



Thinking Like an Enforcer to Minimize Advertising & Marketing Risks

2024
Masters of
Advertising
Law
Conference

Daniel
Kaufman &
Amy Ralph
Mudge

ft. Laura Brett
& Serena
Viswanathan

November 12,
2024



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Meet The Hosts & Guest Hosts



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Laura Brett
Vice President,
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Associate Director,
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Commission



AD
Nauseam

A BakerHosts™ Podcast

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**The Dirty
Dozen**

AD Nauseam – Recent Episodes

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- **We give this Podcast 5 stars** – A Closer Look at the FTC Rule on Consumer Reviews and Testimonials
- **To Defer or Not to Defer:** Courts and the FTC after *Loper Bright*
- **The AD Legend Series** – Featuring Mary Engle
- **Product Demos:** Does It Really Work That Way?
- **Movie Pass:** I Am Big. It's the Pictures that Got Small
- **They Thought it Wouldn't Last** – A One Year AD Nauseam Anniversary: Native New Yorkers and Native Advertising
- **A Different Type of Impostor Syndrome:** Is it Puffery?
- **AI – We Had to Discuss it Eventually** – Part 2
- **NAD and Why Can't We Be Friends**
- **Children, They are Indeed Our Future** – COPPA Developments
- **Food Glorious Food:** Oldies but Goodies Food Marketing Case Lessons



MoviePass, MovieCrash

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Alissa Wilkinson
New York Times

★ TOP CRITIC

Streaming services are loaded with documentaries about scammy internet-era companies, but “MoviePass, MovieCrash” finds the barely told story in all the juicy facts.



John Anderson
Wall Street Journal

★ TOP CRITIC

The directorial choice is to use animation in many instances, just to break up the interviews and archival footage... which is amusing enough. But what it all amounts to is a story of arrogance, strategic misrepresentation, and/or a massive scam.



The doc from Mark Wahlberg’s Unrealistic Ideas production company features interviews with Spikes and Watt, board member Chris Kelly, former FTC director Daniel Kaufman, as well as financial analysts, retail investors and former MoviePass employees and

ADventures in Law



A Star Is Born

05/30/2024 | 1 minute read
Posted in [Advertising](#)

It seems like there is a nonstop stream of interesting developments these days with respect to advertising and marketing law, but only once in our careers has a colleague been in a movie, so we wanted to take a break from "adlaw" news to share our excitement.

June 21, 2024

[Podcast] AD Nauseam: Movie Pass – I Am Big. It's the Pictures that Got Small.

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On today's episode of Ad Nauseam Amy and Daniel talk about the FTC's case against MoviePass and a recent HBO documentary called MoviePass Movie Crash.

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AD Nauseam: Movie Pass – I Am Bi...
Episode 151 • 20th June 2024 • BakerHosts • BakerHosts | BakerHostetl...

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Contributors



Randal M. Shaheen

Insights

Daniel Kaufman Appears in "MoviePass, Movie Crash" Documentary

06/05/2024 | 1 minute read

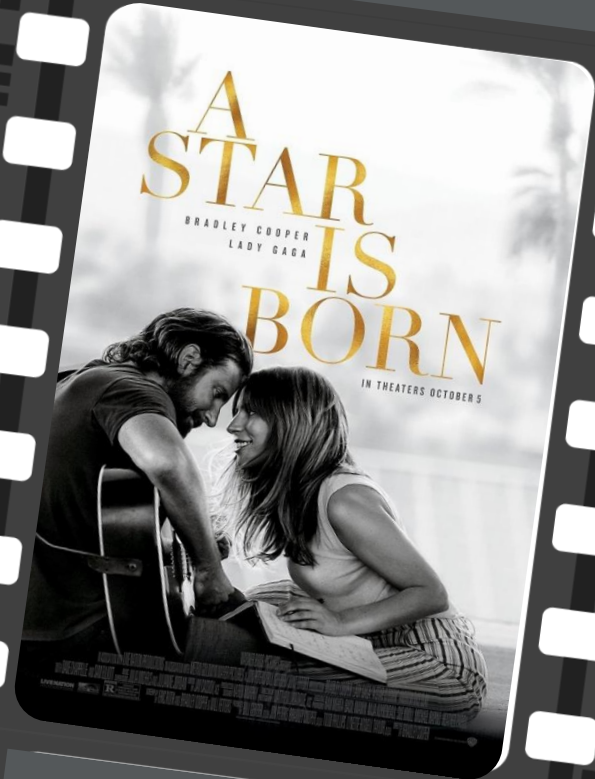
Partner Daniel Kaufman appears in the new documentary "MoviePass, Movie Crash," which details the meteoric rise and spectacular fall of MoviePass. Serving as the acting director of the Consumer Protection Bureau of the FTC during the MoviePass era, Kaufman was interviewed extensively for the project and provides key insights on the complaints lodged against the company regarding the securing of customers' personal data. "MoviePass, Movie Crash" began streaming on Max on May 30, 2024.

Contact



1) FTC Rules on Reviews

- Published in August; currently effective
- \$50K/violation penalty power
- No pending challenges but can be reviewed by Congress with change of administration (unlikely)
- Removed review hijacking provisions
- Prohibits
 - Buying/selling/writing fake reviews
 - Buying good reviews
 - Falsely promoting a review site as independent
 - Insider/employee reviews without unavoidable material connection disclosure
 - Suppressing bad reviews



FTC Rule on Reviews – Takeaways

- Check variations practices – even though not part of the Rule can violate Section 5. Only variants in quantity/color/scent/flavor are okay
- Dust off employee social media policy and do some training at all levels, including c-suite
- Double check review moderation practices. Make sure your posting criteria is objective
- Ask if you are retiring reviews when products materially change
- Catalog language used for review solicitations to make sure it is neutral, balanced, as well as timed for after a customer receives the order
- Audit your affiliates for use of listicles/review sites

2) Influencers & #Ad

- FTC warning letter 11/23 to trade associations and expert influencers warned disclosures were not unavoidable as not in audio and writing and did not disclose the trade association sponsor clearly
- NAD Drunk Elephant #7328 10/24 required #DrunkElephantPartner not #drunkelephantpartner

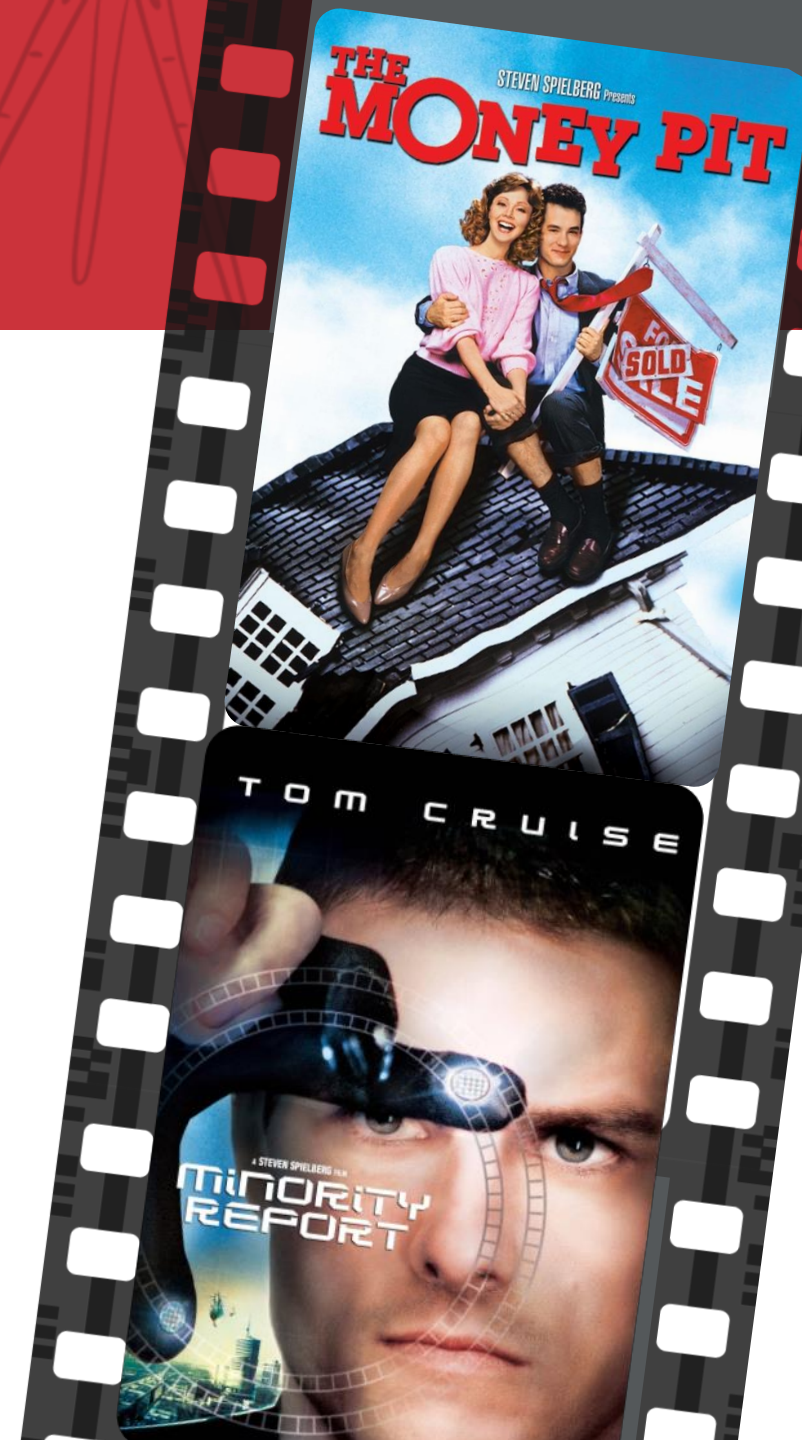


Influencers & #Ad – Takeaways

- Update posting instructions – #BrandPartner not #brandpartner
- Decide if #ad is sufficient, or name of sponsoring company should be included
- Strong encouragement for audio disclosures and text overlay disclosures in video posts
- Consider how content is likely consumed to determine what is an unavoidable disclosure
- Confirm your influencers have used the product and are presenting their true experiences
- If using scripted content appearing like influencer posts (i.e., creator content) consider “actor portrayal” or similar disclosure
- Check Testimonial & Endorsement Guides FAQs for updates

3) Pricing / Earnings Issues

- 3-2 FTC settled with Lyft 10/24 over “up to” earnings claims that were not average but top 20%
- Concerns over “earnings guarantee” including both base pay and tips
- 3-2 Policy on Protecting Gig Workers in full effect
- FTC ordered 8 companies to provide information about use of personal data to set individualized prices; study forthcoming



Pricing / Earnings – Takeaways

- Pricing material terms – when available, under what circumstances, in what areas are key and must be unavoidable
- Earnings claims for small businesses or individuals remain FTC priority with focus on higher earnings looked at as deceptive
- Evaluate use of “up to” claims in context as FTC expressing concerns “up to” should be average savings / earnings claims
- If exploring individualized pricing fluctuating by demand or personal data, watch for FTC Surveillance Pricing study
- All-in-pricing is not dead: Junk Fee Rule may have legs in some fashion but also watch state developments

4) Negative Option Rule

- Highly contentious 3-2 vote; 4 challenges pending in federal appeals courts
- Effective date 180 days (60 for material disclosures provisions) after Federal Register publication
- Applies to all negative option marketing (live, call, online)
- Dropped prohibition against save-a-sales
- Cancellation must be as simple as sign up consent in form to mirror sign up; no dark patterns
- Prohibits all misrepresentations about the product/service and the negative option details
- Ambiguity over when/whether a separate check box is required for adequate consent
- Requires unavoidable disclosures of subscription cost, term, and how to cancel before obtaining billing info immediately adjacent to order mechanism
- Patchwork quilt of state laws still apply



Negative Option Rule – Takeaways

- Go through order and cancellation flows on mobile and desktop
- Include a cancel option that is easy to find and can be accessed at any time, even while offering upgraded offers
- Free offers converting to paid offers are most risky – provide clarity on how to cancel and when before incurring charges (and check state laws for other requirements)
- Monitor complaints, particularly over cancellation confusion and misunderstanding of agreeing to recurring charge
- Use care with a/b testing and only selecting options that maximize retention

5) Demonstrations

- Degree Advanced #7273 4/24
 - Clinical showed sweat reduction; demo showed no sweat
- Dawn Platinum #7294 6/24
 - Testing showed no significant difference in dish washing under normal conditions; demo showed dramatic comparison
- Hardie Siding #7338 10/24
 - Fire demo conveyed message that siding itself can significantly reduce wildfire damage
- Google Gemini #7295 9/24
 - Demo showed use of AI tech with disclaimer “sequences shortened throughout”



Demonstrations – Takeaways

- Your scientific product performance testing must match what is depicted in the demo without exaggeration
- Torture tests won't work; demo must show consumer relevant conditions
- Use extreme caution with AI to enhance visuals
- Disclaiming away with “results not typical” or similar will likely not work

6) AI & Advertising

- AI-Pro.org #7314 6/24: “ChatGPT Available Now” to “Powered by OpenAI”
- FTC AI Comply Enforcement Sweep 9/24
 - AI Business Opportunity Schemes: Ascend Ecom, Ecommerce Empire Builders, & FBA Machine
 - DoNotPay: “the world’s first AI lawyer”
 - Rytr: 3-2 settlement with AI writing assistant alleging service provided the means and instrumentalities to generate fake reviews
- FTC Issues warning about stealth changes to privacy policies to allow information gathering for AI use

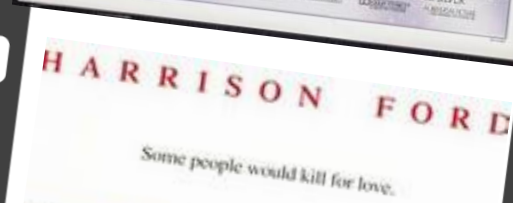


AI & Advertising – Takeaways

- Carefully review claims as to efficacy, speed, and results of AI
- Remember to assess use of AI for discriminatory impact
- Look closely at terms and privacy policies for what you have promised consumers about collection and use of their data in AI context
- When considering updates to policies, also consider notice obligations

7) Reasonable Basis Standard

- xFinity 10G #7212 10/23 + NARB 325 1/24
- Pamprin Botanicals #7247 1/24
- Biossance #7132 3/24
- SharkNinja #7312 7/24



Reasonable Basis Standard – Takeaways

- Quality of the evidence much more important than quantity
- Match your support to both the product and the claims
- Bridging evidence or connecting studies can be done with expert support
- Industry standard tests are not essential, but independent or proprietary tests will be reviewed for reliability
- At NAD submit detailed test methods and reports, not merely summaries

Daniel Kaufman: Breakout Star

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Daniel Kaufman (XXIII)

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Credits (2024-)

Known for [Edit](#)

- MoviePass, MovieCrash (2024)**
Movie | Documentary, Comedy, Crime
Self - Former Director FTC

Credits overview

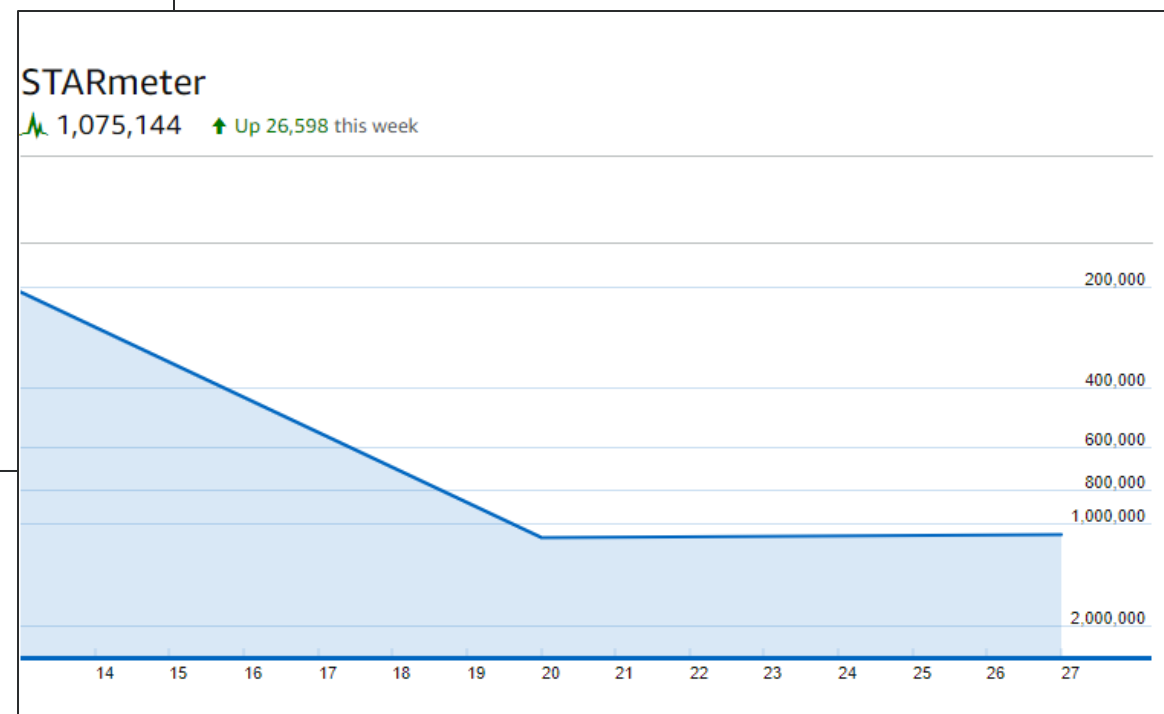
Professions	Credit types	Genres
Self (1)	Movie (1)	Documentary (1)
		Drama (1)
		Crime (1)
		Other (1)

Media

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Daniel Kaufman: The Origin

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8) Kids & Teens

- FTC Analyzing COPPA Rule Update Comments
- 3-2 FTC Staff Report of Social Media and Video Streaming Companies 9/24 recommends strengthening teen protections
- FTC Upcoming Workshop on Attention Economy 2/25
- FTC Bans NGL Labs & founders from offering anonymous messaging app to <18
- NAD Monitoring Sweep of Cosmetics Advertised to Teens



Kids & Teens – Takeaways

- The world is no longer divided between under and over age 13; increasing recognition that teens 13-18 are a vulnerable audience
- Consider target audience for advertising and whether disclaimers or messaging needs to be adjusted for a <18 audience
- Discuss whether actions involving teens in your market can be deemed “unfair” even if not misleading
- Parental controls should be easily accessible and promoted
- FTC engaging teen experts – so should you

9) Transition

- *Between now and January 20* – Current FTC administration may do triage and try to resolve some significant pending matters
- *1/21/25* – One of the Republican FTC Commissioners will be appointed Chair or Acting Chair and that person will appoint new Bureau Directors
 - More triage and review of pending matters
 - Potential use of Congressional Review Act to undo recent rules
- *Spring 2025* – Potential Senate confirmation of a third Republican Commissioner
 - Chair Khan's term has expired but she can remain until her replacement is confirmed
- *History Unlikely to Repeat* – After 2016 election President took over a year to add to FTC, and FTC ran with only 2 Commissioners
- **Critically** – FTC career staff and management remains the same



10) Predictions

- More fraud focus?
- Continued tech / AI focus?
- Doing more with less?
- Less focus on rulemaking?
- NAD to fill the gaps?
- Small uptick in referrals?

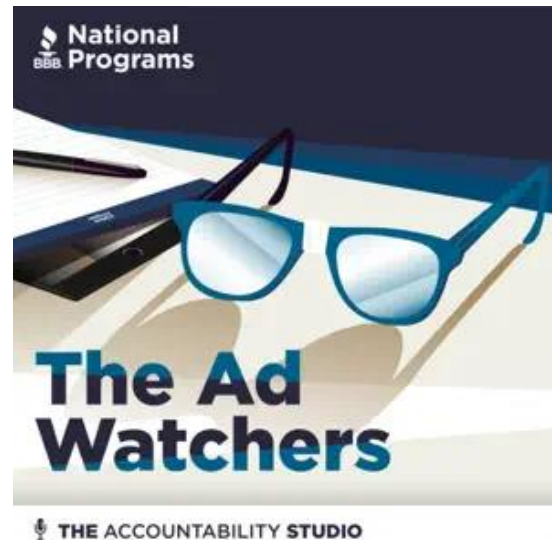


11) Advocacy

- Don't Be an A%*hat
- If you have a pending matter, consider carefully if there is an opportunity to make favorable headway
 - Threats fall flat
- Data and robust analysis will play a bigger role – experts are worth the investment
- At NAD more focus on evidence in the record



12) Keeping Up with the Trends



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