Hogan Lovells

Consumer Horizons

2019

Table of contents

Welcome

2018 was a year of unprecedented disruption and transformation in the consumer industry, and 2019 promises challenges of similar or greater magnitude. From issues in supply chain to digitalization and customization of the consumer experience to rapidly changing consumer demands, the industry is evolving at lightning speed. Amidst these changes, you must learn how you can prepare for the future.

Whether your challenges are geopolitical change, a changing competitive landscape, or fundamental changes in consumer demand, there will be lots to watch. Brexit, tariffs, and political changes are sure to dominate on the supply side. E-commerce regulation will continue to be a factor, with a focus on harmonization and greater consumer protection in Europe, the California Consumer Privacy Act being implemented in the United States, and new e-commerce regulations coming online in China and India. How quickly these regulations are implemented and the effect they will have on consumer rights has yet to be seen.

Our global Consumer team has identified current and evolving trends we think will shape this year. We hope that you find our view of what is on the horizon for the industry thought provoking and informative. We look forward to facing the challenges and opportunities of the coming year with you.

Kelly Tubman Hardy
Consumer Sector Head
Baltimore and Washington, D.C.


P
FIRST-CLASS PACKAGE

Overview

Retail and Fashion

The retail and fashion industries are always evolving. We advise businesses at every level — from business restructuring to marketing, intellectual property to product compliance, distribution, and operations. We understand the complexities behind e-commerce, privacy, data transfer, mobile payments, and real estate law. Our lawyers have their finger on the pulse of current market conditions and the issues you face, day in and day out.

2019 brings new challenges to the retail and fashion industries. The increasing popular support for economic nationalist approaches has challenged the models under which many businesses have been operating, affecting everything from how supply chains are likely to operate to, in the case of Brexit, whether key staff can still live and work outside their countries of origin.

Customers are demanding greater visibility of how businesses operate. It's no longer enough to sell good products – you also need to act as a good citizen of the world. From mastering the integration of sustainable operating practices to having an active engagement on social issues, customers often expect their chosen brands to reflect their preoccupations and pursuits. Increasing engagement by businesses with social influencers is leading to more onerous regulation of them, but they remain a clear route for fashion houses and retailers to use to engage with their customers in a personal and meaningful way.

Personalization has been paramount to the overall retail customer experience, and retailers are using technology and data collation to identify customers and offer them a seamless experience. But personalization brings with it the challenges of meeting toughened, diverse, and differing regulatory regimes.

In the following pages, we offer some perspectives on how you can meet these challenges in key markets around the world.

Meryl Bernstein
Partner
New York and Washington, D.C.

Sahira Khwaja
Partner
London

Food and Beverage

The food and beverage team at Hogan Lovells represents some of the largest names in the industry. We anticipate the developments that may have an impact on your operations and are at the forefront of these issues. The rise of global consumer markets. Increased regulation in labeling and processing. Effective promotion. Supply-chain complexity. Production, packaging, and new ingredient approvals. Distribution and retailing. Recalls and health, safety, and environmental concerns. We are with you each step of the way.

We give practical and creative advice on a national and global level. Our team can help you create an active compliance culture, expand your product offerings, and find creative solutions to regulatory requirements so you are strategically positioned for the future.

In the United States, companies in the food and beverage sectors will face increased scrutiny from the U.S. Food and Drug Administration (FDA) as the agency continues to implement sweeping changes to the laws governing the manner in which companies manufacture products. FDA has been inspecting manufacturing facilities, taking a critical look at the companies' programs, and is recommending modifications when the agency feels the programs are not sufficiently robust. The industry also is scrambling

to comply with new labeling requirements for the nutrition labeling of foods that become effective on January 1, 2020, and with the mandatory disclosure requirements for bioengineered foods that become effective on January 1, 2022.

In addition to these regulatory activities, the industry continues to face constant challenges by class action lawyers who are filing demand letters and lawsuits if they see a practice on a label they view as misleading under state consumer protection laws. These are just a few of the myriad of issues that food and beverage companies in the U.S. are navigating today and which are likely to remain relevant in 2019.

Martin Hahn
Partner
Washington, D.C.

Thomas Salomon
Partner
Hamburg

Electronics and Consumer Appliances

Electronics and consumer appliances play an ever increasing role in our daily lives. Technological change is happening faster than ever. As technology develops and distribution channels evolve to meet changing technology and consumer demands, the legal issues confronting the sector are growing.

Technology is being innovated at breakneck speed, resulting in ever-increasing changes in the design, manufacture, and performance of electronic and consumer appliances. Everyone in the supply chain is faced with questions regarding long-term compliance with consumer or product safety regulations.

Companies involved with connected devices must also face questions about the privacy and cybersecurity issues raised by those devices, as well as the requirements and risks relating to collecting, purchasing, and using the personal data amassed on those devices.

Products and component parts printed with 3D printing technology may face traditional product liability regimes. Who is the manufacturer of the product – the entity that manufactures the 3D printer? The entity that operates it? The entity that wrote the CAD file? All of this is taking place amidst the ever-present scrutiny of the class action claimant bar. A bar that has become global – with class actions, collective actions and vigorous developments in aggregate litigation being available to consumers in more and more countries.

In such a fast-changing industry, experience is often the key to success. Through our cross-practice approach, experience is exactly what we provide. Our extensive understanding of regulatory matters, intellectual property, consumer product litigation, data privacy and cybersecurity, connectivity, M&A, FCC licensing, supply arrangement, and equipment authorization, enables us to advise you in a wide variety of areas, tackling your specific needs wherever and whenever they may arise.

Phoebe Wilkinson
Partner
New York

Disruptive technology

Technology trends that will reshape e-commerce in 2019

Since its inception, technology has been the foundation upon which the e-commerce industry was built. But new technologies now provide retailers with even sharper tools to use against one another as they vie for market position and the oft-fleeting attention of the consumer. And we predict that technological advances will continue to redesign the e-commerce customer experience in 2019.

Virtual and augmented reality technology can make e-commerce customers feel like they are in a brick and mortar retail environment and allow for seamless virtual "try-ons." The lines between traditional e-commerce and social media platforms are likely to continue to be blurred, with customers shopping through shoppable posts and stories on social media channels such as Instagram and Facebook. E-commerce sellers may be able to use cryptocurrencies and other alternative payment methods to directly bill customers. Fulfilment centers and supply chains could shift towards toward the use of robots and droids or drones to fulfill customer orders and ultimately deliver product. And artificial intelligence tools will make it easier than ever for e-commerce companies to predict customer behavior and provide recommendation engines and virtual assistants to drive sales.

New forms of technology raise new legal queries for which there will be no easy answers. How should an e-commerce business adopt a new technology where ownership of the intellectual property underpinning that technology is yet to be determined? Should an e-commerce business rely on some of the new cryptocurrency models? What regulatory hurdles relate to technologies being used in new product fulfilment and distribution models? What is the regulatory environment with respect to customer data as it pertains to the new technologies used to market retail goods to consumers? How should an e-commerce business use social media and shoppable posts and stories in a way that does not run afoul of consumer protection laws?

Whether your e-commerce business has adopted one of these new technologies or is considering it, there are a host of issues that will need to be addressed.

Meryl Bernstein
Partner
New York and Washington, D.C.

Online platforms: New proposal impacting B2B relationships

Online platforms currently represent a fundamental element of digital commerce and the increasing use of intermediation services - such as online e-commerce market places, online software applications services, and online social media services -on which businesses' success depends, implies that the providers of those services have often a higher bargaining power, which enables them to behave unilaterally in a way that sometimes can harm business users and, indirectly, their consumers.

In order to prevent this phenomenon, on 13 February 2019, EU negotiators agreed to lay out new rules - as part of the mid-term review of the Digital Single Market strategy of the European Union - aimed at addressing "the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships, by exploring dispute resolution, fair practice criteria and transparency".

The legislative instrument adopted is a regulation, which will apply regardless of whether online intermediation services and search engines are established in a Member State or outside the Union, as long as the business users are established in the Union and they offer goods or services to EU consumers. The main provisions of the proposed regulation focus on the need to ensure clear, easily comprehensible and accessible platform terms and conditions, also setting out objective reasons justifying any suspension or termination of the services provided. Online search engines will also be required to outline main parameters determining the positioning of the websites in search results, providing a description of differentiated or preferential treatments, if any. Moreover, Courts shall be able to declare provisions found to violation the Regulation as non-binding on users.

Once again the EU has opted to harmonize various competing Member State regulations on this topic, to avoid the applicability of substantially divergent regimes among the various countries that already have implemented laws on the matter (such as France), or to avoid inconsistencies.

The regulation requires that providers of online intermediation services create an internal system to handle business users' complaints. In addition, to encourage out-of-court dispute resolution, the providers should indicate in their terms and conditions the mediators that they are willing to work with. The new set of rules also provides for the possibility of organisations and associations representing business users' interest to take action before competent national courts in case of violations of the regulation.

The regulation is still under discussion and will apply 12 months after its adoption and publication, and will then be regularly subject to review. Once in force, the regulation will be directly applicable in all Member States.

Consumer law harmonization in the digital single market is one of the main priorities of European policy makers. These new legal requirements can lead to substantial technical or business changes.

Charlotte Le Roux
Senior Associate
Paris

Vanessa Tritto
Associate
Rome

Monica Sebastiani
Trainee Solicitor
Rome

Blockchain: Recent developments and predictions for 2019

New for 2019 will be the use of private, permissioned, distributed ledger technology (DLT) systems to settle payments among large entities.

Private payment networks are being implemented to compete with the SWIFT network by providing near-instantaneous payment settlement at a lower cost. Despite considerable hype, these payment systems may not rely on blockchain technology per se and may not utilize traditional cryptocurrencies to represent value. The general idea is that instead of making a wire transfer, a traditional payment will be converted into a corresponding number of proprietary tokens, those tokens will be transferred on a proprietary network, and the received tokens will be credited to a transacting party's account in either tokens or a selected fiat currency.

Leading the charge to topple SWIFT is Ripple, a seven-year old company that raised nearly $100M in investment funds and issued its own publicly-tradable cryptocurrency, XRP. The company's proprietary payment system "RippleNet" is advertised as a "frictionless experience to send money globally."

Recently joining the fray is JPMorgan Chase. The bank announced its own prototype "JPM Coin" to facilitate transfers among accounts held at the bank. The JPM Coin will be pegged to the U.S. dollar and traded on its proprietary Quorum network. Although it initially seems to be merely an internal accounting unit, plans have been expressed to make the JPM Coin usable outside of the bank's own ecosystem.

In response, SWIFT is not standing still. It has announced a partnership with R3, self-described as "an enterprise blockchain software firm," to implement a new payment system using R3's Corda technology. Corda is based on open-source software but can be implemented as a private network.

Global supply chain management continues to be a strong use case for blockchain technology. Leveraging the immutable recordkeeping capability of blockchains, many companies have been exploring their application to the worldwide shipment of goods. Pilot projects in 2018 have proven the efficacy of blockchain recordkeeping to track shipments. As often happens, the adoption of new technology at the retailer level can be expected to drive adoption throughout the supply chain.

Ted Mlynar
Partner
New York

Soraya Ghebleh Keskey
Associate
New York

Virtual social influencers

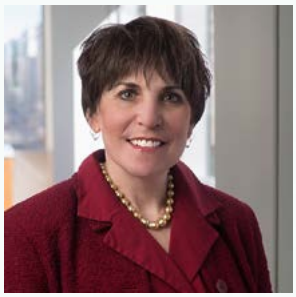
In the world of social media influencers and sponsorships, 2017 and 2018 were notable for the wave of FTC enforcement activity emphasizing the need for influencers and marketers alike to familiarize themselves with and comply with FTC's Endorsement Guidelines. In its first wave of letters, the FTC chose a kinder-gentler approach, choosing not to disclose the recipients' identities. But it left no doubt that it is closely monitoring social media postings for violations.

Now that some time has passed since the issuance of its Endorsement Guidelines, and familiarity with their rules and principles can be assumed, 2019 is likely to see the FTC taking a tougher stance against violators by naming names and initiating more enforcement actions. At the same time, companies are likely to continue to innovate around who they use as influencers and the nature of those communications.

The introduction of virtual social media influencers is just one of those clever innovations. Virtual social media influencers are computer-generated imagery (CGI) created to portray an ideal lifestyle or image while allowing brands to retain more control. CGI Influencers won't say the wrong things, get caught at the wrong party, or otherwise pose a potential risk to your company's valued image.

But the new CGI trend also brings its own new challenges. Not only has the FTC made clear that virtual social media influencers are subject to the same truth in advertising and disclosure requirements as all other social media influencers, but the use of virtual influencers also raises intellectual property ownership concerns and morality issues. As a creative work, intellectual property ownership rights accrue to the creator of the influencer character. As a result, companies should be sure to have an agreement in place clearly outlining the ownership of such rights. And while the FTC does not currently require that brands disclose whether or not their influencers are real people or CGI, guidelines to this effect may be on their way. Virtual influencers have been criticized as setting unrealistic expectations, having suspect motivations, and lacking authenticity.

Being upfront about the nature of the social media influencer can help alleviate some of these concerns.



Julia Anne Matheson
Partner
Washington, D.C.

Meryl Bernstein
Partner
New York and Washington, D.C.

For more best practices for working with social media influencers, download our Social Media Influencers guide.

3D-printing and IP rights

3D-printing changes the way we develop products: an idea can be transformed into a tangible product faster than ever, and it is not even expensive anymore.

But what is 3D-printing? Simply put, it is a machine that builds an object out of base materials by successively stacking thin layers of the materials in accordance with a Computer-Aided Design (CAD). The major advantage over conventional molding processes is its adaptability: one 3D-printer can print any template and does not require prefabricated molds.

Today, 3D-printing offers various printing methods and can print almost anything from medicine, weapons, to organs, and even food (so called Bioprinting).This versatility allows 3D printing to revolutionize almost every industry sector.

Since the prices have fallen, 3D-printers are no longer just a product for the industry, but for everyone. On the Internet, templates can be exchanged on online forums (both legally and illegally).

However, despite its benefits, 3D-printing also poses new risks and new questions with regard to intellectual property rights. Who is liable for an infringing 3-D-print template or sharing such templates online? What responsibilities should the user of a 3-D print have to make sure no intellectual property rights are being infringed? What should you do if 3-D printed products impair your IP rights?

Yvonne Draheim
Partner
Hamburg

Sabrina Dücker
Associate
Hamburg

New EU rules on geo-blocking impact all online retailers selling within the EU

As part of the EU Commission's strategy for a Digital Single Market (DSM), the EU Commission wants to make it easier for online shoppers to buy goods and services (e.g. hotel bookings, car rentals, music festivals, or leisure park tickets) from other EU countries.

Under new EU rules on geo-blocking, which came into force in December 2018 with immediate effect (but which the UK intends to revoke post-Brexit), online traders will have to treat online customers from another EU country in the same way as a local customer, e.g.by allowing them to benefit from the same domestic prices and terms. Blocking or rerouting customers from another Member State will be banned.

In principle, any online traders offering goods or services within the EU will be affected, although there are certain exemptions, including in particular for copyright works and audio-visual services. Even business-to-business trade is covered if the receiving party is an end-user.

Businesses with country-specific versions of a website will need to consider whether any differences in pricing or terms and conditions can be justified under the new rules. Any practices relating to any type of website blocking or rerouting, depending on the customer's nationality, place of residence or place of establishment, will need to be reviewed.

We have tracked the progress of the EU proposal for an anti-geoblocking regulation very closely, and are advising various clients on the impact of the proposed regulation on their business.

Alex Dolmans
Partner
Madrid

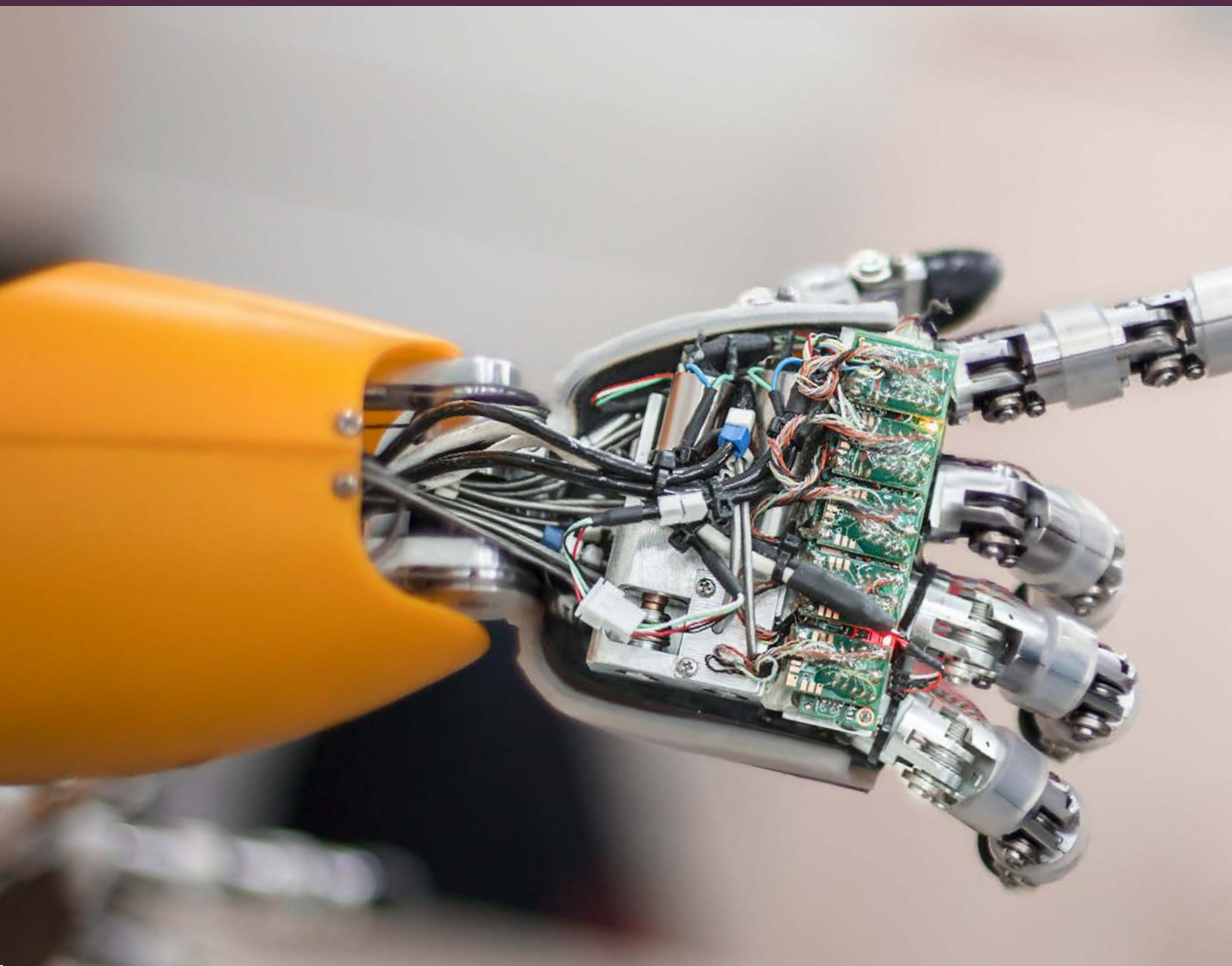
Salome Cisnal de Ugarte
Partner
Brussels

The impact of intellectual property on artificial intelligence

As artificial intelligence (AI) and machine learning are integrated into an increasing number of products and services, protection and enforcement issues involving patents and trade secrets will likely increase. The intersection of AI and intellectual property is quite new, and raises a number of interesting questions, such as: Who is the inventor if an artificially intelligent system discovers a new innovation? Who's liable if an artificially intelligent system makes a decision that causes monetary damage or harm? Who will own the data, information, or results that may be generated by the artificially intelligent system?

AI technology may be protected by, or subject to, various forms of intellectual property law, including patents, trade secrets, and even copyright.

Some of these issues can be addressed in advance, in the licenses, joint ventures, development, and other types of agreements used in the development or use of AI technology. Parties should consider spelling out, in those agreements, who will be liable or responsible for the decision-making or results they get from automated or AI systems they may be using now or in the future.



And these issues are not just for the companies most obviously associated with AI – such as software, automotive (self-driving cars), and the like. Consumer companies are also very much getting into development and use of artificially intelligent systems. For example, AI is used to match paint colors or coating compositions. It needs to be understood that automated and artificially intelligent systems are already touching consumer industries. IP protection and enforcement issues may come more fully to fruition down the road, but consumer companies need to begin to prepare now.

Celine Crowson
Partner
Washington, D.C.

Jason Lohr
Partner
San Francisco

Drones in retail

The advent of new technology ushers in new options for the transportation of goods.

Customers have become accustomed to on-demand shipping and unmanned aircraft, commonly referred to as drones, which open the door for nearly instantaneous delivery. Drones are fast, low-cost, energy efficient, and require little in the way of infrastructure. They can quickly and easily collect goods from one location and delivery them to another, with a remarkable degree of precision.

When placing a retail order, customers may soon have the option to choose drone delivery, which can be accomplished within minutes. Customers can provide a very specific delivery location (for example, the front door or the back patio), track their delivery in real-time, receive alerts when the delivery drone has arrived, and immediately collect their goods. Drones can sense and avoid obstacles, communicate with other aircraft, fly precise flight paths, and land virtually anywhere (or deliver goods without even landing, by gently lowering them from a tether).

Companies such as Amazon, Walmart, and Alphabet are testing the use of drones in large-scale trials around the world. Postal systems (including USPS) and delivery services (such as FedEx and UPS) are also exploring the use of drones. They could become a stand-alone delivery mechanism or they may simply be integrated as a part of the supply chain and transport system. There are a wide range of possibilities.

Aircraft manufacturers have developed prototypes for large drones capable of transporting up to 500 pounds of cargo. Small drones fit for carrying a much smaller payload could be dispatched from trucks to perform last-mile delivery, reducing costs for retailers and wait time for consumers. Drones can even be used in warehouses to monitor inventory, perform inspections, and ferry goods from one location to another. The applications are limitless and the technology continues to evolve.

There is no doubt that drones will be part of the transport system of the future, offering countless benefits for retailers and consumers alike. Many countries require commercial drone users to obtain permits from civil aviation authorities and comply with aviation safety regulations. This may be new territory for in-house legal departments, but governments around the world have recognized the benefits of drones and are keen to work with members of industry to unlock their potential.

Laura Ponto
Counsel
Washington, D.C.

Sustainability and corporate responsibility

Corporate responsibility for consumer-facing brands

Increasingly, consumer brands are focusing on corporate responsibility and sustainability. This can mean a reduced carbon footprint or waste, locally sourced, organic or GMO-free food, ethically sourced products or raw materials, decreased environmental impacts, reduced animal impacts recycling or using recycled products or "slow" or "circular" fashion. Companies around the world are incorporating corporate responsibility into their planning and business operations.

There are good reasons to do this. Governments around the world have adopted laws targeting goods produced using child labor and slave and other coerced labor or produced in conflict zones. This includes the UK Modern Slavery Act; the United States' elimination of the consumptive demand exception and the prohibition on the importation of goods produced by forced labor; the EU conflict minerals regulation; and France's duty of vigilance law.

Many of these laws, like the EU's Non-Financial Reporting Directive, require reporting rather than mandate or prohibit activities, but for consumer companies, the reputational risk of a disclosure of lax compliance could be catastrophic. And regulators are watching. The UK has been closely monitoring compliance with UK Modern Slavery Act compliance, and U.S. Customs and Border Patrol has stopped shipments suspected to have products manufactured with forced labor.

Fear of regulatory consequences is not the only reason for a consumer company to care about corporate responsibility. Consumers and, research has shown, particularly millennial consumers, are increasingly socially conscious and interested in the origin, materials or ingredients, and impacts of the products they buy. And it's not just individual consumers who are demanding change. In his 2018 letter to CEOs, Blackrock's Larry Fink said "To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society." The ability to claim that products are clean, locally sourced, natural, GMO-free, fair trade, animal friendly—the list goes on—is important to generating sales and the prices retailers can charge. And reports of adverse environmental impacts or human rights abuses can significantly harm a company's reputation.

The ability to claim that products are clean, locally sourced, natural, GMO-free, fair trade, animal friendly – the list goes on – is important to generating sales and the prices retailers can charge.

Demands are shifting, and socially conscious products, in all of their forms, are becoming critical to a consumer brand's core offerings. To adapt to this trend, legal departments must:

- Be aware of compliance and reporting obligations and consider the systems that will have to be put in place to document each. U.S. in-house lawyers will remember how difficult it was to diligence conflict minerals reporting.
- Ensure that disclosure is correct and supportable. Regulators and consumers alike have legally challenged company disclosures.
- Carefully consider claims that their company's products are "natural," "GMO-fee," "locally sourced," "Organic," Nontoxic renewable, recyclable, ozone safe ozone friendly "green," "non-toxic," "wholesome," "botanical," "earth-friendly," "safe," "ecological," "fresh," "biological'" "clean." Regulators around the world have recognized the need to address deceptive claims. Food and beverages are particularly closely regulated, but

general prohibitions against unfair and deceptive trade practices open a wide range of products up to challenge. And in the U.S., consumers have brought class action lawsuits attacking allegedly untrue or unsubstantiated claims.

- Encourage their business clients to think ahead about what changes in marketing and product descriptions might mean for the company's existing trademark portfolio.

Kelly Tubman Hardy
Partner
Baltimore and Washington, D.C.

Promoting sustainability and health benefits

Promoting sustainability and health benefits can lead to legal trouble in the European Union. While the EU is discussing strategies against plastics and a ban on certain single-use plastics, consumers are requesting more sustainability and extra benefits from their consumer products.

When addressing these consumers' needs, companies should be aware that there are a number of detailed rules restricting "nature-", "organic-", "free"-and "health-"claims.

When developing new products, product concepts, and marketing strategies relating to sustainability or health benefits, companies are well advised to check with their legal counsel whether or not a certain product name, trademark, or marketing campaign complies with the relevant provisions and case-law on such claims. Failure to do so could lead to regrettable post launch amendments dictated by local authorities or the courts. The forced rebranding of "Bio-oil" to "Bi-oil" in Germany by court order is just one example.

Companies should be particularly thoughtful when making one or more of the following claims. In case of non-compliance with the legal framework, product information, claims and trademarks relating to these benefits could be banned by authorities or courts – with severe consequences e.g. for on-pack promotions or trademark investments.

- Claims relating to health and/or nutrition benefits may only be used subject to the precondition that they are included in special lists of authorized health and nutrition claims when used for food marketed in the EU. In addition, the conditions and wording set forth in those lists need to be observed. For example, a food marketed in the EU may only carry a reference to vitamin C or a health claim with a wording similar to "Vitamin C contributes to the normal function of the immune system," if it contains a certain minimum of this vitamin.
- References to organic, eco(-logical), or bio(-logical) origin or ingredients can only be made for foods marketed in the EU where those foods are produced in compliance with the EU legal framework on ecological farming amended 2018, the new provisions to be observed as of 2021 at the latest. For organic cosmetics, the same rules are applied in parts.
- When referring to nature or natural claims, companies should be aware that besides certain specific legislation e.g. for natural flavorings in the EU (at least 95 percent by w/w from the source material referred to) there is particularly stringent national case-law allowing nature claims only where a product (i) contains only ingredients consumers naturally expect, (ii) has undergone only essential processing, and (iii) shows only ubiquitous pollution.
- Likewise, free labelling such as "free from GMO" underlies statutory restrictions.

Christiane Alpers
Senior Associate
Hamburg

Food and environmental regulatory issues impacting sustainable packaging

Driven by the continuous demand of more eco-friendly packaging materials for food and beverage products, there is a growing interest in the use of recycled packaging as part of a company's sustainable initiative. Businesses, however, are well advised to pay close attention to the regulatory issues on the horizon that are presented by the use of recycled materials in food and beverage packaging.

On the federal level, the U.S. Food and Drug Administration (FDA) exercises jurisdiction over food packaging materials. FDA considers each proposed use of recycled plastic on a case-by-case basis and issues informal advice ("no objection letters") as to whether the recycling process is expected to produce plastic or paper suitable for food-contact applications. While the FDA review process can be time and resource consuming, it is the state laws that pose the most challenges for the sustainable packaging industry.

In particular, under the Model Toxics in Packaging Legislation, a national environmental initiative to reduce the heavy metals in solid waste through state legislations, the combined levels of lead, cadmium, mercury, and hexavalent chromium in packaging materials are required not to exceed 100 ppm. A total of 19 states have adopted the model legislation. The levels can present potential challenges to recycled glass because it typically contains higher levels of heavy metals than virgin glass. To date the model regulations have overlooked because the glass matrix encapsulates the heavy metals, making them incapable of migrating into the beverage. Why does recycled glass contain higher levels of heavy metals? It likely is a result of consumers putting crystal, light bulbs, and industrial glass into the recycling stream.

Another state law of note is California's Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65). Under Proposition 65, businesses are required to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone in California to a listed chemical. Violations of Proposition 65 are subject to civil penalties. Proposition 65 warning requirement for two chemicals commonly found in food service wares - PFOA and PFOS becomes effective in November 2018. Companies selling PFOA/PFOS-containing food packaging materials in California are vulnerable to private litigants or "bounty hunters" who can bring private lawsuits to enforce the Prop 65 warning requirements.

In addition to the state laws, we also expect consumer interest groups such as the Center for Science in the Public Interest (CSPI) to continue their campaign against the use of certain chemicals in packaging. Chemicals including heavy metals, PFOA/PFOS, BPA, and PAHs in the packaging materials will continue to be portrayed as poster child for "bad chemicals."

Martin Hahn
Partner
Washington, D.C.

Xin Tao
Senior Associate
Washington, D.C.

Privacy, data, and the consumer

Data privacy laws disrupting digital ecosystem

Over the past two years data privacy has transformed from being a relatively niche compliance issue into a mainstream topic in boardrooms, amongst legislators, and across the wider public.

The introduction of the GDPR in Europe has greatly increased the regulatory risks of processing data relating to individuals; at the same time, arguably there has been a significant shift in the public's perception of what privacy means to them.

Media interest in the area has intensified as a result of several high-profile incidents, including Cambridge Analytica's misuse of personal data in seeking to influence democratic elections, to an ongoing stream of major data breaches, many of which have involved the loss of user credentials and financial information.

Concerns over the use of big data have resulted in other countries outside of the Europe, such as the United States, looking to introduce tougher regulation. The California Consumer Privacy Act (CCPA) is one such example which, once it takes effect in 2020, promises to grant individuals extensive rights over their data including the ability to opt-out of it being sold to third parties.

For consumer-facing organizations, one of the most pressing challenges over the coming years will be how the future enforcement of these laws may result in changes having to be made to their current business practices. The risks of disruption appear to be particularly prominent in the field of digital advertising, where the online ecosystem of personalized data-driven advertising is being challenged by privacy regulators.

The largest penalty issued in this field to date occurred in January this year, with the French data protection authority (CNIL) fining Google €50m for alleged infringements of the GDPR. This included the CNIL finding that Google had failed to be sufficiently transparent with its users about how they use their personal data for behavioral analysis and targeted advertising.

Beyond the Google decision, wider questions are being asked by regulators and privacy rights advocates about the lawfulness of many existing practices that are intrinsically linked to how organizations undertake digital advertising.

In late 2018, Privacy International filed complaints with the UK Information Commissioner (ICO) against a number of major data brokers and ad-tech companies for the alleged misuse and sharing of personal data relating to millions of people. Meanwhile, in Germany its competition regulator has recently ordered Facebook to place certain restrictions on its current data collection practices.

The outcomes of investigations and actions of this nature have the potential to re-shape how consumer-facing organizations reach their target audiences. Companies that have strong data privacy governance practices in place are likely to be in a better position to manage these risks than those that do not.

Dan Whitehead
Senior Associate
London

Connectivity, smart technologies, and consumer data

Consumers demand connectivity and smart features for a growing range of products – from appliances to toothbrushes and even apparel.

Businesses are striving to monetize and otherwise tap into the value of the data delivered by smart and connected devices.

The data protection and cybersecurity legal landscape is changing rapidly. Regulators, enforcement authorities, and policymakers are scrutinizing how companies collect, use, and share consumers' personal data. Laws and regulations are proliferating at the national, state, and local levels.

All the while, cyber criminals, advanced persistent threat groups, and others are looking to exploit potential vulnerabilities in the connected ecosystem.

Businesses must consider whether data was collected lawfully, whether service providers and business partners processing personal information are trustworthy, whether data processing is consistent with legal and contractual requirements, and whether information and systems are reasonably secure. Some of the specific issues likely to make the headlines in 2019 include:

- **The European Union General Data Protection Regulation (GDPR)**. This year likely will bring increased enforcement as regulators acclimate to the new regime. Look-alike frameworks will emerge across the globe as countries seek adequacy determinations from the EU.
- **Biometrics.** Biometrics support security and convenience. But the sensitivity of biometric data has led to scrutiny from regulators and class-action litigation in the United States, focusing on Illinois' notice and consent requirements.
- Audio and Video Sensors. Audiovisual features are in high demand. But they can lead to unintended or nefarious covert surveillance.
- Data sharing. California's comprehensive new privacy law and media headlines demonstrate that consumers and policymakers are increasingly concerned about the sharing of data with advertisers, research groups, and others.

To succeed and mitigate risk, businesses must have forward-thinking programs in place to assess and mitigate risk and to nimbly respond to incidents should they occur.

James Denvil
Senior Associate
Washington D.C.

Are your calls and texts compliant? An update on TCPA

Retailers must stay in touch with their customers and their business partners to succeed. But as new technologies make it increasingly important to remain connected, retailers face a significant and growing risk of class action litigation and regulatory enforcement actions involving the Telephone Consumer Protection Act (TCPA). Individuals who receive certain unwanted calls or texts can file class actions under the TCPA seeking statutory damages of $500 per call or text – even for non-marketing communications. One consumer loyalty campaign or a single order update or survey message program can quickly lead to a claim for millions of dollars.

With so much at stake, retailers need to know how to protect themselves. Telemarketing calls, autodialed calls, prerecorded calls, and text messages are regulated by the TCPA and the Federal Communications Commission's (FCC) TCPA rules, as well as other federal and state laws and regulations. Strict disclosure and consent requirements, technical restrictions, opt-out provisions and other rules apply.

In 2019, we foresee three big changes to the TCPA:

- First, we expect the FCC to clarify a number of unsettled TCPA legal issues that have stymied callers for years. In March 2018, the D.C. Circuit struck down key portions of a 2015 FCC TCPA decision as overly broad and burdensome. The FCC initiated a new proceeding in June 2018 and it is expected to issue new rules in the first half of 2019.
- Second, keep an eye out for a decision in PDR Network v. Carlton Harris Chiropractic, where the Supreme Court will decide how much force FCC TCPA decisions carry in subsequent litigation.
- Finally, we expect to hear more details about the FCC's reassigned numbers database and caller safe harbor, which was created to reduce the risk callers face when they mistakenly dial a wrong or reassigned number.

Consumer companies will have to stay abreast of these developments to ensure that their customer communications are compliant.

Mark Brennan
Partner
Washington, D.C.

Arpan Sura
Senior Associate
Washington, D.C.

The California Consumer Privacy Act of 2018 (CCPA): Privacy law in the U.S. is changing dramatically

The CCPA is launching a new era of privacy law in the U.S. As of January 1, 2019, if your company operates for profit and is "doing business" in California (which is interpreted broadly and does not require a physical location), you must consider the impact the CCPA will have and implement a compliance strategy.

The CCPA applies to companies that collect or disclose "personal information" about California "consumers." The definition of "personal information" is extremely broad. It is more than information that reveals the identity of an individual. For example, if you have an online presence, the definition can encompass, among other things, a broad array of online identifiers such as IP addresses, advertising IDs, beacons, cookies and pixel tags, browsing or search history, geolocation data and inferences about a consumer's preferences or characteristics. "Consumer" is also a broad concept, covering California residents.

Companies will be subject to extensive new disclosure requirements about "personal information" collection and use. Consumers will also have broad new rights, including the right to access specific pieces of personal information, the right to deletion of their personal information, and the right to opt-out of the "sale" of their personal information. Sales include the exchange of personal information for any consideration. Companies generally cannot discriminate against consumers for exercising rights, i.e., charging different prices or offering different service levels. Companies are subject to a private right of action for data breaches that are the result of failing to maintain reasonable data security.

Compliance will be challenging. Companies should take numerous steps such as assessing the personal information they possess, identifying where it is stored and how it is used and shared, developing new or updated disclosures, creating policies and procedures, and training employees. Look for others states to follow suit in the near future.

Tim Tobin
Partner
Washington, D.C.

Shifting sales models

The FTC sinks its teeth into subscription sales- ROSCA

The Federal Trade Commission is increasingly using the Restore Online Shoppers Confidence Act (ROSCA) to pursue companies that use negative-option features in their business model. Negative options are any recurring/subscription charges that continue until the customer takes affirmative action to discontinue them. They have long featured prominently in traditional membership businesses such as gyms and clubs. ROSCA, however, takes on the ever-growing field of online subscription services. Whether vending online entertainment, meal kits, cosmetics, or other consumer goods or services, online businesses must take note of ROSCA's requirements.

ROSCA requires that any company that uses negative option features must:

(i) clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information; (ii) Obtain a consumer's express informed consent before charging the consumer for products or services through such transaction; and (iii) Provide simple mechanisms for a consumer to stop recurring charges.

ROSCA's requirements require careful interpretation, and insuring compliance is critical. Drafting language for customer enrollment flows from negative option features must be done thoughtfully because it must clearly state the recurring nature. Customers must affirmatively choose to be charged for the specific negative option. Methods for cancelling must be simple and easy to use, and cancellation options must be clear and accessible. All businesses want the opportunity to save subscribers, or otherwise gather information about customers' reasons for cancellation. These are reasonable goals that can be achieved while maintaining compliance with ROSCA if implemented with care.

The FTC has targeted companies for all of the following: free trial offers that automatically convert to paying accounts; cancellation offered exclusively via phone and not online or via email; cancellation methods that are considered difficult, confusing, costly, or time consuming; separate links to view terms of services; burying the return policy within densely worded, hyperlinked web pages, and/or offering customer service centers that are not customer friendly, whether due to long wait times, or otherwise.

FTC investigations and enforcement actions can be costly. AdoreMe's 2017 settlement required the return of over US$1.3m to consumers in addition to penalties, fees, and other costs. In July 2018, the FTC was granted a restraining order that froze the assets of Triangle Media and halted much of the business. In October 2018, DirecTV succeeded in getting the FTC to drop its ROSCA case against the company, but only after three years of investigation, negotiation, and trial, as well as paying all its own legal costs.

Trends for 2019:

- The District of Columbia has just enacted the Structured Settlements and Automatic Renewal Protections Act of 2018. Vermont's Auto Renewal law takes effect July 1, 2019. With California's similar legislation being updated, we expect to see more and more jurisdictions examining ways to address negative option offerings and similar business models.
- Starting in April, Mastercard will require merchants to affirmatively notify consumers when trial periods end. Additional protections meant to go even further than those already required by law will also be introduced. If more financial and payment processing companies follow suit, there will be significant impact on merchants that make use of negative option offerings.

Lillian Hardy
Partner
Washington, D.C.

Bret Cohen
Partner
Washington, D.C.

Doug Martin
Senior Associate
Washington, D.C.


PARKING
Public

The legal implications of brand blanding

In the trademark world, 2018 was notable for the number of well-known brands that chose to shorten and "universalize" their names, to simplify or drop their logos, or to rebrand entirely. Many dispensed with the unique fonts, words, and design elements that have long set them apart in favor of a pared down, sans-serif font popularized by the Silicon Valley. This type of "simplification," known as "blanding," is trending.

The desire to globalize and speak across language and cultural barriers in the face of the maturation or saturation of more traditional markets is self-explanatory. Yet while the finite boundaries of today's digital real estate are obvious, the reality remains that the advertising ecosystem is larger than a single phone screen. And while "blanding" may be on-trend, it runs contrary to the fundamental tenets of brand value, purpose, and enforceability.

The true measure of a brand is its ability to break through the static of the marketplace to generate a powerful consumer response. To "blend in" is, by definition, to not stand out. Dispensing with a unique look in favor of a common unadorned font threatens a brand's ability to serve that basic function. And from an enforcement perspective, in the absence of any other distinctive features, overall appearance, and commercial impression will become less central to the likelihood of confusion analysis.

While the trend towards "blanding" may be an option for well-established brands, what does "blanding" mean for everyone else? How will less dominant brands generate market recognition without visual elements that differentiate it from competitors? Is this a short-lived trend, or here to stay? As infringement analysis is forced to evolve to keep up with this trend, we will be there to keep you posted.

Julia Anne Matheson
Partner
Washington, D.C.


86537
86224
86143

The sharing economy

The sharing economy model's explosive growth has shaped the Consumer sector throughout the last decade, and more changes are expected in 2019. The term "sharing economy" describes an economic model that enables individuals to use and rent assets owned by someone else. This model has become prominent across industries within the Consumer sector, including retail.

Trends have included online retailers offering flat-rate subscriptions for babywear, shoes, and even high fashion where the customer does not own the clothes and has to return them after a certain period. There has also been a shift toward more urban transportation. Sharing economists are satisfying the growing need for "on-demand-mobility" by implementing bicycle or scooter sharing models.

Sharing economy models range from fee-based subscriptions to product sharing, like the scooters. Regardless of the model, the implementation of sharing economy usually triggers a broad range of commercial law and regulatory issues.

Appropriate contractual structures need to be built:

- User contracts are at the forefront of issues. The end user does not own the shared item, and contract structures are shifting from purchasing to renting. This presents new liability challenges. Moreover, the contracts with the end users are usually conducted online and trigger consumer protection law issues, such as information and distance selling requirements.
- Additionally, there often is a complex architecture of different cooperation partners, service providers, and infrastructure providers. Protection is critical; don't offer your end user what your service provider cannot guarantee you.

But this is not all. Sharing economy often comes with regulatory issues:

- Sharing means connecting. Needless to say, this involves the sharing of end user data. Hence, data protection is usually essential for any sharing economy model.
- Sharing does not mean free. Service providers need to be paid. Sharing economy model providers need to comply with payment regulations or contract with regulated payment services providers.
- Sharing economy models also can present issues related to the technology used, such as radio-frequency identification technology or legislation on radio equipment.
- Companies with sharing economy models need to ensure they comply with local regulations when entering a new market.
- Sharing economy models are often embedded in publicly funded research and development projects because of the innovative character and the public interest in the continuing (technical) development and saving of resources.

Last but not least: the developments can be a challenge for legislators. Often balances need to be struck between the interests of traditional stakeholders (such as hotel owners, taxi drivers) and sharing economists (such as Airbnb, Uber).

In a nutshell, sharing economy models are evolving, and these innovative models require legal innovation. The sharing economy market will continue to grow and extend across the world, changing the legal landscape for Consumer companies.

Florian Unseld
Partner
Munich

Nadine Otz
Senior Associate
Munich

Supply and sourcing

Successfully navigating the new trade environment

President Trump's administration ushered in a number of changes that have had a dramatic impact on sourcing and importing consumer goods. Trump imposed significant new tariffs on imports of a broad range of steel and aluminum goods, and on about half of all imports from China, and renegotiated the 25-year old North American Free Trade Agreement (NAFTA). Consumer goods importers have had to scramble to figure out the impact of these new provisions on their global sourcing, but a number of strategies are available to help them successfully navigate this new environment.

In March 2018, President Trump imposed additional 25 percent import duties on a broad range of steel products and additional 10 percent duties on aluminum products, under Section 232 of the Trade Expansion Act of 1962. This section allows for the imposition of duties on imports the United States Department of Commerce (DOC) finds are threatening to impair America's national security. Several countries negotiated exemptions from these duties while other countries retaliated and imposed additional duties on U.S, imports. Canada, Mexico, EU, Turkey, Japan and Russia have retaliated by

imposing duties on U.S. exports to their countries, including on steel and aluminum products, household appliances, lamps, food preparations, and whiskey.

We have been advising client companies on how to avoid or reduce the impact of these tariffs with creative lawyering involving tariff classification, country of origin, and Customs valuation strategies. We have reviewed tariff classifications of impacted products to determine if they can be properly classified in a classification not included in the tariff lists. This can potentially be done through adapting products to alter tariff classifications. Companies can also look at tariff preference programs that exempt the products from the additional duties, or duty mitigation strategies such as duty drawback. The country of origin of products can be adapted by shifting certain assembly or processing operations. Further, companies can look at customs valuation strategies, including First Sale valuation in order to reduce the impact of the additional tariffs.

Looking ahead, companies should closely monitor potential changes in this trade war, and the potential consideration by the U.S. congress of the renegotiated North American Free Trade Agreement (NAFTA) known as the United States-Canada-Mexico Agreement (USMCA), which will not take effect until the U.S. Congress, Canadian Parliament, and Mexico's Congress of the Union, vote to approve it.

Chandri Navarro
Partner
Washington, D.C.

Issues and opportunities in outsourcing in Asia

Retail e-commerce sales in Asia are growing at an accelerated rate, and a larger customer base across multiple jurisdictions has opened up a new world of revenue for consumer companies that are able to tap into this market.

However, the ease of e-commerce transactions has compounded the problem of counterfeit goods in Asia. Estimated international trade in counterfeit goods in 2022 is forecast at US$991 billion, and 52 percent of seized counterfeit imports into the U.S. originated from China.

Commerce is conducted based on trust and as transactions become faceless and goods are now purchased without physical inspection, it has become more important than ever for consumers to be able to trust in the provenance of goods that they receive.

Jurisdictions in Asia have also recently expanded the crackdown on counterfeit sales, with some nations such as China introducing fines for companies that deal in counterfeit goods

Now more than ever, consumer companies need to be certain that their supply chains in Asia will not result in a regulatory fine or reputational damage.

As a result of this growing need, the coming year should see an increased reliance on technologies such as blockchain and machine learning to provide more reliable supply chain solutions. These technologies increase transparency and therefore trust across the supply chain by providing a tamper-proof record of any given shipment of goods. For instance, by providing a solution that enables stakeholders to electronically track a goods shipment from production to sale, companies will have a far more reliable record for regulatory authorities if required.

Machines can now take microscopic pictures of the material, processing, workmanship, and serial number of consumer products and employ the technique of deep learning to compare the images against a vast database that includes top luxury brands to generate certificates of authenticity. The more items are scanned, the bigger the database, and the more accurate the software becomes. There is a lot of potential for what technology can do in the battle against counterfeit goods.

Stephanie Keen
Office Managing Partner
Singapore

CBD in foods, dietary supplements, and cosmetics: Navigating the global Wild West

Increasing consumer interest in cannabis-derived ingredients has led to an explosion of the use of the non-intoxicating cannabinoid, cannabidiol (CBD) in a wide variety of products, including drugs, foods, dietary supplements, personal care products, and cosmetics for both human and animal use. While CBD-containing products continue to proliferate – online and in stores across the globe – regulators have struggled to keep pace with the marketplace, and are now starting to examine and exercise their enforcement authorities over CBD-containing products.

Confusing matters further, numerous media outlets have reported that CBD is now "legal." In the U.S., the recent passage of the 2018 Farm Bill clarified that hemp, and hemp-derived ingredients including CBD, are not Schedule I substances under the Controlled Substances Act. While this change brought much-needed clarity to the legal distinction between Cannabis that is considered non-controlled hemp and Cannabis that is illegal marijuana, hemp-derived CBD remains subject to regulation by several regulatory agencies at both the federal and state level.

FDA has taken the view CBD cannot be marketed as an ingredient in foods or dietary supplements under the exclusionary clauses of the statute that prohibit a substance from marketing as a food or dietary supplement if it was first studied as an investigational new drug. States such as Maine recently started enforcing the FDA position by taking market action against CBD-containing food and dietary supplements.

The uncertainty and complexity around the use of CBD in foods, dietary supplements, and cosmetics is not unique to the U.S. In the U.K., where a booming marketplace for CBD-containing products has also emerged, the Food Standards Authority (FSA) recently determined that CBD is a novel food ingredient and is advocating for removal of CBD-containing foods from the marketplace until CBD is approved as a novel food.

The ever-changing landscape for CBD underscores the need for companies to closely monitor regulatory developments and conduct appropriate diligence before commercialization of a product in their market.

Martin Hahn
Partner
Washington, D.C.

Richard Welfare
Partner
London

Samantha Dietle
Associate
Washington, D.C.

M&A and capital markets

Consumer M&A trends

Coming off of a strong performance for Consumer M&A in 2018, we can expect activity to remain robust throughout 2019. Many factors come into play for the M&A market generally, including relatively inexpensive financing and strategic and financial buyers having significant capital to deploy.

While economic and political forces may produce volatility in the M&A market (e.g., Brexit, trade wars, foreign ownership restrictions), there are a number of trends that will continue to drive consumer M&A activity in 2019, including advances in product innovation, significant and continuing changes in consumer preferences, and rapid growth in new and emerging markets.

Consumer demand for "better-for-you" and sustainable products will continue to be a focus for consumer companies looking to diversify product portfolios. Whether it is plant-based meat, chickpea pasta, or cauliflower pizza crusts in the food and beverage space, or sustainable or ethically sourced durable goods, consumers are demanding alternatives. This demand puts considerable pressure on companies that have more traditional product portfolios. While some companies will develop these products in-house, most companies will continue to look to M&A to expand their product portfolios.

Changing preferences do not always mean innovative products. Coca Cola's acquisition of Costa Coffee and PepsiCo's acquisition of SodaStream are just a couple examples of how the consumer industry is changing, with companies using acquisitions as a means to adapt to consumer preferences for "better-for-you" and sustainable products.

Consumer demand is heavily driven by demographics, and companies will also look to M&A to expand their geographical presence and meet demand in new and emerging markets. The rapidly growing e-commerce markets, for example, was likely a key consideration in Walmart's US$16 billion investment in Indian e-commerce giant Flipkart and its acquisition of on-demand delivery company Cornershop in Mexico and Chile. The rapid and continuing expansion of the middle class in China will also continue to push companies to find ways to deliver product to China despite trade and recent economic conditions. Heineken's 40 percent investment in China Resources Beer to gain better access to the world's largest beer market is just one example of this trend.

John Duke
Office Managing Partner
Philadelphia

Debtor-in-possession financing and the effects on administrative claims

The changing retail market is creating new concerns for suppliers whose customers file for bankruptcy. These changes affect a debtor-customer's ability to pay its financing obligations in addition to claims filed against them.

Many debtor-customers who file for bankruptcy enter into debtor-in-possession (DIP) financing. The debtor-customer takes out a loan which provides financing needed to operate in the ordinary course of business. Historically, DIP financing made suppliers comfortable supplying goods to debtor-customers; it ensured the supplier would get paid from the DIP lender as an administrative creditor. But, given recent bankruptcies where debtors are defaulting on their DIP loans and leaving insufficient cash to satisfy administrative claims, that comfort may be a thing of the past.

In the event of a default on a DIP loan, the lender will enforce its rights to the debtor's assets. This enforcement action acts like a foreclosure on the debtor's estate, placing the lender's debt ahead of any priority claims, including administrative claims. The recent Toys "R" Us and Sears Holdings Corporation bankruptcies suggest that a DIP loan may no longer guarantee a supplier will be paid in full for its services. Suppliers should be increasingly concerned about a debtor-customer's financial condition and potential for default.

In the Toys "R" Us, Inc. Chapter 11 bankruptcy, the debtors were in danger of defaulting on their DIP financing loans. They entered into a settlement with their lender in order to avoid liquidation and filed a Chapter 11 plan. Under the plan, administrative claimholders would get the first $20 million in proceeds from Toys "R" Us assets once the DIP financing is repaid. Many creditors objected to the plan. These creditors asserted that the plan cannot be confirmed without the Bankruptcy Code requirements of paying administrative claims in full. However, the plan was ultimately approved. Creditors who opted-in to the plan received claims from the $20 million pool while the claims outside the plan were wiped out.

While Toys "R" Us reached a settlement, defaulting on a DIP financing loan may become more common. Market trends towards online retail create more uncertainty for brick-and-mortar stores and less opportunity for the debtor-customer to turn around its business. The creditors committee in the Sears Holdings Corp. Chapter 11 bankruptcy case has similar concerns. In a filing on November 9, 2018, the committee stated that Sears' plan to stay in business during the bankruptcy is "wishful thinking" and the company moving forward is "gambling" with money.

In the coming year, supplier-creditors should concern themselves with the liquidity of their debtor-customers. Debtor-customers who enter into DIP financing run a real risk of defaulting on those obligations and more creditors may not receive their full amount in claims. This necessitates a closer review of the debtor-customer's financial situation before a supplier agrees to continue supplying goods and services.

Chris Donoho
Partner
New York

Sara Posner
Associate
New York


営業時間
16:00
～
翌5:00
SEGA
LABI
AKIHABARA
パソコン館
カメラ
メラ
千代田区内は
路上喫煙禁止です。

Global perspectives

Personalized shopping in Asia

Many businesses in the retail industry are cashing in on analytics. Analytics provide businesses with invaluable insight on shopper demographics, product needs, and marketing strategies.

Shoppers also benefit from personalized experiences and targeted promotions. Examples of commonly used analytics technologies by retailers include footfall and heat maps, video camera analytics, mobile phone triangulation, and WiFi tracking.

Analyzing shopper behavior is nothing new in the cyber world. E-tailers have always had the benefit of using cookies and web analytics tools to analyze shopper behavior. But when this kind of monitoring happens in brick-and-mortar stores, the issues become more complex. Quite a few shopping malls that trialed shopper-monitoring technologies suffered public backlash to varying extents.

Brick-and-mortar retailers, even if they operate established online stores, realize the potential and value of analytics technologies. More and more retailers are shifting towards this trend. However, if there are inadequate safeguards, such technologies may give rise to data privacy concerns about the use of consumer data without customer consent and customers being tracked in an identifiable way.

Privacy watchdogs in Asia and elsewhere are increasingly conscious of tracking technologies, with a few watchdogs having issued guidance on the issue. How can you ensure that you do not run afoul of privacy laws and relevant guidelines? How do you know if the privacy laws and regulations of a particular jurisdiction apply to you? What kinds of privacy concerns do you need to be aware of? What do you have to do to protect your customers' data, in the various markets in which you operate? We can help you implement compliant and customized shopping, no matter your location throughout the world.

Eugene Low
Partner
Hong Kong

PJ Kaur
Associate
Hong Kong

The e-consumer in South Africa

The rapid developments in technology have left many electronic spaces unregulated, with lack of or minimal protection to the consumer. However, 2019 could see some new regulatory developments aimed at affording the consumer a more favorable position, particularly in the electronic sphere.

The Protection of Personal Information Act, 2013 (POPIA), is South Africa's first piece of comprehensive data protection legislation. Although partially in effect, the substantive provisions of POPIA are yet to become fully effective. The final Protection of Personal Information Regulations were published on 14 December 2018, and their publication seems to indicate that the POPIA may well become effective during 2019.

One of the major changes that POPIA will bring about relates to direct marketing practices in South Africa. POPIA will override the direct marketing sections of the Electronic Communications and Transactions Act, 2002, which have applied hitherto, and will apply to all direct marketing that is conducted electronically. POPIA will require opt-out consent for existing customers and opt-in consent for new customers, thereby favoring the consumer.

Another new development relates to crypto assets. On 16 January 2019, the Intergovernmental FinTech Working Group and Crypto Assets Regulatory Working Group released a consultation paper on crypto assets. The paper specifically identified risks associated with consumer vulnerability as a result of sellers of crypto currencies not being regulated. The consultation paper recognizes, amongst other things, that there is no regulation or independent oversight in place to ensure that prices, fees and charges involved in crypto asset transactions, are set fairly and transparently. The paper goes on to advocate regulation to ensure consumer and investor protection in the crypto asset space, and proposes introducing regulation in phases, commencing with registration of traders and crypto asset products, and culminating in full regulation, over a period of two to three years.

Ian Jacobsberg
Partner
Johannesburg

Sourcing in Mexico

Coming off two years of uncertainty as to the future of NAFTA, companies manufacturing or sourcing goods in Mexico breathed a sigh of relief when an agreement was reached in November 2018. While executive-level agreement on the United States-Mexico-Canada Agreement (or USMCA, as NAFTA's successor is called), U.S.-China trade tensions, the likelihood of favorable new trade agreements between Mexico and other trading partners, and the continued rise in Chinese labor costs could all benefit Mexican manufacturers, 2019 promises challenges as well.

The USMCA has yet to be approved by the legislatures of the three member countries and faces significant hurdles in the US Congress. Questions about whether, and the extent to which, aluminum and steel tariffs imposed by the Trump administration in 2018 would be lifted were left open when the agreement was signed last November, and could complicate negotiations in the US Congress. Significant opposition to the USMCA also exists in Canada and Mexico where, among other things, the U.S. steel and aluminum tariffs and a decision by the United States to re-impose antidumping duties on imports of fresh tomatoes from Mexico remain serious irritants that could erode support for the USMCA. Industry groups are now acknowledging that negotiations could drag into 2020.

Setting aside U.S.-Mexico-Canada trade issues, there are likely to be significant changes in the Mexican tariff regime. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Mexico and Australia, Brunei, Canada, Chile, Japan, Malaysia, New Zealand, Peru, Singapore and Vietnam, which is expected to become operational in 2019-2020, will form the third most important trading bloc in the world, representing 495 million potential consumers. Amendments to Free Trade Agreement between Mexican and the European Union are expected to go into effect in 2020. Both treaties would provide preferential tariff treatment for member states.

In Mexico, the year began with labor strikes at factories in the north of the country, blockades of railways by the striking teachers' union and concerns about rising populism. Since taking office in December, the administration of President Andres Manuel Lopez Obrador has enacted a broad range of new regulations. High on the list of the new administration's legislative priorities is labor reform and the elimination of a widely utilized loophole in the law requiring Mexican companies to engage in profit sharing with employees. Under the current "outsourcing" law, it is common for companies to form parallel legal entities, one to house the commercial operations, and a second outsourcing entity to provide the workforce. The new labor reforms are expected to affect profitability of manufacturing operations and present opportunities to simplify corporate structures in Mexico.

Companies that manufacture or source in Mexico will have to stay attuned to trade developments and political and regulatory changes.

Ernesto Algaba
Partner
Mexico City

Hugo Hernandez-Ojeda
Partner
Mexico City

Craig Lewis
Partner
Washington, D.C.

Kelly Tubman Hardy
Partner
Baltimore and Washington, D.C.

About the Hogan Lovells Global Consumer team:

The global consumer sector group at Hogan Lovells understands the environment you are operating in — from food and beverages to fashion and luxury goods, retail, consumer electronics, and other consumer goods.

We know about the growing sophistication and the power of the consumer. Securing financing. Acquiring a new business or venturing into new territories. Strategic partnerships. Regulatory compliance. Efficient supply chains and distribution networks. Blockchain. Product design and labeling. Brand protection. Marketing and advertising. Social media. Digitalization. AI and wearable tech. E-commerce and cryptocurrencies. We've got you covered.

Our multilingual, multijurisdictional lawyers are where you need us – London, Paris, Dubai, Milan, New York, Amsterdam, Shanghai, Mexico, Indonesia and Vietnam, among other retail, fashion, financial, sourcing and distribution hubs. A single, industry-focused team combining global outlook with local knowledge.

We build the right team for each client and each matter in order to provide the most efficient counsel possible and achieve the outcomes you want. We recognize the importance of being a part of the solution. Our approach is hands-on and committed, placing value on long-term relationships. We don't just come in for the big transactions — we want to be part of your business lifecycle, your trusted adviser for all aspects of your business.

Areas of focus:

- Product compliance, including labeling, claims, and packaging
- Recalls and product liability
- Intellectual property and brand protection
- Advertising and media management
- E-commerce and social media
- Sustainability and supply chain management
- Tax and transfer pricing
- Promotions and pricing
- Privacy and cybersecurity
- Restructuring
- Antitrust/Competition
- Real estate
- Employment
- Financing, expansion, and mergers and acquisitions

For more information

Consumer Horizons is a snapshot of just some of the issues the industry will face in 2019. Our team is working on those and many other issues to provide clients around the globe with valuable and innovative solutions to their most complex challenges – present and future.

If you want to know more about our team, contact one of the global leads or explore some of our additional resources.

Additional Resources

The global consumer sector group at Hogan Lovells understands the environment you are operating in — from food and beverages to fashion and luxury goods, retail, consumer electronics, and other consumer goods.

www.hoganlovells.com/consumer

A Seat at the Table

A Seat at the Table provides insight and analysis on the recent developments in the food, beverage, and agriculture industry.

www.hlfoodlaw.com

Hot Topics Toolkit

The retail and fashion industries may be transforming at a rapid pace, but the Hogan Lovells Retail and Fashion Group will make sure you are on-trend. We have created a Hot Topics Toolkit so that your business can stay in the know, in real-time.

www.hoganlovells.com/en/publications/trending-topics-in-retail-and-fashion

Product Lifecycle Analysis (PLAN)

PLAN takes you through every stage of product development from the initial idea to after-market service. The tool defines each step of the process, what to expect, and how the Hogan Lovells team can help.

www.hoganlovellsplan.com

DSM Watch

The home of digital single market insight.

www.dsmwatch.com

HL Engage

HL Engage is where you can find detailed analysis of fintech, blockchain, and payments.

www.hlengage.com

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta *
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.
Zagreb*

Associated offices*

www.hoganlovells.com