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RETAIL & E-COMMERCE PRACTICE

Top Retail Issues for 2022

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The retail industry is rapidly changing. To keep up with this dynamic landscape, brands need to anticipate and adapt to the inevitable legal challenges these changes will bring. Many of the highest-risk issues we see on the horizon relate to new retail trends, including the new wave of suits related to data aggregators, the emergence of NFTs and the metaverse, the growing scrutiny of sustainability and ESG advertising, and the proliferation of lawsuits related to subscription programs. Below, we summarize relevant risks that in-house counsel should consider as they take stock of legal priorities for the new year.

Right of Publicity Lawsuits Attack the Sale of Customer Data

A new wave of privacy lawsuits threatens retailers' ability to disclose consumer data, including through popular practices like membership in data cooperatives or selling/renting customer information. These suits—nearly 40 of which have been filed since October 2021—argue that brands violate various, often obscure, state right of publicity laws merely by including plaintiffs' names or other identifying information on lists that were sold or rented to third parties for marketing purposes. At least nine of these suits have been filed against retailers, while others have targeted publishers and credit card companies.

The suits have generally been filed in the state where the company is based or in states where it has a prominent presence. In some instances, plaintiffs' firms have concurrently filed multiple nearly identical suits against the same defendant, each under a different state's right of publicity law. The most common state statutes at issue are those of Puerto Rico, Ohio, Illinois, Alabama, South Dakota, and California. Not so coincidentally, each provides for significant statutory penalties regardless of how much actual damage plaintiffs may have suffered. In Puerto Rico, these statutory penalties can be up to $20,000 per violation, or up to $100,000 where violations were deliberate or due to gross negligence. In Ohio, statutory penalties range from $2,500 to $10,000 per violation.

These right of publicity cases are still in their infancy. While very few pleadings have been filed, the suits nevertheless, raise the important question of whether the traditional right to publicity applies where the plaintiff's name or likeness is not being used for promotional purposes, but rather is itself the product being privately sold. After all, the *sine qua non* of any right of publicity claim is… publicity. Previous case law regarding analogous claims suggests that plaintiffs may be trying to fit a square peg into a round hole.[1] However, if some of these new cases survive the motion to dismiss stage, right of publicity claims will likely become the next major wave of privacy litigation to plague the retail and e-commerce industries.

[1] *See, e.g., Brooks v. Thomson Reuters Corp.*, 2021 WL 3621837, at *5 (N.D. Cal. Aug. 16, 2021). For further detailed discussion, *see* Stephanie Sheridan et al., *The New Right of Publicity Theories Facing Retailers*, Law360 Expert Analysis (Dec. 22, 2021), https://www.law360.com/articles/1450968

NFTs and the Metaverse

Last year saw an explosion of interest in non-fungible tokens, or NFTs, including among many of the world's leading retailers. Retailers have experimented with using NFTs in many new ways, including selling unique or limited images of fashion items, offering branded digital items in online games, and using NFTs as prizes in sweepstakes and similar promotions. With more and more retailers announcing NFT projects, 2022 is shaping up to be another year of strong growth for this emerging space.

While this presents a unique opportunity for brands, creating and distributing NFTs can raise a number of equally unique legal issues, ranging from commercial litigation to government enforcement actions. A number of NFT-related lawsuits have already been filed, particularly with respect to any intellectual property rights that may be associated with a given digital asset. Miramax's lawsuit against Quentin Tarantino[2] is perhaps the most high-profile example, but it is certainly not the only dispute of that nature.

With respect to government enforcement actions—depending on the particular facts and circumstances surrounding an individual NFT project—a number of legal regimes may apply, including, for example, federal and state money transmitter laws, wire usage and anti-money laundering rules, and securities laws and reporting requirements. A similarly wide range of regulators, both state and federal, may start scrutinizing these projects as the NFT space grows.

Another popular NFT use case within the retail industry involves designing and offering digital goods (that may or may not have tangible counterparts) within the metaverse. While the metaverse means different things to different people, it can generally be understood as a digital world, typically involving augmented or virtual reality, in which users can engage in social interactions, play online games, and engage in e-commerce, among other uses. Many observers believe the metaverse will be highly connected, allowing users to seamlessly move from one application to another while retaining a single online identity (often called an avatar), certain digital goods, and certain digital assets such as cryptocurrencies.

A number of top retailers, ranging from luxury fashion brands like Gucci and Louis Vuitton to every day companies like Walmart—the world's largest retailer—have announced plans to join the metaverse and many others are indicating similar interest.[3] Perhaps the biggest splash of last year was Facebook's announcement of its plans to put the metaverse at the center of the company going forward, underscored by rebranding itself as Meta.[4] The rush of retailers to the metaverse is likely to grow exponentially in 2022, with many brands seeking a first mover advantage and looking to capture the growing numbers of metaconsumers, many of whom are younger and whose brand loyalties may be more flexible. Many retailer metaverse projects will involve NFTs and carry the same set of legal risks described above.

However, as metaverse offerings evolve, individual metaverse projects may present different or additional legal risks, and, in some cases, raise novel legal questions with no clear answer or obvious

analogy to traditional retail. These questions are also complicated by web 3.0's emphasis on decentralization, and whether developers design their metaverse projects to be interconnected and interoperable. For example, how do traditional principles of intellectual property rights to or use limitations apply to a digital good, and how do regulations applying to one platform or corner of the metaverse change when that digital asset is moved to another? How is this further complicated when the transition occurs independent of the original creator, or when cryptographic properties make this nexus difficult to trace? These consequential, but novel questions and more are likely to dominate the digital retail landscape in 2022.

[2] *Miramax, LLC v. Quentin Tarantino, et al.,* No. 2:21-cv-08979-FMO-JC (C.D. Cal.).
[3] Lauren Thomas, CNBC, *Walmart is quietly preparing to enter the metaverse* (Jan. 16, 2021), https://www.cnbc.com/2022/01/16/walmart-is-quietly-preparing-to-enter-the-metaverse.html.
[4] Salvador Rodriguez, CNBC, *Facebook changes company name to Meta* (Oct. 29, 2021), https://www.cnbc.com/2021/10/28/facebook-changes-company-name-to-meta.html.

Sustainability Claims on the Rise—And So Is New Legislation

Now more than ever, retailers have been promoting the environmental and sustainable characteristics of their products in an effort to appeal to increasingly socially engaged consumers. Many brands have launched sustainability-focused landing pages on their websites to advertise their efforts to promote sustainable practices. Others use special logos to denote "green" or "clean" products, or offer search filters that allow customers to search for products with certain benefits. All of these practices carry serious risk.

The FTC's "Guides to the Use of Environmental Marketing Claims," or "Green Guides," are the most frequently cited source of guidance for green marketing in the U.S. The Green Guides, published in 2012, primarily offer general principles for companies to follow when engaging in green marketing, including requirements that all claims be substantiated, explained, and accurately conveyed using consumer friendly language. The Guides specifically warn against using broad, unqualified, or general environmental claims, such as: "Sustainable," "Eco-friendly," "Responsible," "Green," or "Clean," and issue additional definitions for select marketing terms, including "Recyclable," "Non-toxic," and "Free Of." While they are not legally binding, courts often view these guidelines as persuasive when determining how reasonable consumers might interpret various claims. But, like any issue governed by flexible principles rather than bright-line rules, sustainability advertising creates a huge opportunity for plaintiffs to test retailers' efforts to comply.

In 2021, we saw a distinct increase in consumer class actions claiming that brands tricked customers into making purchases by overstating their product's environmental benefits (also known as "greenwashing"). We expect more of these claims to come, especially as more brands increasingly promote their sustainability efforts, and design these promotions in new ways.

Additionally, more states are considering legislative efforts that would regulate brands' green marketing efforts or place new sustainability obligations upon them.

On October 6, 2021, California's Governor Newsom signed SB 343 a.k.a. the "The Truth in Labeling for Recyclable Materials" bill, a broad new environmental marketing law banning recyclability claims unless a product and/or its packaging meets specific benchmarks for recyclability. This law applies to all forms of recyclability claims, express or implied, pertaining to a product and/or its packaging. SB 343 includes one of the broadest definitions of "claims" that we have seen, and includes marketing and labels that instruct or request a consumer to recycle that item/packaging, advertising a product as recyclable, and merely including the universal "chasing arrows" recyclability symbol. Drawing from the Green Guides, the new California law requires products and packaging marked or marketed with these claims to specifically identify their recyclable components. To qualify as recyclable, the components must be: free of dyes/inks/components that would contaminate or otherwise interfere with recyclability; eligible for curbside recycling programs in at least 60% of the state or demonstrate special commercial value; and routinely incorporated into new products/packaging. In other words, any product or product component marketed as recyclable must actually and easily be recycled. Although this law won't take effect until January 1, 2024, after the state's Department of Resources Recycling and Recovery publishes additional specific regulations and guidelines, it has already drawn significant attention and may add fuel to the already growing fires of green marketing consumer class action lawsuits.

On Friday, January 7, 2022, a new bill was introduced into the New York State Assembly and Senate, proposing that retailers be required to provide detailed public disclosures of their environmental practices. If passed, the Fashion Sustainability and Social Accountability Act would require all fashion retailers, sellers, and manufacturers with a presence in New York and annual worldwide gross receipts over $100 million to publicly: disclose at least 50% of their suppliers by volume; identify adverse impacts from greenhouse gas emissions and water and chemical use; disclose how much and what type of materials their suppliers produce annually and the volume of recycled materials used; and report the wages paid by their suppliers and how that pay compares to local minimum wages and living wages. The Act would also establish a community benefit fund for the purpose of implementing environmental benefit projects. Companies that fail to comply with the law would be subject to fines of up to 2% of their revenues of $450 million or more. The bill was referred to the Committee on Consumer Affairs and Protection on January 5, 2022.

FTC Will Likely Continue Using New Tactics to Recover Money from Companies

In the several months since the Supreme Court decision in *AMG Capital Management, LLC v. FTC,* holding that Section 13(b) of the FTC Act does not allow the FTC to collect monetary restitution, the Commission has been attempting to find creative workarounds using other provisions of the Act to financially penalize the companies and individuals it prosecutes, and deter others from committing bad acts.

On October 14, 2021, the FTC made a splash when it sent Notices of Penalty Offenses (Notices) to more than 700 of the nation's most prominent retailers, consumer products companies, and ad agencies, setting the stage for the enforcement actions and investigations seeking steep penalties—$43,792 per violation—against brands engaging in deceptive sponsored endorsement practices. On October 26, 2021, the Commission sent similar Notices to more than 1,100 multi-level marketing, direct selling, and "gig economy" companies.

These Notices are a procedural mechanism intended to open the door for the Commission to seek penalties. Under Section 5(m)(1)(B) of the FTC Act, the FTC can pursue civil penalties against a business where: (1) it has already issued a final cease and desist order in which it determined that certain conduct is unfair or deceptive; and (2) the company knew the conduct was unfair or deceptive. The newly-issued Notices are explicitly designed to meet Section 5(m)(1)(B)'s second requirement by ensuring recipients have "actual knowledge" that certain practices violate the law.

On January 25, 2022, the Commission announced a $4.2 million settlement with fast fashion retailer Fashion Nova. The Complaint alleged that between 2015 and 2019, Fashion Nova deceived consumers by using a third-party software to block hundreds of thousands of negative customer reviews from its website. This is the Commission's first case to challenge the practice of suppressing negative customer reviews. This is also the FTC's second big-ticket settlement with Fashion Nova in recent years—in 2020, the company agreed to pay $9.3 million to settle allegations with customers when it failed to ship products in a timely fashion offering appropriate remedies.

Interestingly, although the press release cites the FTC's October 2021 Notices related to endorsements and testimonials, neither the complaint nor the order cite to the FTC's Section 5(m)(1)(B) authority or any other statutory authority for the FTC to obtain monetary relief. This may be because the October letters do not address the issue of suppressing negative reviews, and instead focus on misrepresentations related to endorsements and testimonials more broadly.

In conjunction with the latest settlement, the FTC announced that it is sending letters to 10 companies offering review management services in order to place them on notice that avoiding the collection or publication of negative reviews violates the FTC Act. In addition, the FTC released new guidance for online retailers and review platforms to educate them on the Commission's key principles for collecting and publishing customer reviews in ways that do not mislead consumers.

Looking forward, the FTC has announced an ambitious range of priorities for the coming year. Most importantly for retailers, during 2022 the Commission plans to initiate periodic reviews of several existing guides, including its Guides Against Deceptive Pricing (16 CFR 233), the Guides Against Bait Advertising (16 CFR 238), the Guide Concerning Use of the Word "Free" and Similar Representations (16 CFR 251), and the Green Guides. These guides have not been updated since 2012, 2011, 2011, and 2012, respectively, and yet are still frequently cited by courts as providing the measuring stick for what consumers may find deceptive. Retailers would be wise to monitor the FTC's new guidance and ensure that their practices conform, and review their existing practices in anticipation of any revisions.

New Automatic Renewal Laws in and Outside of California

For the second time in the last four years, California has tightened the screws on its Automatic Renewal Law (ARL) by adding new notice and cancellation requirements. On October 4, 2021, Governor Gavin Newsom signed A.B. 390 into law, which, effective July 1, 2022, amends California's ARL in three notable ways: **FIRST**, it requires companies to allow customers to cancel online subscriptions with either "[a] prominently located direct link or button" or an "immediately accessible [pre-formatted] termination email," and specifically requires that customers be able to cancel "without engaging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately." **SECOND**, it requires retailers to provide notice of upcoming renewal for subscriptions when charging full price following a free or discounted trial period. **FINALLY**, it imposes a notice requirement for subscriptions with an initial term of one year or longer, regardless of any discounted pricing.

Although the Court of Appeal's ruling in *Mayron v. Google* made clear that the California ARL does not provide a private cause of action, injured consumers may still sue for violations under the "unlawfulness" prong of California's Unfair Competition Law. Additionally, the California Auto Renewal Task Force (CART)—whose members include the litigious district attorneys of Los Angeles, San Diego, Santa Clara, and Santa Cruz—continues to aggressively prosecute automatic renewal cases, and has secured numerous multimillion-dollar settlements.

On December 30, 2021, the California Court of Appeal in *Sellers v. JustAnswer LLC*[6] affirmed the denial of JustAnswer's motion to compel arbitration, which was based on a fairly ubiquitous type of check-out disclosure: "By clicking 'Start my trial,' you indicate that you agree to the Terms of Use." Although federal courts have frequently enforced terms based on this kind of disclosure, the *Sellers* court held that JustAnswer's terms were not enforceable because its disclosure was less conspicuous than the ARL's statutorily required notices. In light of *Sellers*—which is the first time a California appellate court has directly addressed the validity of sign-in wrap agreements, retailers nationwide should review their check-out disclosures to ensure that their terms will be enforceable if and when they need to move to compel arbitration.

Although California continues to boast the most stringent automatic renewal laws in the country, numerous states have followed suit and enacted similar laws within the last year or so. On November 11, 2020, New York became the latest state to enact a sweeping automatic renewal law, which took effect in February of 2021. Delaware and Colorado each also recently enacted similar laws, both of which took effect January 1, 2022. Similar to the California ARL, these new laws will require clear and conspicuous disclosure of automatic renewal terms, customer consent, and a cost-effective, timely, and easy-to-use cancellation mechanism, including online cancellation options for all subscriptions entered online. The Delaware law expressly provides a private right of action, but consumers can only file suit after providing businesses with written notice and 30 days to "cure" the alleged violation.

CONCLUSION

Now is not the time to continue business as usual. While brands are exploring new ways to reach, attract, and sell to customers, plaintiffs and public enforcers alike are working in parallel to develop new theories and strategies for litigation. Adapting to the dynamic and increasingly complex legal landscape that retailers face requires more than reading statutes and regulations—as described above, the law is far from clear, and constantly evolving. In-house counsel should take stock of their businesses' current practices and any new options they may be considering, and evaluate and respond to these serious risks.

[5] *Mayron v. Google LLC,* 54 Cal. App. 5th 566 (Cal. App. 6th Dist. 2020), reh'g denied (Oct. 2, 2020), review denied (Dec. 9, 2020).
[6] *Sellers v. JustAnswer LLC*, D077868, 2021 WL 6144075 (Cal. App. 4th Dist. Dec. 30, 2021). No Ibid.