2014 Compendium of Legislative, Regulatory, and Legal Issues Affecting Advertising

Report from ANA's Washington, D.C. Office

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Introduction

ANA's Washington, D.C. office serves as a key spokesperson for our members on advertising and marketing issues in order to communicate the views of the advertiser community to important policymakers at both the federal and state levels, the regulatory agencies, and the judiciary. Despite an unproductive Congress, the advertising and marketing community faced a number of significant challenges in 2014. The following is a brief summary of the major issues the Washington office confronted this year, with more detail on each of these topics in the pages that follow:

The Ad Tax Threat: The current tax deduction for advertising costs is under the most serious threat in Congress that we have faced in several decades in the context of overall corporate tax reform. For the first time in history, draft bills in both the Senate and the House would seriously restrict the ad deduction. These proposals would only allow marketers to deduct 50 percent of their ad spending in the first year and would require them to amortize the remaining 50 percent over the next ten years in the House bill and five years in the Senate bill. Presently, advertisers can deduct virtually 100 percent of their advertising expenditures in the year in which they are made. A revenue estimate on the 10 year proposal concluded that advertisers would spend $169 billion in increased taxes over that period. With the recent focus on tax inversions, pressure for tax reform is ramping up. Working through The Advertising Coalition (TAC), ANA and others in the ad community have responded aggressively to this threat, including updating the IHS Global Insight study, which quantifies the economic impact of advertising in every state and congressional district in the country, providing briefings to Congressional staff, and holding grassroots meetings with key members of Congress.

Privacy, Interest Based Advertising, and Data Security: This year has seen an increased focus on privacy and data security issues. We have substantially expanded the efforts of the Digital Advertising Alliance (DAA), our industry self-regulatory program for interest-based advertising, also sometimes known as online behavioral advertising (OBA). That program is now underway in 31 countries including Canada and the E.U. The program was also expanded to cover mobile media as well as the Internet. Privacy issues continue to expand both in the U.S. and internationally with a growing focus on "Big Data," the Internet of Things, and predictive scoring. We also joined with other DAA members in a letter to the Congressional leadership expressing support for federal data security legislation that would pre-empt the 47 inconsistent and overlapping state laws now on the books. The FTC has held a number of workshops on privacy and "big data" as well.

Food Advertising: We continue to work to preserve the major victory our industry won in 2011 when we blocked a proposal from an Interagency Working Group (IWG) of four powerful federal agencies (the FTC, FDA, CDC, and USDA) that would have significantly restricted the marketing of a wide array of food, beverage, and restaurant products. Pressure in this area increased during the 133th Congress, however, as five powerful Democratic Senators wrote to the FTC requesting

that it conduct another study on the marketing of foods and beverages to children. Also, food advertising is increasingly under attack internationally.

ICANN and New TLDs: ANA took a primary leadership role for almost two years in focusing a spotlight on the serious unresolved problems with ICANN's plan for a virtually unlimited expansion of generic TLDs. While we were not successful in getting a delay in the application process, we greatly increased the scrutiny of both policymakers and the business community on the practices of ICANN and the serious problems with their new TLD program. We continue to actively monitor this area and alert our members to the importance of protecting their brands through ICANN's Trademark Clearinghouse. We also continue to reach out to ICANN, including via comments in September in opposition to a recent radical proposal from the ICANN Board to dramatically increase the amount of influence the Governmental Advisory Committee (GAC) has within ICANN. We are actively watching as the Department of Commerce begins its transfer of its key domain name IANA functions to the global multi-stakeholder community.

Online Piracy: ANA's Legal Affairs Committee worked with the 4A's in 2012 to develop a Statement of Best Practices addressing online piracy. That statement encourages all marketers to take affirmative steps to address the serious problems of online piracy and counterfeiting. In 2014, ANA has been working with a group considering the development of a draft of "Core Criteria for Effective Digital Advertising Assurance" that will be used to evaluate the services offered by these entities, which are referred to as "Digital Advertising Assurance Providers" or "DAAPs." There is continued interest in Congress in self-regulatory efforts to address this challenge. We provided a letter in June to the Congressional International Anti-Piracy Caucus on this project discussing our continuing efforts to respond to this problem.

Patent Trolling: Several bipartisan bills to address patent troll issues were introduced in Congress and we met with key leaders of the Judiciary Committees in both the House and the Senate. The White House has also signaled the need for patent reform. We have been working with the 4A's, the Direct Marketing Association (DMA), the Mobile Marketing Association (MMA) and the National Retail Federation (NRF) as part of the Stop Patent Abuse Now (SPAN) Coalition to push for legislation to go after bad faith demand letters which make spurious claims regarding patent rights, often for common technologies used in online marketing campaigns. We have also met with our members in a series of Patent Troll Forums to learn from their experiences in responding to and combating patent trolls in order to gauge next steps.

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All of these issues, along with a host of others, are discussed in detail in this Compendium. As always, we post regular updates on these and any other important advertising issues we are currently working on at http://www.ana.net/advocacy. The site contains a comprehensive tracking system of legislative, regulatory, and legal issues facing our industry and Dan Jaffe's Regulatory Rumblings blog as well. We also have a Twitter account at @ANAGovRel, which you can follow for breaking legislative and regulatory news. If you have any questions, the DC office can be reached at 202-296-1883. Individual staff members can be reached as follows:

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The Mid-Term Elections

The mid-term elections created a major political power shift in our nation's capital. The Republicans increased their numbers in the House and took control of the Senate. Because of this turnover, as well as self-imposed term limits on committee chairmanships promulgated by the Republican leadership in the House, there has now been an almost unprecedented leadership shuffle. Marketers face a new political environment and new leadership on several of our key congressional committees. House Ways and Means Committee Chairman Dave Camp (R-MI), for example, whose tax reform draft would restrict the deductibility of advertising costs, has retired from the Congress due to the term limitation. His replacement will be Rep. Paul Ryan (R-WI/1), who has stated that tax reform will be a top priority for him in this post.

In the Senate, two major critics of our industry, Senators Jay Rockefeller (D-WV), the Chairman of the Commerce Committee and the second ranking member of the Senate Finance Committee, and Senator Tom Harkin (D-IA), the Chairman of the Health, Education, Labor and Pensions (HELP) Committee, retired at the end of 2014. Chairman Rockefeller was a severe critic of marketers in regard to privacy concerns, while Chairman Harkin proposed highly restrictive food advertising and ad tax proposals. Now that the Republicans have taken control, Senator John Thune (R-SD) will be the new chairman of the Commerce Committee and Senator Orrin Hatch (R-UT) will be the new chairman of the Finance Committee.

Outlook for 2015

One lesson we have learned over the years is that the threats to our industry tend to be bipartisan. Throughout the last several decades, there have been major critics and supporters of advertising on both sides of the aisle. Taxes, privacy, and data security will be on the agenda next year, and so we will be prepared to work with the new leadership and the new members of the 114th Congress.

Advertising Taxes

Background

Advertising is fully deductible as an ordinary and necessary business expense under the U.S. tax code. This has been true throughout the 100-year history of the federal corporate income tax. The last large-scale threat before this year occurred as part of the 1990 budget agreement reached during President George H.W. Bush's administration. However, forces both inside and outside of government are pushing for a large scale rewrite of the federal tax code, both to simplify the tax laws and to lower rates for individuals and businesses. The corporate tax rate has attracted specific attention as the U.S. has a higher rate than other North American and European countries. This disparity has raised arguments about American global competitiveness and has led many U.S.-based companies to consider a so-called "tax inversion" by purchasing a foreign corporation that retained at least 20% stock in the purchasing company. This approach allows US corporations to reincorporate abroad, and thus become subject to a lower corporate tax rate. There have been 47 tax inversions in the past decade, twice as many as in the previous two decades combined. All of these pressures have placed the numerous deductions in the tax code under the microscope, including advertising, and as described below, under serious attack. Additionally, there are efforts each year to eliminate the tax deduction for certain categories of advertising, such as tobacco advertising, segments of food, beverage, and restaurant advertising, or direct-to-consumer prescription drug advertising.

Congressional Activity

In late 2013 and early 2014, the advertising industry faced the most significant threat to the deductibility of advertising expenses in a generation. It arose out of plans by the Chairmen of the two tax writing committees in the Congress to undertake the first wholesale rewrite of the IRS code since the landmark Tax Reform Act of 1986. These efforts began as a combined push by the Chairmen in early 2013, which included a public "road show" and various committee meetings, but the first serious proposal emerged in the Senate.

Tax Reform: The Senate Proposal
In November 2013, Senate Finance Committee Chairman Max Baucus (D-MT) released a number of draft tax reform proposals. The third proposal, dealing with cost recovery and tax accounting rules, contained a plan to allow the immediate deduction of 50% of advertising expenses and require the remaining 50% to be amortized over a five year period.

This proposal is a radical change from existing policy. We quickly sprang into action in response to this proposal. We reached out to all of our members and urged them to contact the members of the Senate Finance Committee in opposition. We also filed comments with the committee in January arguing that the proposal would be counterproductive to then-Chairman Baucus's stated goals of simplifying the tax code, helping to lift the burden on small business, and jumpstarting job growth. Those comments can be viewed at http://www.ana.net/getfile/20432.

In mid-December, President Obama named Chairman Baucus to be the next Ambassador to the People's Republic of China. He was confirmed in February on a 96-0 vote and assumed office in March. Senator Ron Wyden (D-OR) took over as Chair of the Finance Committee upon Baucus's resignation.

After assuming the chairmanship, Senator Wyden turned his focus to "tax extenders" and saw it as a "jumping off point" for reform of the tax code, which he has called a "dysfunctional, rotting mess of a carcass." The resulting bill, the Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act (http://www.finance.senate.gov/legislation/details/?id=67094f10-5056-a032-52ff-257830e0a938), restores a number of tax extenders that expired at the end of 2013, including research and development (R&D), college tuition, alternative energy, and for small business. The committee passed the bill on a bipartisan voice vote in April. Senator Wyden was very clear that this would be the last extenders bill the committee would take up as long as he was chairman, in order to push for more comprehensive tax reform. However, when the bill reached the floor in May, it failed to pass due to a filibuster. The filibuster resulted over a disagreement between Majority Leader Harry Reid (D-NV) and the Republican caucus regarding the ability to propose amendments to the extender package. At the end of the Congress, the extender bill just for the tax year 2014 was passed and signed by President Obama.

ANA has met with Chairman Wyden, Senator Charles Schumer (D-NY), the second ranking Democrat on the Senate Finance Committee, and several other members of the committee to express our strong opposition to the amortization proposal.

Tax Reform: The House Proposal
In February 2014, House Ways & Means Committee Chairman Dave Camp (R-MI/4) released his proposed tax reform legislation, the Tax Reform Act of 2014 (http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=370987). His bill would allow for the immediate deduction of 50% of advertising expenses and require the remainder to be amortized over ten, as opposed to five, years. It would phase in over a period of years until 2018. It also allows for the first $1 million of advertising expenditures to be deducted, with a reduction of the $1 million for companies whose advertising costs are greater than $1.5 million and a complete phase out of the $1 million full deduction for companies whose advertising costs exceed $2 million. The Joint Committee on Taxation estimated that the increased taxes that would be generated by the proposed change in the advertising deduction would generate an additional $169 billion over the ten-year period. This number could be even greater if the committee imposes an expansive definition of advertising that might encompass other marketing expenses.

Even before the proposal was publicly announced, Chairman Camp indicated that it was "time to take on the special interests." In response, we urged ANA members to contact the committee to stress the importance of maintaining the full deductibility of advertising expenses and that the advertising deduction has never been considered a special interest tax "loophole." ANA's Group Executive Vice President for Government Relations, Dan Jaffe, also penned a guest blog for *The Hill's* Congress blog urging Congress to reject any increased tax burdens on advertising (http://thehill.com/blogs/congress-blog/economy-budget/200477-true-tax-reform). We have also met with Chairman Camp, Budget Committee Chairman Paul Ryan (R-WI/1), Energy and Commerce Chairman Fred Upton (R-MI/6), and numerous other members of the House to express our opposition to the amortization proposal.

As opposed to his Senate counterpart, Chairman Camp said in May that he would prefer to deal with tax extenders on an individual basis.

In July, the House Ways & Means Committee began hearings on the Tax Reform Act discussion draft. The Advertising Coalition (TAC), of which ANA is a founding member and which

represents many segments of the advertising industry, submitted comments for the hearing record. Our comments urge the committee to preserve the full deduction of advertising costs, and note the economic danger changing it would cause to the U.S. economy. TAC also notes that decades of research including by several Nobel laureates in economics have shown that advertising should be treated as an ordinary and necessary business expense and that theories advocating otherwise are invalid. These comments can be viewed in full at http://www.ana.net/getfile/21283. Additionally, Curtis Dubay, a research fellow at the Heritage Foundation, testified during the hearing that the amortization proposal would increase the cost of capital and ultimately be a drag on the economy.

On December 11, 2014, Chairman Camp officially introduced the Tax Reform Act of 2014 as H.R. 1 (http://waysandmeans.house.gov/uploadedfiles/hr_1_final.pdf). This proposal formalizes the tax reform discussion draft released in February, without modifications.

IHS Global Insight Study Update

An important tool we are using in our lobbying efforts against these amortization proposals is the IHS Global Insight Study. This study uses an economic model developed by Dr. Lawrence R. Klein, the winner of the 1980 Nobel Memorial Prize in Economic Studies. A major update of this study was completed in January 2014. The key findings from this study:

- Each dollar spent on advertising expenses generates nearly $22 of economic output that would not have otherwise existed.
- Every one million dollars spent on annual advertising expenses supports 81 American jobs.
- In 2012, advertising accounted for $5.8 trillion in U.S. economic activity and supported 21.1 million jobs. By 2017, advertising will account for $6.5 trillion in U.S. economic activity and support 22.1 million jobs

ANA set up a special website devoted to the Global Insight study update, which can be viewed at http://www.ana.net/content/show/id/ADTAX. This study is an important part of our efforts in encouraging members of Congress to retain the full advertising deduction and was used widely in our lobbying against the Baucus and Camp tax proposals. We also have a breakdown that covers each Congressional district that we use in meetings with Congressional staff. The Advertising Coalition has had over 20 grassroots meeting with members of Congress where this data proves to be invaluable. TAC is currently working on an update that would show the effect of the House and Senate amortization proposals.

Product-Specific Proposals

In May, Senators Richard Blumenthal (D-CT) and Tom Harkin (D-IA) introduced the Stop Subsidizing Childhood Obesity Act of 2014 (S. 2342), which would deny the tax deduction for advertising of foods of "poor nutritional quality" to children and to brands whose foods are associated with advertising foods of "poor nutritional quality" to children. It would apply to gift, travel, or promotional expenses incurred as well. The Institute of Medicine (IOM) would be required to identify which foods and brands would be covered by the limitation. It was believed that Senator Blumenthal might bring this legislation up as an amendment during floor consideration of the EXPIRE Act, but floor consideration of that bill was filibustered.

Also pending are three other bills introduced in 2013 that would limit the tax deduction in product-specific areas:

- Representative Rosa DeLauro's (D-CT/3) bill (H.R. 2831) that would limit the tax deduction for advertising of foods of "poor nutritional quality."
- Legislation introduced by Representative Jerrold Nadler (D-NY) that would disallow the tax deduction for new direct-to-consumer prescription drug ads.
- A bill (S. 39, the Healthy Lifestyles and Prevention America Act) introduced by Senator Tom Harkin (D-IA), that would, among other things, deny the tax deduction for any expenses incurred for the advertising of tobacco products.

None of these bills moved out of committee before the end of the last session of Congress.

Outlook for 2015

As we head into 2015, there will be substantial political pressure to consider tax reform as tax inversions continue to make headlines. Major companies as diverse as Walgreens, Burger King, Medtronic, AbbVie, Pfizer, and Chiquita Brands have all considered or attempted inversions recently. Chairman Wyden has stated that, "the longer we wait, our tax base will keep eroding, cash piles overseas will continue to grow, and investment dollars will be driven overseas." The Department of the Treasury and the President, through executive action, have recently imposed further tax restrictions on inversions but whether this will affect these efforts is far from clear.

With Rep. Paul Ryan (R-WI/1) as the new head of the House Ways and Means Committee, we expect tax reform to be a top priority for the Congress in 2015. President Obama, House Speaker Boehner, and Senate Majority Leader McConnell have all stated that they are willing to move forward to pass bipartisan tax legislation.

ANA supports tax reform and the lowering of corporate tax rates to guarantee U.S. competitiveness, but we do not believe it is appropriate to use advertising to fund the reform effort. Advertising is extremely valuable to the U.S. economy, both as an economic driver of sales and as a consumer resource. It is part of the lifeblood of the economy, not a special interest exemption to be used to make up for shortfalls elsewhere. Our major economic competitors in the EU, China and most other major countries do not tax advertising under their corporate tax codes. We see no reason why the U.S. should be an exception to this broadly accepted approach to tax policy. We will continue to strongly oppose any attempts to fully or partially limit the ad deduction, both across the board and on a product-specific basis.

Privacy and Interest Based Advertising

Background

The Internet provides consumers with a vast amount of free services and content primarily funded by advertising. Interest-based advertising, also known as online behavioral advertising (OBA), involves the anonymous tracking of users' web browsing history in order to serve consumers ads tailored to their interests. This type of tailored advertising is generally carried out through the use of a cookie, which is a small electronic text file stored in the cache of a web browser.

Interest-based advertising has enormous benefits for both consumers and advertisers. Consumers are more likely to see advertisements of specific concern to them. Advertisers also can more effectively and efficiently reach potential customers. However, this practice has been the source of expressions of increasing privacy concerns in recent years by some members of Congress, federal regulators, and consumer groups.

In 2009, the FTC called on industry to provide transparency concerning these practices and to give consumers meaningful opt-out choices. In conjunction with a number of other associations, ANA released Principles for Online Behavioral Advertising (http://www.ana.net/advocacy/getfile/15279). In October 2010, a self-regulatory program for interest-based advertising was launched by ANA and its industry partners (the DMA, IAB, NAI, 4As, and AAF). This new self-regulatory program was named the Digital Advertising Alliance (DAA). Despite significant self-regulatory progress, there remain calls for stricter privacy regulations from the Congress, federal regulatory agencies, state governments, and governments of other countries.

Digital Advertising Alliance Self-Regulatory Program

The Program
Building on the release of the Self-Regulatory Principles, the Digital Advertising Alliance launched the self-regulatory program in October 2010 (http://www.aboutads.info).

Advertisements from participating companies display an icon that informs viewers they are seeing an ad served to them based on interest-based advertising (http://www.ana.net/content/show/id/advocacy-obatoolkit). If viewers click on the icon, they are taken to the DAA's website where they are able to access information about OBA and opt-out of further behavioral advertising from any or all companies participating in the DAA program. Enforcement of the program is administered by the Council of Better Business Bureaus (CBBB) and DMA. In its short time in existence, the DAA's icon has been placed multi-trillions of times, and a large number of advertisers are now participating members. A strong and robust self-regulatory program remains the best hope for preventing overly restrictive legislation in this area.

Mobile Guidelines
On July 24, 2013, DAA expanded the scope of its self-regulatory program to the mobile environment (http://www.aboutads.info/DAA_Mobile_Guidance.pdf). These new guidelines were written to help advertisers "provide consumers the ability to see and exercise control over the use of cross-app, personal directory, and precise location data in mobile apps." Because so many advertisers, including ANA members, conduct substantial and increasing business in the mobile

environment, this expansion is crucially important in ensuring consumers that their privacy choices will be respected. It also helps to demonstrate to Congress and the FTC that the industry is serious about protecting consumer choice.

Congressional Activity

Privacy issues have been extremely active in recent years. In past Congresses, numerous privacy bills have been introduced. However, in recent years, legislation has transitioned from general privacy issues to more specific issue areas such as data security and behavioral advertising.

Maladvertising
The Senate Homeland Security Permanent Subcommittee on Investigations held a hearing, titled "Online Advertising and Hidden Hazards to Consumer Security and Data Privacy," on May 15 (http://www.hsgac.senate.gov/hearings/online-advertising-and-hidden-hazards-to-consumer-security-and-data-privacy). The purpose of the hearing, which was led by Senator John McCain (R-AZ), was to examine consumer security and data privacy in the online advertising industry. The term "maladvertising" refers to the malicious practice of placing malware on a computer when people click on ads in order to access personal information stored on that computer. In advance of the hearing, the Committee released a report which stated that the volume of data being collected on individuals makes it impossible for them to adequately protect themselves (http://www.hsgac.senate.gov/download/?id=2A2D6AD9-77A6-43D3-B47D-C6797EA421DE). Lou Mastria, the Executive Director of the DAA, testified at the hearing to explain the very effective steps taken by the DAA in regard to interest-based advertising and that the report failed to fully understand or describe these efforts (http://www.hsgac.senate.gov/download/?id=cb55ff12-cf7f-4334-975b-4a2a50e3a389).

Geolocation Data
Senator Al Franken (D-MN) introduced S. 2171, the Location Privacy Protection Act of 2014 in March (https://beta.congress.gov/bill/113th-congress/senate-bill/2171/text?q={%22search%22%3A[%22geolocation%22]}). The goal of the bill is to make it harder for stalkers to use mobile tracking technology to find their targets by prohibiting the disclosure of geolocation information by nongovernmental entities to each other without consent of the individual whose device contains the geolocation data collected.

On June 4, the Senate Judiciary Committee Subcommittee on Privacy, Technology, and the Law held a hearing on the issue of location data security (http://www.judiciary.senate.gov/meetings/the-location-privacy-protection-act-of-2014). The hearing examined the many uses of geolocation data and the implications, both good and bad, of placing stringent regulations on how this data can be used. In particular, one of the major downsides noted was that the proposed law could curb emerging mobile location tracking innovation that could have substantial safety and other benefits. Lou Mastria of the DAA also testified at this hearing on behalf of advertisers and the other members of the DAA. While online advertisers do collect data from individuals for interest-based advertising, Mr. Mastria made the distinction that this data is far different from data collected by "stalking apps" and should be carefully and completely differentiated from it. In regard to location data for commercial purposes, Mr. Mastria stated, "For the collection of precise location data, the DAA program requires consent prior to collection and the provision of an easy to use tool to withdraw such consent."

State Activity

In the absence of federal legislation, some states attempted to establish their own privacy regulations. ANA believes that a state-by-state approach to this issue will put an extraordinary burden on industry to comply with numerous varying laws and regulations. In particular, 2014 saw several major privacy bills introduced in California.

California
Two particularly important student privacy bills passed in California this year which place restrictions on the types of information that can be obtained about students from schools. The first, S.B. 1177, prohibits educational sites, apps and cloud services used by schools from selling or disclosing personal information about K-12 students, from using the data to market to children, and from compiling profiles on them (http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml). The second, A.B. 1584, applies to providers of digital educational software or services for the digital, storage, management and retrieval of pupil records (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1584). The aim of this bill is largely to regulate school information about pupils and information obtained through the student's use of software or applications assigned by the school.

As members of the State Privacy & Security Coalition, led by Jim Halpert of the DLA Piper law firm, we actively tracked and provided input on these bills. Although the coalition reached out to California Governor Jerry Brown to explain that the bills contain many areas of overlap and that only one bill, preferably A.B. 1584, should become law, both A.B. 1584 and S.B. 1177 were signed into law on September 29.

New York
Elements of two proposed New York student data privacy bills were incorporated into the state's budget bill, which was passed and signed into law in April of this year. The new regulation establishes penalties for the unauthorized release of personally identifiable information (PII) from student records and certain records regarding classroom teachers and building principals. In the law, "student data" means any PII from the student's records of an educational agency. "Teacher or principal data" means PII from the records of an educational agency relating to the annual professional performance reviews of classroom teachers or principals that is confidential and not subject to release. The move to incorporate this language in the New York state budget was an unprecedented move, and the State Privacy & Security Coalition worked with other states to ensure this trend did not take hold elsewhere.

Big Data

This year saw an increased focus on the topic of big data. Most notably, the White House released a report, entitled "Big Data: Seizing Opportunities, Preserving Values," in May (http://www.whitehouse.gov/issues/technology/big-data-review). The report was very balanced and specifically recognized the important role that data use provides to companies, consumers and our economy. This report recommends that Congress pass uniform, national data breach legislation, which we support if narrowly tailored and preemptive of the existing range of conflicting state laws in this area. However, the report also recommends that Congress pass comprehensive privacy legislation, which we do not believe is currently necessary.

In January, President Obama directed White House Counselor John Podesta to lead the working group which developed the big data report. ANA and other industry groups met with Podesta and his staff in March at the White House. As part of this effort, the White House Science and Technology Policy Office issued a formal Request for Information in the Federal Register and ANA filed detailed comments on this matter (http://www.ana.net/getfile/20705).

Federal Trade Commission

ANA has continued to actively engage, both on its own and through the DAA, with the FTC on privacy issues. While there has been no major action in the Congress on privacy issues, the Federal Trade Commission (FTC) has been extremely active. This year, the Commission has held a wide-ranging series of workshops or seminars on the following: the "Internet of Things;" mobile device tracking; alternative scoring products; and consumer generated and controlled health data, and big data. All of these seminars raised serious concerns about the safety of private information and the way that information is being used in today's advertising landscape.

Especially at the most recent workshop on "Big Data: A Tool for Inclusion or Exclusion" on September 15, the FTC expressed a commitment to rigorous enforcement of existing law and to the identification of gaps in current law and ways to fill them. The FTC claims that some uses of big data can be particularly sensitive when an individual's access to credit, housing, employment, and insurance are affected. These areas are usually protected by the Fair Credit Reporting Act (FCRA), the Equal Credit Opportunity Act (ECOA), the Gramm–Leach–Bliley Act, and the Health Insurance Portability and Accountability Act (HIPAA). However, it was noted that new uses of big data could fall outside of these protections, and in that case, new laws would need to be crafted to protect consumers. The DAA has explicitly stated that it will not use this type of data for determinations in regard to insurance, credit, and other similar sensitive areas.

FTC Commissioner Maureen Ohlhausen spoke at our 2014 Advertising Law & Public Policy Conference and Jessica Rich, Director of the FTC's Bureau of Consumer Protection, spoke at the DAA Summit in June. During their speeches, both FTC representatives applauded the work done by the DAA and the advertising industry's commitment to effective self-regulation.

Internet of Things (IOT)

In the growing world of the Internet of Things, where everything from cars to toothbrushes to refrigerators are collecting and sharing information, privacy concerns are greatly increasing. The Internet of Things creates novel challenges as there usually are not interfaces where consumers can state their privacy preferences. It is critical that we continue to strengthen the DAA and the support from the entire online eco-system for that program. However, we must also develop a strategy to address the expanding universe of privacy issues raised by IOT, addressable TV, and other similar developments.

DAA Compliance Warning

The Council of Better Business Bureaus' Accountability Program, tasked with enforcement of the Digital Advertising Alliance's Self-Regulatory Program, announced late last year that it had discovered a "significant minority of website operators that are otherwise in compliance with the OBA Principles that are omitting notice of data collection for OBA on their websites in cases in

which the third parties are not able to provide real-time notice without first-party assistance." The Program stated that under the DAA's Self-Regulatory Principles, website operators are required to provide enhanced notice (via a hyperlink or the DAA's AdChoices icon) to consumers on any page in which a third party may be collecting or a first party is collecting data for transfer to a third-party for advertising targeting purposes. The Accountability Program noted that a number of websites, even some of those that are making diligent efforts to comply with the DAA's Principles, are not providing the enhanced notice required.

In response, the CBBB's Accountability Program issued its first Compliance Warning, stating that the enhanced notice would be enforced effective January 1, 2014 (http://www.asrcreviews.org/wp-content/uploads/2013/10/Accountability-Program-First-Party-Enhanced-Notice-Compliance-Warning-CW-01-2013.pdf). ANA sent an alert to our members about this Compliance Warning in early December 2013 and urged all members to contact the CBBB for any questions on proper enforcement.

Outlook for 2015

We expect online privacy and interest-based advertising to remain a hot button issue area. While Congress may take more time to develop new regulations, the states will certainly be continuing their efforts to reform privacy laws. If more significant privacy legislation passes in California, it could trigger initiatives in others states. Additionally, fallout from recent disclosures about the National Security Agency's (NSA) ability to quickly obtain vast amounts of data will add substantial fuel to calls for stricter privacy regulation nationwide and internationally, even though data collection for marketing purposes clearly is highly distinguishable from NSA antiterrorism-focused activities.

Data Security

Background

Data security is an increasingly important issue for advertisers around the globe. On a virtually weekly basis, media reports tell of hackers stealing important consumer information from vulnerable companies and government agencies. These hacking attacks have been among the largest in history and the companies impacted include Target, Home Depot, J.P. Morgan Chase, Michaels, Neiman Marcus, and Sony among many others. The attack on Target, for example, affected 40 million credit cards and over 70 million records were stolen. Also, the hacking of celebrities' iCloud accounts to access photos has shown that no one is immune from data security threats. On top of this, the ability of typical passwords to provide a strong baseline of security has come into question.

As the technological landscape continues to change, it is critical that legislation be updated to handle current threats while still providing enough flexibility to address issues that arise in the future. We joined with other members of the Digital Advertising Alliance (DAA) and a number of other business organizations in a letter to the congressional leadership expressing support for federal data security legislation that would pre-empt the 47 inconsistent and overlapping state laws now on the books (http://www.ana.net/getfile/21092). ANA and the other groups also stated that breach notification must be based on a material risk to consumers. Unfortunately, no data security legislation passed during the 113th Congress.

Congressional Activity

At least five different congressional committees held hearings this year on the increasing numbers of data breaches and numerous data security bills were introduced.

One of those bills, S. 1976, the Data Security and Breach Notification Act of 2014, would require the FTC to promulgate regulations that require companies owning or possessing data containing personal information to establish and implement policies and procedures for the treatment and protection of personal information (https://beta.congress.gov/bill/113th-congress/senate-bill/1976?q={%22search%22%3A[%22privacy%22]}). The bill would set requirements for notification in the event of a security breach and criminal penalties for the concealment of security breaches involving personal information. S. 1976 was introduced by Senator Jay Rockefeller (D-WV) with 5 cosponsors.

Another bill on this issue is S. 1995, the Personal Data Protection and Breach Accountability Act of 2014 (https://www.congress.gov/bill/113th-congress/senate-bill/1995?q={%22search%22%3A[%22privacy%22]}). This bill was introduced by Senator Richard Blumenthal (D-CT) in February. It would enhance criminal penalties for concealment of security breaches involving sensitive personally identifiable information and set penalties for the unauthorized manipulation of internet traffic on a user's computer without disclosing the data collected and obtaining consent. The bill also requires businesses that have sensitive personally identifiable data on 10,000 or more people to establish a data privacy and security program to protect this information (with an exemption for entities covered under Gramm-Leach-Bliley and HIPAA). Both S. 1976 and S. 1995 were referred to committees but did not proceed further.

State Activity

In the absence of federal legislation, states have often attempted to establish their own privacy and data security regimes. ANA believes that a state-by-state approach to this issue puts an extraordinary burden on industry to comply with the 47 varying state laws and regulations.

2014 saw a particularly important privacy bill introduced in California. California's A.B. 1710 on personal information privacy requires an organization experiencing a data breach to provide at least 12 months of assistance to those whose information has been compromised at no cost to the individual if the organization already offers identity theft mitigation services (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1710). The bill also extends data security requirements to businesses that "maintain" personal information (the current law only imposes that requirement for organizations that "own" or "license" personal information). This amendment applies to third-party service providers that obtain personal information from an owner or licensee of the personal information. The bill was approved by Governor Jerry Brown on September 30, 2014 and is set to take effect on January 1, 2015.

Federal Trade Commission (FTC)

The ongoing theft of valuable private information has raised many important issues about how to better secure this information and protect consumers. It also poses the question of who is to blame. In a recent push, the FTC is looking to place that blame squarely on the company which leaves the information available to theft. The FTC already has brought 50 major data security cases and is currently in the process of suing Wyndham Hotels and Resorts LLC for data security breaches that led to more than $10.6 million in payment card fraud losses. In April 2014, the District Court for the District of New Jersey denied Wyndham's motion to dismiss the complaint. However, at the end of July, the Third Circuit Court of Appeals granted a hearing of Wyndham's appeal to dismiss the FTC data security enforcement action.

The case, *FTC v. Wyndham Worldwide Corp.*, revolves around the FTC's authority to police deceptive and unfair practices under Section 5 of the FTC Act and whether this authority gives them the power to impose specific data-security policies on companies. Wyndham argues that, if the FTC wins this case, the ruling would expose businesses that deal with customer information to a highly uncertain and unpredictable layer of FTC regulation—based on whatever the FTC deems an "unfair" or "deceptive" practice in an after-the-fact enforcement proceeding.

Outlook for 2015

Data security will continue to be a very significant issue in the coming year, especially since the frequency of data breaches does not seem to be diminishing. The Sony breach case has also brought a focus on potential cybersecurity and international government involvement that only has increased the stakes and the concerns in this area.

We also expect the ruling in the *Wyndham* case to have a wide-ranging impact on the FTC's authority to police data security issues. Members of the business community across the country are carefully watching for the decision in this case. Even though Congress has not acted on the data security issue this year, there is a possibility that a bill will be passed next year. In the meantime, we expect states to continue to try to fill in the gap by creating their own extensive data security measures.

Online Piracy

Background

Online piracy – the trafficking in stolen intellectual property, which impacts particularly heavily music and movies – is a huge and growing problem for the entertainment industry. Some estimates put the cost to the entertainment industry as high as $10 billion worldwide. This criminal activity is an important issue for the advertising industry as well. Ads for legitimate products and services are appearing on websites that deal in pirated content, providing financial support for unlawful activity as well as giving these sites an appearance of legitimacy.

Congress attempted to fix the problem in 2011 with the Stop Online Piracy Act (SOPA) in the House of Representatives, introduced by Judiciary Chairman Lamar Smith (R-TX/21), and the PROTECT IP Act (PIPA), introduced by Judiciary Chairman Pat Leahy (D-VT) in the Senate. These bills would have given law enforcement substantially expanded powers to target pirate sites and would have required service providers, search engines, payment network providers, and ad networks to block access to sites containing pirated material. It would also have given rights-holders broad authority to sue domains hosting pirated materials. There was widespread opposition to this legislation, however, as it was viewed as law enforcement intrusion into the operation of the Internet and a threat to free speech and technological innovation, so these bills were eventually dropped.

ANA, along with the American Association of Advertising Agencies (4A's), devised a response to this challenge in the form of a Statement of Best Practices concerning online piracy and counterfeiting. Our statement, released in May 2012, encouraged marketers to take affirmative steps in preventing ads from appearing on pirate sites by including language to that effect in contracts and insertion orders. It also called for the development of processes to remove ads from pirate sites and to terminate non-compliant ad placements, and for refunds or credits to advertisers for any amounts paid for non-compliant placements. The ANA Legal Affairs Committee assisted in the crafting of the statement. The Interactive Advertising Bureau (IAB) signaled support for our statement. The statement can be viewed at http://www.ana.net/content/show/id/23417.

Core Criteria for Effective Digital Advertising Assurance

Online piracy has remained an issue, however, and the industry has been making further efforts to address the problem. Earlier this year, ANA joined a group facilitated by the Venable law firm that is working on devising a technical solution to the problem. This group has been working toward a self-regulatory program that would identify pirate sites, monitor and prevent ad placement, and eliminate payments to fraudulent sites. It also has been working to develop "Core Criteria for Effective Digital Advertising Assurance" which would be used in evaluating service providers (called Digital Advertising Assurance Providers, or DAAPs) that offer the ability to assist advertisers in preventing undesired ad placements and eliminate payments for such ads. The group hoped to have a final document by the end of 2014.

Congress has repeatedly urged the industry to work to prevent ads from appearing on sites dealing in trafficked goods. Our Statement of Best Practices was devised upon the urging of both Congressional leaders and the Executive Branch's Office of Intellectual Property Enforcement. When it was released, it received strong commendations from Congressional

representatives who focused on this issue. In June, the ANA, along with the 4A's and IAB, sent a letter to the Congressional International Anti-Piracy Caucus that described the steps the industry is presently taking to respond to the piracy issue, specifically to inform them of these ongoing efforts. This letter can be viewed at http://www.ana.net/getfile/21364.

Outlook for 2015

Advertisers must have confidence that their ads are not unintentionally providing financial support or otherwise legitimizing websites that deal in unlawfully acquired intellectual property. ANA is continuing to work with our members to ensure their ads are not being placed on sites trafficking in pirated content. Our Legal Affairs Committee has been especially proactive in this area. We will continue to work with our industry partners in devising an adequate solution.

Patent Trolls

Background

The United States patent system, enshrined in Article I of the Constitution, is designed to foster innovation by allowing the exclusive right to market and use new technologies and business methods for a set amount of time. For over 200 years, this system has benefitted both consumers who have enjoyed a vast array of new products and services and producers who have been able to offset huge research and development costs. This system, however, is open to abuse by patent assertion entities (PAEs), more commonly referred to as "patent trolls." These entities are not in the business of producing new technologies or business methods, but instead buy up patents on the open market and then file suit against other entities that the patent trolls allege are using the patented (or similar) technology. Patent infringement suits are a serious problem affecting many industries, and the problem is growing substantially. In 2013, 6,092 new patent suits were filed in federal court, a 12.4% increase over the prior year, and in 2011, PAEs were estimated to have cost the U.S. economy $29 billion. Given the huge costs associated with patent litigation, often those threatened with a suit simply settle with the trolls.

In the advertising and marketing industry, PAEs have been asserting ownership over common advertising practices, such as the use of QR codes, placing static ads in a video stream, embedding a URL in a text message to direct a mobile device to web content, and even putting a store locator on a website.

Congressional Activity

A number of bills were introduced in late 2013 and carried over into 2014 to address the patent troll issue. The main legislative vehicle in the House of Representatives was House Judiciary Committee Chairman Bob Goodlatte's (R-VA) Innovation Act (H.R. 3309). The Innovation Act would set requirements for patent lawsuits, including disclosure of parties with financial interests in the patent being challenged and cost-shifting measures that would allow the court to mandate that the loser in the suit would be responsible for all fees relating to the litigation, as well as expanding post-grant review authority of the U.S. Patent and Trademark Office.

ANA and a number of other associations also pushed for a provision in the bill covering "demand letters," those letters sent prior to a suit alleging infringement and threatening litigation. Representatives Jason Chaffetz (R-UT/3), Ted Deutsch (D-FL/21), and Spencer Bachus (R-AL/6) introduced an amendment expressing the sense of Congress that demand letters lacking particularity about the patents alleged to be infringed constitute a deceptive business practice, and this language was included in the bill approved by the Judiciary Committee in November 2013 on a bipartisan vote of 33-5. The Innovation Act passed the full House in December 2013, again on a strong bipartisan basis 325-91.

Based on the strong vote in the House, it looked like there was momentum for passage of patent legislation in 2014. In the Senate, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) introduced bipartisan legislation with Senator Mike Lee (R-UT), the Patent Transparency and Improvements Act of 2013 (S. 1720). This bill also set standards for patent litigation, including a "loser pays" provision, and included a provision similar to the House provision on demand letters.

Markup of the Senate bill was scheduled several times in the spring of 2014. However, in May, Chairman Leahy announced that he would not proceed to a markup of the bill as there was not consensus support in the committee. It is widely believed that the real reason the bill was pulled is opposition from trial lawyers to the "loser pays" provision and from university groups and other major patent holders. These are important constituencies to the Democratic Party and the pressure was too great for Senate Majority Leader Harry Reid (D-NV) to ignore.

We continued to focus more narrowly on a resolution to the demand letter issue that is particularly vexing to a number of ANA members. Senator Claire McCaskill (D-MO) introduced a bill in the Senate Commerce Committee (S. 2049, the Transparency in Assertion of Patents Act) that would require the Federal Trade Commission (FTC) to issue rules prohibiting unfair or deceptive demand letters and included civil penalties for violations. Rep. Lee Terry (R-NE/2) developed similar draft legislation in his House Energy and Commerce Committee Subcommittee on Commerce, Manufacturing, and Trade. The subcommittee approved a draft of this legislation, the Targeting Rogue and Opaque Letters (TROL) Act in July on a vote of 13-6. In April, ANA, as part of the Stop Patent Abuse Now (SPAN) coalition wrote to Representative Terry and subcommittee ranking member Jan Schakowsky (D-IL/9) urging them to include provisions providing the FTC authority to go after false or deceptive demand letters. That letter can be viewed at http://www.ana.net/getfile/20777. However, these bills were not acted upon in 2014. Congressman Terry also lost his reelection bid so it will be interesting how these initiatives will be handled in the 114th Congress.

Judicial Activity

The U.S. Supreme Court provided those targeted by patent trolls some relief. In April, the Court held in *Octane Fitness v. Icon Health and Fitness* and *Highmark, Inc. v. Allcare Health Management Systems* that lower courts should have more discretion in awarding attorney's fees to prevailing parties, rather than holding them to a more rigid standard. Near the end of its term in June, the Court in *Alice Corporation Pty. Ltd. V. CLS Bank International* also limited the reach of software patents, finding that the use of a computer is insufficient to transform an abstract idea into a patent-eligible invention. This case in particular may limit what is patentable and thus eventually limit the types of suits that can be brought involving new technologies.

Coalition Activity

ANA is part of three coalitions working on a resolution to the issues raised by patent trolls. As noted, the first is the SPAN coalition, which is led by attorneys at the Venable law firm. It includes the American Association of Advertising Agencies (4A's), the Direct Marketing Association (DMA), the Mobile Marketing Association (MMA), and the National Retail Federation (NRF). Its focus has been on legislation that would go after bad faith demand letters and has held discussions with staff on both the Senate and House Commerce Committees. In June, SPAN filed comments with the FTC and the Office of Management and Budget (OMB) in support of the FTC's decision to conduct a so-called 6(b) study of patent trolls. Under Section 6(b) of the FTC Act, the Commission can require businesses to answer questions about specific conduct or practices. Those comments can be viewed at http://www.ana.net/getfile/21157.

Another DC-based coalition, the "Big Tent" coalition, consists of a large segment of the business community and is spearhead by the NRF and has urged patent troll legislative action more generally.

Additionally, the 4A's and ANA have created the Patent Assertion Information Aggregation and Dissemination (PAID) Program, which has been developed to attempt to serve as a clearinghouse of information about patent assertions against our members. This information will be aggregated and combined with additional information on patent assertions to provide periodic reports to members, the goal of which is to assist members in defending against alleged patent challenges.

Patent Troll Forums

In June, ANA convened a "Patent Troll Forum" at the offices of Reed Smith LLP in Chicago. The meeting was spearheaded by ANA Group Executive Vice President Bill Duggan and Marc Kaufman of Reed Smith. The purpose of the meeting was for ANA members to share information, experiences, and perspectives on the patent troll issue, how it is impacting relations between advertisers and their agencies, and to discuss steps the ANA could take to help, such as potential remedies.

An additional meeting was held in New York on September 11. ANA has been working to develop a careful balance to combat patent trolls while not undermining the interests of legitimate patent holders.

ANA Patent Troll White Paper

On December 1, 2014, ANA released a White Paper recommending that marketers generally not indemnify agencies for patent claims (http://www.ana.net/content/show/id/32794). Rather, agencies should assume the liability for their work product, including liability for patent infringement. Accordingly, client/agency contracts should include "indemnity clauses" which require that the agency step in and defend the marketer in the event of a patent infringement claim. It is recognized, however, that shared approaches to liability are gaining traction in the marketplace. ANA members are encouraged to consider whether a shared approach to liability makes sense in any of their agency relationships.

A key finding in the paper is that patent trolls are an issue – either major or moderate – for 45 percent of respondents. Sixty percent of respondents reported that their agencies assume either all (30 percent) or the majority (30 percent) of the risks associated with patent infringement. Another key finding is that a shared approach to liability is gaining traction. Those marketers with contracts that have a shared approach to liability noted that such sharing usually related to either limits to risk or caps to liability.

Outlook for 2015

While no legislation in the patent troll area passed in this Congress, further action is likely next year. There is bipartisan pressure on Congress to "do something" in this area. We will continue to work with our coalition partners for legislation that deals with the demand letter issue. Additionally, we hope to hear more from our members on how they are dealing with patent trolls and what ANA can do to assist in resolving the issue.

ICANN Top Level Domain Expansion

Background

The Internet Corporation for Assigned Names and Numbers (ICANN) is the non-profit organization that operates the Internet Domain Name System under a contract with the Department of Commerce's National Telecommunications and Information Administration (NTIA). In June 2011, ICANN's Board of Directors approved a plan to vastly expand the number of Top Level Domains (TLDs) on the Internet, which are those labels that appear to the right of the dot in an Internet address (e.g., ".COM" and ".ORG"). At that time, there were only 22 Top Level Domains, but the proposed expansion eventually included over 1,000 potential new domains.

Although ANA had consistently expressed concerns to ICANN about the proposed virtually unlimited Top Level Domain rollout, we significantly ramped up our activities after the formal and full-speed-ahead approval of the program in 2011. We organized the Coalition for Responsible Internet Domain Oversight (CRIDO), consisting of 181 national and international companies, associations and organizations. CRIDO sent a petition to NTIA in November 2011 asking NTIA to use its best efforts to urge ICANN to delay the roll-out of the program. ANA took a primary leadership role for almost two years in focusing a spotlight on the serious unresolved problems with ICANN's plan for the vast expansion of generic TLDs. We helped activate the law enforcement community, the non-profit community, as well as other important sectors to weigh-in on this program.

Additionally ANA lobbied the FTC and Congress for support of our position. This culminated in two congressional hearings at which ANA testified, as well as an expression of strong opposition to the program from then FTC Chairman Jon Leibowitz who stated that without additional protections built into the process, the rollout would be a "disaster" for consumer protection. Since the initial roll-out, more than 300 new gTLDs have launched, passed through the sunrise period, and are in the general availability phase. Currently over 2 million second level domain names have been registered. However, those numbers are largely artificially inflated as many gTLD registries have either reserved names in dummy registrations to sell them later for premium prices or they have given domain names away for free to increase notoriety for the gTLD. There are only 5 gTLDs which have over 100,000 registrations and 33 gTLDs have more than 20,000 registrations. In comparison, .COM has 114 million domain registrations and almost a million new registrants use this TLD each month.

ICANN "Strawman Proposal"

While we had many concerns with ICANN's new TLD program, one of the chief problems facing advertisers was the pressure on trademark holders to "defensively register." ANA worried that member companies would be forced to register new TLDs or Second Level Domains (those to the left of the dot) in order to alleviate the concern that a competitor or nefarious party would take the name. ANA pointed to the roll-out of the .XXX Top Level Domain, in which numerous entities (such as companies, universities, and non-profits) spent tremendous amounts of money to register brand names and common misspellings of brand names in order to avoid the risk of those names being associated with any purpose related to the .XXX domain, which had been set up ostensibly to provide sites for adult entertainment registrations. New TLDs applied for under

the new program, such as .SUCKS, .SEX, .GRIPE, and .WTF, also appear to have the potential to create this pressure for defensive registrations, as did a number of other new TLDs.

ANA first pushed for a "Do-Not-Sell" registry for TLD strings in January 2012. Under that proposal, companies, NGOs, and IGOs, would have been allowed to register their brands temporarily, without cost, on a list maintained by ICANN during the first round of applications. We had proposed that such a system be enacted as part of the "batching process" ICANN had said would be necessary for the roll-out of new strings. Later, after this proposal was rejected, ANA proposed a Do-Not-Sell approach for the second level domains. We also encouraged NTIA to push for this approach at the Toronto ICANN meeting in October 2012. In doing so, we noted a growing consensus in the business community that a form of black list was needed.

Ultimately, as a result of the new ICANN CEO, Fadi Chehadé, meeting with ANA, as well as ICANN's Business Constituency (BC) and Intellectual Property Constituency (IPC), at the Toronto meeting, a "Strawman Proposal" was put forward by ICANN. This proposal would have allowed for a 30-day sunrise period for new TLDs, an extension of the Trademark Claims period for new TLDs to 90 days, a "Claims 2" period that rights holders could participate in for a fee, and would have allowed rights holders to submit up to 50 domain names found to have been previously registered for abusive purposes and have those strings associated with trademarks registered within the Trademark Clearinghouse. The proposal did not include a Limited Preventative Registration (LPR) mechanism (similar to the Do-Not-Sell approach) contained in the IPC/BC proposals.

ICANN launched a comment period for both the "Strawman Proposal" and the LPR proposal. ANA filed comments on the proposals on January 15, 2013 (http://www.ana.net/getfile/18223). We detailed the necessity of protecting brand holders' interests in the brands they have spent substantial amounts of time and money to develop. We also pointed out that there were provisions within the proposals to protect those who had legitimate rights to a name that was also the registered trademark of another entity. More than 60 sets of comments from major companies, associations, and organizations were filed in support of the proposals, including the LPR, which ANA argued was a demonstration that a wide range of stakeholders were concerned about being adequately protected.

Fadi Chehadé spoke at the 2013 ANA Advertising Law and Public Policy Conference where he announced that the 30-day Sunrise period, the extension of the Trademark Claims period to 90 days, and the submission of strings previously used for abusive purposes would all be implemented. The so-called "Claims 2" period was not implemented, which ICANN stated was due to the fact that it was a "policy" rather than implementation matter. Additionally, the LPR was labeled "policy" and was tabled indefinitely.

Name Collisions

Last year, we began hearing from Verisign (the registry of .COM, the largest current TLD), PayPal, and a number of Internet and digital security companies about the potential for some new proposed gTLDs to result in "collisions" or "clashes" with internal, privately used domains within companies. These entities have expressed concern that private domains used internally by many companies (such as .MAIL, .HOME, and .CORP) will clash with identical applied-for TLDs should those TLDs ultimately be granted. This could lead to the possibility of server failures and significant security breaches.

On August 5, 2013, ICANN released a Consultant's Report on the Security and Stability issue with new TLDs (http://www.icann.org/en/about/staff/security/ssr/name-collision-02aug13-en.pdf). This report found that roughly 80 percent of applied-for TLDs have a "low risk" of potential name clashes. It found that there was an "uncalculated risk" for roughly 20 percent, and it singled out two applied for strings, .HOME and .CORP as "high risk." As a result of the report, ICANN recommended proceeding with delegating the so-called "low risk" TLDs while admitting some clashes could occur. It also recommended studying those with "uncalculated risks" for an additional three to six months. Additionally, ICANN proposed an indefinite delay for delegating the two "high risk" TLDs, .HOME and .CORP, until mitigation efforts can render them "low risk."

This report unfortunately was based solely on a numeric analysis of potential clashes within the DNS, utilizing a snapshot of DNS information taken over a very short time period. It did not provide a qualitative analysis of the kinds of services that could be affected or the level of risk that could be involved. In fact, the Executive Summary of the Report itself states, "An additional qualitative analysis of the harms that might ensue from those collisions would be necessary to definitively establish the risk of delegating any particular string as a new TLD label, and in some cases the consequential harm might be apparent only after a new TLD label had been delegated." Thus, ANA has argued and continues to argue that this Report is seriously inadequate, and it continues to create uncalculated dangers to go forward with a rollout based on the information contained in this report without a true qualitative analysis of risk.

Domain Name Battles

Since the rollout of new domain names began in 2012, several battles have sprung up over who should have the rights to those TLDs. In 2013, ICANN set up its Trademark Clearinghouse (TMCH) brand database to protect brands and help businesses register domain names for which they have the legitimate rights. However, many companies, and even some countries, claim that they are not being adequately protected in this system and that TLDs of importance to them are being offered up for general sale.

A notable debate to date is over the .WINE and .VIN domain names. When ICANN launched the new gTLD Program, several private firms applied for .WINE gTLDs. France initially started the uproar over .WINE and .VIN, calling the general sale of these TLDs a threat to the country's desire to "preserve the cultural diversity" built on the Bordeaux, Burgundy and Champagne wines and wine regions. Wineries in the U.S. soon followed suit in trying to defend themselves, particularly those in California. They cited either insufficient or non-existent safeguards to protect them from nefarious individuals buying the .WINE and .VIN domain names. The European Federation of Origin Wines issued a statement to ICANN in 2013 arguing that the new gTLDs infringe on intellectual property rights. This year, ICANN issued a 60 day deadline to resolve the debate by June 3, 2014, but its delegates failed to reach an agreement and ICANN has "continued processing of the .VIN and .WINE applications," according to a statement.

Internet Oversight Transition

On March 14, 2014 the U.S. Department of Commerce announced its intent to begin a transition of key domain name functions over to the global multi-stakeholder ICANN community. This proposal triggered considerable backlash from Republicans in Congress, who have argued that the move would give more power to authoritarian countries to take over the governance of

the Internet. Rep. John Shimkus (R-IL/15), a senior member of the House Energy and Commerce Committee, introduced the DOTCOM bill, which provides that the U.S. cannot hand over the oversight of ICANN unless the GAO provides a thorough report to the Congress evaluating the pros and cons of such a transfer and an evaluation of the adequacy of existing safeguards. The House Communications Subcommittee approved the bill as did the House Energy and Commerce Committee, and similar amendments passed the House in the Defense Authorization and the Commerce, Justice and Science Appropriations bills. We will continue to track these developments. ICANN's efforts in this area, if successful, will create even less oversight by the Department of Commerce and the NTIA over their activities, which will be even more dominated by domain name registrars who have not proven highly concerned about the trademark and other protections due advertisers.

GAC Proposal

In August, the ICANN Board proposed a major amendment to its bylaws that would force ICANN to adopt all Governmental Advisory Committee (GAC) advice unless two-thirds of ICANN's non-conflicted board members vote to oppose the advice. Due to already existing conflict of interest issues, the ICANN Board that can act on proposals consists of a limited group of members. This group's number could be further diminished if certain GAC proposals raise issues that create additional conflict of interest questions. Already, GAC, which is made up of more than 100 diverse countries, has a substantial amount of influence within ICANN because its advice must be taken into consideration in all Board decisions. When ICANN's Board proposes actions inconsistent with GAC advice, it must give reasons for doing so and work with GAC to reach a mutually acceptable solution. This proposed change could radically impact the future of ICANN, basically providing governmental authorities extraordinary say as to ICANN policy, and could pose significant challenges for brands. Many of the countries in the GAC are totalitarian in nature and do not have much concern about free speech protections in general or commercial rights of brand holders in particular. Also, there are no requirements to provide transparency in their policy development or to provide a basis for their recommendations. ANA filed comments on September 12 in opposition to this proposal and urged all member companies and their affiliate associations to consider filing in opposition as well (http://www.ana.net/getfile/21365).

Outlook for 2015

We will continue to monitor the potential effects on brandholders and consumers during the roll-out of new TLDs. We will also continue to voice our concerns about the inadequate protections for brandholders within the new TLD program, as well as the rushed deployment. As the transition of NTIA functions to the multi-stakeholder ICANN community moves forward, ANA will provide input when and where appropriate.

Bot Fraud Issues

Background

Bots — computer-generated signals designed to mimic human web traffic in order to trick advertisers to pay for phony non-consumer visits to websites — are a significant problem for digital marketers. They cause serious damage in terms of CPM, revenue, and reputation. Bots find their way onto premium content Internet sites and ads. These sites and networks are the most severely injured by fraud. However, bots are not evenly or predictably distributed, making them exceedingly difficult to track. The most sophisticated bots which cause the most damage cannot be caught by traditional methods. It has been estimated that as much as 25-50% of money spent on digital advertising is wasted because of these criminal bots, translating into multi-billions of dollars of wasted expenditures annually and undermining faith in Internet commerce.

Congressional Activity

The Senate Judiciary Committee held a hearing in July on botnets and cybercriminals (http://www.judiciary.senate.gov/meetings/taking-down-botnets_public-and-private-efforts-to-disrupt-and-dismantle-cybercriminal-networks). The hearing not only examined bot fraud in the ad industry, but it also focused on bots that are used by criminals to take over individual computers using malware. Once the malware has been installed, criminals set up networks of bots which gain access to personal information and bank accounts, completely shut down business operations, and even use webcams to spy on individuals.

This hearing was led by the Chairman of the Crime and Terrorism Subcommittee, Senator Sheldon Whitehouse (D-RI). During the hearing, the witnesses from the Department of Justice and the Federal Bureau of Investigation stated that improved laws are needed to adequately take down bots. Witnesses from the private sector noted that the Internet of Things is presenting additional challenges to those trying to combat bots. Mobile phones and other devices that can access the Internet are turning into the newest hot spots for bots, but the current efforts by law enforcement are still mainly geared toward desktop computers. Senator Whitehouse, along with Senator Lindsey Graham (R-SC), stated a firm commitment to either craft new legislation or improve the current laws to make the take down and prosecution of cybercriminals operating bots a more seamless and effective process.

ANA Bot Fraud Study

In July, ANA announced the launch of a major new industry push to reduce bot fraud. For this initiative, ANA partnered with White Ops, a fraud detection firm, to conduct a study of over 30 member companies' advertising campaigns. The aim of the study was to provide clearer data to advertisers to help reduce bot fraud and improve marketing ROI.

On December 9, the comprehensive study of bot fraud in the digital advertising industry was released (http://www.ana.net/content/show/id/botfraud). This study produced many surprising results, including that almost a quarter of video ad impressions and more than half of third party sourced traffic is fraudulent. The study also revealed that bot fraud levels vary across the day with peak activity occurring when users are sleeping, but their computers are still awake,

between midnight and 7:00 a.m. Additionally, impressions coming from older browsers such as IE6 (Internet Explorer 6) and IE7 had fraud levels of 58 and 46 percent, respectively.

The ANA/White Ops study analyzed 181 campaigns from 36 ANA member companies, which were tagged to identify bot fraud. During the study, 5.5 billion impressions in 3 million domains were measured over 60 days in line with industry spending patterns.

Outlook for 2015

As can be seen from the new ANA/White Ops initiative and the Senate Judiciary Committee hearing, bot fraud is gaining heightened attention across the board. ANA's initiative will assist in the effort to combat bot fraud by helping to develop means to dry up a significant portion of bot fraud funding presently being siphoned from the advertising community.

Food Advertising

Background

The food, beverage, and restaurant industries have been under increasing pressure in recent years in response to the high levels of obesity in the United States. The creation of First Lady Michelle Obama's "Let's Move" campaign, created to foster the laudable goal of curtailing the rising rates of obesity among America's youth, and her continuing push to require schools to serve healthier food to students demonstrates the Obama Administration's strong desire to keep this issue as a key focal point.

In the last few years, bills restricting food and beverage advertising to children have been introduced in both the federal and state legislatures. Also, food advertisers faced a major fight against overly restrictive standards for food and beverage marketing to children under 18 years of age put forward by the Interagency Working Group (IWG) of four federal agencies (the CDC, FDA, FTC, and USDA). Tax proposals to limit food advertising for products of "low nutritional value" also have been put forward. Pressure has grown in the last year from the media and international regulators as well.

The Interagency Working Group (IWG)

The Omnibus Appropriations Act of 2009 called for the establishment of an Interagency Working Group (composed of the CDC, the FDA, the FTC, and the USDA) to carry out a study and provide subsequent recommendations on food marketing to children and teenagers. The IWG's preliminary report was released in April 2011 and contained sweeping restrictive nutrition and advertising proposals that were labeled as "voluntary." If fully implemented, these restrictions would not have allowed the advertisement of any food or beverage to children under 18 unless it met highly restrictive, unprecedented guidelines for fat, sugar, and sodium. The restrictions would also have covered twenty types of advertising, including: word-of-mouth, sponsorships, philanthropic activities, and a catch-all "other" category. Because these proposals were predicated on the necessity of protecting children's health, ANA and other groups found the "voluntary" label to be merely a mask for efforts at backdoor regulation.

ANA partnered with sister associations and member companies to form the Sensible Food Policy Coalition (SFPC) in response to these proposals. The SFPC released a report demonstrating that if the proposals were fully implemented and complied with, 88 of the 100 most commonly consumed foods in the U.S. (including whole wheat bread, 2% milk, low-fat yogurt, and canned vegetables) would fail to meet the IWG's overly rigid nutrition standards. The Coalition also released an economic analysis that demonstrated the substantial negative impacts the proposals would have on jobs and sales if enacted.

ANA, in conjunction with the coalition, met with numerous Hill offices and engaged in a large PR effort to highlight the adverse impacts of the proposals. Dan Jaffe of ANA's Washington office testified at a hearing on this issue before two subcommittees of the House Energy and Commerce Committee. Along with coalition partners, we also worked extensively with the Appropriations Committees of both the House and Senate to urge them to block the four agencies from releasing a final report without performing a detailed cost-benefit analysis, as required by Executive Order 13563. Ultimately, as part of the final 2012 appropriations bill passed in December 2011 (the 2012 Consolidated Appropriations Act), the FTC was prohibited from using any funds to publish

a final report without first performing a cost-benefit analysis. This Appropriations language has been extended in subsequent appropriations bills and every continuing resolution passed since then, including this year's FY 2015 Financial Services Appropriations bill (H.R. 5016) which passed on July 16, 2014.

At a hearing before the House Appropriations Committee in March 2012, FTC Chairman Jon Leibowitz stated that while the FTC still considered food marketing and childhood obesity to be priorities, it was "time to move on" from the IWG proposals. Additionally, Commissioner Julie Brill spoke at our Advertising Law & Public Policy Conference in March 2013. When asked about the IWG report, she stated that the FTC was working at the request of Congress when it issued the proposals. She further indicated that if Congress no longer wanted such a report, the FTC would not pursue it.

Children's Food and Beverage Advertising Initiative

The most powerful self-regulatory approach to the food marketing issue is the Children's Food and Beverage Advertising Initiative (CFBAI), launched by the Council of Better Business Bureaus (CBBB) in 2006. Under the original initiative, participants were required to direct at least 50 percent of food and beverage advertisements directed toward children to foods and beverages that were healthier or "better for you." Foods and beverages labeled as "better for you" were designed to meet established government and scientific standards as established by the FDA and USDA. In addition, participants agreed to reduce the licensing of third party characters in promoting foods, agreed not to use product placement of foods and beverages in programs directed to children under 12, and agreed not to advertise foods and beverages in elementary schools.

CFBAI standards have been revamped and strengthened twice in recent years. In January 2010, the initiative was expanded to include advertising in child-directed video games, cell phone ads targeting children, and word-of-mouth advertising. Participants also were required, starting in January 2010, to provide that 100 percent of food and beverage advertisements directed to children 12 and under be for healthier products. In July 2011, CFBAI began requiring its participants to use uniform nutrition standards for advertising food and beverage products to children with limits on sugar, saturated fats, and sodium varying for different categories of food. These standards were fully implemented by participating companies by December 31, 2013 (http://www.bbb.org/us/storage/16/documents/cfbai/CFBAI-Category-Specific-Uniform-Nutrition-Criteria.pdf). Seventeen companies currently participate in CFBAI, and those companies represent roughly 80 percent of the food and beverage advertisements seen on children's programming.

Congressional Activity

Senator Tom Harkin (D-IA) introduced the Healthy Lifestyles and Prevention America Act (HeLP America Act) in January 2013 (http://www.gpo.gov/fdsys/pkg/BILLS-113s39is/pdf/BILLS-113s39is.pdf). This bill would provide resources for healthier foods and for physical activity programs in schools, provide tax benefits to employers to increase employee wellness and create a number of grant programs to provide funds to communities to develop community health programs such as community gardens. It also would restore to the FTC authority to utilize unfairness in rulemaking directed at advertising to children and would grant notice and comment (otherwise known as APA) rulemaking authority to the FTC regarding children's advertising.

Finally, it would reinstate the Interagency Working Group on Food Marketed to Children and require it to report to Congress its findings and recommendations by July 14, 2014.

In mid-May, Senator Harkin, Chairman of the Senate Health, Education, Labor, and Pensions (HELP) Committee, and Senator Richard Blumenthal (D-CT) introduced the Stop Subsidizing Childhood Obesity Act of 2014 (http://www.gpo.gov/fdsys/pkg/BILLS-113s2342is/pdf/BILLS-113s2342is.pdf). This legislation would end the federal tax deduction for advertising foods of "poor nutritional quality" to children, "children" being defined in the bill as anyone under 14 years of age. The change would include marketing for beverages, candy and chewing gum, along with other foods. The bill would also require the Institute of Medicine (IOM) to develop procedures to identify which foods and brands should be included under the new limitation. The Senate bill has a sister bill in the House (H.R. 2831) which was introduced by Representative Rosa DeLauro (D-CT/3) in July 2013 (http://www.gpo.gov/fdsys/pkg/BILLS-113hr2831ih/pdf/BILLS-113hr2831ih.pdf).

On September 3, 2014, a group of Congressional Democrats, including Senator Rockefeller (D-WV), Chairman of the Senate Commerce Committee, and Senator Harkin (D-Iowa), Chairman of the HELP Committee, sent a letter to U.S. Federal Trade Commission (FTC) Chairwoman Edith Ramirez regarding food marketing to children (http://www.help.senate.gov/imo/media/doc/Senate%20Letter%20to%20FTC%20%20-%20Food%20Marketing%20to%20Children.pdf). The letter called on the agency to strengthen the oversight of food and beverage marketing to children and ensure that companies are making progress on reducing "unhealthy" food marketing to children. The lawmakers urged the FTC to complete a follow-up to the 2012 and 2008 reports on food and beverage marketing to children and adolescents. The letter also recognizes the recent changes to the Children's Food and Beverage Advertising Initiative (CFBAI) common nutrition criteria, but asked the FTC to continue examining food and beverage marketing expenditures in 2014 (http://www.bbb.org/us/storage/16/documents/cfbai/CFBAI-Category-Specific-Uniform-Nutrition-Criteria.pdf).

International Activity

European Union
In February, the EU Action Plan on Childhood Obesity was launched in Athens at a Conference on Health and Physical Activity (http://ec.europa.eu/health/nutrition_physical_activity/docs/childhoodobesity_actionplan_2014_2020_en.pdf). The Action Plan, which aims to halt the rise in obesity in children and young people (0-18 years) by 2020, includes operational objectives on food and beverage marketing to children. These include the development of national recommendations to limit food marketing to children, based on consolidated nutrition criteria developed by governments, and the elimination of food marketing in schools. The plan calls on the European Commission to maintain the EU Platform for Action on Diet, Physical Activity and Health as a key plank of the EU Nutrition Strategy and on stakeholders to make further commitments in that context. The Commission will report back in 2017 and 2020 on progress made in implementing the EU Action Plan on Childhood Obesity 2014-2020. ANA is a key board member of the World Federation of Advertisers (WFA), which has actively provided input to the European Commission during this process.

South Africa
On 29 May, the South African Department of Public Health published "Draft guidelines to the regulations relating to the labelling and advertising of foods for compliance purpose" which propose a full ban of advertising for "unhealthy" products targeting children, as well as a watershed ban (6am-9pm) on TV and radio for "unhealthy" food advertising (http://www.factssa.com/DRAFT%20Guidelines%202014.pdf). The draft guidelines were open for public consultation before being noticed to the World Trade Organization. The WFA worked to provide support to the Consumer Goods Council of South Africa (CGCSA) for the public consultation. WFA also submitted comments to the Directorate General for Trade of the European Commission with regard to South Africa's WTO notification.

Mexico
Mexico took the step this year of restricting advertising to children of food considered high-calorie and soft drinks as part of its campaign against obesity, which has skyrocketed in the country in recent years. The ads are banned from 2:30 p.m. to 7:30 p.m. on weekdays and from 7:00am to 7:30pm on weekends. Restrictions were also imposed on similar ads shown at movie theaters during movies targeted to children. Advertisers wishing to advertise products which do not meet the nutrition criteria during the restricted hours may nevertheless request prior authorization from the public authority. Such authorization will only be granted if accompanied with evidence from an independent body that the audience at the proposed time of broadcast is composed of less than 35% of children between the ages of 4 and 12.

Ecuador
Last year, Ecuador imposed stringent new restrictions on food advertising. One of Ecuador's main restrictions is that all foreign ads – which includes companies without a majority of the stockholders being Ecuadorian nationals or legal residents and those ads which do not have 80 percent or more of those contributing to the ad being Ecuadorian nationals or legal residents – are now banned. Also, any advertisement shown during children's programming must be approved by the country's Health Ministry and ads for any products whose regular use may "harm" the health of consumers – including alcoholic beverages, tobacco, and some foods – are prohibited. A conference was held at the end of August 2014 in Quito, Ecuador which focused heavily on food marketing to children. This conference was organized by the Ministries of Social Development and Public Health, along with the World Health Organization (WHO) regional office for the Americas, the Pan American Health Organization (PAHO) and UNICEF. During the conference, several presenters emphasized the relevance of introducing restrictions on "junk food" ads directed to children as an effective way of combating non-communicable diseases including heart disease, cancer, and diabetes. Ecuador, as a member of PAHO, is leading the work of the Regional Action Plan on Children's Obesity and is basing many of its recommendations on restrictions it imposed on children's advertising last year.
The Action Plan will address food advertising and marketing to children along with other regulation areas. As a part of WFA, we will continue to closely watch the discussions on food marketing to children, particularly in the Pan American region, together with local and regional stakeholders.

On October 28, the Health Ministry in Ecuador published a draft bill that would impose mandatory health warnings in advertising of foods high in fat, sugar and salt (HFSS) on radio, TV, in print media and online. The draft bill requires a message of "High in sugar/salt/fat" to be displayed or broadcast according to a classification to be determined by the Health Ministry. The proposal specifies the length of the message (radio) and the graphical requirements (all other

media), including size of text, color of font and background. Commercials may also contain a message indicating "product low in/with no fat/sugar/salt," if appropriate. WFA is in contact with local stakeholders to determine the best way to move forward with this bill.

Chile
Chile passed a new law last year that places significant restrictions on the advertisement of foods considered high in calories, fat, salt, or sugar content. The law requires that foods in these categories must be labeled as such, and these products may not be sold in primary or secondary schools. There is an absolute prohibition on advertisements of these products targeted to children under the age of 14, and any use of so-called toys or prizes in connection with the sale of such products is now banned.

Colombia
The Ministry of Trade, Industry, and Tourism in Colombia issued rules in July 2014 on advertising to children. The Ministry's Decree 975 regulates what content is permitted in children's advertising and provides for various disclosure requirements, including in branded entertainment and digital platforms. The Decree prohibits advertising that suggests that failure to have a product will lead to social rejection, and when advertising is incorporated into radio or television programming directed to children, the Decree requires that the advertising be preceded by "this advertisement is not part of the content of this program."

Turkey
On August 4, 2014, the Turkish Minister of Health, Mehmet Müezzinoglu, announced that upcoming restrictions on food advertising during children's TV programs – allegedly designed to respond to rising obesity levels among Turkish children - will ban the advertising of sweets, soft drinks and chips during such programs. The law also imposes healthy eating and lifestyle messages in advertisements for such products during other TV programs. The full list of products that will be affected by the ban will be prepared by the Ministry of Health and is anticipated to be released in the upcoming months.

Singapore
On September 30, the Singapore Ministry of Health (MoH) and the Advertising Standards Authority of Singapore (ASAS) announced new guidelines for children's advertising. Under these guidelines, food and beverage marketing communications that do not meet the common nutrition criteria – which are inspired by the EU Pledge common nutrition criteria but adapted for the Singapore context based on local dietary guidelines, product portfolios and dietary habits – cannot be addressed primarily to children 12 and younger. A set of interpretative guidelines accompanying the code outline what the restrictions mean in practice. This includes a list of Singapore TV and radio channels/programs and print titles deemed to be targeted at children aged 12 and under; movie rating guidance; and a detailed explanation of creative advertising elements that are primarily appealing to children, such as licensed characters and the use of games.

Singapore's common nutrition criteria resulted from a public-private partnership and were negotiated in a multi-stakeholder committee including industry and government representatives. WFA was part of the negotiations and represented the interests of advertisers throughout the process. These guidelines will come into effect on January 1, 2015 for all advertisers in Singapore and will be enforced by ASAS. Advertisers wishing to market food and beverage products that are directed primarily at children aged 12 years and under will need to complete a

Nutrition Criteria Compliance Certificate and supply the media owner with the completed certificate. Media owners will be responsible for ensuring that ads for products not meeting the nutrition criteria are not placed in children's media.

UN Advertising Report
The United Nations Special Rapporteur in the field of cultural rights, Farida Shaheed, published a report in early October on the impact of advertising and marketing practices on cultural rights (http://www.commercialfreeeducation.com/wp-content/uploads/UN-Advertising-Final-English.pdf). In this report, she denounced almost all forms of commercial advertising – including advertising of food and beverage to children. Shaheed recommended prohibiting all advertising to children under 12, with a possible extension to children under 16. Overall, the report reflected very negatively on advertising and cites two other UN Special Rapporteurs who expressed similar concerns on the right to health and on the right to food.

Media

A number of articles, books, and other media attacks on food, beverage, and restaurant advertising have been published this year, as well as studies linking obesity to advertising and criticizing industry self-regulation. Katie Couric, the well-known TV journalist, helped produce and narrates a documentary called "Fed Up," which was released in theaters early in 2014. The movie claims to "blow the lid off . . . a 30 year campaign by the food industry aided by the U.S. government to mislead and confuse the American public, resulting in one of the largest health epidemics in history." It also claims the food industry is almost single-handedly responsible for America's obesity epidemic due to advertising of sugar-laden foods, suggesting that people will stop trusting advertisements once they become aware of what manufacturers are actually putting in food.

In May, a study was published in the Bulletin of the World Health Organization (WHO) urging governments to take more aggressive steps, including advertising restrictions, to prevent obesity. Also, a study in the journal Pediatric Obesity has suggested that childhood obesity utilizing BMI data has underestimated the obesity problem by more than 25%. Additionally, a recent article in *Politico*, entitled "The Plot to Make Big Food Pay," describes an effort by a Chicago law firm to convince state attorneys general in 16 states to sue "big food" companies to help pay for obesity-related health care costs in their states. The proposal would rely on a contingency fee agreement, allowing the law firm to perform legal work for the state attorneys general in exchange for a part of any settlements reached. No attorneys general have signed on to this project so far but the law firm is also trying to get a working group started through the National Association of Attorneys General (NAAG).

First Lady's "Let's Move" Campaign

First Lady Michelle Obama continues her strong focus on childhood obesity through the "Let's Move" initiative, now in its fourth year. ANA was invited and actively participated in a White House Summit on Food Marketing to Children in 2013 where the successful efforts of the Children's Food and Beverage Advertising Initiative and the Healthy Weight Commitment Foundation were emphasized. ANA pointed out the many positive steps of the CFBAI self-regulatory program, the over 20,000 food product reformulations focused on fat, sugar, salt, and calorie reduction in the last several years, and the successful Healthy Weight Commitment Foundation program that has led to over 6.4 trillion calories being removed from foods in the

marketplace from 2007 to 2012 (http://www.rwjf.org/en/about-rwjf/newsroom/newsroom-content/2014/09/foodindustryleadersfindingwaystohelpsolvenationsobesityepidemic.html?cid=xtw_rwjf). Mrs. Obama has also continued her push to provide healthier foods in schools, but has been met with heavy pushback on this front as students and administrators find many faults with the plan.

Outlook for 2015

We expect food, beverage, and restaurant advertising to remain a major issue. As long as obesity continues to be a significant health crisis, there will be pressure on lawmakers and regulators to "do something." ANA will continue to work with coalition partners and members to highlight the numerous and significant positive efforts of industry.

Prescription Drug Advertising

Background

Numerous surveys have shown that direct-to-consumer (DTC) prescription drug advertising imparts important benefits to consumers. However, some in Congress want to limit this category of advertising, either through moratoriums or limitations on the tax deductibility of the cost of advertising. ANA has lobbied key Congressional committees in support of DTC pharmaceutical advertising, provided key witnesses for hearings and distributed economic research in support of DTC advertising to key members of Congress.

ANA supports truthful prescription drug advertising and opposes any attempts to limit truthful, non-deceptive advertising in this area. In this effort, ANA works with our member companies and industry groups such as the Pharmaceutical Research and Manufacturers Association (PhRMA) to protect the right of pharmaceutical manufacturers to communicate directly and effectively with consumers. We support PhRMA's Guiding Principles for Direct-to-Consumer Advertising, which can be viewed at http://www.phrma.org/direct_to_consumer_advertising/.

Congressional Activity

Rep. Jerrold Nadler (D-NY/10) introduced the Say No to Drug Ads Act (H.R. 923) in February 2013. This bill would amend the Internal Revenue Code to deny a tax deduction for the cost of direct-to-consumer advertisement of a prescription drug. The bill has been introduced in several previous sessions of Congress with no success, and met a similar fate in 2014. ANA believes that this proposal, which singles out a category of speech for differential adverse tax treatment, is unconstitutional. Also, we believe that DTC prescription drug advertising provides many important information benefits for consumers.

FDA Review of TV Disclosure Rules

In February, the U.S. Food and Drug Administration (FDA) announced its intent to study the potential impacts of an alternate format for direct-to-consumer television advertising, one in which companies would only be required to list the major risks associated with the use of a drug as opposed to all of the potential risks. This proposal is a major shift from the current approach, which requires companies to present the benefits and risks of a drug with a "fair balance" that gives equal weight to both the benefits and risks of taking the drug. In addition to the "major statement" of risks which are most commonly associated with the drug, companies are also required to present other risks that may occur considerably less frequently but to potentially devastating effect, up to and including death.

In its announcement, the FDA noted that it is considering limiting the risks in the "major statement" to those that are serious and actionable. Companies would then be required to include a disclosure to alert consumers that there are other product risks not included in the ad. Comments on the FDA's proposal were accepted until April 21, 2014 and the FDA has not yet moved forward with a new approach.

New FDA Studies

Early in November, the FDA announced its plans to undertake three new studies relating to direct-to-consumer (DTC) advertising.

The first, entitled "Impact of Ad Exposure Frequency on Perception and Mental Processing of Risk and Benefit Information in DTC Prescription Drug Ads," aims to test the FDA's hypothesis that consumers who view the same drug advertisement multiple times will have a slightly different view of the product each time (http://www.raps.org/Regulatory-Focus/News/2014/11/10/20708/Barraged-by-Drug-Ads-FDA-Wants-to-Know-How-That-Makes-You-Feel%E2%80%94About-the-Drug/). This hypothesis implies that if a drug company heavily advertises to consumers, it might succeed in making its products seem safer than they actually are.

The second study, entitled "Spousal Influence on Consumer Understanding of and Response to Direct-To-Consumer Prescription Drug Advertisements," focuses on the social contexts in which an ad is seen and how that could impact perception of a drug's benefits or risks (http://www.raps.org/Regulatory-Focus/News/2014/11/13/20736/Does-Your-Spouse-Affect-How-you-Perceive-Drug-Safety-An-FDA-Study-Aims-to-Find-out/). Specifically, the FDA is interested in the potential for a consumer and their spouse to view an ad together and then discuss it and what impacts that may have on perceptions.

The final study, entitled "Risk and Benefit Perception Scale Development," will test more than 10,000 patients in an effort to examine how they assess drug risk independently of other products (http://www.raps.org/Regulatory-Focus/News/2014/11/19/20784/FDA-Plans-Huge-Study-on-How-Public-Understands-Drug-Risk/).

While we do not yet know what the FDA plans to do with the results of these studies or how the results will impact regulatory policy, there is a clear potential that the studies could impact FDA policy concerning DTC advertisers.

Outlook for 2015

Even though the legislative focus has turned away from prescription drug advertisements recently, due to the increased focus on broad tax reform, we are continuing to be vigilant that these types of proposals do not resurface forcefully suddenly. ANA will watch carefully for any new legislative activity in this area and will continue to advocate for the rights of prescription drug advertisers.

Tobacco Advertising

Background

Advertising for tobacco products has been severely limited since the 1998 Master Settlement Agreement (MSA) between the tobacco companies and the government. These ads are further limited by the Family Smoking Prevention and Tobacco Control Act, signed into law by President Obama in 2009, which shifted regulatory authority over tobacco products and advertising from the Federal Trade Commission (FTC) to the Food and Drug Administration (FDA). The law places stringent restrictions on the colors, illustration and pictures used in tobacco ads. It sets strict requirements on ad placement in publications with an under-18 year-old readership of 15% or greater, requires new warning labels on products and ads, and prohibits promotional samples and sponsorships. It also prohibits outdoor ads within 1,000 feet of schools or playgrounds. Both these restrictions on advertising and the new warning labels issued under a rulemaking by the FDA as required under the act have been subject to ongoing court challenges.

The recent explosion in the popularity of e-cigarettes, or battery powered vaporizers for liquid nicotine, also has forced these new products into the forefront of the tobacco debate. The FDA currently does not have regulatory power over e-cigarettes and their marketing; however many lawmakers have called for more federal regulations of these devices.

Congressional Activity

The Healthy Lifestyles and Prevention America Act (HeLP America Act), introduced in January 2013 by Senator Tom Harkin (D-IA), called for the disallowance of the deductibility of tobacco product advertising as a business expense (http://www.gpo.gov/fdsys/pkg/BILLS-113s39is/pdf/BILLS-113s39is.pdf). The bill has been referred to the Senate Committee on Finance.

Another Senate bill impacting this area is S. 2047, the Protecting Children from Electronic Cigarette Advertising Act of 2014 (https://beta.congress.gov/113/bills/s2047/BILLS-113s2047is.pdf). This bill was introduced in February by Sen. Barbara Boxer (D-CA) and would prohibit the advertisement, promotion, or marketing of an electronic cigarette product in a manner that the person knows or should know will have an effect of increasing the use of an electronic cigarette by a child. Enforcement is shared by the FTC and state attorneys general, with civil penalties up to $16,000 for violations. There are currently seven cosponsors for this bill and it was referred to the Senate Committee on Commerce, Science, and Transportation for further action. This bill has a sister bill in the House, which was introduced by Rep. Elizabeth Esty (D-CT) in March and currently has 36 cosponsors.

E-Cigarettes

On June 18, 2014, the Senate Commerce Committee held a hearing titled, "Aggressive E-Cigarette Marketing and Potential Consequences for Youth." The main concern the committee raised about e-cigarettes was their use of flavors geared to children. The presidents of two major e-cigarette makers testified that these flavors are designed to draw adults away from combustible cigarettes and their carcinogens. However, the members of the committee voiced their commitment to banning these sorts of "child-friendly" flavors for e-cigarettes, just like they were banned for traditional cigarettes. The Senators also attacked e-cigarette makers' use of

advertisements and social media to appeal to children. In particular, the Senators questioned the use of celebrities who are popular with teens in advertisements. Overall, the committee members demonstrated a clear desire to impose strict advertising restrictions on e-cigarettes in the future.

Court Activity

There have been major developments in the two court cases resulting from the Family Smoking Prevention and Tobacco Control Act.

Soon after the law took effect the advertising restrictions, including the limits on colors and images in ads, event sponsorships and requiring new warning labels on ads and packaging, were challenged by six tobacco companies in federal district court in Kentucky. In 2010, the district court held that the ban on colors and images in ads was too broad and unconstitutional. ANA's "friend of the court" amicus brief opposing many of these restrictions in that case can be read at http://www.ana.net/getfile/15431. The court, however, upheld other speech restrictions, including those on sponsorships and the language and graphics required in warning labels. Both parties appealed to the U.S. Court of Appeals for the Sixth Circuit, and ANA again submitted an amicus brief (http://www.ana.net/getfile/15753). In March 2012, that court largely upheld the district court, finding some of the new regulations constitutional – specifically the provisions requiring new graphic warning labels on products and advertising and those banning sponsorships. However, the court struck down the provisions banning the use of colors or pictures in tobacco advertisements featured in media that have underage youth comprising 15% or more of their audiences, an important First Amendment victory with precedential impacts far beyond the tobacco industry.

The tobacco industry filed a petition seeking U.S. Supreme Court review of the case. However, that petition was denied in April 2013, leaving the Sixth Circuit's decision upholding some of the advertising restrictions but not others in place for the time being.

Meanwhile, the FDA's final rule on warning labels as required under the act also has been under searching review by the courts. The warning labels, issued in 2011, included highly disturbing graphics of cadavers, smoke coming out of a hole in a throat, and a lung filled with cigarette butts. The rule was challenged in the U.S. District Court for the District of Columbia by five tobacco companies, and ANA and the AAF filed an amicus brief in the case (http://www.ana.net/getfile/16958), arguing the rule was an illegitimate effort to deputize advertisers to promote the government's message. In March 2012, the court issued a permanent injunction blocking the rule, which was appealed to the Court of Appeals for the District of Columbia Circuit, in which we filed another amicus brief (http://www.ana.net/getfile/17890). That court's decision in August 2012 vacated the rule. In its 2-1 decision, the court noted that the FDA would make every single pack of cigarettes a mini-billboard for the government's message. In doing so, the court noted, however, that the government failed to show any data that the labels would meet the agency's goal of reducing smoking rates – or that any less restrictive means would work. In March 2013, the FDA decided not to seek U.S. Supreme Court review and stated that the agency would go back to the drawing board on the final rule.

Outlook for 2015

The U.S. Supreme Court's refusal to consider the appeal in the Sixth Circuit case is a mixed bag for advertisers and marketers, as some of the restrictions stood while others were found unconstitutional. At the same time, the FDA is required if it wishes to go forward in this area to devise new warning labels under the Act – and the Sixth Circuit, when it reviewed this provision, found it constitutional, while the D.C. Circuit disagreed. We will wait to see how the FDA revises the warning labels. Their revised rule would almost certainly be challenged in court, at which time the Supreme Court may see fit to reexamine the advertising restrictions as well. Also, the debate over the impact of e-cigarettes on tobacco smoking and whether these products are dangerous in themselves is highly likely to continue, with further legislative efforts expected both at the federal and state levels.

International Advertising Developments

Background

ANA routinely tracks advertising issues that occur outside the U.S. We are a member of the Board of the World Federation of Advertisers (WFA) and represent the largest advertising group within the WFA. The WFA is a global federation of multinational companies and national trade associations advocating for responsible and effective advertising practices. Food advertising and privacy rights continue to be major subjects of international focus.

UN Advertising Report

The United Nations Special Rapporteur in the field of cultural rights, Farida Shaheed, published a report in early October on the impact of advertising and marketing practices on cultural rights (http://www.commercialfreeeducation.com/wp-content/uploads/UN-Advertising-Final-English.pdf). In this report, she denounced almost all forms of commercial advertising – including advertising of food and beverages to children. She recommended prohibiting all advertising to children under 12, with a possible extension to children under 16.

The final report draws very negative conclusions on the advertising industry, recommending that "Member States (…) protect people from undue levels of commercial advertising and marketing while increasing the space for not-for-profit expressions." Shaheed believes Member States should regulate more effectively and should, in particular, ban all advertising in public and private schools.

In a section of the report analyzing the legal framework, Shaheed finds that, with the exception of certain well-regulated areas, most commercial advertising remains self-regulated, leading to poor implementation, inconsistencies and legal uncertainty for the industry and the public, as well as an inefficient complaint mechanism. "The multiplicity of regulations and industry codes makes understanding and usage extremely difficult," she concludes, denouncing the lack of transparency in how the various rules relate to each other. Many aspects of advertising are denounced, including the promotion of food and beverages with a high content of fat, sugar or salt. Shaheed cites two other UN Special Rapporteurs who expressed similar concerns. This report exemplifies the types of negative views that advertisers need to combat in important international regulatory and governmental venues.

Food Marketing Restrictions Internationally

Europe presently is a major center of activity on the food advertising front. Last year, the World Health Organization's (WHO) Europe office released a report calling for increased restrictions on the marketing of unhealthy foods. In February, the EU launched an Action Plan on Childhood Obesity that sets highly restrictive objectives for its member countries.

Elsewhere in the world, Mexico took the step of restricting children's television advertising of food considered "high-calorie" and soft drinks during times when children are most likely to be at home, similar to the stringent restrictions imposed on children's advertising in Ecuador, Colombia, and Chile last year. Turkey also announced that it will be instituting heightened restrictions in the near future. Furthermore, South Africa's proposal from earlier this year is especially expansive. The proposal aims to fully ban advertising for "unhealthy" products

targeting children, as well as a watershed ban (6:00 a.m.-9:00 p.m.) on TV and radio for "unhealthy" food advertising. Singapore also recently announced guidelines for children's advertising that was negotiated with industry. More information about all of these developments is available in the Food Marketing Section of this Compendium. We have alerted our members to these developments, as we believe they could have significant impacts for their business in those countries.

Privacy in the EU

Additionally, online behavioral advertising (OBA) in Europe has been a topic of growing concern in recent years. In 2009, the EU Parliament passed a "Cookie Directive" calling for websites to have opt-in consent from consumers for the use of tracking cookies related to online behavioral advertising. Individual member states are responsible for implementing the directive via legislation, which went into effect in May 2011

U.S. companies typically comply with EU privacy laws through a Safe Harbor Framework agreement between the European Commission and the Department of Commerce (http://export.gov/safeharbor/eu/eg_main_018365.asp). This framework, however, has been increasingly called into question by those in the EU who feel U.S. data brokers are abusing the system (http://www.natlawreview.com/article/broadened-crackdown-euus-safe-harbor-violations). Nonetheless, privacy regulations in Europe have a significant effect on U.S. companies due to the large amount of Internet business carried out on a global basis. Also, the DAA OBA Self-Regulatory Program has recently been extended to the EU and will hopefully serve as an alternative to more restrictive regulatory proposals (http://www.youronlinechoices.eu).

Another front where the EU has gone far beyond traditional privacy regulations is in the recent so-called "right to be forgotten" court ruling. In May, the European Court of Justice ruled against Google in a case brought by a Spanish man who wanted the link to an article about the auction for his foreclosed home to be removed. The court ruled that search engines are responsible for the content they link to, and for that reason Google was required to comply with EU data privacy laws and remove links for which an individual mentioned in an article had a valid request to take it down. Google began taking down links at the end of May. As of December 1, Google has received more than 174,000 requests covering more than 600,000 URLs, removing 41.5% of them from its search results.

This development in the EU could have major implications on freedom of expression around the world. It also starkly demonstrates the different paths the EU and the United States are taking on privacy issues. In the United States, such a ruling would most likely never occur due to the strong constitutional protections provided by the First Amendment in favor of free expression. Signals such as these from Europe indicate that the EU may be in the process of taking far more strident positions on privacy issues across the board. Advertisers are likely to be drawn in to the debate as the EU moves forward in regard to data privacy and security.

Outlook for 2015

ANA will continue to monitor developments overseas. Issues affecting advertising internationally can affect our members, as many of them have significant operations worldwide. In addition, regulatory actions in other countries often serve as models for proposed regulatory actions in the

United States. ANA will continue to work closely with the WFA to respond to these threats wherever they arise.

Local Choice Legislation

Background

In September, ANA successfully helped to combat a proposal that would require an *a la carte* approach to broadcasting and that would have adversely impacted advertisers. ANA spearheaded an effort later joined by the 4A's and AAF to send a letter to Senator Jay Rockefeller (D-WV), the Chairman of the Senate Commerce Committee, and the Ranking Minority Member of the committee, Senator John Thune (R-SD) (http://www.nab.org/documents/newsRoom/pdfs/090814_Advertising_Local_Choice.pdf). The letter questioned their "Local Choice" proposal as part of the Satellite Television Access and Viewer Rights Act (STAVRA). Local Choice is the popular name for the effort that would allow individuals to opt-out of paying for broadcast TV station signals, in effect creating an *a la carte* regime for broadcasting, but not for cable channels.

We raised many concerns in our letter about the impact of this proposal on the longstanding local broadcast model, which ensures free over-the-air broadcast television for all Americans.

Through the Communications Act of 1934, individuals receive free local news, weather, sports, and entertainment which are paid for by advertising revenues. Getting rid of a universally free broadcast system would greatly threaten advertisers who participate in the "up fronts" and otherwise support broadcasting through advertising. Advertisers see the value in supporting broadcast programming and would likely be unfairly harmed if the Local Choice proposal eroded through government action the economics of the current system.

With the push provided by our letter and additional opposition from broadcasters and several other groups, the Senate Commerce Committee called off plans to vote on the Local Choice proposal. A Commerce Committee aide is quoted as saying that the proposal needs "more discussion and a full consideration" before it will be introduced again.

The Senate reauthorized the satellite TV legislation in November without the Local Choice provisions.

Outlook for 2015

While we are very pleased with this recent turn of events, there is a possibility the Local Choice proposal will also come up next year as Congress begins to rewrite the Communications Act. If this attack resurfaces, we will again urge lawmakers to proceed with extreme caution and seek out the views of the advertising community to better understand how Local Choice would affect the financial support for programming.

Anti-Photoshopping Bill

Background

Representative Ileana Ros-Lehtinen (R-FL/27) introduced the Truth in Advertising Act in March 2014 (https://beta.congress.gov/bill/113th-congress/house-bill/4341). The bill directs the Federal Trade Commission (FTC) to submit a report to Congress that contains a strategy to reduce the use, in advertising and other media for the promotion of commercial products, of images that have been altered to materially change the physical characteristics of the faces and bodies of the individuals depicted; and makes recommendations for a risk-based regulatory framework with respect to such use. It also requires the FTC to solicit input from external stakeholders and experts who are geographically and culturally diverse and come from the physical and mental health, business, and consumer advocacy communities. The bill is being cosponsored by Rep. Lois Capps (D-CA/24) and Rep. Theodore Deutch (D-FL/21).

The effort to gain support for the Truth in Advertising Act is being spearheaded by Seth Matlins, a former senior advertising executive. On top of his widespread media outreach and his numerous trips to Capitol Hill to tout his cause, Matlins launched an online petition, currently with over 38,000 signatures, to help raise awareness of the issue.

ANA has argued that the FTC already has the power to restrict false, deceptive, or unfair acts or practices including misleading photographic depictions. ANA, however, believes this proposal goes too far and is too vague to meet First Amendment requirements for this type of government regulation.

Outlook for 2015

We expect the fairly significant amount of media attention surrounding the Truth in Advertising Act to continue into 2015. However, we do not believe there will be much legislative action on this bill for the foreseeable future unless members of Congress feel substantially increased pressure from their constituents.

Judicial Activity

Background

Advertising has been afforded strong constitutional protection in a series of decisions handed down by the U.S. Supreme Court. In the landmark *Central Hudson* case in 1980, the Court set out a four-part test to determine when restrictions on commercial speech violate the First Amendment. This test has been used in the intervening years to strike down numerous laws and regulations that impinge on the First Amendment rights of advertisers and marketers. In fact, in 2003's *Western States* decision, the Court held that any restrictions on speech must be a "last – not first – resort." ANA has been a major player in the development of the Court's First Amendment jurisprudence, joining cases when necessary and filing "friend of the court" briefs.

Recent Cases

American Broadcasting Cos., Inc. et al v. Aereo
Aereo is a company that was capturing over-the-air broadcast signals and transmitting them to subscribers for viewing over the Internet at virtually the same time they were being broadcast to those receiving them via antenna or cable. Aereo did this by employing a system of small antennas each dedicated to an individual subscriber that captured the broadcast and made an individual copy that was then transmitted to the subscriber. The major broadcasters brought suit against Aereo, claiming that it was violating the Copyright Act by infringing on their right to "perform" their copyrighted works "publicly," known as the Transmit Clause. Aereo claimed that it was simply supplying the equipment for the subscriber to obtain the broadcast. The U.S. Court of Appeals for the Second Circuit agreed with Aereo and held that did not violate the Transmit Clause as it did not stream directly to the public, but instead sent an individualized, private signal directly to each subscriber from their own antenna.

In a major victory for broadcasters, the U.S. Supreme Court in June overruled the lower courts and agreed that Aereo was illegally transmitting copyrighted material. On a 6-3 vote, the Court held that Aereo "performs" works "publicly" under the definition of the Transmit Clause, which was revised in 1976 in response to the retransmission of broadcast television by cable companies. These changes to the Copyright Act required the cable companies to pay retransmission fees for the right to deliver copyrighted broadcast television to their customers. Much like a cable company, the Court found that Aereo was "performing" as it "transmitted a performance" of the copyrighted material to its subscribers. It also found that it did so "publicly" as even though in Aereo's case each transmission was unique to the subscriber, it was transmitting to multiple subscribers at once.

The Court's decision can be viewed at http://www.supremecourt.gov/opinions/13pdf/13-461_l537.pdf.

American Meat Institute v. USDA
In July, the D.C. Circuit held (en banc) that the government can require labels disclosing the origin of meat products even without a government interest in preventing deception. This decision upsets a prevailing assumption that the Supreme Court's 1985 ruling in *Zauderer v. Office of Disciplinary Counsel* requires that the government must show it has an interest in preventing deception before it may compel commercial disclosures.

The D.C. Circuit held that such disclosures may be required so long as the government may show a rational basis for it, and it overruled prior circuit decisions that required the stronger showing of a government interest in preventing deception. Then, in November, the D.C. Circuit granted rehearing in *National Association of Manufacturers v. SEC*, and directed the parties to brief the question raised in *Zauderer* and *American Meat Institute* of whether disclosure requirements are limited to "factual and noncontroversial information." The decisions set the stage for a possible reevaluation by the Supreme Court of the law governing commercial disclosures.

Patent Troll Cases
There were two cases heard by the U.S. Supreme Court this past term dealing with patent assertion entities (PAEs), or "patent trolls," which are organizations that primarily or solely buy up patents on the open market and then file suit against other entities that are allegedly using the patented business method or technology. These two cases provide a modicum of relief to those targeted by trolls, which includes a number of ANA members.

- In April, the Court held in *Octane Fitness v. Icon Health and Fitness* and *Highmark, Inc. v. Allcare Health Management Systems* that lower courts should have more discretion in awarding attorney's fees to prevailing parties in alleged patent infringement cases, rather than holding them to a more rigid standard.
- In June, the Court in *Alice Corporation Pty. Ltd. V. CLS Bank International* also limited the reach of software patents, finding that the use of a computer is insufficient to transform an abstract idea into a patent-eligible invention. This case in particular may limit what is patentable and thus eventually limit the types of suits that can be brought involving new technologies.

Direct Marketing Association v. Brohl
The Direct Marketing Association (DMA) challenged a Colorado law that requires out-of-state merchants with sales over $100,000 in Colorado to disclose confidential information about their customers' purchases to the state's revenue department. The purpose of the law is to make it easier for Colorado to collect sales and use taxes on e-commerce purchases by its residents. The DMA argued that the law was an unconstitutional restriction on interstate commerce. The U.S. District Court for the District of Colorado agreed, but on appeal, the U.S. Court of Appeals for the Tenth Circuit held that the federal courts had no jurisdiction over the case because of the Tax Injunction Act, which prevents federal courts from interfering in local collection of taxes. The Tenth Circuit opinion can be viewed at https://www.ca10.uscourts.gov/opinions/12/ 12-1175.pdf.

The DMA appealed to the U.S. Supreme Court, which in July agreed to hear the case.
ANA subsequently joined with the National Federation of Independent Business (NFIB) Small Business Legal Center, NetChoice, the Electronic Retailing Association (ERA), and the American Catalog Mailers Association in a "friend of the court" brief. Our brief can be read at http://www.ana.net/getfile/21384. Our brief contends that the Tenth Circuit's reading of the Tax Injunction Act is in conflict with both the text and legislative history of the law and that it unlawfully restricts interstate commerce, as it will encourage states to enact legislation that imposes burdens selectively on out-of-state retailers.

The case was argued on Monday, December 8, 2014.

Outlook for 2015

After a few quiet years, there are a number of cases working their way through the courts dealing with commercial speech. We will continue to monitor these cases to ensure that advertising and marketing retain their broad protection under the First Amendment. We will be active in intervening with "friend of the court" briefs whenever needed.

2014 ANA Advertising Law & Public Policy Conference

The tenth-annual ANA Advertising Law & Public Policy Conference was held April 23-24 at the Ritz-Carlton Hotel in Washington, D.C. Keynote speakers included FTC Commissioner Maureen Ohlhausen, Reid Horwitz, Assistant Litigation Deputy in the Consumer Financial Protection Bureau's Office of Enforcement, and Wisconsin Attorney General and National Association of Attorneys General President J.B. Van Hollen.

It was the best-attended meeting in the conference's ten year history. Once again, the Advertising Law & Public Policy Conference received very high marks on the post-conference survey. Highly rated sessions included sessions on social media and the mobile environment, claim substantiation in the tech industry, native advertising, and the SAG-AFTRA commercials contract.

We also discussed many other regulatory and legal challenges confronting the advertising industry, including consumer fraud and false advertising class actions, health and wellness claims, data security, the Internet of Things, and cultural and religious implications of international ad campaigns.

We are in the process of developing the agenda for the 2015 conference. The eleventh-annual conference is slated to take place March 31-April 1 at the Four Seasons Hotel in Washington, D.C. To view the agenda and to register, visit http://www.ana.net/conference/show/id/LAW-MAR15.

ANA Legal & Regulatory Webinar Program

In January, ANA initiated a series of webinars on legal and regulatory issues. We felt that it would help compliment the efforts of the Legal Affairs Committee and provide an outlet for topics that we otherwise would not cover or analyze in as much depth at the Advertising Law & Public Policy Conference. Webinars occur every other month and are conducted by industry legal experts and leading client-side marketers and explore topics on the cutting edge of advertising and marketing law.

There were six webinars in 2014, covering the Telephone Consumer Protection Act (TCPA), SAG-AFTRA, bot fraud, social media, data breaches, and the FTC's Operation Full Disclosure.

Coalitions

ANA is a member of a number of coalitions that bring together diverse sets of groups sharing an interest in protecting the rights of advertisers. These coalitions provide a united front in lobbying Congress and government agencies on advertising issues and they help strengthen our efforts on behalf of our members. They have been beneficial in areas such as advertising tax deductibility, children's food and beverage advertising, privacy and interest based advertising (at both the federal and state levels), direct-to-consumer prescription drug advertising, and dealing with patent trolling.

The Advertising Coalition (TAC)
The Advertising Coalition was established in 1988 in order to counter federal ad tax proposals and has expanded its scope to general advertising issues. TAC members now include a wide range of companies and associations from various types of media that are heavily dependent on advertising revenue. TAC has held numerous grassroots meetings on federal ad tax issues and also worked to defeat proposals that would eliminate the tax deduction for prescription drug advertising.

TAC also has sponsored the development of the IHS Global Insight Study on the economic impact of advertising. The study, carried out using an economic model developed by Nobel Laureate in Economics, Lawrence Klein, demonstrates the enormous economic impact of advertising for the U.S. economy, every state, and each individual congressional district.

ANA played a critical role in providing substantial funding for both the 2010 and 2013 updates of the Global Insight Study. The 2013 update showed that advertising expenditures supported 21.1 million jobs in the U.S. and accounted for $5.8 trillion in economic output. Every dollar spent on advertising generates nearly $22 of economic output that would not have otherwise existed. This is a critical arrow in our quiver for ad tax fights and is used extensively in our meetings with members of Congress and their staffs.

The Alliance for American Advertising (AAA)
The AAA consists of a number of trade associations and large companies and focuses primarily on advertising issues related to food and obesity. In recent years, the AAA has carried out major lobbying efforts in regard to broad proposed expansions of FTC rulemaking power in the Dodd-Frank Wall Street Reform Bill and the proposed food marketing guidelines of the Interagency Working Group (IWG) on Food Marketed to Children.

Digital Advertising Alliance (DAA)
ANA is a founding member of the Digital Advertising Alliance, which administers the Self-Regulatory Program for Online Behavioral Advertising. Other members include the 4As, DMA, IAB, and AAF. Since the DAA program has been in operation, the AdChoices icon has been placed trillions of times. The quick and successful work of the DAA in providing consumers education and meaningful choices about data collection for OBA purposes has received significant praise from many important leaders in the Congress, the FTC, and the White House. In 2014, the program was expanded to include the mobile environment. More information about the important work of the DAA can be found in the Privacy and Online Behavioral Advertising Section of our Compendium.

State Privacy Coalitions
ANA has joined two coalitions working on state privacy issues. One coalition is led by the DLA Piper Law Firm and is active on privacy issues in all states. This year, it has focused extensively on several pieces of privacy legislation that have been put forward in California. In addition, we joined the California Chamber to work on privacy issues in that state. More information about our efforts in these coalitions is available in the Privacy and Online Behavioral Advertising Section of the Compendium.

Patent Troll Coalitions
ANA is working with three coalitions to address the growing burden to industry posed by patent assertion entities (PAEs), also known as "patent trolls." The Stop Patent Abuse Now (SPAN) Coalition is working to resolve patent abuse issues through legislative, legal, and regulatory means. The "Big Tent" Coalition cuts across nearly every sector of the business world. Additionally, the ANA and the 4As have assembled a task force to address indemnification issues in regard to advertisers and ad agencies when patent litigation occurs. More information about ANA's work through coalitions is available in the Patent Trolls Section of this Compendium.

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