Podcast Transcript

AD Nauseam – Every Breath You Take (Will Be Regulated)

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Corbett: 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 Connor Corbett, your new host of AD Nauseam, 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 are joined by special guest advertising associate, Mike Ingram, to dive into the FTC's first enforcement of the INFORM Act, which requires online marketplaces to verify and disclose information about high-volume sellers. They will also discuss the upcoming TAKE IT DOWN Act, focused on online content takedown. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Mike for this week's episode.

Mudge: Welcome back, everyone, to AD Nauseam. Pop those bottles of champagne, ladies and gentlemen. We have a first today, the first FTC case brought under the INFORM Act. And it is always a special moment the first time we see the agency use one of the newer tools provided to it by Congress.

Kaufman: And you know what, Amy, it always makes me think a little bit of that old Chekhov principle, to go a little highbrow here. So, if you're writing a book and you say in the first chapter that there is a rifle hanging on the wall, in the second or third chapter, it absolutely has to go off. If it is not going to be fired, it shouldn't be hanging there. Then, of course, when Congress grants authority to an agency, including the FTC, it very much expects it and wants it to be used. And we're also going to talk today about some even newer authority that Congress has given to the FTC, and that is the TAKE IT DOWN Act.

Mudge: The INFORM Act and the TAKE IT DOWN Act, okay. But Daniel, getting all fancy on me. If you throw out Ibsen, I'm getting a new podcast partner.

Kaufman: Absolutely guaranteed I will not be doing that.

Mudge: Alright. And speaking of first timers, for the first time, we are absolutely delighted to have our associate, Mike Ingram, join us on our podcast.

Ingram: Delighted to be here. Long-time listener, first-time caller. So this is a dream come true for me. Also, most of my family, including my grandfather, listens to the podcast and always remarks on how intelligent you all sound. So, here is hoping I can meet that threshold. And hi, Grandpa.

Mudge: Well, Grandpa is going to be real impressed with that Chekhov hoo-ha. Alright? Not sure Grandpa Ingram is in our target audience, but we welcome all of our dear listeners. Actually, I was at the NAD conference this past week, and I was deeply touched about the number of people who came up to me and said they actually dug our podcast, Daniel. I feel like we might be moving past relatives, met our beloved patent partner, Jason, who is the president of the AD Nauseam Fan Club, into a solid base. At least that is the hope. But Mike, I know that you and Daniel have worked on a number of projects involving the INFORM Act, and so I think you're uniquely suited to help us with some of the nuances here.

Ingram: Yeah, I'm super excited. Working with Daniel is probably one of my top 10 favorite things to do. So this is going to be a great opportunity to chat about it.

Kaufman: Is it high up on that top 10 list? I know, Mike, I'll fess up. There is a bit of an age gap between Amy and I and you. And with our associates generally, we often have situations where our associates have no idea what we are talking about. We had a really painful moment recently. And as an associate, I will not mention her name, but she knows who she is. She had to look up Tracy Chapman on her phone when we were talking to her. So we thought, in honor of that associate, we're going to play a little game with you, Mike. Kind of share a bunch of terms and concepts with you and see if you have any familiarity with what we would be talking about.

Ingram: Alright, I'm ready.

Mudge: I walked into our Cleveland conference room and I said, hello, Cleveland, and literally not a single associate knew what I was talking about. And I just refused to talk to them until they all committed to seeing Spinal Tap that weekend. But anyway, alright, Mike, let's see how up you are on the greatest decade.

Kaufman: Okay. Mike, what is Bananarama?

Ingram: A song.

Kaufman: It is a group.

Ingram: It is a group. I was close, it was music.

Mudge: You know what? He is in the zone. Keep going.

Kaufman: Okay. Do you know what a Trapper Keeper is?

Ingram: Isn't that, it is like a plastic box where you put things in?

Mudge: Oh, there is no way. No, no, no.

Kaufman: I was going to give half a point. Loose leaf binder that was sort of advertised everywhere.

Ingram: I was thinking of a Caboodle.

Mudge: If you showed up at school without a Trapper Keeper, you were nobody. Alright? It was, school supplies were cool back then. Alright?

Kaufman: Okay. What is the Breakfast Club?

Ingram: Oh, classic movie. Huge fan.

Kaufman: Oh, thank God. Oh, thank God.

Ingram: I love that one. Alright, you got me there.

Mudge: Too easy. Name three more John Hughes movies.

Ingram: St. Elmo's Fire. Right?

Mudge: Okay, keep going.

Ingram: Breakfast Club, we already said. Let's see, Ferris Bueller?

Mudge: Okay, good. Okay, St. Elmo's Fire is wrong. But that is okay. It was in the zone.

Ingram: Oh, man. Oh, God, okay.

Mudge: No, no. Stay, no, no, you're good. Ferris Bueller. Anyone else?

Ingram: I'm out.

Mudge: Alright. Well, I'll have to educate you on the greatest actress of that generation, Molly Ringwald, on another day. Mike, we all went to the mall. What did we drink at the mall? Don't say Starbucks. We didn't have it.

Ingram: Orange Julius.

Mudge: Yes, good. Alright, Mike, what did we wear to the mall?

Ingram: A lot of neon.

Mudge: Okay, any brands? I was in Espirit, Daniel was in O.P. shorts, all right?

Ingram: Alright.

Mudge: How did we get our hair so big before we went to the mall? What was our hair care secret?

Ingram: I'm going to go with Aquanet.

Mudge: Yes!

Kaufman: Part of this, it is showing me, Mike, you have some really solid, awesome Gen X parents.

Ingram: I do.

Mudge: And we will end with, this is a throwaway probably, what is Cher's best song released in the 80s?

Ingram: Released in the 80s. My mom is the biggest Cher fan, so I'm going to have to say all of them. But I believe Believe is from the 90s, which I think is her top song, so.

Mudge: Okay. It is If I Could Turn Back Time. And let me tell you, Mike, you turn back time beautifully. You get an A plus for a knowledgeable associate of the greatest decade. But moving along.

Ingram: I'll take it.

Mudge: So, I did some digging on our blog, which is available at adventuresinlaw.com, and I see back in 2023, you and Daniel co-authored a blog called Let's Get Informed About the INFORM Act. And that was probably right when it was launched. But Mike, please inform us, what is this act and what do we need to know about it?

Ingram: Sure. So, let's quickly turn back time. This was passed in late December 2022. It was part of that Omnibus appropriations bill that gets passed at the end of the year. What it does, broadly speaking, is it requires online marketplaces to collect, verify, and make available to buyers information about what they call high-volume third-party sellers that operate on their platform. The act became effective in June 2023, and the Federal Trade Commission and state attorneys generals have the enforcement authority under the act. So it comes with the ability to seek civil penalties, which are currently set up about $53,000 per violation.

Kaufman: Okay. So there is a lot to digest there. We'll break it down a little bit. But my first question for you, Mike, why?

Ingram: You know, the original thought here was they wanted to deter the sale of stolen, counterfeit, or unsafe products and reduce fraud generally.

Mudge: Alright. So the next question, let's talk a bit about who the act applies to. What type of online marketplaces are subject to the act?

Ingram: Right. So, if you're a company that is just selling your own products on your website, you probably don't have to worry about the act all that much. What we're more focused on are those marketplaces that are selling other people's stuff. So, an online marketplace is specifically defined as an electronically-based or access platform that includes features that allow for, facilitate, or enable third-party sellers to engage in the sale, purchase, payment, storage, shipping, or delivery of a consumer product in the United States and is used by one or more third-party sellers for such purposes.

Mudge: So there are platforms that, of course, do this all the time. But the provisions of the act could come into effect if a platform decided to change things up a bit and provide offerings from third parties. It is actually pretty rare to have an eBay or an Etsy that is only providing a platform for third-party sales. There are lots of hybrids of companies selling directly, but then also adding the ability for third parties to engage in marketplace activity. But it becomes effective in mid-2023, and we waited almost two years with radio silence as far as no enforcement.

Kaufman: Yeah. The FTC did send out some letters to some of the main platforms reminding them that this law exists and you've got obligations under it. And they also issued a fairly brief piece of business guidance. But as we said earlier, look, when Congress passes legislation, they want to see some action. And recently, some members of Congress did start to publicly question, hey, where is the enforcement? What is going on here?

Mudge: Yep, and we did finally see some. The FTC brought its first case, brought against the owner of Temu, very well-known online marketplace for all sorts of consumer products.

Kaufman: And any time an agency brings a first case, it is always worth a close read. And I have to say, this one did surprise me a little bit.

Mudge: You're always surprised. Okay. Alright, a little. Alright. Lay it out.

Kaufman: I mean, I was expecting that the first case would be some case about a company that really didn't comply with the core provisions of the act and weren't vetting the high-volume sellers. But that is not the case here. There are no allegations that the company failed to verify high-volume sellers on the platform. And I think that is really mission number one of the statute. Instead, this case is much more about the details of how to comply with the disclosure and reporting requirements that are built into the INFORM Act.

Ingram: Yeah. There is those two main core allegations here. So, taking the first one is the requirement to report. So, in addition to those big-picture requirements we talked about above, the Act also requires that there be telephonic and electronic mechanisms to report suspicious activity by high-volume third-party sellers. Not one, but both. So electronic and telephonic.

And then, secondly, the FTC alleged that the telephonic reporting mechanism was not in place until many months after the act effective date. And that the reporting mechanism was delayed even longer for the more gamified shopping parts of the website. Those are places where consumers were invited to play games, spin wheels, earn extra coupons while they're browsing and shopping for products. Because shopping online is not addictive enough, let's add in some extra layers. And, to top it all off, those reporting mechanisms were not clear and conspicuous. So consumers weren't easily able to find them.

Mudge: Shopping online is not addictive, Mike. It is perfectly fine and normal activity for people to do all the time. Right? But.

Ingram: Keep telling yourself that. I love it.

Mudge: I will. Okay. So, it is an act with lots of detailed requirements. And clearly, the details matter a lot to the FTC. But then there were additional allegations about the disclosure requirements. So, once you're subject to the act, you're a platform for third parties and you have high-volume sellers, which are defined, you generally have to disclose the seller's contact information on each of the seller's product listings and in the order confirmation messages or in the account transaction histories. And, once again, in the Temu case, the FTC alleges that was not done to their satisfaction.

Kaufman: Yeah, and details mattered here as well. The act requires such disclosure, but you can't make that information difficult to find. And the FTC alleges that, for a period of time, the company did just that and also failed to make some disclosures in, yet again, the gamified purchasing areas. So certainly, if you're subject to the act, it is really important to take a look at the order. Although the injunction, of course, just applies to Temu, there is some really helpful information there as to what the FTC expects from the actual telephonic reporting mechanism and from the positioning of disclosures and things of that nature.

Ingram: And also, don't forget, in addition to the order with the adjunctive relief to ensure compliance going forward, the FTC also required $2 million in civil penalties to settle the matter. That is a lot of online shopping.

Mudge: Well, no, so that is interesting. I know a lot of companies actually acted quickly and certainly focused heavily on the actual due diligence and developing a system to determine who were high-volume sellers. But certainly, this case makes it clear that that is just the beginning. The disclosures and the reporting are crucial, and they can't be buried. And while it might be said that $2 million is a small penalty for a company the size of Temu, the first company the FTC goes after often gets a break. So, my crystal ball tells me we can expect in future more cases that the FTC is going to bring, and likely with higher civil penalties.

Kaufman: Yeah. We haven't had a podcast about civil penalties yet. That might be a good topic because there is no mathematical formula, but you're establishing some sort of baseline with the first case and you're sort of level setting what expectations might be for those future cases. So look, the INFORM Act shows what happens when Congress gives the FTC new authority. And we have another example, the recently-enacted TAKE IT DOWN Act, which had unusually strong bipartisan support. So, Mike, what is this one about?

Ingram: Alright. TAKE IT DOWN, which I love when Congress gives out fun little quippy names to laws, especially ones like CAN-SPAM, which kind of follows with what it is actually doing. So the TAKE IT DOWN Act, AKA Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act, you're right, it received broad bipartisan support and was signed into law on May 19th, 2025. So it is pretty new. What it does exactly is prohibits any person from knowingly publishing, without consent, intimate, visual depictions of minors or non-consenting adults, or any deepfakes, which the act calls digital forgeries, whether intimate depictions or not, that are intended to cause harm.

The act requires covered platforms to establish a notice and takedown process where users can report such depictions. Platforms must then respond to valid requests and take down the offending materials ASAP, but no later than 48 hours. And they must make reasonable efforts to identify and remove any known identical copies of such depictions that also appear on their platform. Covered entities are required to have these procedures in place by May 19th, 2026, which is just around the corner.

And I know you may be wondering, what is a covered platform here? So, what we're thinking is public websites, online services, and applications, mobile applications, that are primarily designed to provide a form for user-generated content, or are primarily designed to publish non-consensual intimate, visual depictions. And of course, the FTC is the main enforcer here, with failure to comply with these prohibitions being considered a violation of the FTC Act.

Mudge: So the agency has certainly talked about this act a good deal. And although, I think, Mike, as you said, it doesn't come into effect until May of next year, the FTC's testimony to Congress indicated they were gearing up. They were getting ready for enforcement. The FTC told Congress they needed additional staff and resources to be able to enforce it effectively. And certainly, given the nature of the images that will be at issue, the FTC specifically called out a need for special IT requirements and trained staff to enforce the notice and takedown requirements. So this is one I don't think we're going to have to wait for two years to see enforcement. Daniel, any final thoughts here?

Kaufman: Yeah. We talk a lot here on AD Nauseam about the core FTC consumer protection authority, the prohibition against deceptive or unfair practices. But it is really important to keep in mind there are dozens of other statutes and rules that the FTC enforces that you got to be aware of, ranging whether it is COPPA, the Children's Online Privacy Protection Act, to the Telemarketing Sales Rule, to the Fair Credit Reporting Act, to ROSCA, to even the Horse Racing Integrity Act. Yeah, that one came into effect, I think that was in 2021. But really, narrow focus there for horse racing.

But look, it is important to keep track of FTC developments, both with respect to those core authorities, as well as those other areas where Congress has given it specific and focused authority. And keep in mind, and Amy, you talked about this earlier, as your business evolves, it may well be that you have to start being mindful of some of the other rules and statutes. So with that, thank you so much for joining us here on AD Nauseam.

Mudge: And thank you so much, Mike, for joining us. Since you passed the 80s test, we will have you back anytime, sir.

Ingram: I can't wait. Looking forward to it.

Mudge: And that is a wrap for AD Nauseam.

Corbett: Thanks, Amy, Daniel, and Mike. If you have questions for Amy, Daniel, or Mike, 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.

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