

KATTISON AVENUE

Advertising Law Insights From Madison Avenue and Beyond

Fall 2024 | Issue 13

Letter From the Editor



As the seasons change and autumn settles in, we are excited to welcome you to the Fall 2024 edition of *Kattison Avenue*. Inside this issue, you will find updates on recent court decisions regarding paid search advertising and related trademark infringement claims, and the latest directive targeting deceptive practices linked to subscriptions and memberships.

First, Litigation Partner and Deputy General Counsel **David Halberstadter** delves into the dispute between 1-800 Contacts, Inc. and JAND, Inc., which operates as Warby Parker, involving Warby Parker's use of keyword advertising tied to 1-800's trademarks. In his article, David explains why the Second Circuit affirmed the dismissal of 1-800's trademark infringement claims against Warby Parker and shares key takeaways from the decision for retailers and other advertisers that may find themselves on either side of similar litigation.

Next, Intellectual Property Associate **Cynthia Martens** discusses the Federal Trade Commission's new "click-to-cancel" rule

aimed at negative option programs to improve clarity during the subscription process and make it as easy for consumers to cancel their memberships as it is for them to enroll.

Finally, we revisit the topic of paid search advertising in Intellectual Property Associate **Matthew Hartzler's** article about both the Second Circuit's decision rejecting 1-800's trademark

infringement claims, as well as the Ninth Circuit's decision rejecting similar claims brought by a law firm against its competitor. Matthew explains that while neither decision is precedent-breaking, these decisions may make it more difficult for brands to prevail against use of their trademarks in paid search advertising.

Please look for members of our team at the ANA Masters of Advertising Law Conference in Scottsdale, Arizona, from November 11-13. As always, we are here to answer your advertising law questions, so please don't hesitate to reach out

Jessica G. Kraver



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Warby Parker Prevails Against 1-800 Contacts in Keyword Advertising Dispute



By David Halberstadter

In the [September 2022 issue of *Kattison Avenue*](#), we reported on a decision in the Southern District of New York dismissing claims by 1-800 Contacts, Inc. (1-800) against JAND, Inc., which does business as Warby Parker. The dispute involved Warby Parker’s use of keyword advertising tied to 1-800’s trademarks, which causes internet search results for 1-800 to display paid advertisements for Warby Parker’s website at or near the top of the results page. 1-800 had claimed that this amounted to trademark infringement, but the district court disagreed, granting Warby Parker’s motion for judgment on the pleadings. Unsurprisingly, 1-800 appealed to the Second Circuit.

On October 8, 2024, the Second Circuit affirmed the district court’s ruling. This article will explain what 1-800 had alleged – and, significantly, what it did not allege; the key facts and evidence; and the basis for the Second Circuit’s affirmance. Finally, we will provide a few important takeaways from the decision for retailers and other advertisers who might find themselves on either side of a similar dispute.

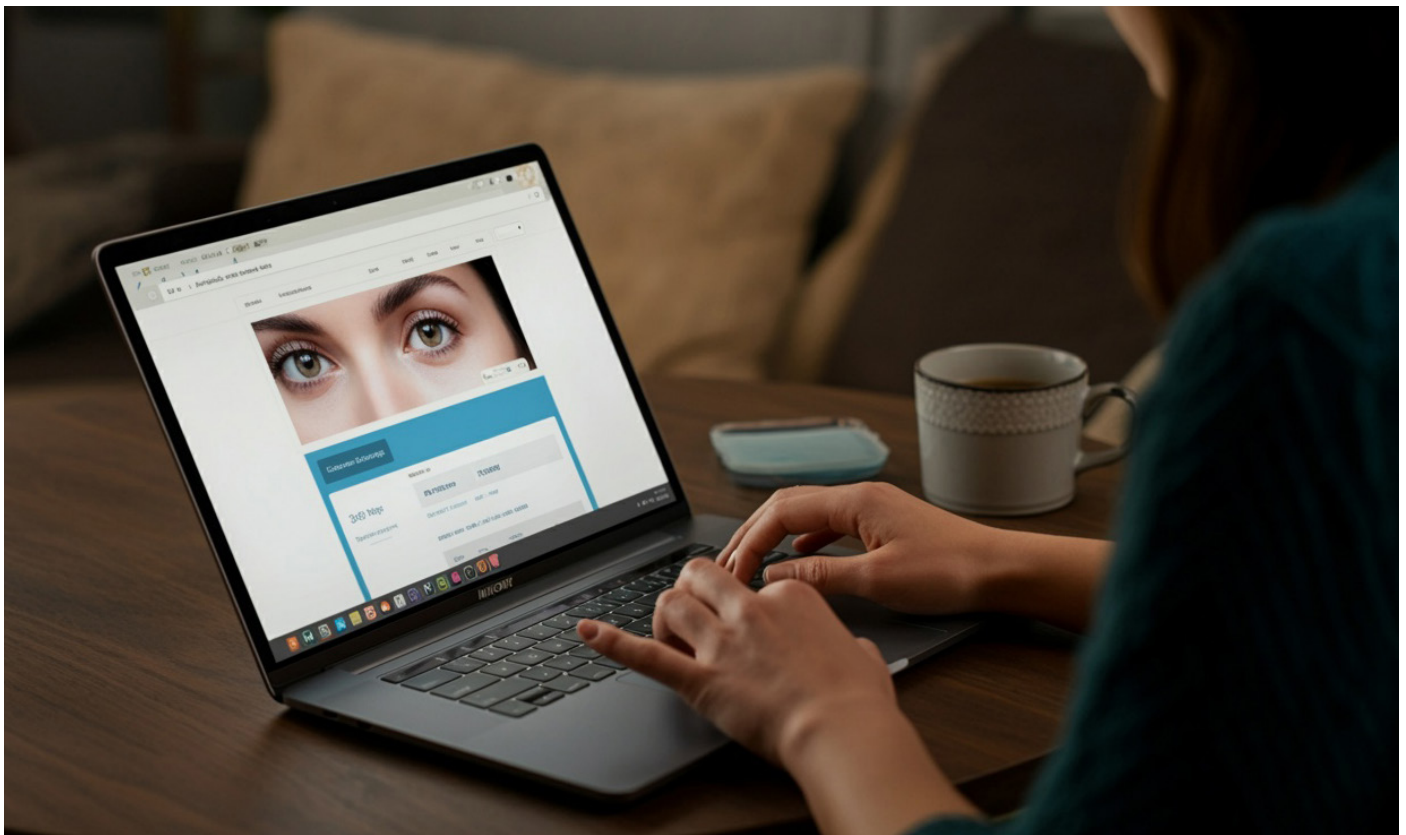
The Litigants and Their Businesses

1-800-Contacts is a retailer of contact lenses that consumers access solely through its website, 1800contacts.com. Many consumers navigate to the website by searching for 1-800’s registered trademarks on search engines, including Google, and finding 1-800’s web page in the search results.

Warby Parker was originally an online retailer of eyeglasses only. In 2013, it opened brick-and-mortar stores. Then, around November 2019, Warby Parker entered the online contact lens marketplace by selling contact lenses on its website, warbyparker.com. As a result, Warby Parker and 1-800 became competitors in the online sale of contact lenses. Warby Parker uses the trade name and trademark “Warby Parker.”

Warby Parker’s Use of 1-800 Keywords

This dispute revolved around Warby Parker’s purchase at auction of keywords, including variations on 1-800’s trademarks, in a



▶ type of internet marketing called search (or keyword) advertising. When online shoppers search for “1-800 Contacts” or variations of its trademarks by typing those terms into a search engine, they receive two principal types of search results: (1) organic or natural results, and (2) sponsored or paid results. Both results provide links to web pages.

The organic results include the web pages that the search engine’s algorithm deems to be most relevant to the shopper’s search. The paid results are based on which advertisers paid the most to have their advertisements shown in response to the search term. At the time of the lawsuit, paid results typically included a designation labeling the result as an “Ad,” while currently, such results are often labeled as “Sponsored.”

Google Ads (formerly Google AdWords) is Google’s platform through which advertisers can bid to place advertisements in Google’s search results. Using Google Ads, an advertiser can “strategically place advertisements” in a search term’s results at or near the top of the results page by outbidding the competition for that term or keyword. Further, most search engines, including Google’s, do not limit which keywords an advertiser can bid on. Thus, an advertiser can bid on a competitor’s brand or trademarks so that the advertiser’s ad appears in response to a consumer’s search for the competitor’s marks.

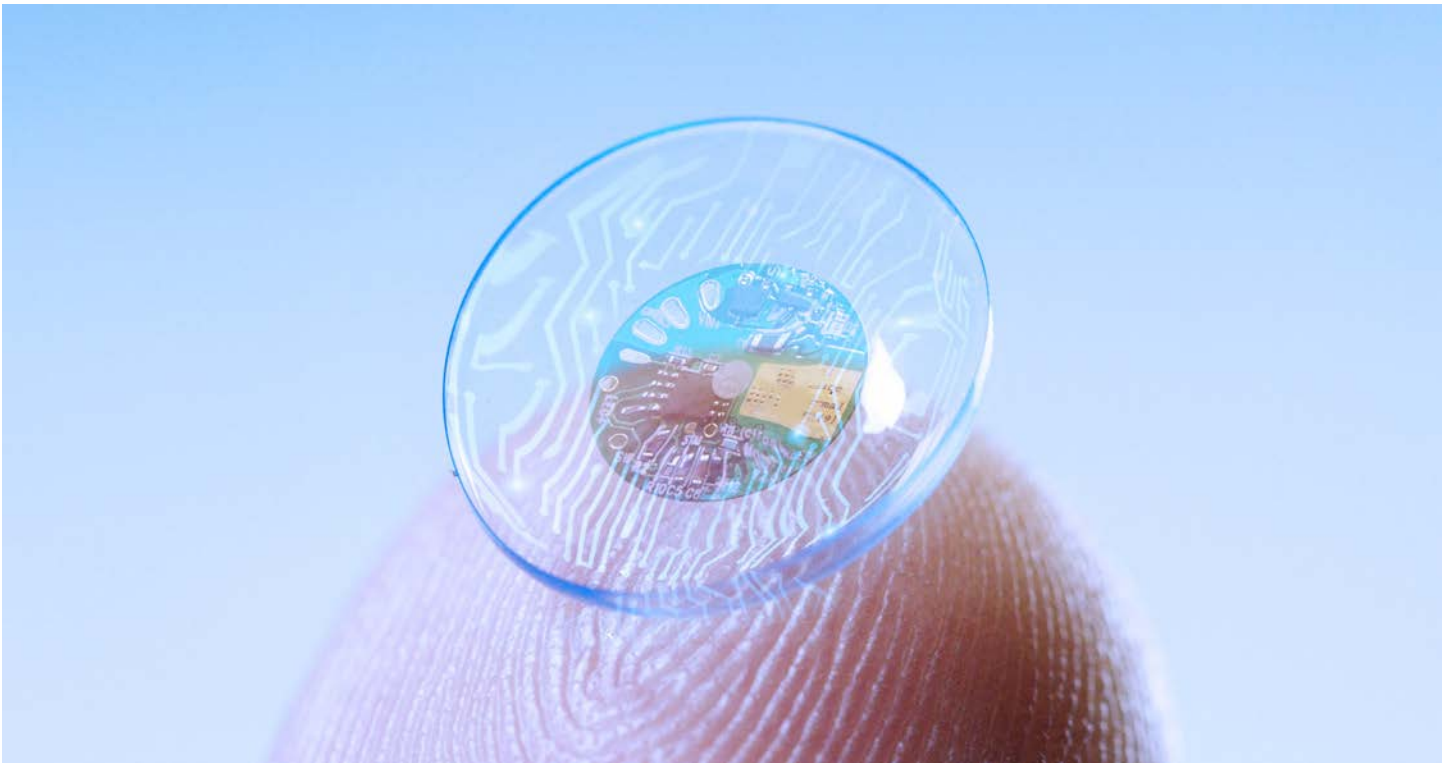
Warby Parker successfully bid on and purchased several keywords tied to 1-800’s trademarks; as a result, its paid advertisements appeared early (i.e., high up on the list) in the search results of any consumer who conducted a search using a similar variation of 1-800’s marks.

1-800 Claims Trademark Infringement

1-800 alleged in its complaint that Warby Parker used 1-800’s trademarks and related variations in keyword search advertisements in violation of the federal Lanham Act. According to 1-800, Warby Parker engaged in a plan to purchase 1-800’s trademarks as keywords in online advertising campaigns and then designed misleading paid advertisements, so that customers searching for 1-800’s website by typing “1-800-Contacts” into a web browser would be diverted to Warby Parker’s website instead.

According to 1-800, the “three-step” plan that Warby Parker implemented involved: (1) purchasing 1-800’s marks as keywords; (2) displaying “source-ambiguous” ads to consumers who were searching for 1-800’s website; and (3) directing such consumers to a Warby Parker “landing page” that mimicked 1-800’s homepage so that consumers would believe they had gotten to 1-800’s official website or a website affiliated with ▶





▶ 1-800. Accordingly, the three principal issues raised by 1-800's claims were:

- (i) whether Warby Parker's acquisition of keywords relating to 1-800's marks was itself wrongful;
- (ii) whether Warby Parker's paid ads, which would show up in a consumer's search results when the consumer searched for one of 1-800's marks, were in any respect ambiguous or misleading as to their source; and
- (iii) whether the Warby Parker web page that a consumer would arrive at if he or she clicked on the Warby Parker ad – i.e., the landing page – mimicked 1-800's official website, leading consumers to mistakenly believe they were on 1-800's website instead of Warby Parker's.

The District Court Rejects 1-800's Claims

In June 2022, the district court granted Warby Parker's motion for judgment on the pleadings and dismissed 1-800's complaint. Taking the allegations of 1-800's complaint as true, the court acknowledged that 1-800's marks were strong but found the strength of its marks irrelevant under the circumstances presented.

The court noted that in many trademark infringement cases, the defendant is using a mark that looks or sounds similar to the plaintiff's mark; for example, when a drug store chain offers a "house brand" for a product that is packaged and labeled in a way that copies a brand name's packaging. In this instance, the

court rejected 1-800's argument that "the marks used by the parties are identical" because Warby Parker was using 1-800's marks only as keywords to trigger search result advertisements. Rather, the court found, the appropriate comparison was between 1-800's marks and Warby Parker's marks, which were entirely different.

Further, the court observed that when a consumer's search results are displayed, Warby Parker's paid search result is prominently labeled as an "Ad" and displays Warby Parker's own website address. Turning to 1-800's allegations that Warby Parker acted in bad faith, the court concluded that there was some evidence of bad faith by virtue of Warby Parker providing links to different contact lens landing pages depending on whether a consumer searched using variations of 1-800's marks or using variations of Warby Parker's marks. The latter landing page matched the overall aesthetics of the rest of Warby Parker's website while, according to the complaint, the former landing page was specifically designed to mimic the aesthetics of the 1-800 website. That said, the court also pointed out significant differences between 1-800's website and the Warby Parker landing page at issue, including the fact that Warby Parker's name is clearly displayed on that page.

So Does The Second Circuit

Upon its review, the Second Circuit also rejected 1-800's claims:

We now reiterate that the mere act of purchasing a search engine keyword that is a competitor's trademark does not alone, in the context of keyword search advertising, constitute



▶ trademark infringement. Upon examination of the remaining allegedly infringing components of [Warby Parker's] search advertising campaign – i.e., the resulting advertisement itself and landing web page linked within, neither of which displays 1-800-Contact's trademarks – we conclude that [1-800] failed to plausibly allege any likelihood of consumer confusion under this Circuit's test in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961).

First, the appellate court left no room for doubt that there was nothing wrongful about Warby Parker's successful bidding on keywords associated with 1-800's marks: "As an initial matter, Warby Parker's practice of bidding on competitors' trademarks during search advertising auctions is a permissible and standard industry practice. This well-known marketing strategy – standing alone – cannot support a claim of trademark infringement absent additional use of 1-800's Marks."

Next, the Second Circuit considered 1-800's assertion that the paid advertisements that would appear in a consumer's search results were "source-ambiguous." The court considered it critical that Warby Parker did not use 1-800's Marks in the paid advertisement displayed on the search results page or in the domain name of the URL linked in the paid advertisement (www.warbyparker.com). In fact, the Second Circuit repeatedly noted throughout its decision that 1-800 did not claim that Warby Parker actually used its trademarks *other than* by purchasing them as keywords in the online search engine auctions. Additionally, "1-800's own pleadings show that the word 'Ad' is displayed directly next to Warby Parker's domain name at the top of its paid search ad in bold; the linked URL contains only the www.warbyparker.com domain name."

The appellate court then turned to the assertion that Warby Parker's "landing page" mimicked 1-800's official website, thereby leading consumers to mistakenly believe they were on 1-800's website instead of Warby Parker's. To the extent that 1-800 alleged that Warby Parker committed trademark infringement by copying the "look and feel" of 1-800's website, the appellate court observed, "That is really a trade dress claim. Such a claim would require an additional showing by 1-800 that its website design is 'distinctive.' Here, 1-800 did not plead or argue that the 'look and feel' of its website is a protectable mark. Rather, 1-800's complaint is focused on Warby Parker's use of its 'distinctive "1 800 CONTACTS" trademark and variations thereof."

In fact, the Second Circuit went out of its way to point out how significant it was that 1-800 had not alleged infringement of its distinctive trade dress: "We are not holding that a plaintiff can never allege some sort of violation of the Lanham Act

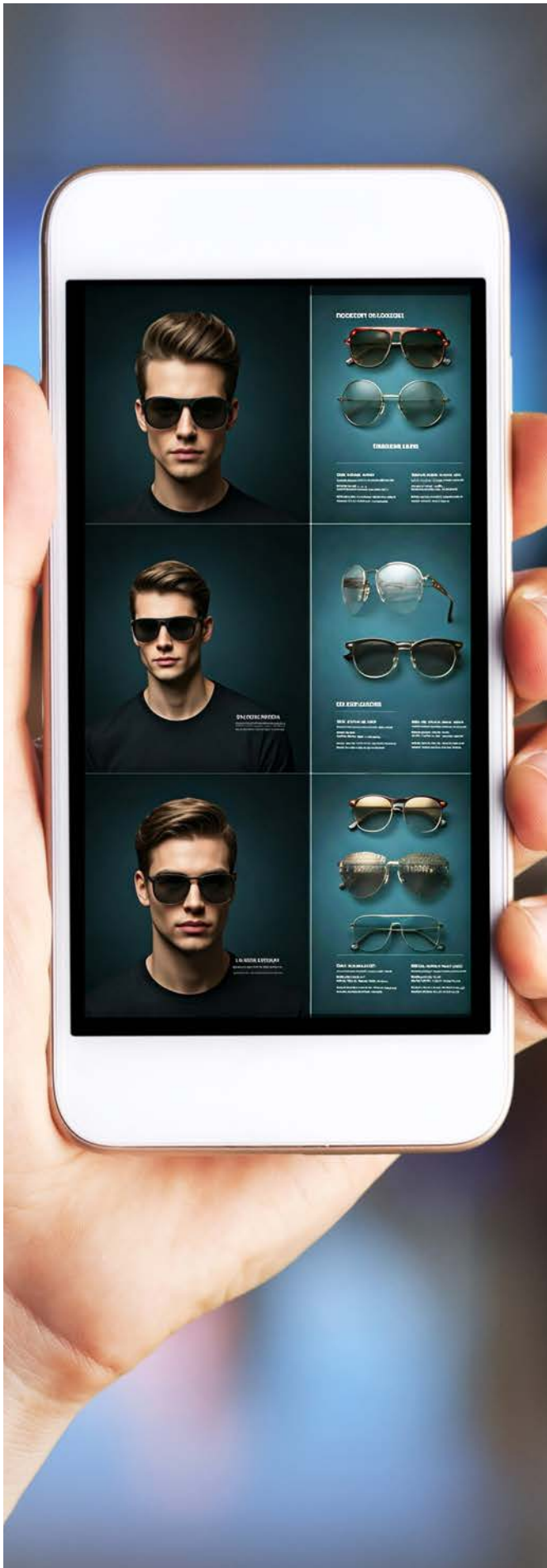
where the defendant's only use of the plaintiff's mark is in the keyword purchase. For example, if Warby Parker's landing web page mimicked 1-800's website such that it was a mirror image of 1-800's site but stopped just short of using 1-800's brand name and related marks, 1-800 could have a potential trade dress infringement claim, and our analysis would likely weigh the similarity-of-the-marks factor much more heavily in 1-800's favor." But ultimately, the appellate court concluded that 1-800's complaint failed to plausibly allege that consumers were likely to be confused by any portion of Warby Parker's search advertising plan:

Here, the pleadings failed to plausibly allege that Warby Parker used 1-800's Marks anywhere during the search advertising process outside of its purchase at the initial, permissible keyword auction. Notably, Warby Parker did not use 1-800's Marks in the paid advertisement displayed on the search results page, in the domain name of the URL linked in the paid advertisement (www.warbyparker.com), or on the landing web page displayed to consumers who clicked on the URL in the paid advertisement. Nor did 1-800 plausibly allege that Warby Parker used any other protectable marks in these remaining components of the search advertising campaign ... Thus, the dissimilarity of the marks factor is dispositive in this case; 1-800 has not adequately alleged likelihood of consumer confusion.

What Retailers and Advertisers Can Learn From This Decision

Prior to this litigation, 1-800 had employed a consistent strategy to deal with competitors seeking to "piggyback" on 1-800's popularity through keyword advertising. It regularly filed trademark infringement lawsuits against competitors who purchased keywords related to 1-800-Contacts, and then entered into settlement agreements in which the competitors agreed not to bid on 1-800's name or variations of its trademarks in future keyword auctions. The Federal Trade Commission considered these settlement terms a method of unfair competition under the Federal Trade Commission Act, but the Second Circuit disagreed in *1-800-Contacts, Inc. v. Federal Trade Commission*, 1 F.4th 102 (2d Cir. 2021).

However, the Second Circuit's decision in this case is likely to put a dent in that strategy, given its conclusion that the mere act of purchasing a search engine keyword that is a competitor's trademark does not alone, in the context of keyword search advertising, constitute trademark infringement. This decision



could embolden other competitors to ramp up their bidding on keywords related to 1-800's marks and to refuse to settle should 1-800 sue them.

More broadly, a retailer who intends to bid on search engine keywords that derive from a competitor's trademarks might consider that the safest course is to make *no other use* of the competitor's marks, either in the resulting paid advertisement or on the retailer's own website (especially on a unique landing page tied to the advertisement). Second, the retailer should also make sure that what pops up in a consumer's search results from the keywords is not itself a misleading paid advertisement. The paid search results should not be in any respect ambiguous as to their source.

Third, the retailer should ensure that the page of its own website to which a consumer will be directed (i.e., the landing page) does not resemble or mimic the competitor's website in any way. It should employ a different color scheme, different arrangements and presentation of the products or services offered for purchase. Ideally, these pages should prominently display the retailer's own marks and trade dress (including any distinctive color scheme, fonts and other design elements).

Fourth, it goes without saying that to the greatest extent possible, the retailer's own marks should not be similar to its competitor's marks. This was key to the Second Circuit's decision – because Warby Parker's marks didn't look anything like 1-800's marks, the court found dispositively that there was no likelihood of confusion.

Finally, for the retailer or advertiser who seeks to preserve the strength of its marks and trade dress and to protect against consumer confusion resulting from keyword advertising, ongoing vigilance is the watchword: It should be aware of which competitors have successfully bid on keywords related to its own marks; it should monitor how the search results from internet searches using variations on its own mark are being displayed, including whether the word "Ad," "Sponsored" or some similar designation is prominently displayed next to any competitor's paid search results.

The retailer should also assess whether the paid search results are in any respect "source-ambiguous," such that a consumer might think the search results will direct them to the retailer's official website. Additionally, the vigilant retailer will review the landing page for its competitor's paid search result and any other relevant pages of the competitor's website to determine whether any of the content or overall look and feel of the web pages might confuse consumers into thinking that the site they landed on is the retailer's official site or in some way affiliated to or sponsored by the retailer.

Cancel Culture

The FTC's new rule makes it easier for consumers to cancel subscriptions and memberships they no longer want.



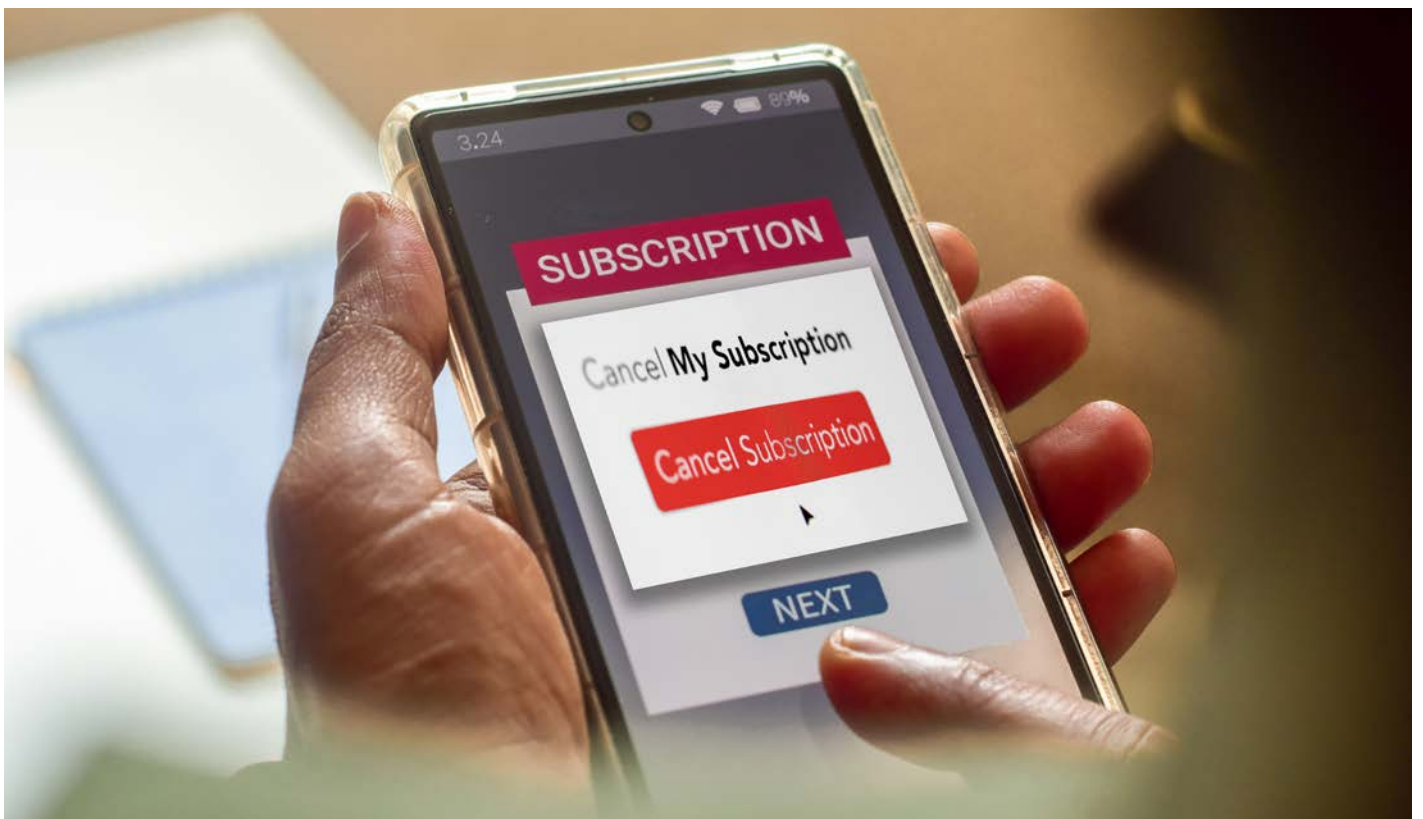
By [Cynthia Martens](#)

The Federal Trade Commission (FTC) introduced a “click-to-cancel” rule on October 16, amending the 1973 [Negative Option Rule](#) to target unfair or deceptive practices linked to “subscriptions, memberships, and other recurring-payment programs in an increasingly digital economy where it’s easier than ever for businesses to sign up consumers for their products and services.” The FTC said it had received an average of 70 complaints daily this year about recurring subscription and other negative option practices. The new rule will go into effect 180 days after it is published in the Federal Register.

“Too often, businesses make people jump through endless hoops just to cancel a subscription,” [said FTC Chair Lina M. Khan](#). “The FTC’s rule will end these tricks and traps, saving Americans time and money. Nobody should be stuck paying for a service they no longer want.”

Consumer Watchdog Director at Public Interest Research Group (PIRG) Teresa Murray lauded the FTC rule [in a statement](#). “Subscriptions and memberships have often been like a visit to the Hotel California: ‘You can check out any time you like, but you can never leave.’ Now, you’ll be able to leave,” she said.

The updated “click-to-cancel” rule will apply to almost all negative option programs in any media, prohibiting sellers from misrepresenting material facts in connection with negative option marketing. Further, sellers will be required to clearly and conspicuously disclose key terms connected to a negative option prior to obtaining consumers’ billing information, and to receive consumers’ express, informed consent before billing them. Going forward, sellers must make it as easy to cancel a membership or subscription as it is to enroll in the first place by providing “a simple mechanism to cancel the negative option feature and immediately halt charges.”



No Confusion From Keywords: Federal Courts of Appeals Help Defendants Facing Trademark Suits on Paid Search



By [Matthew Hartzler](#)

In October 2024, both the US Courts of Appeals for the Second and Ninth Circuits issued published decisions that rejected trademark infringement claims based on advertising in keyword searches. While not precedent-breaking, these two decisions create a greater possibility that brands engaged in paid search advertising will be able to ward off either a disgruntled, soon-to-be plaintiff or one that has already filed.

At issue in both claims was paid search “conquesting,” the practice of an advertiser bidding on its competitors’ trademarks as keywords. This allows an advertiser to insert itself into a customer’s search for a competitor — akin to ambush marketing on a micro, search-by-search scale. The competitors are rarely happy to see another brand crashing the search engine optimization (SEO) party.

In the Second Circuit case, which David Halberstadter’s article in this issue discusses in further detail, the first link that appeared from a customer’s Google search of “1800-Contacts” was an ad from a Warby Parker URL: “15% Off First Contacts Order – 90 Daily Contacts for Only \$55.”¹ It was a similar story in the Ninth Circuit: searches for the law firm Lerner & Rowe first yielded advertising for the Accident Law Group.² In both, the competitors sued, claiming that consumer confusion was likely.

The trend from the courts has been that purchasing a competitor’s name or mark as a keyword is not likely to cause confusion, and this is especially so when the resulting ads do not use the competitor’s trademarks. In both of these cases, the advertisers followed this rule, and the competitor’s marks were not used. Yet, despite following this “rule,” both advertisers ended up in litigation. This is at least in part because there is not an easy way for the courts to adjudicate these cases without stepping into the multi-factor likelihood of confusion tests. These consist of weighing eight slightly different iterations of factors under the Second Circuit’s Polaroid test or the Ninth Circuit’s *Sleekcraft* test.³ Additionally, these can be fact-intensive rulings.

Both cases offer boons to advertisers using this paid search tactic. In addition to contemporary, binding and precedential decisions to cite in response letters or briefs, these decisions provide hints of early exit strategies for brands.



First, the Second Circuit case proves that these claims are capable of being dismissed at the pleading stage. While the suit between the law firms in the Ninth Circuit progressed to discovery and summary judgment (with statistic and expert survey evidence being crucial in the discussion of whether actual confusion existed), the 1-800 Contacts dispute with Warby Parker was dismissed based on a motion for judgment on the pleadings. This makes it an outlier.

The bulk of the key decisions on paid search and trademark infringement spawn from review at summary judgment.⁴ Some are even Rule 50 motions for judgment as a matter of law. Here, the Second Circuit’s willingness to evaluate the messy likelihood of confusion factors — even while taking the facts pleaded as true — demonstrates that defendants facing meritless suits should consider a motion to dismiss or for judgment on the pleadings: a tactic rarely taken by those defending themselves against Lanham Act claims.⁵

Accordingly, advertisers subject to similar unfair competition claims related to paid search should consider the costs associated with discovery against the risks of facing an early loss at the pleading stage.

Second, the concurrence in the Ninth Circuit case offers a framework to reconsider whether Lanham Act claims brought on the basis of search keywords are even viable. In that concurring

opinion, Judge Roopali Desai recognizes the difficulty of the likelihood of confusion analysis and offers to rethink whether claims like these should be possible to bring:

[G]iven the predominance of the internet in our lives, this type of advertising has become commonplace. Scrolling through sponsored ads at the top of a results page is often the rule – not the exception – when using a search engine. The familiarity of sponsored ads to those navigating internet platforms makes the likelihood of confusion inquiry difficult, if not impossible, to satisfy.⁶

Prior Ninth Circuit precedent has ruled that keyword bidding on search platforms constitutes a “use in commerce,” subjecting that conduct to potential liability under the Lanham Act.⁷ Judge Desai writes, “I am not convinced that we got it right or that our holding withstands the test of time and recent advancements in technology.”⁸

She asks for reconsideration of this issue *en banc* and distinguishes other cases on internet search, explaining, “Consumers likely understand that, even when they search for a trademarked term, the sponsored results may not be associated with that trademark.”⁹ If using a competitor’s trademark during the keyword bidding process is not a “use in commerce,” then the Lanham Act would not apply, barring a plaintiff from bringing these kinds of claims.

Unless the Ninth Circuit is able and willing to take up Judge Desai’s offer, advertisers may have to wait quite a while until courts follow her approach of not treating paid keywords as a “use in commerce” under the Lanham Act. But her opinion suggests that the tides are shifting away from considering this kind of conduct as potential trademark infringement.

- (1) *1-800 Contacts, Inc. v. JAND, Inc.*, --- F.4th ---, No. 22-1634, 2024 WL 4439136, at *3 (2d Cir. Oct. 8, 2024)
- (2) *Lerner & Rowe PC v. Brown Engstrand & Shely LLC*, --- F.4th ---, No. 23-16060, 2024 WL 4537915 (9th Cir. Oct. 22, 2024).
- (3) *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979).
- (4) See, e.g., *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015) (summary judgment); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1234 (10th Cir. 2013) (summary judgment); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012) (summary judgment); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1147 (9th Cir. 2011) (summary judgment); but see *Allied Interstate LLC v. Kimmel & Silverman P.C.*, No. 12 CIV. 4204 LTS SN, 2013 WL 4245987, at *1 (S.D.N.Y. Aug. 12, 2013) (granting motion for judgment on the pleadings).
- (5) <https://katten.com/motions-to-dismiss-in-meritless-trademark-infringement-claims-when-to-roll-the-dice>
- (6) *Lerner & Rowe*, 2024 WL 4537915, at *12.
- (7) *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137, 1144–45 (9th Cir. 2011)
- (8) *Lerner & Rowe*, 2024 WL 4537915, at *9.
- (9) *Id.* at *12.



Recognitions

Katten Attorneys Recognized as Best Lawyers® and Best Lawyers: Ones to Watch® Award Recipients

The 2025 editions of *The Best Lawyers in America*® and the *Best Lawyers: Ones to Watch*® in America named 180 Katten attorneys based on their peers' identification in a wide range of practice areas.

Among the recognized Katten attorneys, The Best Lawyers in America® honored the following from our Advertising, Marketing and Promotions practice: Partner **Kristin Achterhof** (Chicago, Litigation – Intellectual Property, Trademark Law), Partner and National Co-Chair of Katten's Trademark/Copyright/Privacy Group **Karen Artz Ash** (New York, Trademark Law), Partner and Deputy General Counsel **David Halberstadter** (Los Angeles, Entertainment Law - Motion Pictures and Television, Litigation - Intellectual Property, Media Law, Trademark Law), Partner and Co-Chair of Katten's Trademark/Copyright/Privacy Group **Floyd Mandell** (Chicago, Litigation – Intellectual Property, Trademark Law), Associate **Alexandra Caleca** (New York, Intellectual Property Law) and Associate **Julia Mazur** (Chicago, Litigation – Intellectual Property).



Managing Intellectual Property Recognizes 2024 Katten IP Stars

Managing Intellectual Property released its 2024 rankings of IP Stars, honoring multiple Intellectual Property attorneys as "Trade Mark Stars," including **Kristin Achterhof**, **Karen Artz Ash**, **Floyd Mandell**, Intellectual Property Partner **Bret Danow** and Chairman Emeritus **Roger Furey**. IP STARS also designated Katten with IP Star status overall for Trademark and Trademark Prosecution.

News to Know

Supervising FINfluencers' Social Media Spin: Don't Believe Everything You View on Your Phone

This article by Intellectual Property Partner and Advertising, Marketing and Promotions Chair **Christopher Cole**, Intellectual Property Partner **Michael Justus**, Financial Markets and Funds Partner and Broker-Dealer Regulation Co-Chair **Susan Light** and Financial Markets and Funds Associate **Nicholas Gervasi** discusses a new breed of influencers that has emerged – FINfluencers, or financial influencers. While FINfluencers can make general financial literacy more accessible and reach an audience not traditionally targeted, the authors warn that broker-dealers need to consider the implications of these promotional communications.


[Read the article.](#)

Exploring Best Practices for the Use of Artificial Intelligence in Advertising

This article by Intellectual Property Associate **Cynthia Martens** examines important legal issues that fashion companies should consider when exploring how to leverage artificial intelligence (AI) in their marketing campaigns. Though AI has many potential uses in advertising, including text generation for ad creation or AI-generated "influencers," it is not free from legal and regulatory restrictions – for example, how companies use AI is governed by the Federal Trade Commission, which has the authority to monitor and address advertisements that are untruthful, misleading or deceptive.

[Read the article.](#)

State Law Requiring PFAS Disclosure Leads to Class Action Lawsuit

This article by **Christopher Cole** delves into a Maine law that required (at least until recently amended) consumer products companies to disclose the presence of "intentionally added" per- and perfluoroalkyl substances (PFAS) in products sold within the state, which has led to the filing of a consumer class action lawsuit against the disclosing company. This lawsuit may be a harbinger of future litigation aimed at companies who must make similar disclosures in order to comply with a growing number of state PFAS disclosure mandates, such as in New York, 

Save the Date:

46th Annual ANA Masters of Advertising Law Conference

November 11-13, 2024



Mark your calendars for the nation's premier marketing law conference, where more than 100 industry leaders from major brands, top law firms and regulators will present updates on the ever-changing advertising law environment, including Katten Intellectual Property Partners **Kristin Achterhof** and **Jessica Kraver**, who will speak together on the "Basics of IP Issues in Advertising, Including Copyright & Trademark" panel on November 11. Our Advertising, Marketing and Promotions Chair and Intellectual Property Partner **Christopher Cole** will also be in attendance.

- ▶ Washington, Vermont, Connecticut, Colorado, California, Maine, Maryland, Minnesota, Rhode Island and Hawaii.

[Read the article.](#)

ABA Weighs in on Generative AI Use in Legal Practice

In this article, **Michael Justus** and Financial Markets and Regulation Associate **Alex Kim** discuss Formal Opinion 512, issued by the American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility, which attempts to provide guidance on the ethical considerations for lawyers using generative artificial intelligence (GAI) tools. While the opinion addresses important issues, it may raise as many questions as it answers regarding the use of GAI in legal practice.

[Read the article.](#)

After Loper Bright, Should the FTC's Views on Advertising Interpretation Still Receive Deference?

In this article, **Christopher Cole** discusses a 2015 case in which the Federal Trade Commission (FTC) prevailed against POM Wonderful, makers of pomegranate juice.

The case involved the FTC's assertions that POM had inadequate substantiation to support advertising claims the FTC alleged POM was making, such as that drinking the juice daily had been shown in clinical studies to treat, prevent or reduce the risk of heart disease, prostate cancer, and erectile dysfunction. The DC Circuit noted that there had been a dispute between the FTC and POM regarding the precise meaning of the claims at issue but that it ultimately deferred to the FTC's own expertise in advertising interpretation. Christopher notes that the issue of whether to defer to the FTC on advertising interpretation is likely to recur and can determine the course of an investigative process.

[Read the article.](#)

FTC Finalizes Rule Banning Fake Reviews

The FTC has finalized its [new rule banning fake consumer reviews](#), which became effective in October. This article by **Christopher Cole** describes the primary components of the rule, including prohibitions on selling or purchasing fake consumer reviews or testimonials, buying positive or negative consumer reviews, certain insiders creating consumer reviews or testimonials without clearly disclosing their relationships, creating a company-controlled review website that falsely purports to provide independent reviews, certain review suppression practices, and selling or purchasing fake indicators of social media influence.

[Read the article.](#)

Events

PFAS-or-Treat: Are PFAS Giving You Nightmares? How to Manage PFAS Risk to Sleep Better at Night

On October 31, Katten will present the "PFAS-or-Treat: Are PFAS Giving You Nightmares? How to Manage PFAS Risk to Sleep Better at Night" webinar at 12:00 p.m. (ET). Speakers including **Christopher Cole** and Commercial Litigation Partner **Nancy Rich** will present a session dedicated to understanding and managing per- and polyfluoroalkyl substances (PFAS) risks and liabilities. This informative event will help demystify the complexities surrounding PFAS regulations and current litigation regarding PFAS at sites and in products and the implications for businesses.

[Learn more about the event.](#)

Katten's Advertising, Marketing & Promotions Practice

Katten represents advertisers, advertising and promotions agencies, technology developers, content producers, and media and entertainment companies, in reimagining the connection to consumers. From clearance, privacy and regulatory obligations to smooth product launches and brand integration, we address concerns in a variety of areas, including: ad, marketing and promotional programs; agency-client relationships; branded entertainment; contests and sweepstakes; internet distribution; licensing and vendor agreements; litigation (comparative and false advertising, First Amendment issues, Lanham Act, unfair competition laws, etc.); privacy and data security; talent and production agreements; user-generated content; and sponsorships.



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