews and testimonials that materially misrepresent (expressly or by implication) (1) that the reviewer exists (e.g., for an AI-generated fake review); (2) that the reviewer used or otherwise had experience with the product or service; or (3) the reviewer's experience with the product, service, or business.

  The Rule also prohibits a brand from buying consumer reviews or disseminating (or causing the dissemination of) testimonials that fall into above categories (1) - (3) if the brand knew or should have known about the misrepresentation.

- **Buying positive or negative consumer reviews.** Brands must not provide compensation or other incentives in exchange for or conditioned on (expressly or by implication) creating consumer reviews expressing a particular position (positive or negative) about the brand or its products or services. The Rule defines "consumer reviews" as reviews published to a website or platform dedicated (in whole or in part) to receiving and displaying consumer evaluations, including, for example, via text reviews or star ratings.

- **Insider reviews and consumer testimonials.** Officers or managers of a brand cannot write or create consumer reviews or testimonials about their business, products, or services without a clear and conspicuous disclosure of their material relationship to the brand (unless, in a testimonial context, the relationship is clear to the audience).

    - If the brand knew or should have known of the material relationship between the testimonialist and the business, it is likewise a violation for the brand to disseminate or cause the dissemination of a consumer testimonial from its officer, manager, employee, or agent without a clear and conspicuous disclosure of such relationship (unless the relationship is clear to the audience).

    - When officers or managers solicit consumer reviews about the brand or its products or services from their own immediate relatives or from employees or agents (or when they tell employees or agents to solicit reviews from relatives), such solicited reviews must include a disclosure of the material relationship between the reviewer(s) and the brand. Relatedly, the

officer or manager must instruct such reviewers to clearly and conspicuously disclose their relationship to the brand and, if they knew or should have known that a related review appears without a disclosure, take remedial steps to address the disclosure.

- **Definition of "clear and conspicuous."** The Rule states that "clear and conspicuous" disclosures about material relationships—such as a manager or officer's relationship to the brand—must be easy to notice and understand for ordinary consumers. For audiovisual content, disclosures must be presented in "at least the same means as the representations requiring the disclosure." Further, for communications made using social media or the internet, the disclosure must be "unavoidable."
- **Company-controlled review websites.** Brands must not materially misrepresent (expressly or by implication) that a website or entity that they control, own, or operate provides independent reviews or opinions, other than consumer reviews, about a category of business, product, or service that the company sells. This is meant to prevent brands from creating purportedly independent websites, organizations, or entities to review their products or services and, therefore, does not apply to general consumer reviews on a brand's website, so long as those reviews otherwise comply with FTC and truth-in-advertising law requirements.
- **Review suppression.** Brands must not use unfounded or groundless legal threats, intimidation, or certain false public accusations (made with knowledge of the falsity or disregard for the truth) to prevent or remove a negative consumer review. Brands also cannot materially misrepresent (expressly or by implication) that the consumer reviews represent most or all of the reviews submitted to the website when reviews have been suppressed based on their rating or negative sentiment. A review is not considered suppressed based upon rating or negative sentiment if the suppression occurs based on criteria for withholding reviews that are applied equally to all reviews without regard to whether the review is positive or not (e.g., criteria prohibiting communication of trade secrets, confidential information, or harassing or obscene content).
- **Purchase or use of fake social media indicators.** The Rule prohibits anyone from selling or buying fake indicators of social media influence (e.g., likes, saves, or shares that are generated by bots, hijacked accounts, etc.) that materially misrepresent an individual or brand's influence. This Rule only applies to those who knew or should have known such indicators to be fake.

Combined with the FTC's updated Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Guides), the FTC emphasizes that it will monitor and enforce against false and misleading testimonial and review practices. Brands should review the Rule and Guides, update applicable review policies and terms, and ensure their related practices are up to date. Perkins Coie is also happy to offer training to legal and marketing teams on these issues, as the Rule is nuanced as applied to different types of reviews and testimonials.

In a Single Day, California Enacts Five Bills Tackling Digital Replicas and Deepfakes

Last week, over the course of a single day, California Governor Gavin Newsom made headlines by signing into law five new bills tackling complex issues involving digital replicas and deepfakes. Two of the bills are aimed at "digital replicas,"[1] and the other three address concerns about deepfakes relating to elections.

Digital Replica Laws

With the passage of these two bills, California is one of only three states that currently have laws specifically regulating digital replicas or deepfakes outside the context of elections or pornography (joining Illinois and Tennessee).

The first of these bills is intended to address concerns raised by SAG-AFTRA and actors and performers in Hollywood that computer-generated digital replicas of performers may be used in place of human performers to replace work that otherwise would have been performed in person. It places certain conditions on the enforceability of provisions in services agreements that allow for such use. The second bill expands the prohibitions on the use of a digital replica of a deceased personality's voice or likeness.

Assembly Bill 2602 (Kalra, D-San Jose)

Under AB 2602 (to be codified at Cal. Lab. Code §927), a provision in a contract between an individual and any other person for a performance of personal or professional services may be unenforceable (as to performances fixed on or after January 1, 2025, by a digital replica of the individual) where all of the following conditions are met:

- First, the provision involves the creation and use of a digital replica of the individual's voice or likeness in place of work the individual would otherwise have performed in person.
- Second, the provision does not include a "reasonably specific description of the intended uses of the digital replica" (except where "the uses are consistent with the terms of the contract for the performance of personal or professional services and the fundamental character of the photography or soundtrack as recorded or performed").
- Third, the individual was not represented by (1) legal counsel negotiating the individual's digital replica rights, where the commercial terms are stated "clearly and conspicuously in a contract or other writing" signed by the individual; or (2) a labor union where terms of their collective bargaining agreement "expressly" addresses use of digital replicas.

In all other circumstances (i.e., where any of the above conditions are not present), the plain language of the statute dictates that the provision remains enforceable. This means that if the provision does include a reasonably specific description of the intended uses OR if the individual was represented, either by legal counsel (and the terms were clearly and conspicuously stated in the agreement) or by a labor union (under a collective bargaining agreement that addressed digital replicas, which currently only includes the recently re-negotiated SAG-AFTRA TV/Theatrics Contract), then the provision would be enforceable. We note that statements by SAG-AFTRA and Rep. Ash Kalra (who are sponsors of the bill), as well as descriptions of the legislation on Governor Newson's website and in a number of media accounts have suggested that both a reasonably specific description of the intended uses of the digital replica and representation by either a

lawyer or a labor union (as specified in the new law) are required for such a provision to be enforceable. However, as explained above, this is contrary to what the plain language of AB 2602 appears to require.

Notably, AB 2602 states that to the extent a provision is deemed unenforceable, the remaining provisions of the agreement are unaffected, and it does not "impact, abrogate, or otherwise affect any exclusivity grants contained in, or related to, a provision subject to the law."

Assembly Bill 1836 (Bauer-Kahan, D-Orinda)

Also enacted last week was AB 1836, which amends California's Civil Code to prohibit the use of a digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without prior consent from the deceased personality's estate or from surviving family members (with the right to consent to such uses). The bill makes any person who produces, distributes, or makes available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without specified prior consent liable in an amount equal to the greater of $10,000 or the actual damages suffered by a person controlling the rights to the deceased personality's likeness.

AB 1836 eliminates the broad "expressive works" exemption under prior law that excluded use in any "play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works." Instead, more limited exceptions apply for uses in connection with (1) news, public affairs, or sports broadcasts; (2) comment, criticism, scholarship, satire, or parody; (3) representation of the individual as themself in a documentary or in a historical or biographical manner, including some degree of fictionalization (except where the document is intended to create and does create the false impression that the work is an authentic recording in which the individual participated); (4) a fleeting or incidental use; or (5) advertisements or commercial announcements for any of the above.

Election Deepfake Laws

Governor Newsom also signed three bills into law aimed at addressing the use of artificial intelligence (AI) to create deepfakes and other altered content in political communications. As AI technology has advanced, it has increasingly been used to mimic political candidates and create deceptive political communications. In this election cycle, AI-powered tools have been employed to produce fake robocalls, fraudulent celebrity endorsements, and deepfakes imitating candidates' voices, including one notable instance using the voice of President Joe Biden on the eve of the New Hampshire primary.

Existing California law prohibits the distribution of materially deceptive audio or visual media of a candidate within 60 days of an election unless the media includes a disclosure that it has been manipulated. Cal. Elec. Code § 20010. However, California legislators have become increasingly concerned about AI's growing role in political campaigns. In response, California has enacted three bills into law relating to AI and elections: Assembly Bill 2839, Assembly Bill 2655, and Assembly Bill 2355. These laws impose new requirements regarding the use, dissemination, and labeling of AI-generated content in election communications, and the laws' breadth covers candidates, committees, and large online platforms (predominately social media platforms). A summary of each law is provided below.

Assembly Bill 2655 (Berman, D-Palo Alto)

Titled the "Defending Democracy from Deepfake Deception Act of 2024," AB 2655 requires that large online platforms (i.e., those with at least one million California users during the preceding 12 months) develop and

implement "state of the art techniques" to identify certain digitally created or modified content that would falsely appear to a reasonable person to be an authentic record of the content depicted in the media and then to either label or remove such content (depending on various factors, such as the nature of the content). The law applies only within certain time periods prior to (and, in some cases, after) an election. The law also requires large online platforms to provide an easily accessible way for California residents to report content to be removed or labeled and stipulates that such labeling or removal must occur within 72 hours after receiving a report. The law empowers political candidates, election officials, the attorney general, and district attorneys or city attorneys to take action against platforms that do not comply, including seeking injunctive relief to compel the removal of the content if the platform fails to act. The requirements of this bill do not apply to materially deceptive content that is satire or parody, even if it does not include a disclaimer. This law takes effect January 1, 2025.

Assembly Bill 2839 (Pellerin, D- Santa Cruz)

AB 2839 expands prior law regarding the distribution of deceptive content about a candidate to prohibit any person, committee, or entity from knowingly, and with malice, distributing an advertisement or other election communication containing certain types of "materially deceptive content" within certain periods of time around an election. It applies to digitally created or modified content that would falsely appear to a reasonable person to be an authentic record of the content depicted in the media and that is about (1) a candidate portrayed as doing or saying something that they did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of the candidate; (2) an elections official portrayed as doing or saying something in connection with an election that the elections official did not do or say if the content is reasonably likely to falsely undermine confidence in the outcome of an election contest; (3) an elected official portrayed as doing or saying something in connection with an election that the elected official did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate or is reasonably likely to falsely undermine confidence in the outcome of one or more election contests; or (4) a voting machine, ballot, voting site, or other property or equipment related to an election portrayed in a materially false way if the content is reasonably likely to falsely undermine confidence in the outcome of one or more election contests.

The new law also extends the applicable time period to 120 days before (and, in some cases, 60 days after) any election in California. In addition, it broadens the scope of current law by empowering recipients of materially deceptive content distributed in violation of AB 2839, as well as candidates or committees participating in the election and elections officials, to file a civil action to enjoin the distribution of this content and seek damages and by providing for an award of attorneys' fees and costs. The law has a safe-harbor provision for satire or parody, so long as it includes a specified disclosure identifying the communications as satire or a parody. It also does not apply to a candidate portraying themself as doing or saying something that the candidate did not do or say if the content includes a specified disclosure. The law took effect immediately upon Governor Newsom's signature on September 17, 2024.

Assembly Bill 2355 (Carillo, D- Los Angeles)

AB 2355 requires that political advertisements created or originally published or distributed by a "committee" that contain any images, audio, or video generated or substantially alerted using AI to disclose the following (in a clear and conspicuous manner): "Ad generated or substantially altered using artificial intelligence." A "committee" is defined as any person or group of persons who receive contributions totaling $2,000 or more in a calendar year, make independent expenditures totaling $1,000 or more, or contribute $10,000 or more in a calendar year to candidates or other committees.

Under this bill, the Fair Political Practices Commission can enforce violations with the disclosure requirement and enforce the bill via injunctive relief and other remedies. Notably, the law provides that it does not alter or negate any rights, obligations, or immunities of an interactive service provider under Section 230 and expressly does not apply to (1) radio or television broadcasting stations that broadcast political advertisements containing any image, audio, or video that is generated in whole or in part using AI (a "qualified political ad") (a) as part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of bona fide news events, if the broadcast acknowledges through content or a disclosure that the qualified political ad may have been generated in whole or in part using AI, or (b) when it is paid to broadcast a qualified political ad; (2) internet websites or regularly published newspapers, magazines, or other periodicals of general circulation if the publication clearly states that the qualified political ad may have been generated in whole or in part using AI; and (3) qualified political ads that constitute satire or parody. The law takes effect January 1, 2025.

Legal Challenges Ahead

Opponents of these laws have raised concerns regarding the laws' implementation and effectiveness, as well as their possible violation of the First Amendment. For instance, civil rights groups have stated that notwithstanding AB 2655's limitation on targeting "materially deceptive" ads, with no sure means of determining what is "materially deceptive," the platforms may err on the side of blocking content, thus burdening more speech than is necessary.

One opponent of the new California legislation has already initiated a legal challenge. On the same day the bills were signed, Christopher Kohls filed a lawsuit in the U.S. District Court for the Eastern District of California. Kohls v. Bonta et al., Case No. 2:24CV02527 (E.D. Cal Sep. 17, 2024). The complaint challenges Assembly Bill 2839 and Assembly Bill 2655 on free speech grounds and brings claims under the First and Fourteenth Amendments. Kohls has already filed a temporary restraining order seeking to preliminarily enjoin AB 2839's implementation.

If you have questions about the applicability of these laws or need guidance on compliance, consult experienced legal counsel.

Endnote

[1] Both laws define a "digital replica" as: "a computer-generated, highly realistic electronic representation that is readily identifiable as the voice or visual likeness of an individual that is embodied in a sound recording, image, audiovisual work, or transmission in which the actual individual either did not actually perform or appear, or the actual individual did perform or appear, but the fundamental character of the performance or appearance has been materially altered.