



# Artificial Intelligence in Advertising

## An Update on Recent Developments in False Advertising Law



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# Speakers



**Roger Colaizzi** chairs Venable’s national Advertising Litigation Group. Roger has significant trial experience litigating Lanham Act false advertising, state deceptive trade practices, unfair competition, advertising class actions, trial and continuity marketing, direct-to-consumer marketing, social networking, affiliate advertising, domain names, keyword advertising, and other e-commerce matters.



**William Lawrence** practices at the intersection of litigation, antitrust, intellectual property, and advertising. William has represented individual and corporate clients in media, entertainment, retail, finance, and legal industries. Prior to joining Venable, he worked with clients on commercial litigation, including securities fraud, white collar investigation, and malpractice.



**Ellis McKennie** advises clients on regulatory and litigation matters related to advertising and marketing. Ellis employs his background in policy to assist clients with Federal Trade Commission (FTC) and Federal Communication Commission (FCC) regulatory compliance.

# Technology Advances

- Working definition of AI:
  - “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.” Ex. Ord. No. 14110. (2024)
- Advertising Advances
  - Predictive Analytics
  - Programmatic Ads
  - Chat Bots
  - Deepfakes
  - Voice Cloning, etc.



# AI Executive Order

- Biden administration issued the AI Executive Order in October 2023
  - “Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence”
- EO outlines regulations for agency use of AI, standards and best practices for developing and using safe and secure AI, and support for continued American innovation. Significant work is under way.
- Guiding Principles and Priorities
  - Safe and Secure
  - Innovation, Competition, and Collaboration
  - Supporting American Workers
  - Equity and Civil Rights
  - Consumer Protection
  - Privacy
  - AI in Governance
  - AI in Government



# Federal Trade Commission

- Lead U.S. agency in AI consumer protection regarding advertising and data use, as well as unfair and deceptive acts
  - Asserts authority over deceptive AI claims through Section 5 of FTC Act
  - Chair Lina Khan: “There is no AI exemption from the laws on the book.”
  - From early on, expressed concerns about potential use of AI, deepfakes, etc. to mislead or defraud consumers
  - Expectation is that bots, etc. will be designed to avoid deception, avoid emulating humans if it is not necessary, and make disclosure if it is
- NEW Impersonation Rule
  - Includes application in artificial intelligence
  - Considering expanding rule to impersonation of individuals



# FTC Truth in Advertising

- Four Guiding Questions for Truth in AI Advertising
  1. Are you exaggerating what your AI product can do?
  2. Are you promising your AI product does something better than a non-AI product?
  3. Are you aware of the risks?
  4. Does the product actually use AI at all?



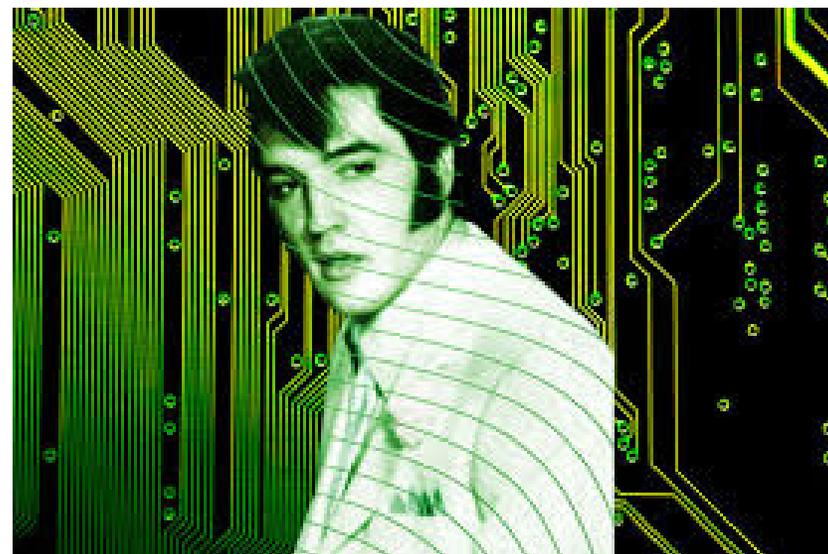
# FTC Impersonation Rules

- FTC passed a new rule that will be critically important to addressing issues arising with the use of AI to impersonate businesses or government agencies to commit fraud
- Rule allows the FTC to seek consumer redress and civil penalties
- Seeking to extend this rule to the use of AI in impersonation of individuals
- Examples:
  - Deceptively using government seals or logos
  - Spoofing government or business email or web addresses
  - Adopting lookalike email addresses or URLs
- Rule goes beyond deepfakes and other innovative technologies



# State Law Patchwork

- Tennessee ELVIS Act
  - Protects against any unauthorized commercial use of an individual's voice that is readily identifiable
- State Political Ad Laws
  - 16 states have enacted laws creating a disclosure requirement or a prohibition on using AI in political advertising
- CA Bot Law
  - “Unlawful for any person to use a bot to communicate with a person online with the intent to mislead about its artificial identity...”





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# Advertising Litigation Stemming from AI

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# AI Washing

## Delphia and Global Predictions Settlements

- Fined by the SEC for making deceptive claims regarding AI capabilities
- Companies claimed to use an AI algorithm that gave their investors an “unfair advantage” over other investors
- In reality, the companies never used any AI technology
- Delphia fined \$225,000
- Global Predictions fined \$175,000

## *Automators AI v. FTC*

- FTC sued Automators for unfair and deceptive advertising
- “...scheme that lured consumers to invest \$22 million in online stores, using unfounded claims about income and profits. The operators of Automators also claimed to use artificial intelligence to ensure success and profitability for consumers who agreed to invest with Automators.”
- Automators settled with the FTC for \$21,765,902.65

# Wait...that sounds like me!

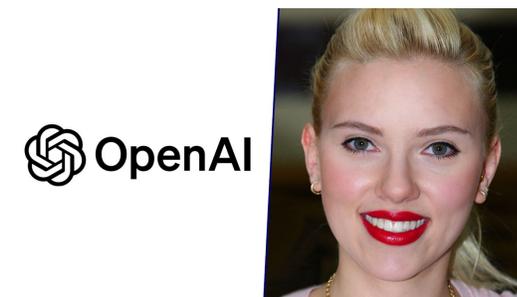
## *Lehrman v. Lovo*

- Class Action Complaint - Voiceovers
  - NY Civil Rights Law Claims
    - Liability on a party for misappropriating an actor's voice "for advertising purposes...without written consent
  - False Advertising (both NYCRL and Lanham Act)
  - Lovo is selling AI versions of actor's voices without permission after tricking them into providing voice samples for the company
  - The actors are seeking damages of at least \$5 million



# Legal Battles in the News

- Rapper Drake recreated Tupac's voice in his song "Taylor Made Freestyle"
  - Resulted in a cease-and-desist letter from Tupac's estate and the song being taken down
- Lawyers for Scarlett Johansson sent letters to Open AI requesting information on the voice used for its new AI assistant. OpenAI has paused using the voice.
- Lingo Telecom sent AI-generated robocalls mimicking President Biden. The company is now facing fines from the FCC and state criminal claims.



# AI Legal Service: Deceptive?

- *MillerKing, LLC v. DoNotPay, Inc*
  - Real law firm sues online subscription services advertising itself as “The World’s First Robot Lawyer” using AI to provide legal services.
  - MillerKing alleged violations of the Lanham Act through false advertising and false affiliation, connection, association, sponsorship, or approval.
  - Robot Lawyer claims to perform legal work, such as drafting contracts, marriage annulment, restraining orders, and even speeding ticket appeals.
  - Court found plaintiff did not have standing to bring claim because it had not properly alleged injury, and injury would not be presumed, because parties were not direct competitors.



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# Proposed Legislation

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# No AI FRAUD Act

- The No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act
- Introduced by Reps. María Elvira Salazar, R-Fla., and Madeleine Dean, D-Pa.
- “This bill plugs a hole in the law and gives artists and U.S. citizens the power to protect their rights, their creative work, and their fundamental individuality online.”
- Those providing AI duplication services could be subject to a \$50,000 fine per violation.
- AI creations using unauthorized material could be subject to \$5,000 fine per violation.

## The No AI FRAUD Act

### would:



Ensure every person has an intellectual property right over their own likeness and voice



Allow individuals to seek monetary damages for harmful use of their likeness or voice without their consent



Empower survivors to combat sexually exploitative deepfakes and child sexual abuse material



# AI Legal Technology

- Casetext
  - AI-powered research platform that helps attorneys find relevant cases based on plain language questions.
- CoCounsel
  - AI legal assistant
- Lexis+ AI
  - Interactive search, summaries, drafting, and analysis
- Blue J L&E
- AI Tech saves time in basic tasks
  - Proofing Documents
  - Case Searches
  - Identifying Relevant Data in Files
  - Drafting

How familiar with AI are you?

73%

of legal professionals are somewhat familiar

26%

solo practitioners are very familiar

21%

mid-size firms (6-20) are very familiar

# AI Legal Technology: Gone Wrong

- Hallucinations
  - *Mata v. Avianca Inc.* – lawyers filed a brief citing fake cases generated by ChatGPT
  - Steve Cohen’s attorneys used fake cases in a brief to end his supervised release



# Questions? Contact us!



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