

# **Let's get Digital: Advertising and Digital Marketing Law in 2025**

**SBOT Corporate Counsel Power Hour**

**March 11, 2025**

# Presenter

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# Advertising Law Basics

A dark, semi-transparent background image showing a group of business professionals in a meeting. A woman stands in the center, leaning over a table where several people are seated. They appear to be reviewing documents or a laptop. The setting is a modern office with large windows in the background.

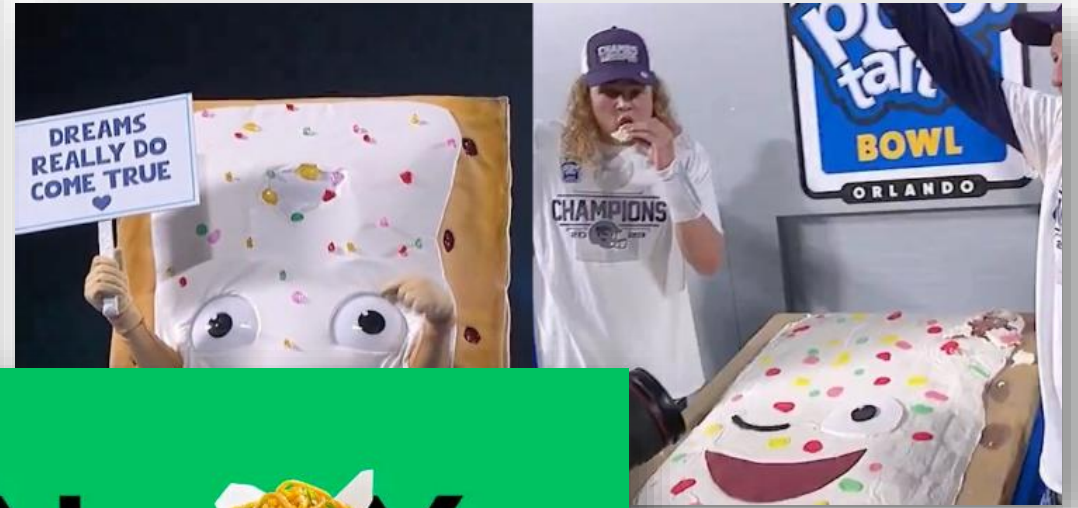
# What is “Advertising”? It’s Broader Than You Think

- “Advertising” is broadly defined as any communication by a business about its products and services
  - Ways you know: television, print, radio, direct mail, telemarketing, social media
  - But also, ways you may not think of:
    - Press releases
    - Annual reports
    - Sales pitches
    - Corporate blogs
    - Newsletters
    - Customer testimonials
- Advertising spend for many industries is focused on digital and mobile
- All are regulated; all can give rise to liability

# Advertising can be Powerful



Calvin Klein



This was never a long shot.



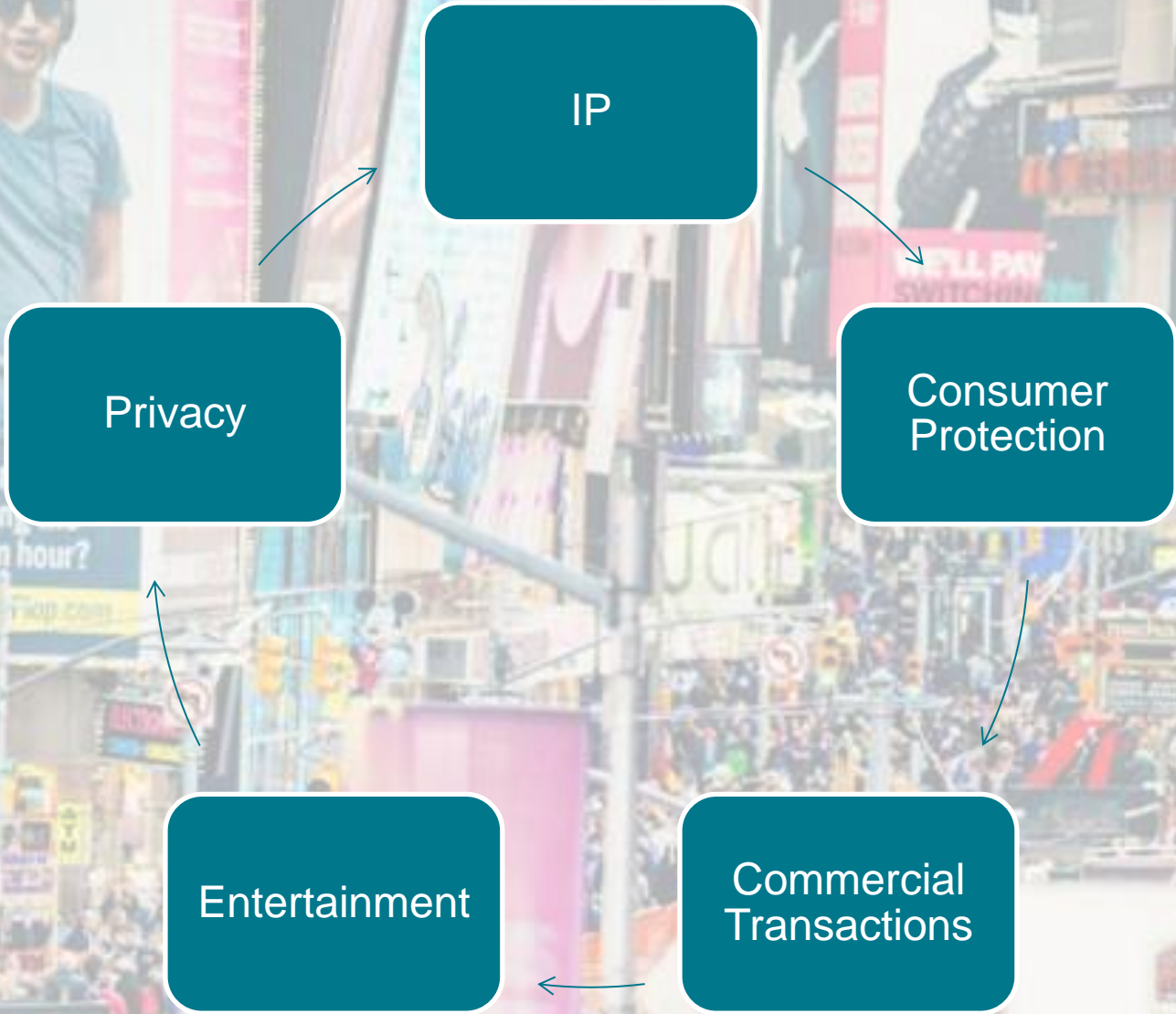
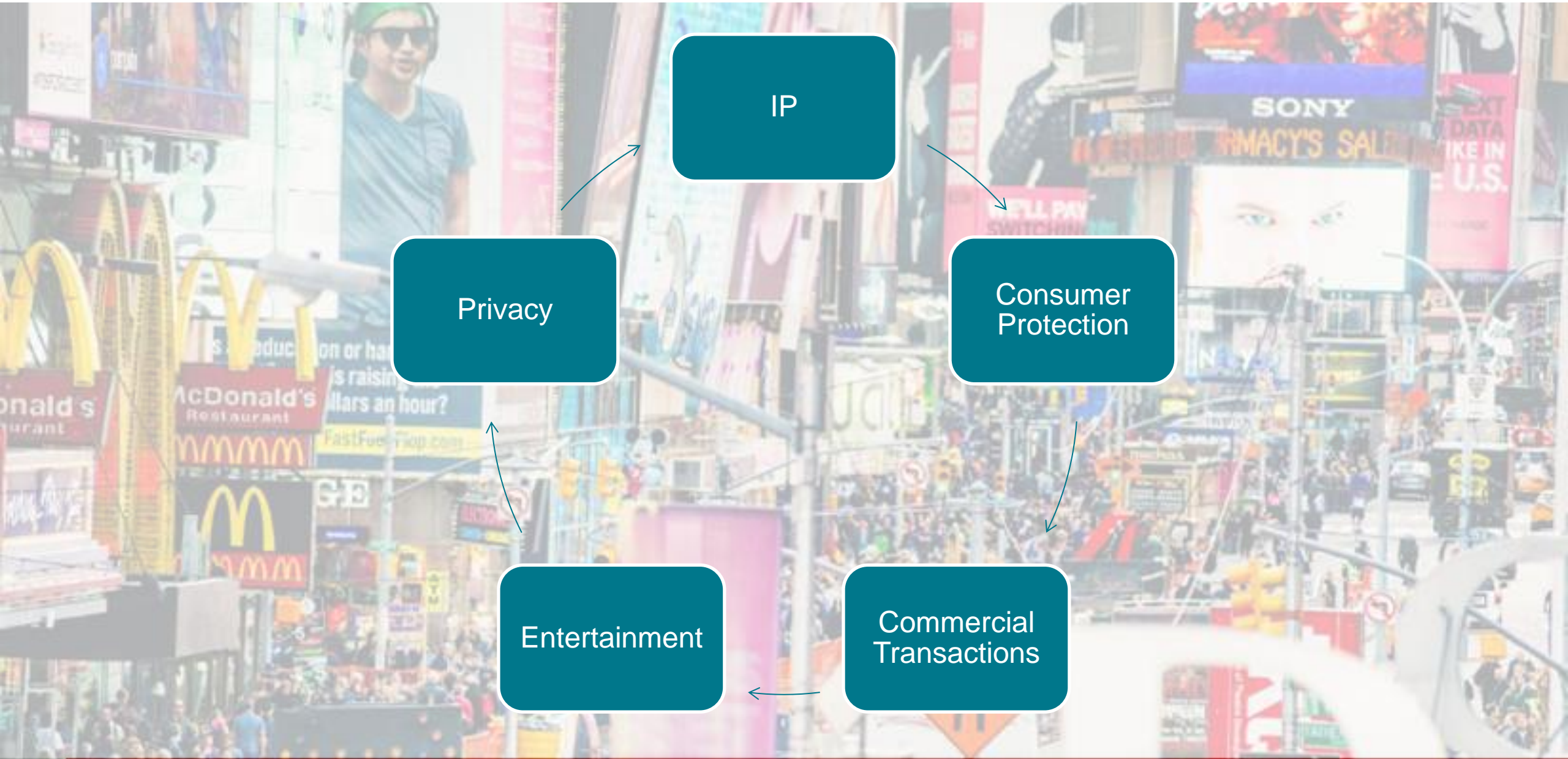
Get almost almost anything



copy nothing



# What is “Advertising Law”?



# What is “Advertising Law”?

- What does an “advertising lawyer” do?
  - Intellectual property clearance and compliance;
  - Compliance with state and federal truth-in-advertising laws;
  - Substantiation of advertising claims;
  - Compliance with industry or product-specific regulations;
  - Compliance with privacy laws and regulations;
  - Review sweepstakes and contest parameters, draft official rules;
  - Monitoring competitors for compliance with these requirements and seeking enforcement when necessary; and
  - Managing contractual relationships with the various intermediaries involved in marketing to consumers (especially adtech).

# Attorney Ethics in Advertising Law

- Duty of competency.
- Ensure all advertising is truthful and not misleading.
- Maintain client confidentiality in all communications.
- Avoid conflicts of interest in promotional materials.

**TEXAS**

**DISCIPLINARY RULES OF  
PROFESSIONAL CONDUCT**

**2024 EDITION**

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**TEXAS SUPREME COURT**



# Compliance Areas

- **Advertisement Content**
  - IP infringement
  - Truth in advertising
- **Advertisement Delivery**
  - Regulations (CAN-SPAM, TCPA, TSR)
  - Advertisement standards (FTC/FCC)
  - Privacy



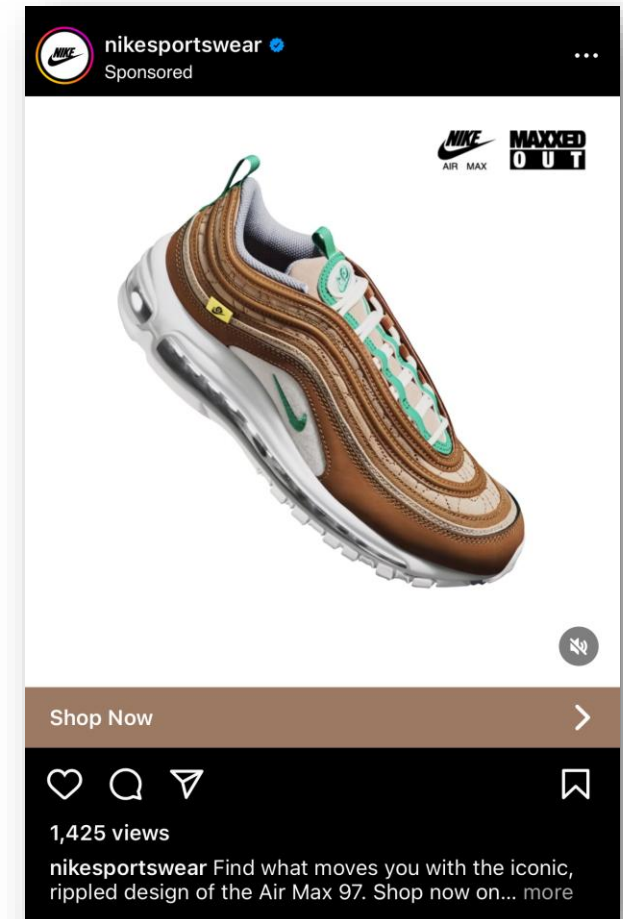
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# IP Rights & Social Media Engagement

A group of business professionals in a meeting room, with a woman standing and pointing at a document on a table. The scene is dimly lit, with a large window in the background showing a view of trees. The overall atmosphere is professional and collaborative.

# Rules of Engagement

- Use of content by advertisers is NOT the same as use by individuals; same rules do not apply
- Use of content by brands will be deemed commercial speech
- Platforms' terms of use do not override legal protections against unauthorized use for commercial purposes
- If you retweet or repost:
  - You are the publisher; DMCA and CDA safe harbors do not apply
  - You own it and are responsible for what it says
  - FTC will consider it an endorsement
  - You will be responsible for product claims



# Trademark Clearance and Enforcement

- Use of third-party trademarks in ads
- Proper use of first-party trademarks
  - Brand guidelines for creatives
- Ancillary trademark appearances
- Special Issue: comparative advertising



# Comparative Advertising Claims

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## Substantiation must be impeccable

- Depends on type of claim and target

## Types of comparative claims:

- Parity Claims: Your product/service is as good as the competitor
- Superiority Claims: Your product/service is better than the competition
- Uniqueness Claims
- ALL THREE CLAIMS CAN BE COMPARATIVE & REQUIRE SUPPORT

## No more use of the trademark than necessary

- Is the use of the logo necessary in the comparison?

## Comparative Advertising: Additional Considerations

- Beware of apples to oranges comparisons
  - Allowed but material differences must be disclosed
- Avoid cherry picked comparisons
  - Net impression may be misleading
- Avoid product disparagement
  - Superiority vs. ashcanning
- Business disparagement



# Comparative Advertising Challenges

- Potential Challenges:
  - The National Advertising Division
    - Self-regulatory body
    - Voluntary participation/compliance
    - Referral to FTC for non-compliance
    - Can recommend that advertiser modify or discontinue claims – no money
    - Competitor or NAD initiated
  - Federal Court – The Lanham Act
    - Trademark use and advertising claims
    - Injunction and monetary relief
    - TRO/injunction for “literally false” claims
    - Treble/punitive damages for “willful” violations

**CAUTION: Both often lead to consumer class actions**

# Other Potential Risks/Violations

- Rights of Privacy/Publicity
  - Privacy/Publicity laws prohibit the use of a person's name/likeness for advertising or commercial purposes without their written consent
  - Scope includes name/likeness/voice/any indicia of identity
  - Rights of privacy end on death of the person
  - Publicity rights are a property right; survive death; length depends on state laws
  - Broadly applied by the courts



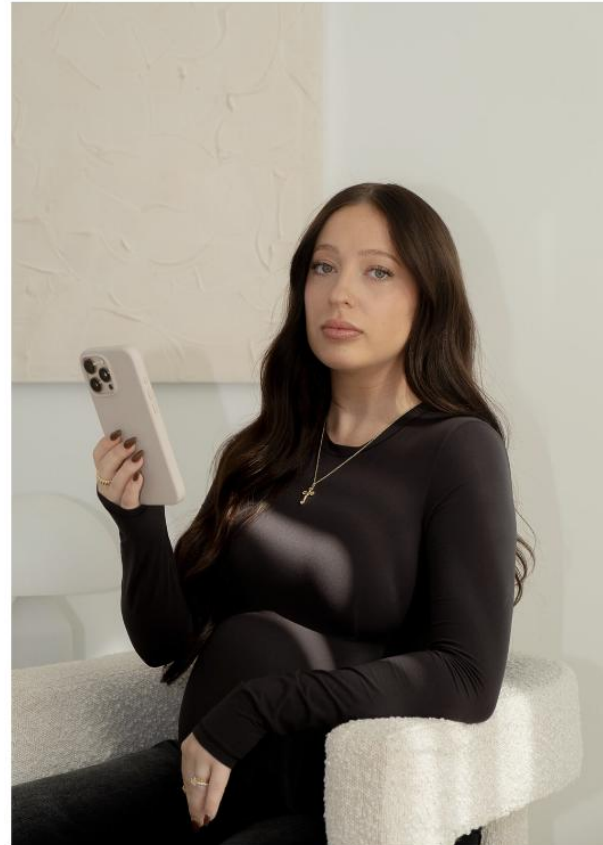
# New York Times: Can You Copyright a Vibe?

The New York Times

## Can You Copyright a Vibe?

One influencer is suing another, accusing her of copying her minimalist aesthetic on social media. It turns out there is a lot of gray area in shades of beige.

- *Gifford v. Sheil*
- No. 1:24-CV-00423
- District Court, W.D. Texas



Sydney Gifford, left, and Alyssa Sheil, two influencers whose similar aesthetics are at the heart of a lawsuit before a federal court.  
Yasmin Yassin for The New York Times, Christopher Lee for The New York Times

# Defendant's Answer

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But Gifford didn't come up with the idea of a natural, beige, and cream aesthetic. Neutral colors have been *in* for some time. (Thirty minutes watching Chip and Joanna Gaines on HGTV will reveal that to anyone with a television and cable access.)<sup>3</sup> People who spend more time online will be more familiar with the “clean girl” aesthetic pushed by celebrities such as Hailey Bieber.

Unsurprisingly, Gifford's complaint conspicuously avoids the phrase “clean girl” aesthetic. Anyone who googled that phrase or spent a few hours on TikTok or Instagram would quickly realize that it destroys Gifford's case; her “look” is not original. For that matter, on that front,

neither is Sheil's. Both women have been participated in a massively popular fashion trend that has been the predominant look for the last several years. But Gifford did not create the “clean girl” aesthetic. She does not own it or have the legal right to attack and exclude other influencers from it. Gifford should not be allowed to use lawfare to stifle fair competition in the influencer space.

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<sup>3</sup> A visit to the Silos in Waco or the Magnolia Farms website shows the same *See* <https://magnolia.com/>.

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# Truth in Advertising



# In a nutshell ...



**Ads must be  
truthful and not  
misleading**

**+**

**Advertisers must  
have adequate  
substantiation**

# Truth in Advertising

- Advertising may be considered **deceptive or misleading** if:
  - **Claims**: Claims about your own products or services or those of your competitor are **false or unsubstantiated**
  - **Disclosures**: Material information about your products or services offering are **not clearly and conspicuously disclosed**

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# Claim Substantiation



# Basic Principles of Claim Substantiation

1. All advertising claims must be **truthful, accurate, and properly substantiated**
  - Substantiation for advertising claims must exist **before** the advertising is disseminated
2. All **reasonable interpretations** must be **supported**
  - If a claim is ambiguous, all reasonable interpretations must be supported
3. **Both express and implied claims** must be **supported**



# Implied Claims: The Net Impression

- Overall net impression of the ad
- Can be communicated through text or graphics
  - Remember: All reasonable interpretations must be supported
- Intent is irrelevant
- Source of most legal challenges
- Context is key



# Substantiating Advertising Claims

- Standard is a “reasonable basis”
- Flexible standard – depends on:
  - Type of product/service
  - Type of claim
  - What experts in the field believe is reasonable
- Highest standards:
  - Health and safety
  - Privacy and data security



# Claim Support

## What It **Is**

- Tests, studies, surveys
- Empirical evidence
- Reliable third-party studies/industry reports

## What It's **Not**

- Sales material
- Patents
- Anecdotal evidence
- Customer feedback/testimonials
- Reports/statements in other publications

**The Support Must Fit the Claim!**

# Claim Substantiation: Practical Tips

- Document substantiation
  - What evidence correlates with which claims
  - Denote dates
  - Refresh as needed
- Good communication between marketing and legal

# Puffery

- Exception to claim substantiation requirement
- A statement of opinion so hyperbolic or vague that no reasonable person would take it seriously
- A statement of opinion incapable of being objectively proven
- Context is everything

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# Disclosures



# Disclosures

- Material information must be “**clearly and conspicuously**” disclosed
- **No minimum font size** requirements
  - must be easily noticeable and readable
  - viewed in relation to surrounding text
  - the more “material” the bigger it should be
- **Can’t be buried** in an ad or appear in small hard to read font
- Must appear in **close proximity to the claim** being modified
- Should be against a **contrasting background**
- Layered approach
- Disclosure cannot cure a false claim
  - Can only qualify or limit claim to avoid misleading impression

# Disclosures in Digital and Social Media



Space constraints are **no excuse** for lack of disclosure



Material disclosures must be **unavoidable**

- The one click rule does not exist
- Must determine if claim can stand on its own; is disclosure necessary to truthfulness of ad



**Links**, if used, should be properly labeled and take consumer directly to disclosure



All ads must be **optimized for mobile viewing**



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# Consequences of Bad Advertising / Enforcement



# Consequences of False/Misleading Advertising

- Regulatory Challenges
  - Federal Trade Commission
  - State attorneys general
  - Other agencies
    - Consumer Financial Protection Bureau (CFPB)
    - Environmental Protection Agency (EPA)
    - U.S. Dept. of Agriculture (USDA)
  
- Possible Outcomes
  - Consent orders – broad injunctive terms
  - Restitution to injured public/disgorgement of profits
  - Civil penalties



# Consequences of False/Misleading Advertising

- Competitive Challenges
  - Court challenges under the Lanham Act
    - Damages/penalties and injunction
  - Self-regulatory challenges before the NAD
    - No monetary relief
    - Modification of advertising

# Last Year's Regulatory Climate

- Federal Trade Commission
  - Very active/aggressive enforcement
  - Hot Topics:
    - Use of endorsements and testimonials
    - Dark patterns
    - Billing and subscription issues
    - Impact of digital advertising on children
    - Customer reviews
    - Energy issues and greenwashing
    - Made in USA
    - Privacy
    - AI



# This Year's Regulatory Climate

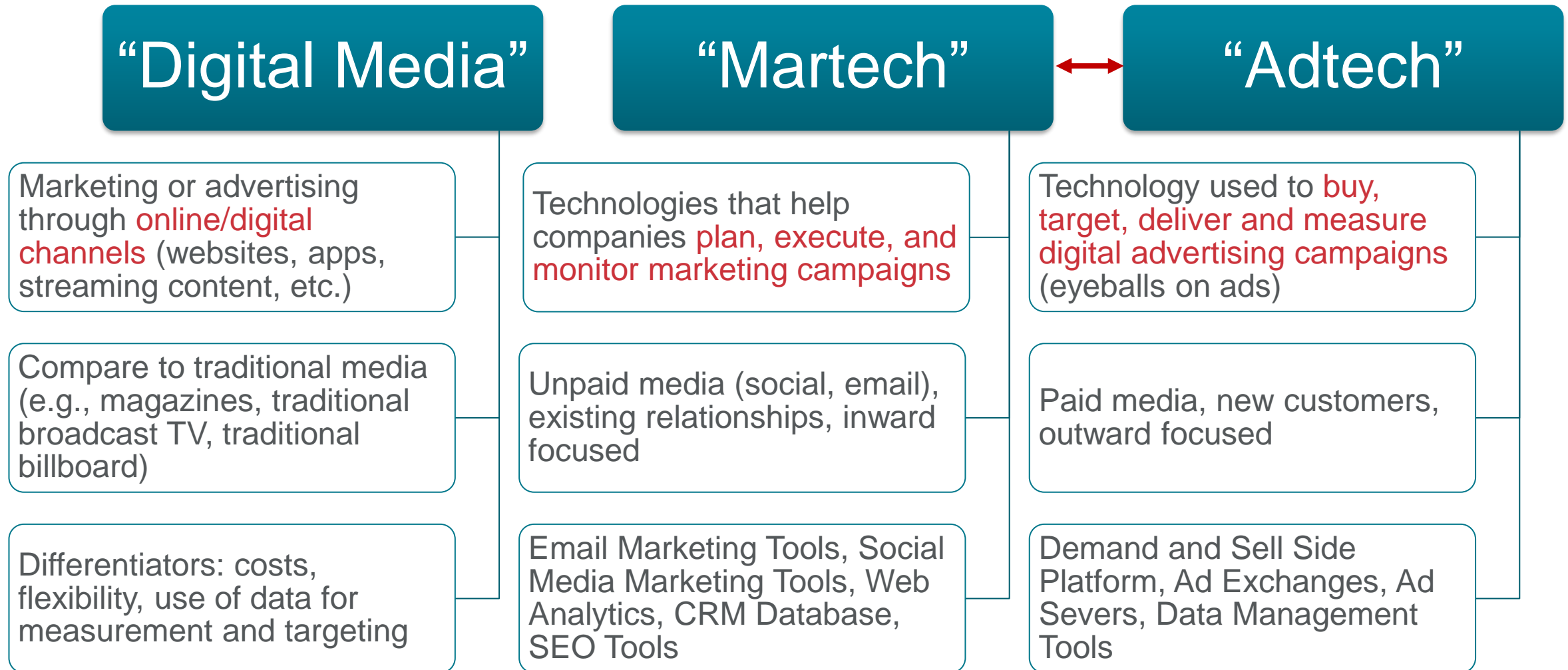


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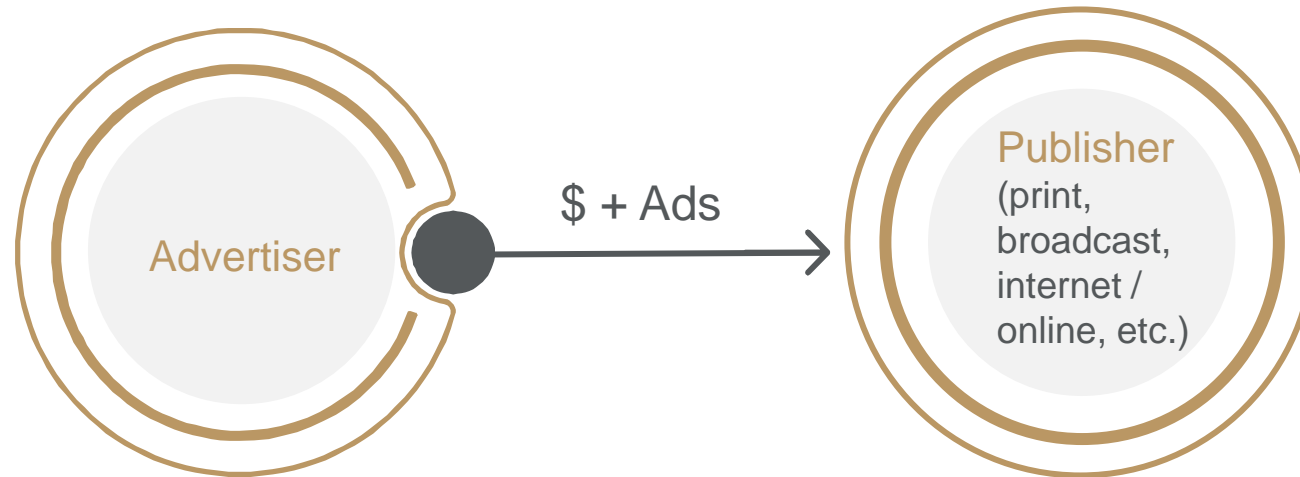
# Adtech



# “What’s in a name?”



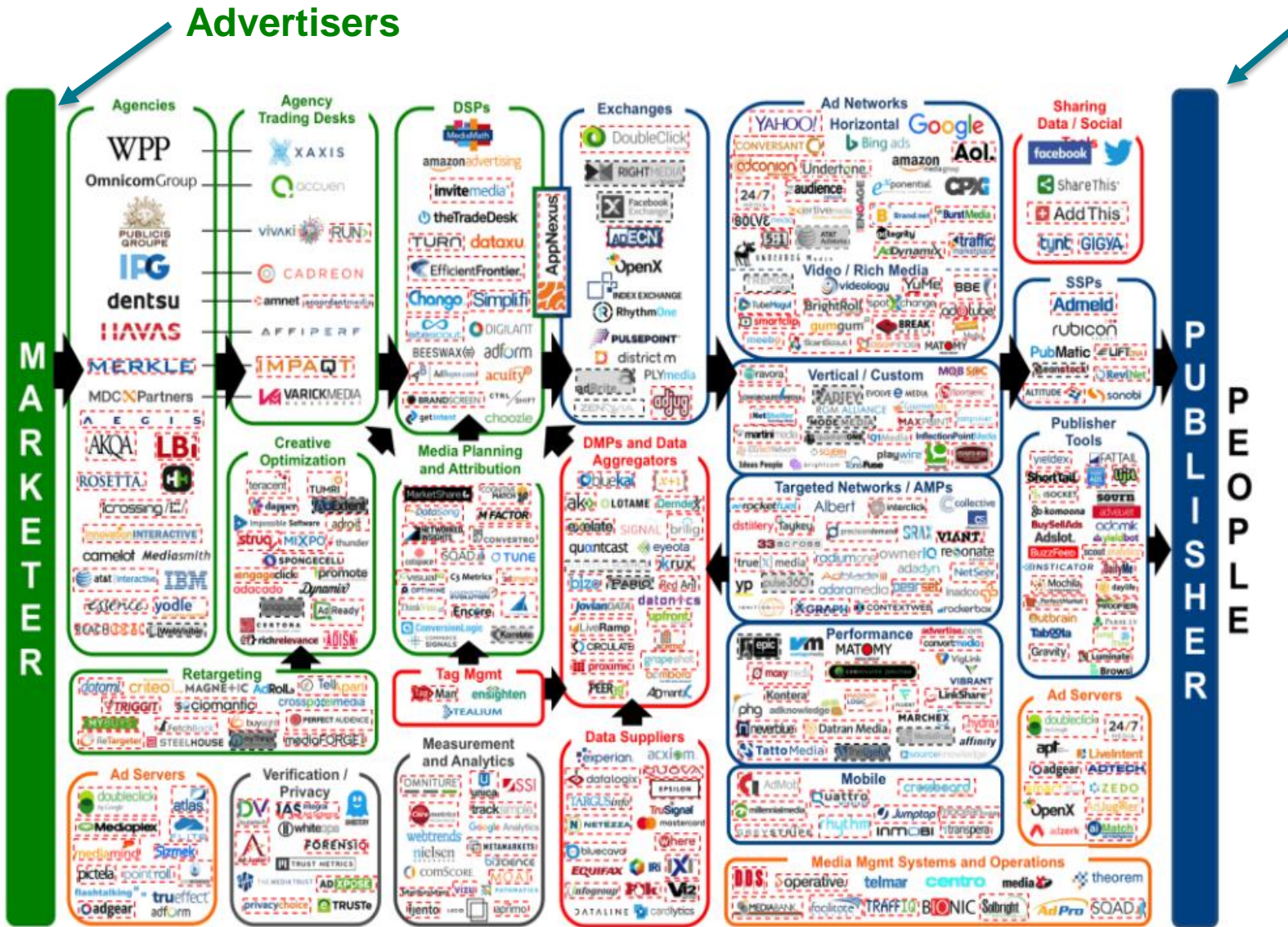
# The Ecosystem



- In the beginning it was simple
- Direct deals between Advertisers and Publishers
- No direct connection between Advertiser and Audience
- Use of and access to Audience data is limited:
  - Buying inventory as a proxy for Audience
    - ✓ E.g., magazine publisher tells Advertiser the demographic of their subscriber base, Advertiser relies on that to make decisions



# The Ecosystem Has Evolved

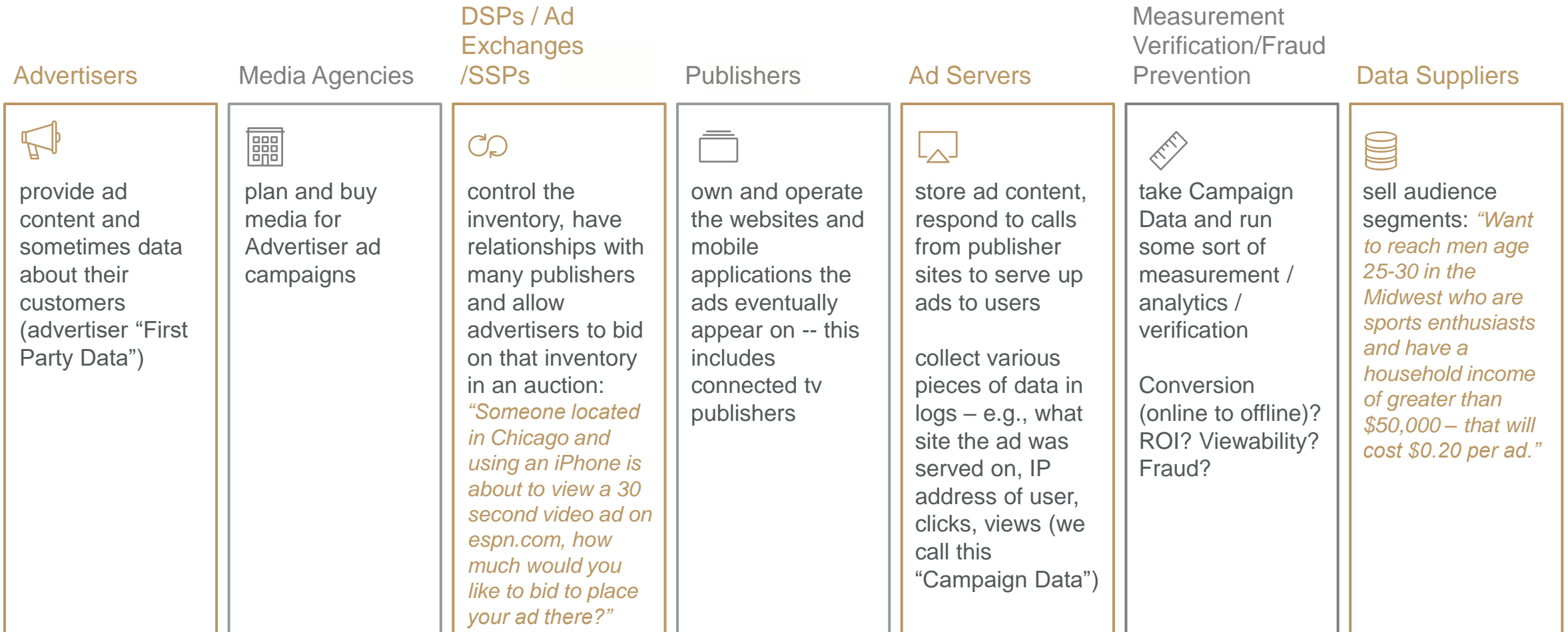


Websites / Apps Where Ads Appear

Now:

- Complicated ecosystem
- Many players - different roles; each one plays a critical role in the success of a media campaign
- Programmatic buying / RTB (real-time algorithmic bidding)
- Data is paramount, it flows throughout the ecosystem, and everyone uses it:
  - e.g., data informs decision whether to bid on an impression
  - e.g., data helps attribute a conversion to a particular ad creative

# The Ecosystem Has Evolved To Include Many Different Players Performing Many Different Functions



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# Agency Agreements



# Important Agreements in the Advertising Ecosystem

- Adtech
  - Data and Measurement
- Agency Agreement
  - Creative
  - Media Buy
- Talent Agreements
  - Actors
  - Influencers
  - Production
- Social Media Platforms
- Union/Guild Terms (e.g., SAG-AFTRA)



# Advertising Agency

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**The New York Times**

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## ***Two Major Ad Agencies to Merge, Creating Global Giant***

If successful, Omnicom and Interpublic would become the largest advertising company in the world, with more than \$25 billion in combined revenue.

# Advertising Agency

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The deal comes after years of transformation and disruption for the advertising industry, as digital ads overtook analog advertising channels and tech giants including Meta and Alphabet, the respective parent companies of Facebook and Google, moved further into the territory once dominated by traditional agencies. The tech and consulting giant Accenture has also made a big push onto the agencies' turf, acquiring dozens of creative studios and related companies.

The “Big Four” ad companies — Omnicom, Interpublic, WPP and Publicis — adapted by remaking themselves into digital technology companies, often through acquisitions.

# Advertising Agency

- Services
  - Creative
  - Media Buy
  - Both
- Ancillary Services
  - Measurement
  - Data
- Industry Consolidation



# Creative Agency Agreement Checklist

- Who is responsible for copyright and trademark clearance of creative works;
- Who is responsible for third-party licensing;
- What approvals are needed for incorporation of third-party works;
- Who is going to own newly created works;
- Does the agency need to follow existing brand guidelines or are they tasked to create new ones;
- Who is responsible for releases for individuals appearing in the works;
- Who is responsible for dealing with actors and other artists represented by collective bargaining or industry requirements (e.g., SAG-AFTRA); and
- Who is responsible for hiring the director to produce any filming of ads?



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# Hot Topics



# Social Media – Key Principles for Marketing Teams to Understand

- Yes, it's advertising
- Statements made by or on behalf of a company can be actionable
- Statements made by employees with or without authority can be actionable
- Statements made by influencers or other partners can be actionable
- This includes actions as simple as tagging or retweeting or even liking
- FTC Endorsement and Testimonial Guides are Critical



# Updated Disclosure Obligations

- Disclosures to be unavoidable
  - This will vary by the platform
- Disclosures for kids may need to explain what advertising is
  - “I was paid to say this”
- Disclosures may need to include the name of the sponsoring product or brand
  - #ad v. #AcmeAd or #sponsoredby[brand]



# Regulatory Focus on Dark Patterns



## What are Dark Patterns?

Manipulative interfaces or designs that get users to do things they wouldn't do otherwise and that may cause harm – often through making purchases or sharing personal information



## What is the relevant legal framework?

Dark Patterns are not a stand-alone legal concern  
Practice must be deceptive or unfair under Section 5 of the FTC Act to be a legal concern

Multiple Dark Patterns will more likely be considered deceptive or unfair

Ambiguity as to when a Dark Pattern becomes an unlawful practice that violates Section 5 of the FTC Act

Steady stream of FTC law enforcement actions (and state actions) that highlight Dark Patterns

# Practices Being Dubbed Dark Patterns

**Roach motel** – making it easy to proceed down a purchase path or sign-up process, but hard to get out or cancel

**Interface Interference or Misdirection** – Using repetition or color or other design elements to direct consumers' attention to certain words and away from others; presenting asymmetric choices that focuses user attention to one thing to distract from something else

**Sneaking** – hiding or disguising key information or delaying the disclosure of such information

**Confirmshaming** – shaming users into taking an action they wouldn't otherwise take

**Forced Action** – Design elements that require users to perform a certain action such as forcing registration (consumer tricked into thinking registration, such as signing up for newsletter, is necessary)

**Nagging** – repeated requests to do something in the business' best interests

**Urgency** – e.g., false indication of limited quantities of a product

# Negative Option Marketing

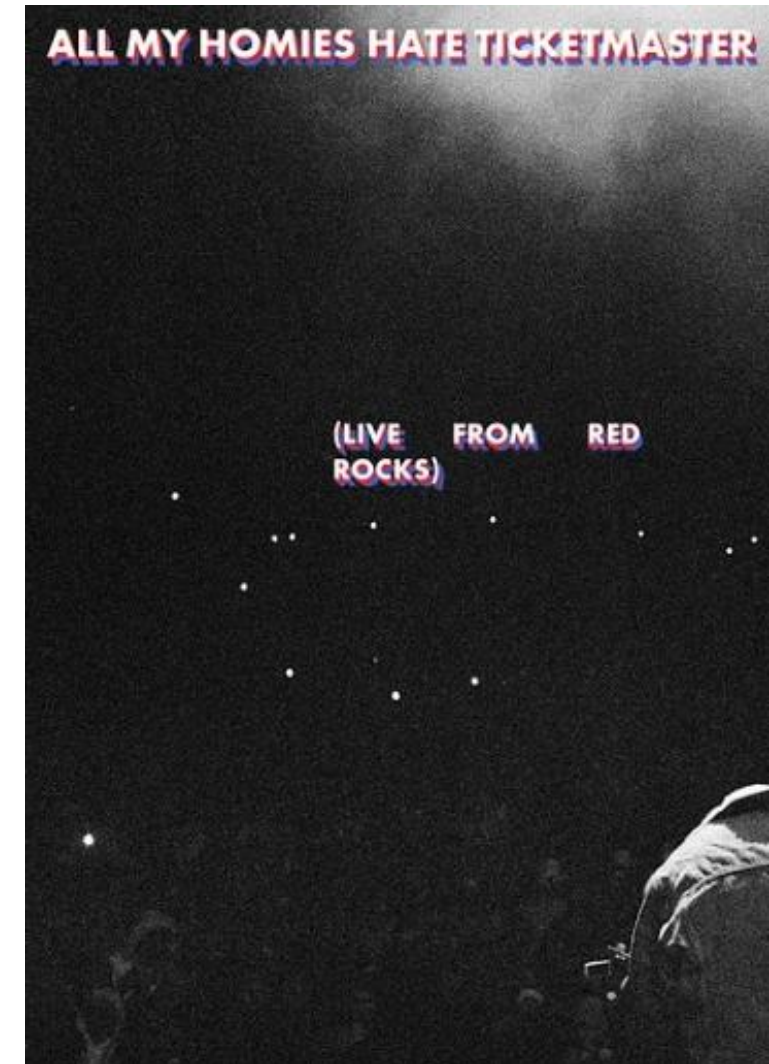
- FTC “Click to Cancel” Rule
  - Disclosures
  - Consent
  - Cancellation
  - Misrepresentations
- State Negative Option Laws
- Auto-Renew Litigation



Cancel

# Junk Fees

- Junk Fee Rule
  - Limited to event ticketing and short-term lodging.
- State Junk Fee laws
  - California
  - Minnesota
- Also litigation risk



# Consumer Reviews: What the FTC is Saying

## Solicitation Practices

- Don't pay consumer to write a positive review
- Don't condition incentives on a positive review
- Solicitations should be phrased in a neutral fashion – cannot ask only for positive reviews (i.e., tell me why you love the product)
- Don't discourage or prevent negative reviews
  - Remember the Consumer Fairness Act



## Moderation Practices

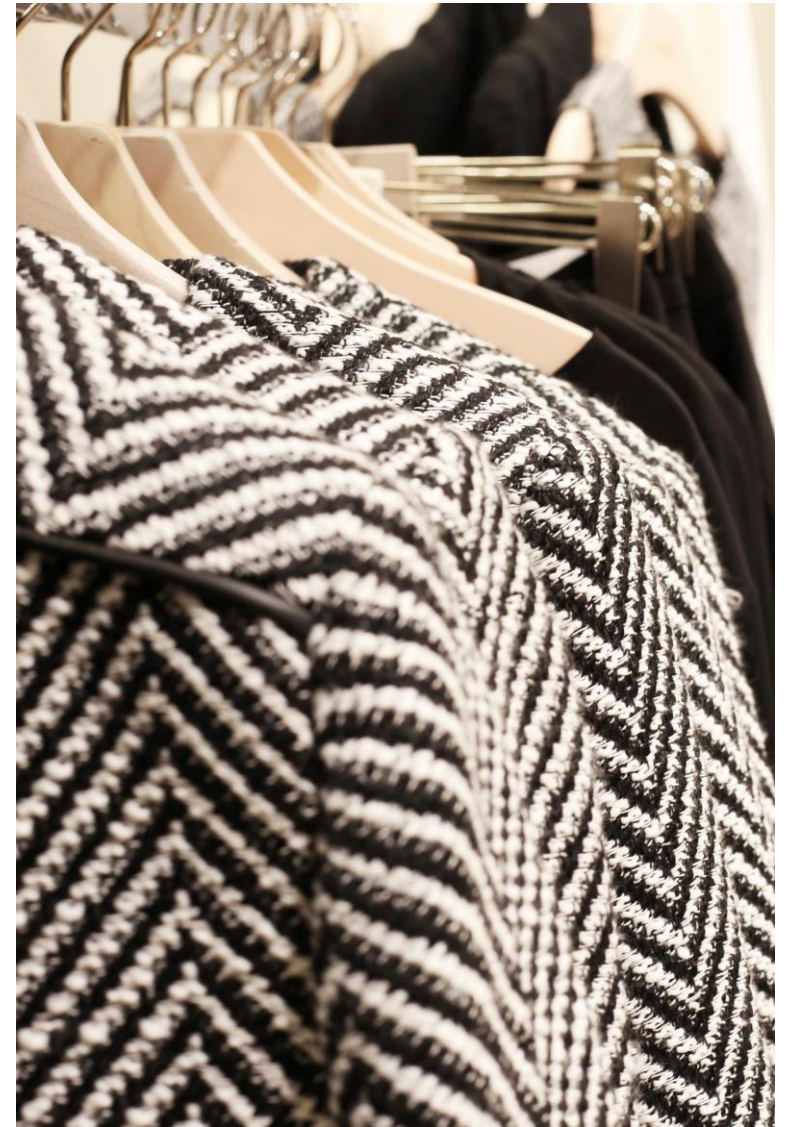
- Positive and negative reviews must be treated equally
  - Negative reviews cannot be suppressed or delayed
  - Positive and negative reviews should be equally scrutinized
- Reviews must be verified





# Fashion Nova Settlement

- The FTC alleged that Fashion Nova blocked reviews with ratings less than four stars out of five from being posted to its website
- Blocked reviews were withheld for the company's approval
- The website did not disclose this practice, and the FTC argued this implies to consumers that all reviews are posted
- This practice also had the effect of artificially inflating the average star rating
- Fashion Nova settled the complaint for \$4.2 million
- Fashion Nova required to post ALL negative reviews

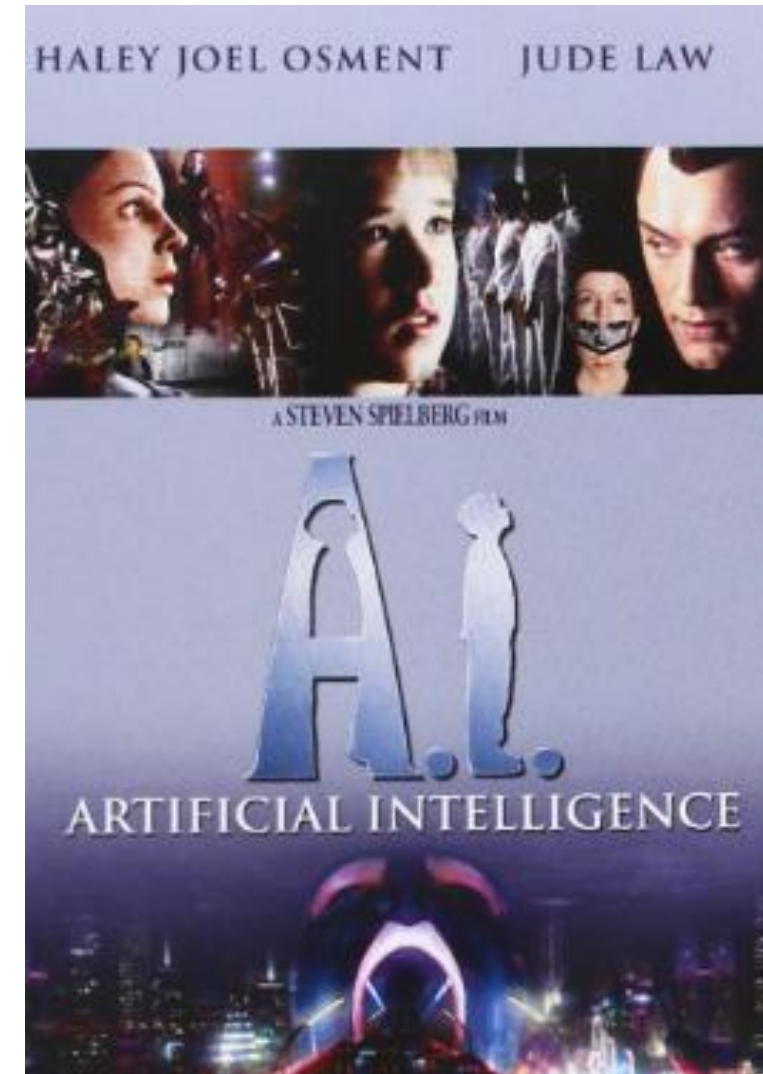


# FTC Privacy Priorities

- Health and geo post-Dobbs
- Platforms and marketplaces
- Algorithmic discrimination and racial equity
- Expanded remedies (bans on collection and sharing)
- Children and teens – COPPA and beyond
- Behavioral advertising
- Interplay between competition and privacy

# Artificial Intelligence

- Deceptive AI claims
  - FTC “Operation AI Comply”
- Copyright infringement risk
- Use of AI by creative agencies
- Use of AI by vendors
  - *Jones v. Peloton Interactive, Inc.*, Case no. 23-cv-1082-L-BGS, 2024 WL 3315989 (S.D. Cal. July 5, 2024).
- Privacy concerns



**QUESTIONS?**

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Atlanta | Chicago | Cincinnati | Cleveland | Columbus | Costa Mesa

Dallas | Denver | Houston | Los Angeles | New York | Orlando

Philadelphia | San Francisco | Seattle | Washington, D.C. | Wilmington