



Podcast Transcript

AD Nauseam: AI – We Had to Discuss it Eventually – Part 2

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD, I'm Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. And today, Amy and Daniel are joined by Sarah La Voi, a partner in BakerHostetler's Chicago office who provides counsel to clients on forming strategic advertising and brand partnerships and creating in-house systems to manage clearance risk. On today's episode of AD Nauseam, which is the second of a two-part series, Amy, Daniel, and Sarah talk about AI and why it is such a broad, pressing concern.

With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Sarah.

Mudge: Welcome back to AD Nauseam, everyone. When we last met, the wonderful Nichole Sterling joined us to provide a helpful overall framework for us to better understand why we keep hearing about AI, but also why it is so transformative, and really what regulators are talking about. And today, because you could never really talk about AI too much, we have another special guest, Sarah La Voi, a partner in our Chicago office, who joined us after having spent lots of time in-house working for both brands and ad agencies. And she has lots of thoughts and tips to share about generative AI from the perspective of ad agencies and brands, and how this stuff is being used in advertising.

La Voi: Thanks so much, Amy. I'm honored to be back visiting you both on AD Nauseam. I'm actually a little shocked to be invited back, even more shocked that somehow this amazing podcast has not received any awards yet for being such an awesome podcast.

Kaufman: And, Sarah, that is specifically why we invited you back. Thank you so much.

Mudge: Anytime.

Kaufman: There is a reason you're my favorite partner. Or second favorite, I should say.

Mudge: Whoa, whoa, whoa. Enough of that.

Kaufman: Okay. So, before we start talking about the substance, let's talk a little bit about some of the really fun ways that we're starting to see AI enter the advertising universe. I know just the other day, I was reading an article about AI being used to create video from text inputs, and I've been using text-to-image generators a lot. I can't wait to give text-to-video a try and see how that flies. But we're also starting to see a lot more ads incorporating elements of AI into what they're doing. So, one thing I love is a beloved hamburger chain started having a sort of make your own Whopper on one of the websites. So, it is an AI inspired way to create your own Whopper. You do your toppings, add things, and it generates an image. I've got an image on my screen of the Whopper I created, and I can then enter a contest to win \$1,000,000.

Mudge: Whoa, whoa, whoa. Do you win \$1,000,000, and if you win, they also make you your Whopper that you invented? Or is that just all a beautiful picture?

Kaufman: I need to check our terms. I don't know that I would want to eat the hamburger that I created because I actually put ham on top of the hamburger, and I don't know if that would taste good.

La Voi: That sounds delicious.

Mudge: Okay, Whoppers are delicious. Yeah, and I would not be surprised if Burger King had not done that at some point, because they flexed that Whopper a lot.

La Voi: I saw that contest too. I really liked the way it was done for all sorts of reasons. For the AI, but also, from a contest perspective, but that is for another podcast.

So, Amy and I actually got to watch the Super Bowl together. It was fantastic. We made everyone be quiet during the commercials. Lots of fun. The one I really liked was Field of Fake by Bodyarmor. Did you guys get to see that?

Mudge: Mm-hmm.

Kaufman: It was a really good one.

La Voi: What I liked about it, it had AI at the center of it, that was the theme, but it poked fun at AI quality, and the distinction between what is real and what is fake. That one definitely stood out.

Mudge: Yes, Sarah, I did like watching the Super Bowl with you. We were at our partner retreat. I bought us both t-shirts that said, we're only here for the ads, which did get lots of applause. But I really liked another Super Bowl ad, the Avocados from Mexico. I learned that 58% of people who watch the Super Bowl make or eat guacamole during the Big Game. But the commercial, so, you could do a couple of different things. You could either take a picture of ingredients that you had in your house and then there would be an AI generated recipe that you could incorporate those ingredients into a type of guacamole. You could take pictures of your chicken wings, and they would send you a chicken wings guacamole recipe. Or if you've made your guacamole, you could take a picture and text that in, and the AI generator would figure out, reverse engineer what the recipe was, and give you that back. I just thought that was very, very cool. And who doesn't love guacamole?

So, we know that AI is currently and will likely be even more spawning enormous leaps in creativity. And I think what is really cool is, a couple of years ago we saw the Metaverse being dabbled in ads, but it was almost more referring to it. I mean, this is truly using AI to create the advertising, and we love that, we really do. But there is also a lot to think about and be concerned about as an in-house counsel. And in-house counsel is certainly talking about this a whole lot, trying to figure out what the best practices are in terms of getting their arms around this. And these, the issues, they go from copyright infringement to quality issues, reputational issues. Sarah, you wrote a amazing blog the other day I want to

suggest to folks. It is on our ADventures in Law blog about AI Amnesty Day, and you really talked about a few finer points that I'd like you to flesh out for us here.

La Voi: Sure. Absolutely. Yes, it was entitled Happy AI Amnesty Week. Is that a real holiday? No, it is not.

Kaufman: It should be.

Mudge: It will be. It will. I think we're in AI year. I'm not sure about amnesty, though.

La Voi: Well, and that is exactly the point. The blog definitely gave some attorneys hives, and I've heard from quite a few people behind the scenes about it. The gist of it is this. Let's be real. People are using generative AI tools, whether they are sanctioned or unsanctioned. I wanted to start a dialogue and put forth the idea that in-house counsel should consider the right way to figure out what tools their teams are using. Sure, they've got AI policies that say here is what we can and can't do, but if you really want to flesh it out and manage that risk operationally in a very commercial and sensible way, it might make sense to set up a forum and ask people what they're doing, and I think the only way to do that is in a, what? A corporate safe space saying, let us know, come to me, tell me what you're using, and let's figure out how to manage it.

Kaufman: I thought it was a great blog, Sarah. I also got to say, I love when I get feedback from something I wrote or something I, or one of our podcasts, and people questioning, criticizing, chiming in. I think it is great having that feedback from some of the content we get to put out there.

Mudge: Oh, Daniel. You and your craving validation.

Kaufman: I am. It is like, I write this stuff. Is anyone reading it? Come on. I need to know.

Mudge: They are.

La Voi: I read it all. It is amazing.

Kaufman: Oh, you're, oh, don't tempt me. I'm going to quiz you at some point.

Mudge: Yeah, Sarah, you're just, now you're just sucking up to keep you, you're going to be a permanent guest, alright?

Kaufman: Well, only two chairs as hosts here, Sarah, come on.

Okay, so, Sarah, we know agencies are using AI, and we know in-house marketing folks are also using AI. Should they be partnering on this? How should we be thinking about risk? And when I think about risk in this area, I assume one of the risk elements could be, what happens if, for example, you're creating AI generated content? That could raise, certainly, FTC issues. AI certainly could be used to create deceptive product demos, for example.

Mudge: Oh, well, people do that all by themselves on their own. I can't even imagine unleashing AI on a product demo. Whoa.

Kaufman: And that is why we have Sarah here.

La Voi: Yeah, I mean, the opportunity and the risk, I guess, is limitless. One thing I would like to encourage brands to do is to have that conversation with their agencies about the use of GenAI. And I think that conversation should be just that. The first time you address it shouldn't be in the exchange of paper where you're talking about indemnity, right? I think it is a good idea to have a meeting when there is a project that comes up where GenAI tools will be used for those deliverables, and discuss what is rational, what is reasonable, what the limitations are. Again, just more dialogue so that when you get to the contract stage, everybody is clear.

Mudge: You know, I think this is ground rules. Certainly, around a product demo. And I think one of the pieces is, the same rules are going to apply. If a human created it, if a generative AI created it, the demo is going to have to match how the product actually works. So, in some ways we do know how to tackle things like that. But Sarah, I know you said a dialogue before the contracts, but I do want to dive into the contracts. And I know it might not be on the most sexiest thing we talk about, but they're a really critical role here. What is and is not allowed? Who is and is not responsible? And, Sarah, we know you've been dealing with agency brand contracting for years. So, what should some of these deals consider and have incorporated in their contracts related to generative AI issues?

La Voi: Well, one practical tip, if you're just starting out, it is okay to do a beta. Maybe a one-off SOW that addresses a deliverable that has generative AI output as part of that deliverable, right? So, it is okay. You don't have to jump in with a full contract. I think you could do a separate statement of work that has different terms. But I can walk through, if it is helpful, some of the big terms to think about and address in a contract.

Mudge: Oh, go for it. Do it.

Kaufman: You got it.

La Voi: Alright, get ready. I know you guys don't love contracts, but just come with me on this journey.

Mudge: No, we don't, we love them. It is just we don't write them. We rely on people like you. If I wrote a contract, it would be half a page and look like a Valley Girl wrote it. It is not happening. But these things are really important. They form the foundation of the relationship, so please share. Share with us, Sarah.

La Voi: Your clients would love a half page contract. Everybody, do not expect it. We can try. It is just almost impossible.

Mudge: Oh, my contract won't protect you.

La Voi: Right, right. So, one thing to talk about in terms of between an agency and a brand where the output will involve generative AI. One is what is that tool? What is the tool that the agency is using? The brand should ask that question, vet it, and ask to see that license that the agency has, because it will tell you if there is any protections that passed down. The answer is probably no. But there is a different risk assessment based on the tools. So, one, vet the tool. Two, you have to think about and address both intellectual property in terms of infringement and in terms of ownership.

So again, this is where there is going to be less protection all around in terms of infringement risk. That said, if possible, put any output through your standard review process, so if this involves copywriting or headlines, for example, you put that through the standard processes that you would have in place for trademark clearance, and that really reduces your risk. That gets a little more difficult when you are generating images or videos, but again, a human needs to review it. Daniel made that point earlier and it is a great risk management, just common-sense tool.

Mudge: Oh, whoa, whoa, whoa. Amy made that point earlier. Don't be giving Daniel any extra credit.

Kaufman: Yeah, I was wondering, that sounded really sharp and perceptive. I'm like, I don't think that is something I said.

La Voi: Good job, Amy. We'll have the AI fix that one. Okay, so we covered, you know, IP infringement, the ownership piece. You'll also see some contracts where it says, hey, this can't be owned because it is the output of a GenAI tool. And sure, in the U.S., the Copyright Office has told us that is the case in part. However, there may be something that is ownable and therefore conveyable in that delta between the raw output and what work the agency, or the brand, has done on top of that, right? There is always going to be some design work and some elements that are added to the raw output of a generative AI tool. So, I like to call that the delta. And if there is anything there in the delta that you can either own, protect, convey, do that. Don't leave it on the table.

Another important piece to address is the services. So, when you're entering into a contract for anything related to advertising and marketing, the agency in this example, or another vendor, is providing services. There is no reason that the agency couldn't indemnify for its participation, its services, that it is offering a brand. For example, those design services we just talked about that you lay on top of the generative AI output. They could also be, and should be, responsible for prompt engineering. Have you guys, does that ring a bell? Prompt engineering.

Kaufman: What do you mean by that, Sarah?

La Voi: Well, I know that you like to work with the AI tools, so it really is what you put into the tool to get the output. And so, there is just some basic common-sense guidelines...

Kaufman: Oh, like the prompts.

La Voi: And this is my, yeah, the prompts. Yeah, the prompt engineering. So, in terms of prompt engineering, I predict that there will be good guidelines soon that are attached to contracts saying do not use our confidential information in the prompts, do not use others' trademarks, things like that. Because if you were to say to a GenAI tool, give me a model that looks like J Lo, you're going to get a model that looks like J Lo, and that wasn't necessarily a very responsible thing to do.

So, that is the big tips. I think you can really manage your risk there, and not have a contract that just says, nope, nobody is responsible for anything because GenAI was involved here.

Kaufman: And speaking of J Lo, I know this is a little bit off topic, but I did see that new hour-long, \$20 million thing on Amazon, and I'm still trying to digest it.

Mudge: You actually watched that?

Kaufman: I did. I don't know why, and I couldn't stop watching it, because it was like...

Mudge: I felt like I got all I needed to get in the preview, but alright.

Kaufman: Yeah. It wasn't one of my finest hours, I'll put it that way. Okay, so I want to talk about the exciting stuff. Like what excites you most about the uses for AI in this space? What problems do you see it solving or new doors that it is going to open for creativity?

La Voi: I think one of the big problems is that people are afraid of it, and in a commercial world, the brands and the agencies need to talk and figure out how to use it. So, I would say that fear is something that I'm worried about, because I want to see brands and agencies continuing to partner really well in a commercially smooth way where they can just get past these betas and start doing very cool things. Yeah, I mean, what excites me about it? All of it. I somehow have a lot of hope. I'm an optimist when it comes to AI. Where do you guys think you fall?

Mudge: Oh, completely, absolutely, no questions asked, terrified.

Kaufman: I'm fascinated. I love seeing these tools being used creatively and seeing where we end up. Well, not that we're going to end up anywhere. There is just the continued evolution I find to be very exciting.

Mudge: I'm just waiting, the AI is just going to make stuff up. Some of the stuff is going to slip through the cracks. I think for claim substantiation, that is where it is cool, it is fun, it is nifty. Sure, it might cut a few jobs, which isn't great, but I really don't know how we're going to truly layer on responsible claim substantiation when a machine is doing your ads.

Kaufman: It will keep us in business, Amy.

Mudge: Oh, you think? I don't know, though, they'll get the AI lawyers coming on.

Kaufman: Oh, no.

Mudge: Well, I want to go back to contracts. So, we have our contracts in place. That is a great start. But that is not the end. So, what else should brands be doing to make sure that their AI house is in order, at least now?

La Voi: Well, a lot of companies have a cross-functional AI panel and I think that is a great idea.

Mudge: Whoa, whoa. What is that? A panel sounds good. Who is on it?

La Voi: That is exactly the issue, right? Who is on it? I feel like legal absolutely needs to be on it. They need a seat at the table. But marketing legal specifically, not just IP legal. Sometimes that is the same person, but I think it is very important to get on that panel. And then I think it is really important to do a lot of listening on that panel, not saying no out of the gates. As my grandma would say, just have big ears, because you can align to the business objectives, and really people will open up more if you listen and try to think about ways to match those goals and to mitigate the risk practically. But, yeah, cross functional AI panels is important, and I think that legal, with good stakeholders from the marketing side of the house, should definitely have a seat at that table.

Mudge: Well, who should be running this? Is it the brands? Is it the agencies? Is it a partnership? Are people separate on this?

La Voi: Yeah, that is a cool point, Amy. I hadn't even thought about it, because usually it is within companies, and they have their own AI panel. But I do think that they should have seats on that, at least guest seats, for their agencies and other key stakeholders.

Kaufman: Well, Sarah, we love having guest seats on our podcast and we love having you here as a guest as well. Starting to come to a close here, but do you have any final take-away tips for our audiences as they venture into this very new, very exciting and, from the Amy perspective, very terrifying advertising frontier?

La Voi: Absolutely. I think ask your agency what tools they're using. That way you can do your own due diligence and assess the risk up front and see if you might want to make a change, or adjust things based on that. So, vet the tool. Also, when you're looking at your contracts, even if you have to give up indemnity in certain places, maintain it where it is fair and it is reasonable. Also, own the delta on that output. Clear the delta on that output. And put everything that comes out of AI through a human review process. And then one final technical tip I would say is to consider having the agency maintain prompt log so that you can audit that, and together see if you need to evolve or change best practices to reduce risk in terms of prompt engineering.

Kaufman: Well, thank you so much, Sarah, for being our guest, and thank you to everybody for joining us here on AD Nauseam.

Brave: Thank you, Amy, Daniel, and Sarah. If you have questions for Amy, Daniel or Sarah, their contact information is in the show notes. For more information on the latest developments at AD law, visit our ADventures in Law blog at www.adventures-in-law.com, and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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