

### Your AI Made a Great Ad. Your Lawyer Has Questions.

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**A**s artificial intelligence technology continues to develop, the advertising and marketing industry, like virtually everyone else, is looking to implement its powers into the creative process. Although there are advantages to using this technology, brands and advertising professionals should be aware of the rapidly shifting regulatory landscape and the potential legal pitfalls it entails.

From new state disclosure laws to federal preemption threats, the rules of the road are being written in real time, and the stakes for getting it wrong are rising.

#### **The State-Level Push: New York Leads the Way**

While traditional advertising laws continue to apply regardless of the technology, as these technologies have become more prevalent, several states have passed laws to regulate their use. In the context of advertising, there have been some recent developments in New York. Specifically, New York has enacted a number of laws that will impact how AI is used in advertising.

Of particular note, recently enacted New York Senate Bill 8420 requires advertisers to



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disclose when a “synthetic performer” is used in advertising. A “synthetic performer” is defined as a digitally created asset using generative artificial intelligence or a software algorithm that creates the impression that the performer is a human when it is not recognizable as any identifiable natural human. Such disclosure must be conspicuous, and violations will result in civil penalties of \$1,000 for the first violation and \$5,000 for subsequent violations.

There are some explicit exceptions to the law, namely, the requirement does not apply to advertisements for expressive works (including television programs and video games), audio

advertisements, or situations where the use of AI solely involves the language translation of a human performer. This law goes into effect on June 9, 2026, 180 days after enactment. This unique requirement is certain to impact how advertisers use AI moving forward.

In addition, New York has expanded its right of publicity law to require prior consent to use a deceased personality's name or likeness for the purpose of advertising, or a deceased performer's "digital replica" in an audiovisual work, sound recording, or live performances of a musical work.

A "deceased personality" is defined as a natural person domiciled in New York at the time of their death whose name or likeness had commercial value at the time of their death.

A "deceased performer" is defined as a personality domiciled in New York at the time of their death who was regularly engaged in acting, singing, dancing, or playing a musical instrument for their livelihood. A "digital replica" is a realistic, computer-generated representation of that person. This law went into effect on Dec. 11, 2025. Although aspects of these recently enacted New York laws are novel, they may set a path for other states to follow suit and enact similar restrictions that could impact how advertisers use these new technologies in their campaigns.

### **Federal Pushback: The Preemption Question**

State regulation, however, only tells part of the story, as the federal government has shown a keen interest in regulating AI in its own way. On the same day that New York enacted the two laws discussed above, President Donald Trump issued an Executive Order titled "Ensuring a National Policy Framework for Artificial Intelligence." Here, Trump calls out "onerous and excessive" state

laws that regulate AI and, in the opinion of his administration, "stymie innovation."

In part, the executive order requires the attorney general to establish an AI Litigation Task Force to challenge state AI laws that are found to be inconsistent with the stated policy position of establishing a "minimally burdensome national policy framework for AI."

With this executive order in mind, it is possible that the New York laws may be challenged by the federal government in the future. However, for now, their effective dates remain in place, and advertisers should move toward compliance.

### **Protecting Likeness: The Talent Perspective**

In addition to the regulatory landscape, advertisers must be aware of the innovative ways in which talent and personalities are seeking to safeguard against use of their likenesses in advertising through AI and without their consent.

Advertisers must understand that just because certain content is generated by AI tools does not mean it is authorized by the individuals and/or entities that retain rights to certain aspects of that content. In other words, standard advertising clearance (including sound and image rights) must be cleared in advance of releasing an advertisement.

As an example, actor Matthew McConaughey filed applications with the United States Patent and Trademark Office (USPTO) to protect certain audio and video clips, including a sound mark for his famous catchphrase "alright, alright, alright" from the film *Dazed and Confused*. By registering these marks with the USPTO, McConaughey is seeking to prevent unauthorized use of his likeness or voice by others, whether through AI or other means.

This type of proactive protection by talent is likely to become more common, making it even more critical for advertisers to conduct thorough rights clearance before deploying AI-generated content.

### **Copyright Considerations: The Human Creativity Requirement**

Furthermore, using AI to serve as the creative process may greatly limit protections for the advertiser. The United States Copyright Office's position is that only human authors qualify for copyright protection, as copyright protection is designed to protect human creativity.

Nevertheless, the use of AI tools to assist in human creativity (as opposed to replacing human creativity), can result in copyright protection. As such, advertisers need to be able to clearly demonstrate the role of human creativity in designing advertising.

### **What's Ahead**

With the continued temptation to integrate AI into many facets of the advertising industry, it is important for advertisers to stay up to date with the changing regulatory landscape at both the state and federal levels. Further, advertisers must not blindly rely on AI output and instead

must independently confirm that any content created by AI, in whole or in part, is produced with the appropriate consents.

As technology continues to rapidly develop, so too do the ways in which rights holders and regulators seek to restrain unpermitted uses. It is important for advertisers to adopt strong compliance policies that allow use of these new technologies while ensuring compliance with applicable laws.

The bottom line: AI offers tremendous creative potential for advertisers, but only those who invest in compliance infrastructure today will be positioned to fully capitalize on it tomorrow. Brands that treat AI governance as an afterthought risk not only regulatory penalties but reputational harm in an increasingly scrutinized marketplace.

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