Podcast Transcript

They Thought it Wouldn't Last – A One Year AD Nauseam Anniversary

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Rubenking: 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 Randall Rubenking, 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. On today's episode of AD Nauseam, Amy and Daniel talk about the one-year anniversary of their podcast and some notable changes in that time. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Thanks for joining us for a very special episode of AD Nauseam. Of course, they're all very special. At least we think so. But it is special because we have hit an anniversary. It is the one-year mark of AD Nauseam. And they said it couldn't be done, but here we are.

Kaufman: It is a celebration of one year. Of course, we got the traditional gift, is paper. And there are stacks of it right now in my office. So, it really feels like a party and a celebration here, Amy.

Mudge: Okay. Daniel, that, no, that is not a celebration. I feel like we should have some champagne, some red carpets, some general extra fabulousness recognizing our achievement, although some might characterize it as a stubborn commitment to this podcast. But I feel like what they did last week at the Met Gala, we deserve a little bit of that here.

Kaufman: Always the dreamer, Amy, but the Met Gala was fabulous. I really had a great time watching and looking at the pictures. So, look, the people who struck me as particularly amazing and I am a firm believer, you got to stick with the theme. It can't just be fabulous. It has to be fabulous and with the theme. Mindy Kaling, I thought was underrated, but she was amazing looking.

Mudge: I completely agree. It was super flowy and gorgeous and look, I lost hours of my life on Tuesday night because I love the Met Ball. I will say when I saw Andy Cohen with Sarah Jessica Parker on the carpet, I thought, that could be me and Daniel in my wildest fantasies and dreams. I think my favorite dress, I really like that yellow, puffy, big black floral dress that Gigi Hadid had. That just made me go, ohhh. But I know you were, it is not about just what the fashion is. I always like the avant-garde things, and there was that dress this year made completely of sand, and then there was that…

Kaufman: That was really cool, and I love the video of them having to pick her up to bring her up the stairs. It was…

Mudge: Picking her up. Yeah, well, it is not. Fashion is not just painful. It is unwalkable. And then the same, the living terrarium dress. Those were amazing, but alright.

Kaufman: I'm sure our invite is coming any day, Amy. We just, it got lost in the mail.

Mudge: Any day, D. I'm waiting for it. Alright. So you distracted me a little bit, but I got to get back to looking over our past year. And we always try to identify new things to talk about, but it might be nice to walk over if there's key developments we missed or if we haven't gotten to yet or if there are developments that we talked about that seemed like a big deal at the time but then fizzled out. Let's just do a little retrospective.

Kaufman: Yeah. Look, probably the biggest issue the last year has been AI. Not surprisingly, it is all everybody is talking about. And it also, bringing us back to the Met Gala, the day of the Met Gala there were these amazing AI images that were coming out, particularly of Lady Gaga and Katy Perry. And they were going viral, and people were thinking they were legit. But of course, they weren't. They were amazing images. They were really cool, but look, AI is everywhere. It is at the Met Gala now. It is all the FTC is talking about. We did a couple of great episodes here with Nichole Sterling, with Sarah La Voi. We're doing a lot of work here on a wide range of AI issues, and we're going to, the issue is just exploding. And it is certainly not going away.

Mudge: Yeah, it feels like that is one we'll probably have some future podcasts on. I'd love it if we had a podcast where we had answers instead of identifying issues. But this is certainly an emerging space. I guess I would say if I had a contender for one of our most notable topics for this year besides AI, it would be dark patterns. And I'd wager that half or more of the cases that came out of the FTC this year talk about dark patterns to some degree. We had a session talking with, maybe a couple, talking about dark patterns. I felt like at the time we're like, okay, we did that, done that. But it really turns out that most of these cases, at least that have an online component, all have a dark pattern element to them. And not every company is settling, so I think we're going to see movement here.

Kaufman: Yeah. Look, there is one really large significant case that is in litigation. It is alleging ROSCA violations in terms of signing up and ability to cancel. And it is a really interesting case. The company moved to dismiss, and a lot of the briefing is focused on specifically the dark pattern allegations with the company emphasizing that dark patterns isn't a violation. And they're raising a whole range of process issues, notice issues and it is interesting because the FTC is perhaps backing off in that litigation a little bit on the dark pattern focus. And they're emphasizing, no, this is a case about ROSCA and potential violations there and in opposing the motion to dismiss, the FTC is really de-emphasizing the aspects of the complaint that focus on dark patterns.

Mudge: Yeah. Look, I, you got to wonder if the agency has overemphasized the dark patterns element and needs to refocus on the core allegations. Look, my general take is the dark patterns are really a gloss that provides some more information regarding how the challenge conduct was allegedly deceptive, made it difficult to cancel. The motion to dismiss in that case had been fully briefed for months now, amicus were filed.

I think we need a decision in that area to provide some really good clarity on the ROSCA issue but more particularly the dark patterns issue. Things like confirm shaming, alright. Things like, do we need neutrality of options. I mean, these are fairly, not fairly. These are really out-there concepts that I really think the courts are going to have to weigh in on, and I think they will this year. So, we'll certainly be talking about that.

Kaufman: Yeah, but let's be clear. This dark patterns concept even separate from subscriptions and purchasing is not going away. I mean, just a few weeks ago, we heard about those, all the headlines, Congress announced a new federal privacy legislative proposal. And in that proposal, they specifically define dark patterns. And they also prohibit the use of dark patterns in getting consent. So, I'm hearing that nothing is going to happen with that bill. But when you have legislation starting to incorporate the phrase dark patterns, defining it and using it as a legal construct, that is a big deal, but also negative options of course deserves its own discussion. The FTC's rulemaking is moving along pretty rapidly, and we continue to see a steady stream of FTC investigations and cases that are focusing on just a wide range of subscription issues. There always seems to be something new going on in the subscription space, and it is probably worth an update since we did our last podcast with our partner, Linda Goldstein.

Mudge: Well, and there is going to be more to talk about. There is another ROSCA case that's heading into litigation. I think it was just last month, the FTC announced a complaint against, is Doxo, D-O-X-O. It is a bill payment company, and there's new allegations including subscription or ROSCA allegations, as well as allegations regarding junk fees.

Kaufman: No. And junk fees, of course, are also moving ahead hot and heavy. We had, I believe our favorite guest or the fan favorite guest, Jack Ferry, our associate, talked with us about emerging issues with junk fees, and a lot has continued to happen. The FTC rule is still pending, but the states are moving forward, and California just put out some updated guidance on its rule. So, it is an emerging space and one we will certainly need to invite Jack back soon to tell us all about the new news and to perhaps hear about what crazy bands he is listening to these days that you and I have never heard of.

Mudge: It is always a good day to have Jack back. You know, I think that we, it's important to say he is fan favorite. We don't play favorites amongst our guests. But yeah, he did, although he did do a little age shaming of us, Daniel. I don't know if we're going to forget that that quickly, but I know he in particular is watching the space for a lot of clients and the junk fee issue affects a lot of clients differently.

Kaufman: And hopefully, he's listening to this podcast, too. Isn't that one of his job requirements as an associate at the firm?

Mudge: Well, next topic I think warrants some highlighting is Made in U.S.A., and we had a lot of fun and talked about the history of Made in U.S.A. which I love. It goes back to one of our favorite decades, the nineties, the standards, the newish rule and also a lot of NAD cases with domestic origin claims. But I think we're seeing really a monetary sea change in Made in U.S.A. cases at the FTC with now a fairly steady stream of seven-digit supplements. And where there's seven, probably eventually, they'll be eight, maybe even higher. The current record stands at $3.17 million. But that is real money for a Made in U.S.A. settlement.

Kaufman: Okay, Amy. I know I'm going to annoy you, but I always refer to it as MUSA. Ever since my years at the FTC, it is always called MUSA. So, I'm going to call it MUSA. But it's always been a really challenging area.

Mudge: Nobody calls it MUSA, okay? But that, maybe it is like fetch. If you can make that happen, Daniel. I am on board but alright. MUSA.

Kaufman: Okay. Well, look. MUSA has always been really challenging when it comes to money. How do you determine the appropriate redress amount if you're talking about redress when maybe the product is not even being sold at a premium? And at the FTC this was always a recurring issue, but now when you've got the rule covering unqualified MUSA claims, the FTC can now get penalties. And once you've got penalties on the table, a lot of that hand-wringing over what is the appropriate amount of redress is no longer as big a concern.

Mudge: Yeah. Now, I mean, your MUSA. It's got a ring to it. Your MUSA rule or the MUSA rule only covers labels and that is broadly defined, but that is different than advertising. And certainly, it only covers unqualified pure Made in U.S.A. claims. But this is an election year, and sometimes Made in U.S.A. always seems to be a bigger issue when we got the people on the campaign trail and that is all hot and heavy.

Kaufman: Yeah. Look, one thing I think is worth flagging, and I've seen some confusion there, is MUSA Made in the U.S.A. advertising claims are really different than country of origin statements. It is real important that legal closely monitor any Made in the U.S.A. claims being made. And any process changes on how products are made may require some reanalysis of the ability to make certain MUSA claims.

Mudge: Alright. We clearly love this, and we'd have to do a new podcast on this when there is something new and interesting to say. But one other thing to add to tie a couple of different podcasts together. We have the MUSA rule. We also have the FTC's Imposter rule, which we did a session on, or part of a session on, which currently addresses government and corporation impersonation. And the two can certainly be related if we've got flags and government icons that are also part of the label or part of a Made in U.S.A. claim.

Kaufman: No, absolutely. And when it comes to rules, we should probably also update the discussion we had about online reviews and focus a little bit on the FTC rulemaking on the subject, which is also progressing at a pretty rapid pace.

Mudge: Yeah. I mean, much like Made in U.S.A. as you flagged Daniel, it is hard to determine monetary harm in a review case. I mean, how do you know if people actually relied on reviews or weren't able to rely on suppressed reviews for making a purchase decision? So, it is, that to me is also not too surprising that getting a rule finalized in that area to take that issue of consumer redress and whether it is appropriate off the table is a high priority for the agency to move into that penalty land. And a lot has happened. The proposed rule was issued and then the FTC's had informal hearings about the rule.

Kaufman: So, I'm going to go all FTC nerd on you. I know that may surprise you, Amy, but the hearings issue is really interesting. So, the bottom line is the FTC wants to avoid what is called material issues of fact in the rulemaking process. To the extent that there are material issues of fact, those informal hearings expand and take on a life of their own and make the process much more complicated. So, there's been a lot of back and forth. And it is not being publicized regarding the rule and some of the other rules and whether there are material issues of fact.

Mudge: I love that you're a nerd. You're all different kinds of nerd, not just an FTC nerd as we know from your many references in the past year in our podcast to science fiction. But I think we should explore in a future edition, get a little bit geeky into rulemaking because you've got a lot of in-depth knowledge in there that I think is definitely worth exploring.

Kaufman: And if we're getting geeky, we got to bring Randy Shaheen back also, just to be clear.

Mudge: Amen. Yes, 100 percent. Now back to that review, the review rule. I know that the initial rule proposed a prohibition on repurposing or reusing reviews. What the FTC calls review hijacking, when you take reviews that are written for one product and then use them as purported consumer sentiments for another product. Sometimes when there is a line extension or a product reformulation when arguably those original reviews don't squarely apply to that newer product. And of course, there was a case we talked about in one of our podcasts with Nature's Bounty about that idea, but this is one where the FTC got a lot of comments on that raised all sorts of issues of fact about that specific review hijacking provision. And it was interesting, the FTC dropped that provision whether then move ahead and allow a broader inquiry. To me, that really signals that there is a broader big goal of getting that rule finalized even if it is going to be a little bit whittled down from what the agency initially proposed.

Kaufman: I totally agree. But I have to say, I really find the issue of reviews to be fascinating and the important and valuable role they play in commerce. And Amy, are you a review follower or a review writer? I know you have a lot of opinions about things, but do you share them with the world?

Mudge: I, deeply, I have deep feelings, deep thoughts, or superficial thoughts about just about everything. But I almost never write reviews. I need, it's gotten me thinking. I have so many opinions and if I don't share them. Who does write these reviews? To me I need to be really, really mad about something or really, really happy before I put pen to paper, you know? But I certainly read them. There is no question that they play an important part of my purchases.

Kaufman: So, I never post reviews either, but I did one recently. I actually, I'm moving to a new place. I'm getting the place painted, and I really am bad at picking colors. And I worked with this color consultant who I worked with a number of years ago because I've made huge mistakes in my life. And she did a great job the first time, and she did a great job this time. So, I actually made, went forward and I posted a review online. Because look, she is a small business. I want to help her succeed, and it seemed like the right thing to do. So maybe I need to do this a little more often.

Mudge: Okay. Just as long as you didn't get a coupon for that because then you've got to disclose it. But if you're motivated by your altruism and being happy with the painting, I love that for you.

But I guess there's others, so, there is some other topics that we covered this year that have actually not turned into lots of FTC enforcement activity, but they have continued to play out at the NAD. And that, the NAD has continued to come out with cases in the sustainability area, which is one of the earlier podcasts that we did when we first launched. Some of their cases focus on use of humane seals and certificates, with net zero promises. The FTC is still plugging away in its green guides updates, but there's not been real new news there. The California recycling laws are generating a lot of discussion and maybe merit a future podcast. Certainly, looking at that, is there a relationship between recyclability claims and recycled claims? But we'll certainly do a new podcast when those green guides are updated.

I think the NAD's also put out a number of monitoring cases in the affiliate advertising space. That is a variant on testimonials and reviews which we've covered. That might be something to talk about on its own. And NAD has issued a number of cases interpreting the FTC's health claim guidance. Very shortly after we launched, we did a three-parter series with our favorite geek Randy Shaheen on those, the new health guidance. But the FTC's been surprisingly quiet in that area but not the NAD.

Kaufman: So, Amy, we have wrapped up a year, and I am really looking forward to another year of doing this podcast thing. But my last question for you today, did you have a favorite episode? Because I've got two, and my two favorites are, because I really like the titles. I thought they're really well done. I really like Junk Fees Will Keep Us Together. I thought that was brilliant. And our Back-To-School episode, which we called A Very Special AD Nauseam. I just thought that was a wonderful throwback to the after-school specials of our childhood.

Mudge: Alright. So, Daniel, first, I can't pick a favorite. That is like asking me which of my kids do I love the best. They're all, they've all been a labor of love and I enjoy doing this with you so much. Regardless whenever we talk about, I do feel as much grief as I give you. I do have to give you a shout out that you, of course, are the father of the AD Nauseam name which is, I think that is my favorite thing of all. But you are also the one who comes up with those titles. And I don't know if they just come to you naturally or whether you work at it for a long time, but either way, the titles are absolutely fabulous and something I think our listeners really enjoy. We do get a fair amount of comments on them.

Kaufman: Yeah, I think the titles basically are taking up parts of my brain that should be focused on other things. So, I don't know if it is a good thing, but we really love hearing from folks. Topics you want us to talk about more, topics you wish we would stop talking about, constructive criticism, bring it on. We love to hear about it. We want to make sure folks listening to this are learning, enjoying it, and want to know what you want to hear about.

Mudge: Yeah. I know we say that a lot, please reach out, but please, please reach out. I think we've got a pretty dedicated listener base now which I'm really excited about. I do have folks occasionally coming up to me and saying I love your podcast, and it is a fairly motley bunch of people, but I love them all. I do. We really are interested in what do you want to hear us talk about. Do we talk too long? Should we go on longer? Do you like the series? Do you want a one and done? What guests would you like to see on?

We've talked about maybe branching out and getting some FTC or NAD guests, bringing in some external folks and really anything that is on your mind that you would like to see us do. I'm at amudge@bakerlaw.com. Daniel is at dkaufman@bakerlaw.com. Please don't be a stranger. Let us know. Otherwise, we're just going to continue doing the damn thing. Right?

Kaufman: Thank you so much for joining us.

Mudge: Thank you. And with that, that is a wrap on another episode of AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in 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.