2016 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 office faced numerous major challenges in 2016. We responded with a series of extensive comments to two proposed rulemakings at the FCC, dealing with set top boxes and privacy. We also filed "friend of the court" *amicus* briefs in two very important and potentially groundbreaking court cases dealing with governmentally required disclosures in advertising. In advance of a potential threat to the full deductibility of advertising in 2017, we worked to educate Congress on the economic benefits of advertising to the U.S economy. In addition, we helped formulate an industry response to the ad blocking threat, helping to launch an ad community initiative called the Coalition for Better Ads (CBA). Working with the Alliance for American Advertising (AAA), we obtained further prohibition on the ability of the FTC to finalize the Interagency Working Group's (IWG) overly restrictive standards for food marketing. At the state level, we overcame attempts to tax advertising as well as impose stringent new privacy restrictions.

Here, in brief, is a recap of our major accomplishments in 2016:

FCC Rulemakings: The Federal Communications Commission (FCC) has taken on an increasingly active role on issues that affect the ad community. ANA filed comments regarding two highly significant notices of proposed rulemakings (NPRMs) in 2016. One NPRM dealt with an FCC proposal to "open up" the market for set top boxes, the receivers that the vast majority of subscribers use to watch their pay television signals. ANA noted that, while our association is agnostic in regard to the technological means of delivering programming to consumers, there are major copyright, contract, and piracy concerns surrounding the FCC's proposal, and therefore we filed detailed initial comments and reply comments opposing this proposal as poorly designed and counterproductive. The other NPRM – which has now been voted on and passed by the FCC – grants the Commission immense power over Internet Service Provider (ISP) online privacy and data security requirements. This includes a broad expansion of the definition of sensitive data, opt-in consent, and extensive data breach notification requirements. We filed initial comments and reply comments in this NPRM as well. We also have met with FCC commissioners and staff laying out our issues with these proposals and have called for a review and reversal of this rulemaking proposal as exceeding FCC authority and violating the First Amendment.

Amicus Briefs: There were two extremely important court cases dealing with governmentally compelled disclosures making their way through the courts in 2016. The first deals with a San Francisco ordinance which restricts ads in certain locations for "sugar sweetened beverages" that contain more than 25 calories from sweeteners per 12 ounces. It further requires "health warnings" taking up to 20 percent of the space on certain ads for these products. ANA has filed two *amicus* briefs, one in federal district court and the other with the U.S. Court of Appeals in support of a lawsuit filed by industry groups opposed to the ordinance. In the other case, the city of Berkeley requires wireless producers and sellers to provide a point of sale public warning about the safety of cell phones, in contradiction to FCC findings. We filed an *amicus* brief in

opposition to this ordinance with the district court in this case as well.

Coalition for Better Ads: Ad blocking is a serious threat to the continuing viability of ad-supported content online. In May, ANA, the 4A's, and IAB held a joint board meeting focusing just on the ad blocking issue, demonstrating the growing ad community concern about this issue. In September, ANA and a large number of other groups, including the 4A's, DMA, IAB, WFA, Google, Facebook, Procter & Gamble, and Unilever, came together to establish the Coalition for Better Ads. The Coalition will help create consumer-based, data driven information that companies can use to improve consumer ad experience, along with the technology to implement these improved advertising methods and encourage awareness among consumers and businesses. The Coalition is actively working to develop a more consumer friendly digital marketplace to enlist a broad range of the ad community to support and further these efforts.

Ad Taxes: Working with The Advertising Coalition (TAC), we continue to educate members of Congress on the economic benefits of advertising to their states and districts. In November 2015, we updated our important groundbreaking study on the economic impact of advertising in each state and congressional district in the country. The study demonstrates that almost 20% of U.S. GDP is generated by advertising activity. We have continued meeting at the grassroots level with members of Congress, and we also responded to threats to tax advertising on the state level, with one serious threat in Oklahoma averted in 2016.

Food Marketing: We worked successfully with the Alliance for American Advertising (AAA) to ensure that the prohibition on the completion of the Interagency Working Group's (IWG) proposal for Food Marketed to Children, which would impose severe restrictions on marketing of food, restaurant and beverage products to those under 18 years of age, remained in appropriations legislation and the continuing resolution.

Privacy and Data Security: We worked to increase awareness of the industry's privacy self-regulatory program, the Digital Advertising Alliance (DAA). We took part in numerous meetings with the House Energy and Commerce Committee emphasizing, that should Congress take up one of the many pending privacy and data security bills, of the high importance of strong federal preemption of the 47 inconsistent and constantly changing state data security laws.

We also took part in two state privacy coalitions that responded to a number of sweeping privacy proposals, including in California and Illinois.

Online Piracy: In February 2015, ANA, the 4A's, and IAB launched the Trustworthy Accountability Group (TAG), which focuses on fighting online piracy as one of its four core areas of work. TAG has established a Brand Integrity Program Against Piracy, which helps advertisers avoid the placement of ads on sites dealing in pirated items. In July, TAG announced the first 100 companies approved for participation in the TAG registry, which works to verify legitimate actors in the online advertising ecosystem to ensure ad placements are legitimate.

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Further analysis and descriptions of our government relations activities in 2016 can be found in more detail throughout the Compendium. We also post regular updates on the issues that affect the industry on our website, at http://www.ana.net/advocacy. We regularly monitor legislation and major court cases in our legislative and regulatory tracking system, as well as provide

analysis of current advertising legislative and legal issues at Dan Jaffe's Regulatory Rumblings blog. For breaking advertising and marketing government relations news, our Twitter account, @ANAGovRel, is another useful resource.

If you have any questions on any of these issues, the Washington office staff can be reached at 202.296.1883, or by email as follows:

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Election 2016

In a political bombshell still reverberating through Washington, DC, Donald Trump confounded most of the pollsters and pundits last November and was elected the 45th President of the United States. Republicans maintained their majorities in both the U.S. Senate and the House. Republicans will now control both the White House and the Congress for the first time since 2006 and it is likely there will be an end to the political gridlock of the last several Congressional sessions.

Senator Mitch McConnell (R-KY) continues as the Republican Majority Leader and Senator Chuck Schumer (D-NY) is the new Minority Leader. In the House, Speaker Paul Ryan (R-WI) and Minority Leader Nancy Pelosi (D-CA) maintain their leadership positions.

The conventional wisdom is that Republican control of both the White House and the Congress will usher in a strong deregulatory pro-business environment. That is certainly the best bet, but in light of President-elect Trump's recent responses to Carrier's plans to move some of their activity to Mexico, to Boeing's charges for presidential jets, his promise to bring prescription drug prices down during his presidency, and other direct forceful interventions opposing business initiatives of specific companies, attempts to stereotype the likely approach of the new Administration to business-across the-board is premature.

So what does this new political environment likely mean for the marketing community?

Major tax reform efforts are almost certain. Donald Trump talked about it during his campaign. Speaker Ryan, House Ways and Means Committee Chairman Kevin Brady (R-TX) and Senate Finance Committee Chairman Orrin Hatch (R-UT) are strong proponents. This is one area where both parties may be able to agree that action is necessary.

One of the top early priorities for the Trump administration is to repeal and replace Obamacare. This will once again place a spotlight on the advertising of products that might impact health costs.

Another area where action is almost certain is the privacy arena. The WikiLeaks revelations, the scandal about Hillary Clinton's emails and the leak of Donald Trump's tax returns during the campaign have drastically increased the focus on privacy, data and cybersecurity issues. Legislation in these areas has been introduced in Congress for several years but nothing moved. These efforts are likely to be substantially reenergized and launched again.

Federal Advertising Tax Deductibility

Background

Advertising expenses are fully deductible in the year in which they are incurred as an ordinary and necessary business expense under section 162 of the Internal Revenue Code. Each year, however, there are proposals to limit or end the deduction entirely, either across the board or for specific categories of products. ANA actively opposes any proposals to end or limit this critically important tax deduction. We have helped defeat numerous proposals over the last 30 years, usually working with our industry partners in The Advertising Coalition (TAC). This includes beating back a major threat in 2013 that would have required the amortization of advertising expenses over either 5 years (as proposed in the Senate by former Senate Finance Committee Chairman Max Baucus (D-MT)) or 10 years (as proposed in the House by former House Ways & Means Committee Chairman Dave Camp (R-MI)) as part of large-scale tax reform. The analysis provided by Chairman Camp indicated that the amortization of advertising expenses over a 10 year period would raise $169 billion in additional revenue for the Treasury. While Chairman Camp did eventually introduce legislation before he retired in 2014, these proposals did not advance past an embryonic stage due to lack of political impetus from either the White House or the Congressional leadership.

Since 2013, however, support has grown in both the House and the Senate for some sort of major tax reform in 2017. House Speaker Paul Ryan (R-WI), who had initially taken over the House Ways & Means Committee on Chairman Camp's retirement, and then ascended to the Speakership upon the retirement of John Boehner (R-OH), is a strong proponent of tax reform as is the present Chairman of the House Ways & Means Committee, Kevin Brady (R-TX). There is also support for tax reform in the Senate from the Chairman and ranking member of the Senate Finance Committee, Orrin Hatch (R-UT) and Ron Wyden (D-OR).

Tax Reform

The last large-scale, bipartisan reform of the tax code occurred 30 years ago, during the last years of the Reagan Administration. In the ensuing years, the code has become increasingly complex, especially on the corporate side. The maximum statutory U.S. corporate tax rate is significantly higher than in competing economies in the developed world, and this has led to a dramatic increase in so-called "inversions," where U.S. based companies buy a foreign company and reincorporate in that country to qualify for a lower corporate tax rate. These inversions have been criticized by the White House and Congressional leadership alike, and have drawn attention to the state of the U.S. corporate tax code.

Despite these concerns, there was little activity around tax reform in 2016. It was always unlikely there would be completed action on such a major and contentious issue in an election year. In February, Speaker Ryan announced the creation of six task forces on what Congressional Republicans identified as the pressing issues facing the nation – poverty, national security, the economy, the Constitution, health care, and tax reform. The Tax Reform Task Force, which was led by House Ways & Means Chairman Kevin Brady (R-TX), held ideas forums with members of the Republican Conference starting in March, discussions with economic thought leaders, as well as public hearings, in developing a final report.

The task force released its report in June. The report focused on simplifying, lowering, and flattening the tax code for both individuals and businesses in the hope that this would spur economic growth. It also identified a few deductions and credits that would be eliminated for businesses, but did not single out the amortization of advertising expenses as had the 2013 tax reform proposals.

The "A Better Way" plan released by the House Ways and Means Committee and Speaker Paul Ryan would include a shift away from a traditional income tax to a consumption tax. Consumption taxes measure tax liability by spending on goods and services, similar to the value-added taxes in force in many European countries.

Our efforts in protecting the full deductibility of advertising are greatly assisted by an important study conducted for The Advertising Coalition. This study, by IHS Economics & Country Risk and based on a model created by Lawrence Klein, the winner of the 1980 Nobel Memorial Prize in Economic Studies, examines the value of advertising to the economy in each state and Congressional district in the U.S. The last update was conducted in 2015, which along with data showing the value of advertising to the economy, also examined for the first time the impact of advertising on gross domestic product (GDP). The study found that:

- Advertising supported $5.8 trillion or 18% of U.S. output and 20 million or 14% of U.S. jobs in 2014
- Every dollar of ad spending supported, on average, $19 in economic output (sales)
- Every million dollars spent on advertising supported 67 American jobs
- The total impact of advertising represented 19% of U.S. GDP

Category Specific Advertising Tax Proposals

Every year, there also are proposals to end the tax deduction for advertising of various product categories. In 2016, there were proposals introduced relating to both food and beverage advertising to children and for prescription drugs.

Food and Beverage Advertising
Senator Richard Blumenthal (D-CT) and Rep. Rosa DeLauro (D-CT) introduced legislation in May, the Stop Subsidizing Childhood Obesity Act (S. 2936 and H.R. 5232). This bill would deny the tax deduction for marketing and promotional expenses for foods of "poor nutritional quality" directed to children. It would deny the deduction not just for expenditures on advertising, but product placement, point of purchase displays, product packaging, character licensing, celebrity endorsements, and in-school marketing. It would leave it up to the Department of Health and Human Services and the Federal Trade Commission to write regulations defining "directed to children" and "poor nutritional quality."

Direct-to-Consumer Prescription Drug Advertising
In March, Senator Al Franken (D-MN) introduced legislation (S. 2623, the Protecting Americans from Drug Marketing Act) to disallow the deduction of advertising expenses related to direct-to-consumer prescription drug products. Additionally, Democratic Presidential Candidate Hillary Clinton has in the past called for eliminating the tax deduction for prescription drug advertising, as has the American Medical Association. There is also another bill, H.R. 4565, introduced by Rep. Rosa DeLauro (D-3/CT), which takes aim at prescription drug advertising. This bill would

restrict DTC advertising for a new drug in the first three years after the drug's approval by the FDA.

Outlook for 2017

The odds are extremely high that tax reform will be a major issue in 2017. Donald Trump strongly criticized the current state of the American tax code. Additionally, key leaders in the House and Senate – Speaker Ryan, Chairmen Brady and Hatch and Ranking Member Wyden – have all indicated a willingness to seriously tackle tax reform. The ingredients are all in place, and now we await the specifics. ANA will forcefully fight any attempt to end or limit the deduction on an across-the-board or a product specific basis, and also oppose requirements to amortize advertising expenses.

State Advertising Tax Deductibility

Background

Forty-nine of the 50 states are constitutionally required to balance their budgets every year (Vermont is the one exception). Nearly all states exempt advertising from state sales taxes. When searching for new revenue or looking to broaden the tax base to lower tax rates, however, states often examine ending the tax exemption for advertising.

Over the last 25 years, ANA has helped defeat over 120 ad tax proposals in more than 40 states. These successful efforts have saved the ad community potentially billions of dollars in additional tax burdens. We work with our member companies and our sister associations [the American Association of Advertising Agencies (4A's) and the American Advertising Federation (AAF)] to respond to these threats. Through The Advertising Coalition (TAC), we have produced the IHS Economics & Country Risk study, which demonstrates the benefits of advertising to the national economy and to each of the fifty states. We also work closely with the broadcasters, newspaper publishers, magazine publishers and outdoor advertising groups in the states to explain why taxing advertising is a counterproductive idea.

2016 Proposals

The marketing community has faced a significant potential state ad tax threat in just one state this year – Oklahoma. In April, Governor Mary Fallin (R) proposed eliminating a number of sales tax exemptions, including the exemption for advertising, in order to resolve a potential budget shortfall of nearly $1.3 billion for FY2017. The current sales tax rate in Oklahoma is 4.5 percent and counties and cities can add an additional local sales tax, so the average sales tax rate is 8.77 percent. It was not clear whether the Governor would impose the sales tax only on local advertising purchased in-state or whether she would seek to impose it on all advertising appearing in the state.

However, in June, the Oklahoma Legislature passed a budget which did not include any tax on advertising. The legislature cut overall state spending by 5 percent and used "rainy day" funds and other "one-time money" to cover part of the budget shortfall. Lawmakers will likely face a revenue gap of more than $600 million when they begin drawing up the new budget next February, so ad taxes may be on the agenda again next year. We worked effectively with the Oklahoma broadcasters and other industry groups to closely monitor this situation.

The state of Illinois continues to present a tax threat to advertisers as the Governor and the Legislature are again unable to come to an agreement over the budget. Governor Bruce Rauner and the Illinois General Assembly remain locked in a heated political battle over the state's budget for the current fiscal year, which began on July 1st, as a continuation of the failed budget negotiations of 2015. During his election campaign in 2014, Rauner had proposed extending the sales tax to a number of services, including advertising on billboards, radio and television as well as ad agency services.

The Governor subsequently has not specifically called for a new tax on services as part of the budget debate. However, ANA has been working closely with the state broadcasters and a coalition of other industry groups in Illinois to prepare for a possible ad tax fight. We helped provide funding for the coalition, which has a website at: http://noadtaxillinois.com.

Governor Rauner is a Republican who has called for reforms in state government and the Democrats control both houses of the General Assembly. The state is currently running on a multi-billion dollar deficit, so despite the current deadlock, some budget deal will ultimately have to be reached, and we continue to closely monitor developments in Springfield.

Outlook for 2017

These threats come up almost every year – and as we have seen numerous times, both Republican and Democratic leaders are open to considering taxing advertising. With our recent update to the IHS study, we now have additional data that shows the harm taxing advertising would impose on every state in the nation. We will continue to work hard with our allies and friends when confronted with state advertising tax proposals.

Privacy and Online Behavioral Advertising

Background

The Internet provides consumers with a vast amount of free services and content primarily funded by advertising. Online behavioral advertising (OBA), also known as interest-based advertising (IBA), 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 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 interest to them. Advertisers also can more effectively and efficiently reach potential customers. This practice, however, has been the source of increasing expressions of privacy concerns by some members of Congress, federal regulators, and consumer groups.

In 2009, the FTC called on industry to provide transparency concerning OBA 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 Online Behavioral 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). This type of program is now operational in 35 countries, including the EU and Canada, and in 26 languages. 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 Digital Advertising Alliance Self-Regulatory Principles, the DAA launched a 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 the Direct Marketing Association (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. There have been approximately 68 million unique visits to the DAA website with the vast majority of consumers not opting out of receiving interest based ads. A strong and robust self-regulatory program remains the best hope for preventing overly restrictive legislation in this area.

Mobile Guidelines

On September 1, 2015, DAA began enforcing its new set of guidelines for companies which collect and use data across mobile sites or mobile apps for interest-based advertising purposes (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 to 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.

DAA Education Program

The DAA launched a refreshed and mobile-optimized education initiative in March 2016 to remind stakeholders of the control the AdChoices program puts at consumers' fingertips with respect to interest-based advertising. This is the second such initiative and it supplements the trillions of icons served every year globally, which, themselves, also act as a ubiquitously available pathway for consumers to learn about and make choices to control data collection used for IBA.

This latest initiative is supported by a mobile-friendly and updated version of the youradchoices.com site, which amplifies the consumer control messaging while also addressing the benefits of relevant advertising and the independent, robust nature of DAA accountability. The site also lists a sample of DAA participants at http://youradchoices.com/participating allowing companies to be associated with the unique and well-regarded DAA self-regulatory program.

The education initiative has been live for several months and is being run on desktop and mobile, through search, social and display campaigns. To date, a dozen key companies have pledged hundreds of millions of impressions toward this initiative. The companies are: Google, Facebook, AT&T, AOL, Washington Post, Cox, AppNexus, Rocketfuel, Criteo, LinkedIn, Quantcast, and Xaxis.

The support DAA receives from these companies is critically important toward maintaining and building the integrity of DAA, and indeed self-regulation, as answers to complex policy questions about responsible data collection in the furtherance of improving competition and accelerating innovation. This consumer education initiative also acts to remind key stakeholders about the DAA's control and accountability mechanisms – an important 'promises made, promises kept' message for the regulator and legislator audience.

The mobile ads, in particular, will also help us educate about the new mobile tools that DAA rolled out in 2015, including the Consumer Choice tool for Mobile Web and the AppChoices app, both firsts for self-regulation in the mobile space. In another example of making responsible data collection-based choice available to a broader audience, AppChoices has been made available in Spanish (AppChoices en Español). This addresses the privacy needs of the growing Spanish-speaking audience. YourAdChoices.com will also shortly be available in Spanish, and a portion of the donated inventory will be used for Spanish-language ads.

While DAA has made great strides thus far, we still need more inventory donations, particularly after the fourth quarter of 2016. The education initiative is currently slated to run through the second quarter of 2017. If you have access to inventory for public service campaigns, please contact Lou Mastria, Executive Director, DAA at Lou@AboutAds.info.

Congressional Activity

Privacy issues have been extremely active areas in the Congress in recent years. There were no data breach/data security bills introduced in Congress in 2016, yet several key bills introduced in 2015 continue to be promoted. None, however, have come to a floor vote.

Student Privacy
Senator Ed Markey (D-MA) introduced the Do Not Track Kids Act of 2015, a bill which would extend the Children's Online Privacy Protection Act of 1998 (COPPA) to certain online applications and mobile applications directed to children (https://www.congress.gov/bill/114th-congress/senate-bill/1563). It prohibits targeted marketing to children (defined as persons under 13) without verifiable parental consent and to minors, defined as persons over 12 but under 16, without the minor's consent and prohibits the collection of geolocation information from children or minors. It creates a safe harbor if a company has adopted a Digital Marketing Bill of Rights for Teens that is consistent with fair information practices principles. The bill also establishes provisions for the creation of a so-called "eraser" button that would allow users to eliminate content that is publically available and contains or displays personal information of children or minors. Currently Senators Mark Kirk (R-IL), Richard Blumenthal (D-CT), and Robert Menendez (D-NJ) are cosponsors of the bill. A companion bill, H.R. 2734, has been introduced in the House by Rep. Joe Barton (R-TX) and has 14 cosponsors.

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 legislative action in the Congress on privacy issues this year, the Federal Trade Commission (FTC) has been very active. The Commission held an event in January called "PrivacyCon" which brought together researchers and academics to discuss the latest trends related to consumer privacy and data security. At PrivacyCon, the DAA AdChoices icon was attacked by some academics as not being seen or understood by consumers. ANA responded to this inaccurate characterization by publishing a blog post detailing the many successes of the AdChoices icon and the DAA program as a whole (http://www.ana.net/blogs/show/id/38412). In fact, roughly 68 million visits have taken place to the DAA webpage. Another PrivacyCon is slated to be held in January 2017. The FTC also held an "Economic Conference on Marketing and Consumer Protection" on September 16, 2016 to bring together scholars interested in issues at the intersection of marketing and consumer protection policy and regulation and two privacy-focused workshops, "The Changing Consumer Demographics" and "Fall Technology Series: Smart TV," in December.

Jessica Rich, Director of the Bureau of Consumer Protection at the FTC, spoke at our 2016 Advertising Law & Public Policy Conference in Chicago. During her speech, she applauded the work done by DAA and the advertising industry's commitment to effective self-regulation.

Federal Communications Commission

Following upon last year's adoption of the Net Neutrality Open Internet Order, the Federal Communications Commission (FCC) has emerged as a new major "cop on the beat" in the online privacy arena by issuing two new Notices of Proposed Rule Making (NPRMs) regarding broadband privacy and set-top box regulation. The FCC eventually promulgated the rule on broadband privacy. Through these efforts, the FCC is attempting to create and implement a bifurcated regulatory environment in which consumers, business, the Internet ecosystem, and the U.S. economy unfortunately will be seriously hurt. ANA strongly believes the FTC, not the FCC, is the appropriate entity to oversee Internet privacy. The FTC has been carrying out this regulatory role and doing it well for years. For more information on the new FCC proposals and ANA's work to fight these initiatives, please see the "FCC Activities" section of this compendium on page 17.

Right to Be Forgotten

The so-called "Right to Be Forgotten" is also a growing privacy issue. In 2014, the European Court of Justice in Luxembourg established the "Right to Be Forgotten" online in a groundbreaking and disturbing decision. The ruling mandated Google to take down data that are "inadequate, irrelevant, no longer relevant, or excessive in relation to the purposes for which they were processed and in light of the time that has elapsed." While it was not initially clear how far the Right to Be Forgotten concept would be extended, Google is now under pressure from the French government to apply the ruling worldwide. Google has rejected a request from the French government to remove links not just from all European search results but also from all versions globally to carry out the Right to Be Forgotten mandate.

In the U.S., the debate has taken the form of a petition to the FTC from Consumer Watchdog last year demanding that the Right to Be Forgotten be enforced here. They claim that Google's refusal to do so "…while holding itself out to be concerned about users' privacy is both unfair and deceptive, violating Section 5 of the Federal Trade Commission Act." We believe this view is legally baseless. ANA sent a letter to the FTC explaining why the Commission should immediately dismiss Consumer Watchdog's complaint (http://www.ana.net/getfile/22665). The letter demonstrates that allowing Right to Be Forgotten policies to be enforced in the U.S. would cause serious and undue harm to the public's right to determine for itself what is important and relevant information and would seriously undermine free expression under the First Amendment.

EU-U.S. Safe Harbor

Last October, the longstanding trans-Atlantic "Safe Harbor" trade agreement allowing companies to share online customer data between Europe and the United States was invalidated by the European Court of Justice. The Court ruled that American privacy rules did not offer European citizens enough protection against their online data being misused by companies or national governments and therefore, domestic regulators in each European country should have the right to suspend transfers of data about their citizens to the United States.

All U.S. companies that were certified under the Safe Harbor – more than 4,000 – were affected by the EU court's decision. Many technology companies rely on transferring data between the two continents to power their operations, particularly for online advertising. ANA spoke out against this ruling in a blog post, which explained that U.S. based online advertisers would be

forced to deal with new technical complexities and to reevaluate how they provide online services (http://www.ana.net/blogs/show/id/36998).

After the invalidation of the Safe Harbor, U.S. and EU authorities quickly began working on a new compromise to allow companies to legally transfer consumer data between the two continents. Top issue areas of concern to the EU were: surveillance by public authorities, independent oversight and individual redress regarding national security, resolution of complaints about how companies process data, and binding commitment from the United States.

In February, an agreement, dubbed the "Privacy Shield," was finally reached. One key piece of the new agreement includes safeguards and transparency obligations for U.S. government access to data. This means access by U.S. law enforcement and national security organizations to the data from Europe will be subject to new limitations. Annual reviews by the European Commission and U.S. Department of Commerce will provide oversight of the arrangement, with European Data Protection Authorities (DPAs) and U.S. intelligence experts able to attend the reviews. A second component of the Privacy Shield will require American companies that import personal data from the EU to comply with strong public obligations regarding data processing. The Department of Commerce will monitor compliance and the Federal Trade Commission will have the enforcement authority. Redress mechanisms for EU citizens make up the final key component of the new agreement. EU citizens now have several new methods to address their concerns if they believe their data has been misused.

As of December, there are 1700 companies who are seeking or have obtained the Privacy Shield certification. Estimates predict that it could take two years or more before all of the companies that participated in Safe Harbor are covered by the Privacy Shield program. Also, legal challenges to the Privacy Shield rules have been launched already in the EU. For additional information about international online privacy developments, including the General Data Protection Regulation (GDPR), please see page 40 of this Compendium.

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 and data security concerns are greatly increasing. The Internet of Things creates novel challenges as there often are not easily accessible interfaces where consumers can state their privacy preferences. Therefore, the ad community must also develop a strategy to address the expanding universe of privacy and data security issues raised by IoT, addressable TV, and other similar developments. It has been estimated that the number of connected IoT devices, sensors and actuators will pass 46 billion in 2021(http://www.mediapost.com/publications/article/291399/internet-of-things-connected-devices-heading-to-46.html).

Outlook for 2017

We expect privacy and interest based advertising to remain hot button issue areas at the federal, state, and international arenas. While Congress may take more time to develop new legislation, the advertising industry will need to continue to be at the forefront of addressing emerging technological privacy.

FCC Activities

Set Top Box NPRM

Background

In the current cable television marketplace, consumers rent their set top box from their cable company (also known as a multichannel video programming distributor, or MVPD) for a monthly fee in order to access the programming and other offerings provided under their agreement. The FCC proposed in a Notice of Proposed Rulemaking (NPRM) released in February to allow electronics manufacturers and other developers to build competitive navigation devices or software solutions to allow consumers to access their provider's programming. The FCC's main argument is that it would create competition in the set top box marketplace and allow for innovation and sought comment on various aspects of the proposed rules. Most significantly for the advertising industry, paragraph 80 of the NPRM stated that the FCC did "not currently have evidence that regulations are needed to address concerns…that competitive navigation solutions will disrupt elements of service presentation…replace or alter advertising, or improperly manipulate content."

ANA Comments to FCC

ANA has major issues with the FCC's set top box NPRM, which we noted in comments http://www.ana.net/getfile/23708 in April and reply comments http://www.ana.net/getfile/23898 in May. Our initial comments pointed out that the FCC is ignoring the legal protections provided by contractual obligations between advertisers and programmers, opening the door to third party manipulation or replacement of ads during programming. We also noted that there were already instances where this type of manipulation of advertising content was occurring. Advertising underpins the financial health of the broadcast and ad-supported cable networks and the investments these industries make in programming and product development. This proposal would seriously threaten its future economic viability. Our reply comments note the unconstitutional violation of advertisers' copyright protections through the alteration or addition of content. They also note the serious First Amendment issues with the FCC proposal.

Our case was strengthened in August when the U.S. Copyright Office weighed in against the rules, pointing out the rule would allow third parties to unfairly exploit copyrighted works and to ignore contractual agreements through manipulation, alteration, or replacement of ads (http://www.wsj.com/articles/u-s-copyright-office-criticizes-fccs-plan-on-set-top-boxes-1470260812). Additionally, numerous members of Congress have come out in opposition to the proposal on a bipartisan basis, including the Congressional Black Caucus, the leadership of the House Judiciary Committee and the House and Senate Homeland Security Committees, the House Financial Services Appropriations Subcommittee, and former Senate Judiciary Chairmen Orrin Hatch (R-UT) and Patrick Leahy (D-VT).

Outlook

This multitude of concerns has not gone unnoticed at the FCC, on both sides of the political spectrum. Democratic Commissioner Jessica Rosenworcel said that "[i]t has become clear the original proposal has real flaws and, as I have suggested before, is too complicated. We need to find another way forward." Additionally, Republican Commissioner Ajit Pai has stated that "[i]t is

long past time for the FCC's leadership to walk away from its deeply flawed set-top box scheme. Instead, the Commission should focus on ways to ditch the set-top box and embrace the video marketplace of the future."

In September, the FCC came out with a new proposal that would require consumer electronics manufacturers and other developers to make available free apps from which consumers could access their pay TV content from their own devices – whether they are tablets, smartphones, streaming devices, or smart TVs. Unfortunately, the FCC did not make public the full details of this proposal, only providing a sketchy two-page "fact-sheet" supposedly summarizing the changes. This material appeared to provide greater support for advertising's contract and copyright protections, but without sufficient detail for an adequate judgement to be drawn. The FCC planned to vote on the proposal on September 29. However, this vote was postponed at the last minute, signaling lack of support among the Commissioners. We have met with several FCC Commissioners and staff to point out our continuing concerns about these proposals, and numerous groups including ANA have called for the full publication of the new set top box proposal. Now that the FCC is set to fall under Republican control in 2017, it is highly unlikely that the set top box proposal will be brought up again next year.

CPNI NPRM

Background

Under Title II of the Communications Act of 1934, the FCC has wide latitude to set rules for "common carriers," or telecommunications services engaged in interstate or foreign communication. In February 2015, in a dramatic and unprecedented move, the FCC reclassified internet service providers as common carriers as a first step in allowing the Commission to enforce net neutrality, or the principle that all internet traffic should be treated equally without preference to any particular service provider, carrier, user, or content. Net neutrality has been a major priority of President Obama. In April 2015, the FCC followed through on this priority by releasing its 2015 Open Internet Order, which would regulate broadband service providers (referred to as broadband internet access service, or BIAS) under Section 222 of the Communications Act. These rules were immediately challenged in court. Meanwhile, the FCC went ahead with releasing a Notice of Proposed Rulemaking to apply the privacy requirements of the Communications Act to broadband service providers in April. Among other things, the proposed rules, unprecedented in the U.S., would establish sweeping notice requirements to consumers, require opt-in consent requirements before sharing a broad range of personal information (not just sensitive information), and set a mechanism for customer access to data and preventing unauthorized disclosure. It also sets forth extremely rapid and rigid notice requirements in the event of a data breach.

At its October 27th meeting, the FCC voted on party lines to adopt the sweeping broadband privacy NPRM. ANA believes the FCC's decision is unprecedented, misguided, counterproductive, and potentially extremely harmful. Subjecting virtually all web browsing and application use data to opt-in consent is completely inconsistent with its long-standing treatment by the FTC, the states, and the Digital Advertising Alliance (DAA) self-regulatory program.

ANA Comments to FCC

ANA filed both initial comments (http://www.ana.net/getfile/23919) and reply comments with the FCC (http://www.ana.net/getfile/24046) stating our strong opposition to the FCC's proposal. Our initial comments note that the FCC's expansion of opt-in for non-sensitive interest-based advertising would substantially curtail the effectiveness of online advertising by requiring bombarding consumers with intrusive, annoying privacy-related pop-ups online and on mobile while providing them with advertising less relevant to their interests. ANA argued that the proposal could potentially further accelerate the movement of content behind paywalls and for ISPs to raise subscription rates or to limit their desire to innovate. Our reply comments note that a broad range of expert commenters concur with our assessment that the rules would dramatically and counterproductively expand the FCC's jurisdiction over privacy to the detriment of consumers. Our comments were also critical of the FCC's inadequate distinctions between sensitive and non-sensitive data and the overly broad data breach notification requirements.

Outlook

ANA believes that the FTC, in conjunction with strong industry self-regulation, is the most effective guardian of the privacy of consumers online. The FCC rules will have a dramatically negative impact on online advertising, which supports much of the freely available content online. ANA is committed to seeing that these rules are overturned, either by court challenges or action on Capitol Hill to reverse this extreme overreach by the agency. Now that the Republicans will be in command of the Commission moving forward, both Commissioners Ajit Pai and Michael O'Rielly vowed to revisit the net neutrality rules "as soon as possible." Overturning or modifying the net neutrality rules, which are the basis for the new broadband privacy rulemaking, will be greatly beneficial for digital advertising and the online ecosystem in general. ANA also intends to lobby forcefully against the broadband privacy rule in 2017.

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 the largest in history and the companies impacted include world-renowned organizations such as Target, Home Depot, Sony, and Neiman Marcus, among numerous others. The attack on Target, for example, affected 40 million credit cards and over 70 million records were stolen. In the Sony hack, it was believed a foreign government instigated the intrusion. In the government sector, hacks have included 22 million highly sensitive or top secret files from the Office of Personnel Management (OPM), to the information of over 800,000 employees of the U.S. Postal Service, to 2016 Presidential Candidate Hillary Clinton and the Democratic National Committee.

As the technological landscape continues to change rapidly and radically, it is critical that legislation be updated to handle current threats while still providing enough flexibility to address issues that arise in the future. In 2014, 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, overlapping, and constantly changing 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.

European Union General Data Protection Regulation

European Union (EU) negotiators concluded nearly four years of talks on the final text of the General Data Protection Regulation (GDPR), which replaces the EU's now over 20-year-old EU Data Protection Directive, in December of last year (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN). Although U.S. states have had data breach notification laws for years, European companies had never been subject to a mandatory breach notification law that applied to all companies in all sectors before the GDPR.

The EU's new rules, which go into effect in May 2018, impose an extremely short 72-hour data breach notification deadline on companies operating on the continent. Also, it encompasses a broad array of data that is deemed personally identifiable and sensitive, including IP addresses. Article 33 of the GDPR will require data controllers to report personal data breaches to the appropriate privacy regulator "without undue delay and, where feasible, not later than 72 hours after having become aware" of the breach, unless the breach "is unlikely to result in a risk to the rights and freedoms of natural persons." Failure to comply with the notice requirement could result in a fine of 10 million euros ($11.29 million) or 2 percent of a company's worldwide revenue, whichever is higher. Companies operating in the EU need to start preparing for this new rule as soon as possible by establishing a breach notification plan to avoid the exceedingly large fines.

FTC Activity

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 companies that, in their view, leave the information available to theft. The FTC already has brought over 50 cases against companies for failing to have adequate data security programs. A recent federal court of appeals decision in the *Wyndham* case recognized the ability of the FTC to bring data security cases under their existing authority, even in the absence of any federal data security legislation or rulemaking.

The case, *FTC v. Wyndham Worldwide Corp.*, revolved around the FTC's authority to police deceptive and unfair practices under Section 5 of the FTC Act and whether this authority gives the Commission the power to impose specific data-security policies on companies. Wyndham argued that, if the FTC prevailed, 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 determines to be an "unfair" or "deceptive" practice in an after-the-fact enforcement proceeding. The FTC sued 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 2015, the Third Circuit Court of Appeals granted a hearing of Wyndham's appeal to dismiss the FTC data security enforcement action. After considering this appeal, the Circuit Court ultimately ruled on August 21, 2015 that the FTC could proceed with its lawsuit.

In December 2015, Wyndham agreed to settle the FTC charges by establishing a comprehensive information security program to protect cardholder data – including payment card numbers, names and expiration dates. In addition, Wyndham is required to conduct annual information security audits and maintain safeguards in connections to its franchisees' servers. Wyndham's obligations under the settlement are in place for 20 years.

The FTC last year announced a new "Start with Security" initiative drawing on the results of the lessons learned from the 53 data security cases brought by the FTC over the last few years. This initiative included conferences around the country to help educate small- and medium- sized businesses in various industries. Last year, the conferences were held in San Francisco, California on September 9 and Austin, Texas on November 5. This year, conferences were held in Seattle, Washington on February 9 and Chicago, Illinois on June 15. The goal, as stated by the FTC's Director of the Bureau of Consumer Protection Jessica Rich, was to promote good data security practices and help companies avoid risks to consumer data in the first place. ANA held a webinar last year to address questions raised by this new initiative – in particular, why the Commission is carrying out this road show, the key components of the conferences, and how one might be able to evaluate the trends in terms of data security enforcement.

Congressional Activity

There were no data breach/data security bills introduced in Congress in 2016, however legislation introduced earlier continued to be considered.

One particularly noteworthy legislative effort is H.R. 1770, the Data Security and Breach Notification Act (https://www.congress.gov/bill/114th-congress/house-bill/1770). The bill was written by House Energy and Commerce Vice Chairman Marsha Blackburn (R-TN) and Rep. Peter Welch (D-VT), and would require certain entities that collect and maintain personal information to secure that information and provide notice to individuals in the event of a security breach. Representative Blackburn discussed her legislation at a "meet and greet" in ANA's office last

year. H.R. 1770 was approved by the House Energy and Commerce Committee on April 15th on a party-line vote.

ANA took part in numerous meetings with key members of the House Energy and Commerce Committee emphasizing the importance of a strong federal preemption provision. The sponsors and leadership are working to build bipartisan support for the legislation. There is strong opposition in some quarters however to federal data security laws. Attorneys General from states with data breach laws have written to Congress opposing federal preemption in this area.

Several data breach bills have been introduced in the Senate but members are waiting for the House to act before marking up these bills.

State Data Breach Developments

In the absence of federal legislation, states often have 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 data breach laws and regulations.

ANA continues to oppose worrisome changes in several state data breach laws. The most serious recent proposal was SB 1833 in Illinois (http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1833&GAID=13&DocTypeID=SB&LegID=&SessionID=88&SpecSess=&Session=&GA=99). The bill, which was introduced in 2015, was drafted by the state attorney general and would have, for the first time in any state, added "consumer marketing information" to the definition of personal information. This dramatic expansion of the scope of the data breach law without any harm component could have cost companies multi-millions of dollars and created a very dangerous precedent for other states to consider. The bill also contained geolocation breach notification language.

ANA worked very actively with our members and other industry groups to oppose this bill. Despite considerable effort, the bill was approved by the General Assembly, though on a relatively close vote. However, Illinois Governor Bruce Rauner then issued an emendatory line-item veto of the bill by striking out the most egregious provisions, including the inclusion of "consumer marketing information" in the legislation. The Governor sent the bill back to the legislature where the General Assembly could have voted to override the veto. Instead, the legislature adjourned without voting on the bill, leaving it to die and not be enacted. In 2016, the bill, which included the Governor's veto message, was reintroduced, passed through the legislature, and was signed into law. This was a huge success for the advertising industry.

If Illinois had passed SB 1833, this would likely have lead other states to consider marketing breach provisions as well. On the other hand, passage of these types of bills would create more pressure for federal preemptive action.

Outlook for 2017

Data security will continue to be a very significant issue in the coming year, especially since the frequency and severity of data breaches do not seem to be diminishing. The latest Yahoo breaches alone, for example, implicated more than 1 billion accounts, and breach issues and data security were key components of the Presidential elections. We expect a renewed focus on

this topic in 2017 now that the elections are over. In the meantime, the states will continue to try to fill in the gap by creating their own extensive data security measures.

Ad Blocking

Background

Ad blocking has become one of the most significant challenges facing the advertising community in the digital marketplace, both nationally and internationally, and we have been active on this issue throughout 2016.

A growing number of consumers are using ad blocking technology, with some estimates showing 200 million people worldwide having installed ad blockers on their computers or other devices as of August 2015. Particularly worrisome is the fact that millennials especially are substantial users of ad blocking technology, so this is likely to be a growing problem if an adequate response is not developed quickly. Studies have shown that, as of 2015, the global use of ad blockers has led to an advertising revenue loss of $21.8 billion. The most widely cited reason for the installation of ad blockers is that users find many ads to be interruptive or annoying. Other reasons consumers cite include advertising negatively affecting site performance, excessive advertising, and privacy concerns.

Publishers, who are feeling the financial brunt of this activity, have begun implementing many different tactics to discourage people who downloaded ad blockers from using the technology. Some websites are asking ad block users to turn the technology off in order to access their content. Others are requiring them to become paying subscribers or asking them to whitelist the site moving forward.

Taken together, these developments are creating increasing threats to the ad-funded digital marketing economy. Clearly, if there is sufficient ad blocking, the present generally free access to the extraordinary amount of information funded by advertising is likely to be jeopardized as companies would have to find other ways to monetize their activities. ANA and others in the ad community are actively examining all potential options to respond to this challenge.

Coalition for Better Ads (CBA)

Earlier this year we held a joint board meeting with the American Association of Advertising Agencies (4A's) and the Interactive Advertising Bureau (IAB) focused solely on the ad blocking challenge. On September 15, ANA and other industry groups announced the formation of the Coalition for Better Ads.

CBA was formally launched at the Digital Marketing Exposition and Conference (DMEXCO) in Cologne, Germany. In addition to ANA, founding members and supporters of the Coalition, in alphabetical order, include the American Association of Advertising Agencies (4A's), BVDW Germany, Digital Content Next, the Direct Marketing Association (DMA), European Publishers Council, Facebook, Financial Times, Google, GroupM, IAB, IAB Europe, IAB Tech Lab, as well as additional national and regional IABs, the Network Advertising Initiative (NAI), News Media Alliance, Procter & Gamble, Unilever, The Washington Post, and the World Federation of Advertisers (WFA).

The Coalition will focus on several initiatives in the coming months including:

- Creating consumer-based, data-driven standards that companies in the online advertising industry can utilize to improve the consumer ad experience
- Developing and deploying technology, in conjunction with the IAB Tech Lab, to implement these standards
- Encouraging awareness of the standards among consumers and businesses in order to ensure wide uptake and to elicit feedback

The Coalition will draw upon extensive consumer research in shaping the standards. More information about the Coalition is available at: www.betterads.org

Leading the development of the Coalition is Stu Ingis and colleagues at the Venable law firm. Stu helped develop the Digital Advertising Alliance (DAA), the industry self-regulatory program for interest-based advertising. Between now and the end of the year, the Coalition will work on drafting the *Better Ads Standards*, built on the existing work of IAB's LEAN program (https://www.iab.com/news/lean/).

Other Related Marketplace Developments

In August, Facebook introduced coding that made it impossible for Adblock Plus to wipe out its desktop display ads. However, within a day, popular app Adblock Plus tweaked its software to break through Facebook's own technology, with Facebook quickly working to seal up the damage. This back-and-forth saga continued for weeks with Facebook updating its software to halt the advances of Adblock Plus. Facebook also has rolled out new ad-preference tools, benefitting advertisers and consumers by letting users control which ads they see in their news feed. Furthermore, Facebook has sent a forceful message to the ad blocking companies and users that digital content cannot be sustained without advertising.

On September 13, Adblock Plus announced that it was launching an "Acceptable Ads Platform" that would let advertisers reach the users of ad blockers, with help, Adblock Plus stated, from Google and AppNexus. Google, which has been involved in the development of the CBA program, quickly disassociated itself from that announcement and ended its relationship with ComboTag, the ad buying platform that teamed up with Adblock Plus to offer the ad exchange.

Outlook for 2017

These back and forth developments are likely to continue for some time. ANA will continue to work through the Coalition for Better Ads to respond to these continuing challenges.

Online Piracy

Background

Online piracy – the online trafficking in stolen intellectual property, particularly entertainment products – remains a multi-billion dollar challenge for marketers, consumers, and the entire online ecosystem. The issue for marketers in particular revolves around ads for legitimate products and services appearing on websites dealing in pirated content, providing financial support for illegal activity as well as giving these sites the appearance of legitimacy and leading consumers to believe their activity is above-board. This problem is ongoing, as a report in June from the Digital Citizens Alliance and MediaLink LLC titled "Good Money Still Going Bad" found that advertising revenues on sites dealing in pirated content totaled $209 million, nearly the same as in 2013. The report can be viewed at http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=GMGB2.

ANA has been working for a number of years to help advertisers avoid pirate sites. In 2012, we issued a Statement of Best Practices with the American Association of Advertising Agencies (4A's), urging our members to take affirmative steps to address online piracy. The statement counseled them to include conditions in placement agreements or insertion orders with ad networks and others that would prevent their ads from being placed on sites dealing in content piracy. 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.

Until very recently, however, there were few technological or other solutions available to help companies meet the commitments of the Statement of Best Practices.

Trustworthy Accountability Group (TAG)

In February 2015, ANA, the 4A's and the IAB launched the Trustworthy Accountability Group (TAG). One of TAG's "four core areas of work" includes fighting internet piracy, which is a direct outgrowth of the Statement of Best Practices. Consulting with TAG is an Anti-Piracy Working Group, which includes ANA's Dan Jaffe. The TAG Anti-Piracy group met with the White House Office of the Intellectual Property Enforcement Coordinator to bring the administration up to date on progress in this area and to determine if there were areas where White House support would be productive.

The Anti-Piracy Working Group also helped TAG establish a Brand Integrity Program Against Piracy. This voluntary program has as its goal helping advertisers and agencies avoid placements on sites dealing with pirated content by identifying such sites and removing them from the distribution chain. The program establishes Digital Advertising Assurance Providers (DAAPs), which are certified by independent third-party validators. DAAPs provide tools to members to limit exposure to undesirable websites by meeting certain Core Criteria for Effective Digital Advertising Assurance. These criteria include identifying "ad risk entities;" helping to prevent advertisements on undesired ad risk entities; detecting, preventing or disrupting fraudulent or deceptive transactions; monitoring and assessing the compliance of ad placements, and eliminating payments to undesired ad risk entities.

This July, TAG announced its first 100 companies approved for participation in the TAG Registry. TAG Registered companies have been verified as legitimate participants in the digital advertising industry through a proprietary background check and review process powered by Dun & Bradstreet and approved by TAG. Once registered, companies are awarded a TAG-ID, a unique global identifier that they can share with partners and append to their ads or the ad inventory they sell. Many ANA members are a part of this group. Additional information about TAG's work on internet piracy can be found at https://www.tagtoday.net/piracy/.

Outlook for 2017

It is our hope that TAG's efforts on piracy will help advertisers avoid placements on pirate sites. Our industry should be doing all it can to avoid funding illicit activity online or otherwise legitimizing websites dealing in pirated content. We will continue our work with the Anti-Piracy Working Group and will encourage ANA members to join the TAG effort.

Patent Trolls

Background

The United States patent system is vital for promoting innovation and protecting intellectual property by allowing the exclusive right to market and use new technologies and business methods for a set period of time. This system has enormous benefits both for industry and consumers. It encourages innovation, creativity, and competition by awarding an exclusive right to develop and market new products and technology. Unfortunately, the system is also subject to abuse. For a number of years, "patent assertion entities" (also known as PAEs or, more commonly, "patent trolls"), have been buying up patents on the open market and then threatening to sue creators or developers of technologies or business methods similar to the patent they allegedly own. These suits have grown more numerous in the past few years, and advertisers have not been immune. ANA is concerned that our members are being targeted with questionable demand letters, or letters sent prior to litigation that allege an infringement. ANA members and other advertisers have been challenged over their use of QR codes in ads, placing static ads in a video stream, and embedding URLs in text messages to direct a mobile device to web content. Many companies quickly settle upon receipt of a demand letter rather than face extremely costly and time-consuming litigation.

Congressional Activity

Last year, it appeared as if legislation to reform the patent system was on its way to President Obama's desk. House Judiciary Committee Chairman Bob Goodlatte (R-VA) reintroduced the Innovation Act (H.R. 9), which set revised pleading requirements for patent suits, including requiring disclosure of parties with a financial stake in the patent and cost-shifting measures that would create a "loser pays" model where the losing party would be responsible for fees relating to the litigation. It also stated that it was the "sense of Congress" that demand letters be specific. The Innovation Act passed the Judiciary Committee in July 2015. Another bill introduced in the House by Rep. Michael Burgess (R-TX), the Targeting Rogue and Opaque Letters Act (or TROL Act, H.R. 2045), specifically targeted demand letters by making it an unfair or deceptive act or practice under the FTC's Section 5 authority to send letters in bad faith, including sending letters alleging a right to enforce a patent that does not exist, to falsely allege that legal action has been or will be taken, or seeking compensation for an unenforceable patent. The TROL Act passed the House Energy and Commerce Committee in late April last year.

In the Senate, Judiciary Chairman Charles Grassley (R-IA) introduced bipartisan legislation with immediate past Chairman Patrick Leahy (D-VT) and five other Senators. Like the Innovation Act, his bill, the Protecting American Talent and Entrepreneurship Act (or PATENT Act, S. 1137) sets requirements for patent suits but also has specific provisions dealing with demand letters, requiring clarity and specificity in the alleged infringement and claims being made and the identity of those with rights to enforce the patent. This bill passed the Senate Judiciary Committee last June.

In 2016, there has been very little activity on the patent troll issue, with only the Senate Committee on Small Business and Entrepreneurship holding a hearing in February to review these bills. None of the bills have been considered by the full Senate or House of Representatives.

Industry Activity

In 2014, we joined with the 4A's, Direct Marketing Association (DMA), the Mobile Marketing Association (MMA), and the National Retail Federation (NRF) to create an industry coalition, the Stop Patent Abuse Now (SPAN) coalition. However, due to a difference in opinion on how best to proceed, this coalition was dissolved at the end of 2014.

FTC Activity

In October, the Federal Trade Commission (FTC) released a report spotlighting the business practices of PAEs and proposing several recommendations for patent litigation reforms (https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study.pdf). The report examined non-public information and data covering the period 2009 to 2014 from 22 PAEs, 327 PAE affiliates, and more than 2,100 holding entities (those entities that did not assert patents) obtained through compulsory process orders (subpoenas) using the agency's authority under Section 6(b) of the FTC Act. The FTC's recommendations include:

- Addressing the imbalances between the cost of litigation discovery for PAE plaintiffs and defendants
- Providing the courts and defendants with more information about the plaintiffs that have filed infringement lawsuits
- Streamlining multiple cases brought against defendants on the same theories of infringement
- Providing sufficient notice of these infringement theories as courts continue to develop heightened pleading requirements for patent cases.

Outlook for 2017

It appeared that some sort of patent legislation was likely at the beginning of 2016, but this failed to materialize. There remains, however, bipartisan pressure to "do something" regarding patent trolls. We will continue to monitor legislative developments and work with industry partners where possible to find a solution to the pressing demand letter issue.

Food Marketing

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, established 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 demonstrated the Obama Administration's strong desire to keep this issue as a key focal point of the administration.

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) consisting 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 in regard to food advertising 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 these products 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 sustained 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 House and Senate FY 2016 Financial Services Appropriations bills (H.R. 5485 and S. 3067 respectively) which are still awaiting passage.

San Francisco Ordinance

In June 2015, the City and County of San Francisco passed a very problematic ordinance which requires that all out-of-home ads for "sugar sweetened beverages" contain a health warning that "drinking beverages with added sugars contributes to obesity, diabetes and tooth decay." Clearly if the thousands of cities and counties in the U.S. are allowed to place this type of onerous and sweeping restriction on advertising, it could be very disruptive to national advertising in the United States.

ANA filed an *amicus* brief with the district court in January and another with the U.S. Court of Appeals in August in support of the industry groups claiming that this ordinance violated the First Amendment. The ordinance was set to become effective in July. The district court refused to grant the preliminary injunction requested by the industry groups, but did ultimately agree to a temporary injunction blocking enforcement of the ordinance. The industry groups are seeking a permanent injunction until the case is finally decided. For more information on this case, *American Beverage Association et al v. The City and County of San Francisco* (https://dockets.justia.com/docket/california/candce/3:2015cv03415/289685), please see the "Advertising Legal Issues" section of this compendium on page 40.

Baltimore Proposal

The Baltimore City Council also introduced a bill that would require health warnings in most advertisements for sugar-sweetened beverages, including point-of-sale ads in restaurants and other retailers. The Health Committee of the City Council held a very contentious hearing on the bill in June. ANA submitted a letter to the members of the Committee, noting that, by seizing a significant part of ads for certain beverages to impose a government-mandated health warning, the proposal raises very serious First Amendment concerns.

The Chairman of the Health Committee scheduled a work session on the bill on September 6. However, that meeting failed to reach a quorum, resulting in the bill effectively being dead for the rest of 2016. ANA worked closely with the local retailers, restaurants and outdoor advertising industry to try to defeat this bill. It remains to be seen whether the lawmakers will attempt to resurrect the proposal in 2017. We are working hard to convince the Baltimore City Council that imposing this type of restriction almost certainly will lead to an expensive challenge with a high likelihood that the proposal would eventually be struck down by the courts.

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 with ANA and other ad community support. 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 target 100 percent of food and beverage advertisements to children 12 and under to 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). Eighteen of the nation's leading food and beverage companies and quick-service restaurants currently participate in CFBAI, representing roughly 80 percent of the food and beverage advertisements seen on children's programming.

Healthy Weight Commitment Foundation

The Healthy Weight Commitment Foundation (HWCF), formed in 2009, is a CEO-led organization of more than 300 retailers, food and beverage manufacturers, restaurants, sporting goods and insurance companies, trade associations, nongovernmental organizations (NGOs), and professional sports organizations (http://www.healthyweightcommit.org/). The goal for HWCF is to help reduce obesity, especially in children. Many of ANA's largest food and beverage advertisers are part of HWCF. In May 2016, HWCF announced that members had surpassed their goal of removing 6.4 trillion calories from the marketplace, which represents a 78 calorie reduction per person, per day. This announcement came 3 years ahead of schedule – and member companies have no intention of stopping furthering this effort.

The work of HWCF clearly shows the industry's positive response to consumer demands for healthier food and beverages. In recent months and years, we have seen encouraging signs that the high obesity levels in this country in many areas have stopped or slowed their increase. The Healthy Weight Commitment Foundation will continue its efforts in responding to the obesity challenge.

Congressional Activity

On March 26, 2015, Rep. Rosa DeLauro (D-CT) introduced H.R. 1687, the SWEET Act or Sugar-Sweetened Beverages Tax Act of 2015 (https://www.congress.gov/bill/114th-congress/house-bill/1687). This bill would impose an excise tax of one cent per teaspoon (4.2 grams) of caloric sweetener (sugar or high-fructose corn syrup). It contains exemptions for 100% fruit or vegetable juice, milk, infant formula, or other nutritional supplements. The bill was referred to the House Ways and Means Committee and the Energy and Commerce Committee.

Rep. DeLauro also introduced the Stop Subsidizing Childhood Obesity Act (H.R. 5232) this year (https://www.congress.gov/bill/114th-congress/house-bill/5232). This bill denies the tax deduction for any marketing or promotional expenses directed at children for food of "poor

nutritional quality" or brands primarily associated with that food. "Marketing" is defined to include advertising, product placement, point of purchase displays, product labeling and packaging, character licensing, celebrity endorsements and in-school marketing. It requires the IRS to consult with DHHS and FTC on promulgation of regulations defining "directed to children," "food of poor nutritional quality" and in identifying brands associated with such foods. The companion to this bill is S. 2936, which was introduced by Sen. Richard Blumenthal (D-CT).

International Activity

World Health Organization (WHO)
In April, the WHO office for the Eastern Mediterranean Region (EMRO) recommended governments to "impose restrictions on marketing, advertising and sponsorship of all sugar-enriched foods and drinks across all media platforms" based on WHO regional nutrient profile model, along with a series of actions for Member States to lower sugar intake in the region. EMRO indicates that "children and adults should consume less than 10%, or preferably 5% (roughly 25 grams per person a day) of free sugars in their diet" - with 5% seen as the most appropriate long-term goal. EMRO also encourages governments to "eliminate sugar subsidies provided by national governments and introduce progressive taxes initially on sugary drinks."

Later in April, WHO Global Coordination Mechanism on the Prevention and Control of Noncommunicable Diseases (GCM/NCD) published the final report of its Working Group which, among other recommendations, advises governments to put in place strong regulatory frameworks with effective restrictions on food and beverage marketing to children, especially in schools. The objective of this Working Group was to identify ways to encourage the private sector to realize the commitments of a previous WHO report on the marketing of unhealthy foods and non-alcoholic beverages to children. In regard to marketing to children, the report states that policies should control both exposure and content, and should be monitored and enforced. This recommendation is based on the WHO's stance that self-regulation via industry-defined targets "are generally not sufficient to ensure meaningful progress."

ANA is a board member of the World Federation of Advertisers (WFA) which has actively provided input to the WHO on their reports. WFA, together with the International Food and Beverage Alliance (IFBA), will continue promoting self-regulatory programs on food marketing to children. IFBA participated in the dialogue meeting in October to discuss this latest set of recommendations.

Slovenia
The Slovenian Health Ministry released dietary guidelines in June which are based on WHO Europe's nutrient profiling model to restrict food and beverage advertising during children's television programming (http://www.mz.gov.si/fileadmin/mz.gov.si/pageuploads/javno_zdravje_2015/prehrana/prehranske_smernice-oglasevanje_072016.pdf?mc_cid=f364b23304&mc_eid=5af9d5e486).

The guidelines are aimed at media service providers, which are mandated to adopt codes of conduct within the next six months, and were developed in consultation with the Slovenian Chamber of Commerce.

These guidelines are more stringent than the EU Pledge common nutrition criteria. They completely ban products containing chocolate, ice creams, sweet biscuits and soft drinks, and set stringent thresholds for breakfast cereals (max 15g of sugar per 100g), savory snacks (max 0.1g of salt per 100g), dairy products other than cheese and dairy-based drinks (max 10g of sugar per 100g) and cheese products (max 20g of fat per 100g).

The aim of this measure is to protect children from "inappropriate food commercial communications during children's programmes," the ministry said in a statement. They also aim to tackle obesity and non-communicable diseases among children which is one of the priorities of the National Programme on Nutrition and Physical Activity for Health 2015-2025. The Ministry of Health also indicated that this measure responds to the 2014-2020 EU Action Plan on Childhood Obesity which recommends national governments to restrict the marketing of foods high in fat, sugars and salt to children.

Chile
Chile's 2012 regulations setting the nutrition criteria applicable to the marketing and labelling of processed food and beverage products came into effect in June of this year (http://www.leychile.cl/Navegar?idNorma=1041570).

These measures include a ban on toy giveaways to prevent the use of "commercial hooks" to promote "unhealthy" food to children. In addition, strict nutrition criteria require food and beverage products exceeding set limits of calories, sodium, sugar, and saturated fat to carry large black front-of-package labels indicating "high in (…)". One label must be used for each nutrient limit exceeded. Such products cannot be sold in schools, be advertised on TV at hours where children under 14 are likely to watch, or include promotions involving toys, accessories, stickers, incentives or similar products designed to attract children's attention. Smaller food and beverage companies have 36 months to adapt to the new labelling regulation, which notably entails the modification of 8,000 packages.

WFA provided comments to the informal consultation through ANDA Chile and the local food industry. WFA worked with GMA and local associations in order to ensure industry input was aligned.

United Kingdom (UK)
On August 18, the UK Department of Health (DoH) published its "*Plan for action to significantly reduce childhood obesity by supporting healthier choices"* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546588/Childhood_obesity_2016__2__acc.pdf?mc_cid=451e9615ab&mc_eid=5af9d5e486). Among the proposals, Public Health England (PHE) is expected to be working with stakeholders to review the OFCOM nutrient profile model which underpins restrictions on broadcast advertising to children. The plan was criticized by advocates who felt it failed to introduce additional restrictions on food marketing to children.

The Childhood Obesity Strategy would impose a tax on sugary drinks, a reduction of overall sugar across a range of products that contribute to children's sugar intakes by at least 20% by 2020 (including a 5% reduction in year one), and would encourage more exercise in primary schools. The Strategy also states that the UK's decision to leave the EU will give it more flexibility in terms of food labeling.

Outlook for 2017

Recently, there has been some good news in regard to the issue of obesity. Several studies now have shown a significant change in U.S. eating patterns with Americans on average consuming fewer calories. This, however, is not likely to stop consumer groups or regulators from pushing for more restrictions to combat obesity. We expect food, beverage, and restaurant advertising to remain a major issue. President-elect Trump has been noted for his love of fast food and is not likely to place as much emphasis on food advertising issues as Michelle Obama and the Democratic administration did. Nevertheless, as long as obesity continues to be a significant health crisis, there will be pressure on lawmakers and regulators to take forceful action. ANA will continue to work with coalition partners and members to highlight the numerous and significant positive efforts of industry.

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").

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, nearly 1,200 new gTLDs have launched, passed through the sunrise period, and are in the general availability phase. Currently over 27 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 awareness for the gTLD. There are only 4 gTLDs that have above one million registrations: .xyz, .top, .wang, and .win. Only 22 other new gTLDs have more than 100,000 registrations. In comparison, .com has over 127 million domain registrations and logs a new registration roughly every second.

ICANN's CEO, Fadi Chehadé, announced last year that he would be stepping down in March 2016. This February, ICANN chose Göran Marby, formerly the Director-General of the Swedish Post and Telecom Authority (PTS), to be the new CEO starting in May 2016.

Internet Oversight Transition

In March 2014, the Department of Commerce announced its intent to begin a transition of their key domain name functions to be transferred over to the global multi-stakeholder ICANN community. This proposal to transfer the NTIA's IANA (Internet Assigned Numbers Authority) contract to ICANN triggered considerable backlash from Republicans in the Congress, who have argued that the move would give more power to authoritarian countries to take over the governance of the Internet.

There have been 7 bills introduced in this session of Congress to attempt to stop or slow down the IANA transition. Rep. John Shimkus (R-IL), a senior member of the House Energy and Commerce Committee, introduced H.R. 805, the DOTCOM Act, 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 bill has passed the House in June of last year and is awaiting action in the Senate. Senator John Thune (R-SD), Chairman of the Senate Commerce Committee, has introduced a companion bill to the DOTCOM Act in the Senate.

Regardless of the pending legislation, NTIA allowed the IANA contract to expire on October 1, 2016. This came after ICANN informed NTIA in early August that it had completed, or was about to complete, all the requirements NTIA said had to be met before it felt comfortable with the hand-off. The plan mandated that ICANN: support and enhance the multistakeholder model; maintain the security, stability and resiliency of the Internet DNS; meet the needs and expectations of the global customers and partners of the IANA services; and maintain the openness of the Internet.

GAC

In August 2014, the ICANN Board proposed a major amendment to its bylaws that would force ICANN to adopt all Government Advisory Committee (GAC) advice unless two-thirds of ICANN's non-conflicted board members vote to oppose the advice. 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 in September 2014 in opposition to this proposal and urged all member companies and their affiliate associations to file in opposition as well (http://www.ana.net/getfile/21365). In February 2015, ANA filed comments with the Senate Commerce Committee raising concerns about the GAC's power and urging the Committee to consider this when deciding on the timeline for the IANA transition.

There was an important decision in July of last year by an Independent Review Panel (IRP) which sharply criticized the actions of ICANN and particularly those of the GAC and demanded a further reevaluation of the decision in regard to the .africa decision (http://www.ana.net/blogs/show/id/36154). This marks the first time ICANN's decisions and particularly those of the GAC were substantively reviewed by an external body and found wanting. This development gives some hope to brand owners that there will be some independent oversight in the process going forward.

At the July 2016 ICANN meeting in Helsinki, Vice Chair of the GAC, Olga Cavalli, presented an ambitious agenda on how to move forward on her 2014 proposal for expanding a governmental veto over so-called "geographical names." The Draft Work Plan, Version 4 (May 19, 2016), set forth in Helsinki, presents a 10-step plan to analyze the current ICANN track record in this area,

to discuss whether the GAC should formally reply to the public comments it has already received on the 2014 draft of the proposal, to define "geographical and community names," to analyze the divergent interpretations of the concepts of "public interest" and "public good," to review "annexed/occupied territory" names, to evaluate best practices, and to explore other, presumably expanded, geographical and community name lists. Despite almost universal disapproval of the previous draft of the proposal, at least some members of the GAC believe this project is worthwhile. A new version of the proposal is expected to be published for comment in the coming months.

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.

The most notable debate to date was 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. In 2014, ICANN issued a 60 day deadline to resolve the debate by June 3, 2014, but its delegates failed to reach an agreement and ICANN "continued processing of the .vin and .wine applications," according to a statement. A change came in 2015 when the European Union and various wine trade associations dropped their Cooperative Engagement Process complaints and allowed registrations for those domain names to proceed normally after settling the issues with Donuts, the Registry for .vin and .wine, outside of the ICANN process.

Other serious concerns continue over the approval of domain names such as ".sucks", ".porn" and ".wtf". A company called Vox Populi is charging $249 for ".sucks" registrations. But if marketers want to defend themselves against someone who seeks to register their brands attached to ".sucks," that costs $2,499 for each defensive registration. Those defensive registrations may also have to be obtained in multiple languages in order to protect global brand names.

Outlook for 2017

We will continue to track developments regarding ICANN and the IANA transition as it affects advertisers. ICANN's control of the IANA contract will create even less oversight by the Department of Commerce and the NTIA over its activities. This means that Internet governance will be even more dominated by domain name registrars who have not proven highly concerned about trademark and other protections due advertisers and by countries that have not proven to be committed to sustaining a free and open global Internet. Now that the IANA transition has

taken place, ANA will continue to closely monitor the Internet governance environment to keep members apprised of major developments.

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.

Food Marketing Restrictions Internationally

Europe presently is a major center of activity on the food advertising front. The World Health Organization (WHO) this year established two particularly broad sets of recommendations regarding advertising and marketing. The WHO advocates for countries to implement more stringent regulations on sugar-enriched foods and drinks and tighter controls on the exposure and content of advertising to children, particularly in schools. The World Federation of Advertisers (WFA) has actively provided input to the WHO on these and other reports. Within Europe, both Slovenia and the United Kingdom have put forward plans to change the guidelines for advertising and marketing of food and beverage products to children with the goal of reducing childhood obesity.

Elsewhere in the world, Chile's new law which sets the nutrition criteria applicable to the marketing and labelling of processed food and beverage products has gone into effect (http://www.leychile.cl/Navegar?idNorma=1041570). All advertisements to children under the age of 14 exceeding the set values for energy, sodium, total sugar, and saturated fat will be banned and the products will have to carry a warning label.

Many countries also have established taxes on sugary or otherwise "unhealthy" foods in the past several years, especially in Central and South America. ANA and WFA continue to fight against these new barriers to advertising and alert our members when these developments arise. For more information on global food and beverage advertising restrictions, please see the "International Activity" subsection of the Food Marketing portion of this compendium on page 33.

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 had historically complied with EU privacy laws through the Safe Harbor Framework agreement between the European Commission and the Department of Commerce. This framework, however, was invalidated by the European Court of Justice last year and has since been replaced by the Privacy Shield agreement between the two continents. For more information on the Privacy Shield, please see the Privacy and Online Behavioral Advertising section of this compendium on page 12. 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. Last year, 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. Numerous other takedowns of information have been required to be carried out subsequently.

This development in the EU has had 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 violate 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 into the debate as the EU moves forward in regard to data privacy and security.

Outlook for 2017

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.

Advertising Legal Issues

Background

Truthful, nondeceptive advertising has significant protection under the First Amendment. Over the last 40 years, the U.S. Supreme Court has granted increasingly broad protection to commercial speech. ANA has played an active role in these developments, through "friend-of-the-court" *amicus* briefs in nearly every major advertising case in federal court. This has continued in 2016, with ANA filing briefs in federal court in two commercial speech cases from California that could have substantial impacts on the advertising industry at the national level.

Pending and Recently Decided Cases

American Beverage Association et al v. The City and County of San Francisco
In June 2015, the San Francisco Board of Supervisors adopted an ordinance relating to beverage marketing in the city. It required that all out-of-home ads for "sugar sweetened beverages" containing more than 25 calories from sweeteners per 12 ounces contain a health warning that "drinking beverages with added sugars contributes to obesity, diabetes, and tooth decay." This warning had to take up to 20 percent of the space on the ad. A lawsuit was filed the following month in the U.S. District Court for the Northern District of California by the American Beverage Association (ABA), the California Retailers Association, and the California State Outdoor Advertising Association challenging the ordinance on First Amendment grounds and seeking a preliminary injunction.

ANA filed an *amicus* brief in opposition to the mandated disclosures, which can be viewed at http://www.ana.net/getfile/23343. The brief contends that the ordinance could set a dangerous precedent for any of the 30,000 local governments across the country to adopt similar laws on products and services that fall out of favor and would unconstitutionally compel manufacturers to disseminate the government's preferred message.

The ordinance was set to take effect in July 2016. The District Court denied the motion for preliminary injunction in May, finding that the plaintiffs were "not likely to succeed on the merits of their First Amendment claim, and it is unlikely they would suffer irreparable harm" from the ordinance. The court, however, did grant a temporary injunction blocking enforcement of the ordinance while the case is appealed. ANA has filed an *amicus* brief in favor of the preliminary injunction (http://www.ana.net/getfile/24144).

CTIA – The Wireless Association v. The City of Berkeley, California, et al.
Berkeley passed an ordinance requiring mobile phone manufacturers and sellers in the city to provide a warning notice at the point of sale regarding the danger of radio frequency (RF) radiation from cell phones "to assure safety." This is contrary to FCC findings that the radiation from cell phones is safe.

The cell phone industry challenged the warning ordinance in the U.S. District Court for the Northern District of California, which denied a preliminary injunction. The case was appealed to the U.S. Court of Appeals for the Ninth Circuit.

ANA filed an *amicus* brief with the appellate court in March, which can be viewed at http://www.ana.net/getfile/23446. As in the San Francisco case, our brief argues that the

ordinance compels manufacturers to convey the government's preferred message in violation of the First Amendment. The Ninth Circuit declined to overturn the lower court.

Both of these cases would drastically expand the grounds for government mandated disclosures. In *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985), the leading Supreme Court case in this area, the Court made clear that governmentally mandated disclosures could only be imposed to counteract false or deceptive advertising and that even in that circumstance, the disclosures needed to be both neutral and non-controversial. Unfortunately, the disclosures that have been required in the Berkeley and San Francisco ordinances fail to meet these criteria, and if upheld, would allow governments to force advertisers to pay for and become the megaphone for government hectoring of the public.

New Supreme Court Cases

The Supreme Court recently accepted certiorari review of two speech cases that may signal where the Court may be leaning in speech areas.

The first case, *Lee v. Tam,* deals with whether pejorative terms can be utilized as trademarks (http://www.scotusblog.com/case-files/cases/lee-v-tam/). The second case, *Expressions Hair Design v. Schneiderman,* examines whether state no-surcharge laws unconstitutionally restrict speech conveying price information as the Eleventh Circuit has held, or regulate economic conduct as the Second and Fifth Circuits have held (http://www.scotusblog.com/case-files/cases/expressions-hair-design-v-schneiderman/).

We will watch these cases carefully for clues in regard to the Court's approach to commercial speech issues.

Supreme Court Vacancy

The vacancy left by the death of Justice Antonin Scalia in February 2016 remains unfilled. President Obama nominated Merrick Garland, a judge on the D.C. Circuit Court of Appeals, to fill the seat in March, but the Republican-controlled Senate refused to act on the nomination until after the next President is sworn in. Garland's nomination expired on January 3, 2017. We expect President-elect Trump's nominee for the Supreme Court to be announced soon after his Inauguration on January 20, 2017.

Many of the recent decisions in favor of the First Amendment protection of advertising have been close, 5-4 decisions. The person who is appointed could have a huge impact on the future of our industry.

Outlook for 2017

We will be paying close attention to the San Francisco and Berkeley cases. These two cases would have a dramatic impact on how consumers interact with advertising well beyond those two jurisdictions. We will continue to follow these cases as they make their way through the courts to a potential Supreme Court challenge. We will also closely monitor any Supreme Court confirmation hearings to see if First Amendment commercial speech protection issues are raised.

FTC Workshop on Disclosures

Background

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." Thus, the FTC has broad authority to regulate claims and disclosures made in advertising. The FTC has deployed this authority in numerous ways over the years, either in bringing specific cases challenging claims made in advertising and assessing penalties where appropriate, or developing guidance for industry in certain areas to help craft claims that are truthful and nondeceptive.

FTC Activity

The FTC announced in May a workshop to take place in September to examine the testing and evaluation of disclosures that companies make to consumers regarding claims in advertising, privacy practices, and other information. Noting its long commitment to understanding and testing the effectiveness of consumer disclosure, the FTC is particularly interested in learning about the cost and benefits of disclosure testing methods in the digital age. Along with determining whether disclosures in advertisements are effective (and how to determine this effectiveness), the FTC also plans on carefully examining how consumers interact with privacy policies and what is communicated through privacy-related icons, and how best to provide informed consent on the use of their data. In addition, it plans on examining consumer research into the guides it has issued in the past, such as on environmental claims (the "green guides") and the use of endorsements and testimonials in advertising.

ANA held a meeting in our office in June with our members to discuss how to respond to the workshop. We determined that providing input on best practices in this area was warranted and asked Howard Beales, Professor of Strategic Management & Public Policy from George Washington University and a former head of the FTC's Bureau of Consumer Protection, to provide input for us and DAA to the Commission on this disclosure issue. His submission can be found here: http://www.ana.net/blogs/show/id/42017.

The workshop mainly focused on academic research on whether consumers understand privacy policies, and noted that even when disclosures are clear and conspicuous, consumers may still not notice or understand them.

Outlook for 2017

We will monitor what the FTC does in the aftermath of the workshop and continue to keep our members up to date on developments.

2016 ANA Advertising Law & Public Policy Conference

The twelfth annual ANA Advertising Law & Public Policy Conference took place April 6-7 at the Westin Chicago River North in Chicago, Illinois. It was the first time the conference took place outside of Washington, D.C. since 2009 and the first time it was held in a city other than Washington or New York.

Paid attendance was the second best in the conference's history. The conference also received some of its highest ratings on the post-conference survey since 2011. The most popular session was an innovative panel conducted by ANA's General Counsel, Doug Wood of the Reed Smith law firm, that took audience questions from Twitter and gave panelists only 140 seconds to answer (taking its cue from Twitter's 140 character limit). Other well-received sessions included a discussion of Lanham Act and NAD issues with ASRC's Lee Peeler, Molly Malouf of ANA member company T-Mobile, and Ross Weisman of Kirkland & Ellis; Dan Jaffe's update on issues in Washington; and the keynote from the FTC's Director of the Bureau of Consumer Protection, Jessica Rich.

Other sessions included a keynote from Illinois Attorney General Lisa Madigan, industry self-regulatory efforts, global hot topics in advertising law, advertisers as content producers, and legal ethics.

The next Advertising Law Conference will return to the Ritz-Carlton in Washington, D.C., March 28-29, 2017.

ANA Legal & Regulatory Webinar Program

In 2014, ANA initiated a series of six, hour long webinars on legal and regulatory issues to both complement the annual Advertising Law & Public Policy Conference and to explore timely and relevant advertising law topics in a more in-depth manner. Webinars typically take place on the second Tuesday of every other month at 1:00 p.m. Eastern time and are conducted by leading advertising law practitioners.

There were six webinars in 2016, covering the European Union's safe harbor ruling, activities relating to advertising at the FTC and CFPB, comparative advertising, the new SAG-AFTRA agreement, media transparency issues, and The Coalition for Better Ads (CBA).

ANA Legal Affairs Committee

The ANA Legal Affairs Committee was created in 2003 to address, discuss, and seek solutions to the numerous legal and regulatory issues advertisers face that relate to challenges to their advertising content and practices. It is open to all ANA members with an interest in legal and regulatory issues. The Committee currently has 108 members. In 2016, it met four times, with meetings on February 10 in New York, April 5 in Chicago (prior to the ANA Advertising Law conference), July 20 in New York, and October 26 in New York.

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. In 2015, TAC held an annual record 13 grassroots meetings with Senators on the Finance Committee and Representatives on the Ways and Means Committee in their home states or congressional districts. Election years provide the greatest challenge to secure grassroots meetings, but so far in 2016 TAC has successfully held 4 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 Economics & Country Risk 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 positive 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 the 2010, 2013, and 2015 updates of the IHS study. The 2015 update showed that advertising expenditures supported 20 million jobs in the U.S. and accounted for $3.4 trillion in economic output. Every dollar spent on advertising generates nearly $19 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 successful 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, which proposed sweeping restrictions on advertising of food, beverage, and restaurant products to anyone below eighteen years of age.

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, AAF, and NAI. Since the DAA program has been in operation, the AdChoices icon has been placed multi-trillions of times. The quick and successful work of the DAA in providing consumers education and meaningful choices about data collection for interest-based advertising

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, and in 2015 DAA started enforcing its mobile guidance. More information about the important work of the DAA can be found in the Privacy and Online Behavioral Advertising section of this Compendium.

State Privacy Coalitions
ANA is a member of 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 two privacy bills put forward in California as well as data security legislation in a number of states. In addition, we are a member of the California Chamber to work on privacy issues specific to that state. California has repeatedly proven to be the most active state in adopting new, groundbreaking privacy legislation.

Patent Troll Coalitions
ANA is working with several coalitions to address the growing burden to industry posed by patent assertion entities (PAEs), also known as "patent trolls including the "Big Tent" Coalition which 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 in this area is available in the Patent Trolls section of this Compendium.

Coalition for Better Ads (CBA)
On September 15, 2016, ANA and other industry groups announced the formation of the Coalition for Better Ads (CBA). CBA was formally launched at the Digital Marketing Exposition and Conference (DMEXCO) in Cologne, Germany and was created by digital advertising industry leaders from around the globe. The Coalition reflects the commitment of the online advertising community to improve the advertising experience for Internet users worldwide, specifically addressing the issue of ad blocking. CBA's goal is to focus on: creating consumer-based, data-driven standards that companies in the online advertising industry can use to improve the consumer ad experience; developing and deploying technology to implement these standards; encouraging awareness of the standards among consumers and businesses in order to ensure wide uptake and elicit feedback; and developing a comprehensive accountability and enforcement solution to ensure that Coalition participants who endorse these efforts are applying the standards in a correct manner. The Coalition will draw upon consumer research in shaping the standards.

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