

Advertising Law Alert: How Brands Can Identify and Mitigate AI-Related Risks in Advertising Campaigns

08.16.2023 By [Kyle-Beth Hilfer](#) and [John S. Miranda](#)



Brand owners rely on their advertising and media buying agencies for content creation, brand analysis, and marketing strategy. These agencies have been quick to take advantage of the Artificial Intelligence (“AI”) revolution. The utilization of AI can help agencies work more efficiently, and possibly even create higher quality deliverables for their brand clients.

At the same time, agency use of this novel technology may create significant legal and quality-control risks for the advertisers. Accordingly, brands will need to consider how their contracted agencies are using AI to create and implement campaigns and media purchases.

ANA Suggested Contract Provision

In June 2023, the Association of National Advertisers (“ANA”) released a new version of its [Master Media Buying Services Template Agreement](#). This latest template, the first update since 2018, includes a suggested provision that requires a media buying agency to disclose its use of AI when supplying media buying services and to obtain its brand client’s consent prior to such use.

The ANA’s annotations encourage advertisers to consider how this provision might be expanded, to adapt to advertisers’ policies. Additional limitations may be appropriate, depending on the brand. Some brands may not yet be ready to receive this new information from their media buying agencies. Brand owners will want to think through their own internal processes for receiving this information and how best to assess risks relating to use of AI-generated content.

Legal Issues from Use of AI

Brand owners also should consult with their legal counsel, to determine which legal concerns are most relevant, for AI-related deliverables governed by a particular agency

agreement. Some of these issues are applicable to advertisers' creative agencies as well as the media buying agencies.

Protection Issues. Brands need to be aware and informed that their agencies may be providing content that is not protected by intellectual property laws. While these are new legal questions and the landscape continues to evolve, the U.S. Copyright Office has issued guidance stating that a fully AI-generated work is not eligible for copyright protection. From a legal and practical standpoint, brand owners will need to consider that it may be more difficult to take down infringing content or otherwise enforce exclusive rights to such AI-generated content. The first step is for brands to determine what portion of agency deliverables has been created with AI--a difficult calculation.

Infringement Issues. AI-generated content is particularly risky due to the possibility that such content may infringe third-party intellectual property rights. AI content generation platforms function by crawling the web, indexing content and its related metadata, and analyzing such content for key parameters. Throughout this "training" process, AI content generation platforms are highly dependent on the datasets (including accompanying keyword metadata) upon which they are trained. Sometimes, these platforms train their models based on licensed catalogs, such as stock photo or music libraries that license content specifically for AI training purposes. Other AI platforms train on datasets comprised of content indiscriminately cribbed from the web, including content that consists of third-party intellectual property.

Use of AI-generated output could therefore lead to a third-party infringement claim. In fact, there are many pending intellectual property infringement lawsuits in federal and state courts litigating this issue. On a vicarious liability basis, these legal risks could implicate not only the agency that produced the content, but also the brand owner that commissioned the campaign.

In addition, when users submit keywords or other data to request AI-generated output, the application compares the inputted data with the dataset on which the platform was trained, to generate the requested content. If the agency provides the AI system with input that is third-party intellectual property, there is a possibility that the output could also infringe that third-party's rights. Certainly, the brand can and should exercise contractual control around the agency's creation of input, to mitigate this risk.

Terms of Use Issues. Many AI platforms have terms of use that prohibit commercial use of their generated content. In addition, the AI platforms are constantly adapting. Many of these update their terms of use nearly constantly. Agencies or their employees may not focus on these limitations, instead focusing only on creative output or enhanced media buying campaigns. Accordingly, they could be creating content that violates the AI platform terms of use when the advertiser ultimately makes commercial use of AI-generated output. Brands can manage around this risk by understanding what their agencies are doing, requiring the agencies to be aware of terms of use and updates, and even controlling whether the AI-generated output should be part of final deliverables.

Reputational Issues Associated with AI

If the use of AI in a campaign is known to the general public, the campaign may be perceived as less professional than a traditional advertising campaign. To mitigate this risk, brand owners may consider a modified confidentiality clause in agency agreements, specifically focused on

preventing agencies from disclosing use of AI in campaigns to anyone except for the brand owner.

Advertisers should also consider the gender, racial, and other biases inherent in AI systems (based on their training models). Are the campaigns generated from AI output contemporary in mood and message? Consider the reputational backlash that may come from a campaign that is out of touch with today's sensibilities. Understanding the origins of any campaign will help an advertiser to be sensitive to these issues.

Conclusions

The ANA's suggested contract provision is intended to illuminate for both advertisers and their agencies the risk of legal liability, as well as the business (and reputation-related) risks associated with the use of AI.

Whether or not the clause makes it into a client/agency contract, agencies could have the opportunity to take a proactive approach in keeping clients informed of AI-generated content used in campaigns. Some brand owners may be uncomfortable with the prominent use of AI applications in campaigns, given the novel and potentially unpredictable nature of the incipient and ever-changing technology.

Advertisers should consider including the ANA clause, or some derivative of it, to enhance the ability to make educated decisions about risk. AI provisions in agency agreements can also help ensure that AI-related cost savings are passed on to the brand owners. This transparency is particularly useful and welcome in the case of media buying agencies based on historical industry issues related to agency pricing.

Proactive brand owners will also want to consider more detailed amendments to their agency contracts, to guard against liability for intellectual property infringement resulting from agency use of AI, such as specific representations, warranties, indemnities, and confidentiality provisions.

Inclusion of AI-generated content in advertising campaigns and media buying has arrived at the doorstep of national brand owners. Given the weight of the legal and business issues involved and the speed with which the content creation industry is changing, advertisers should confer with their legal advisors and prepare to protect themselves. The ANA's suggested clause will arm advertisers with knowledge of their contracted agency's practices. Undoubtedly, advertisers' acquiring such knowledge will open the door for more robust conversations with their agencies. Although advertisers and agencies may have contracted at arms-length, ultimately, they are partners together in the AI revolution and need to work cooperatively to protect the brand.

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Kyle-Beth Hilfer has over thirty years' experience providing legal counsel to advertising, marketing, promotions, intellectual property, and new media clients. Leveraging her deep understanding of branding, Kyle-Beth ensures regulatory compliance for her clients' advertising and marketing campaigns.

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