



DOWNLOAD[®]

DIGITAL TECH CONFERENCE | FEBRUARY 27, 2020 | LOS ANGELES



HIGH-Tech: Cannabis, Technology, and Content

The Unique Hurdles Facing the Cannabis
Industry and Those Working With It

Panelists



Yvette Encarnación

Senior Vice President,
Business & Legal Affairs, Production Content Review

Viacom Media Networks



Yoko Miyashita

General Counsel

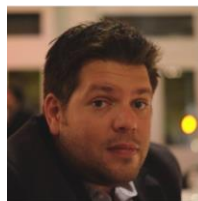
Leafly



Bradley Melshenker

Founder and President

710 Labs



Jonathan Segal

Partner

Davis Wright Tremaine LLP

Moderator



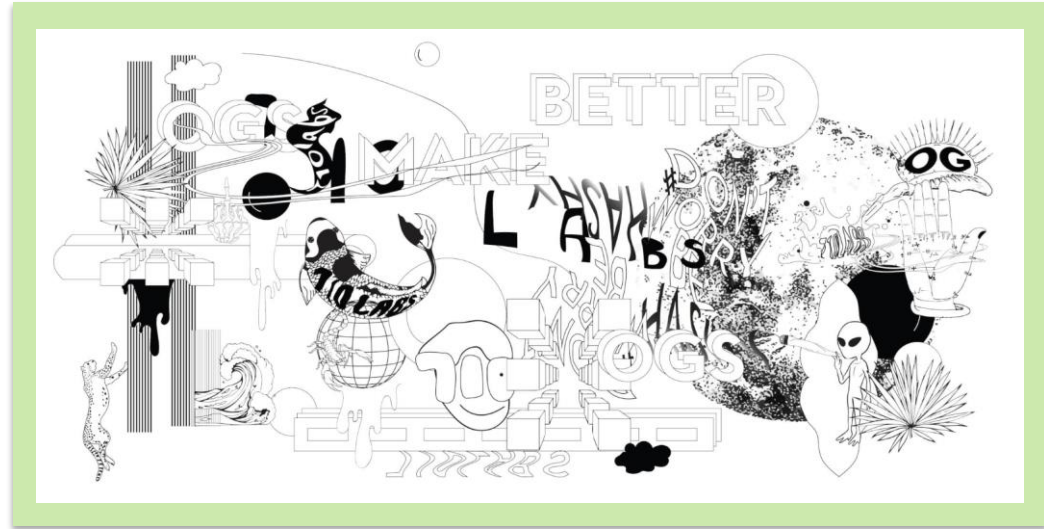
Aaron N. Colby

Partner

Davis Wright Tremaine LLP

Cannabis in the Media

- Responsible Cannabis Advertising
- Cannabis in Content Creation
- Protecting Cannabis Intellectual Property





Advertising

Responsible Cannabis Advertising

- **Unique concerns . . .**
 - Federal Criminal Laws
 - State Advertising Restrictions
 - Private Platform Restrictions
 - Limits of the First Amendment
- **. . . that can be managed**
 - Consider your risk appetite
 - Implement sensible guidelines



Advertising – Challenging Regulation

- Limits of the First Amendment
 - Governments may ban “speech proposing an illegal transaction.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982)
- State law protections might apply
- Section 230 may provide some protection
 - But it has limits
- Private or contractual limits

Federal Criminal Laws

- Cannabis is still federally illegal
- Federal laws to consider
 - Controlled Substances Act
 - Aiding and Abetting
 - Money Laundering Statutes

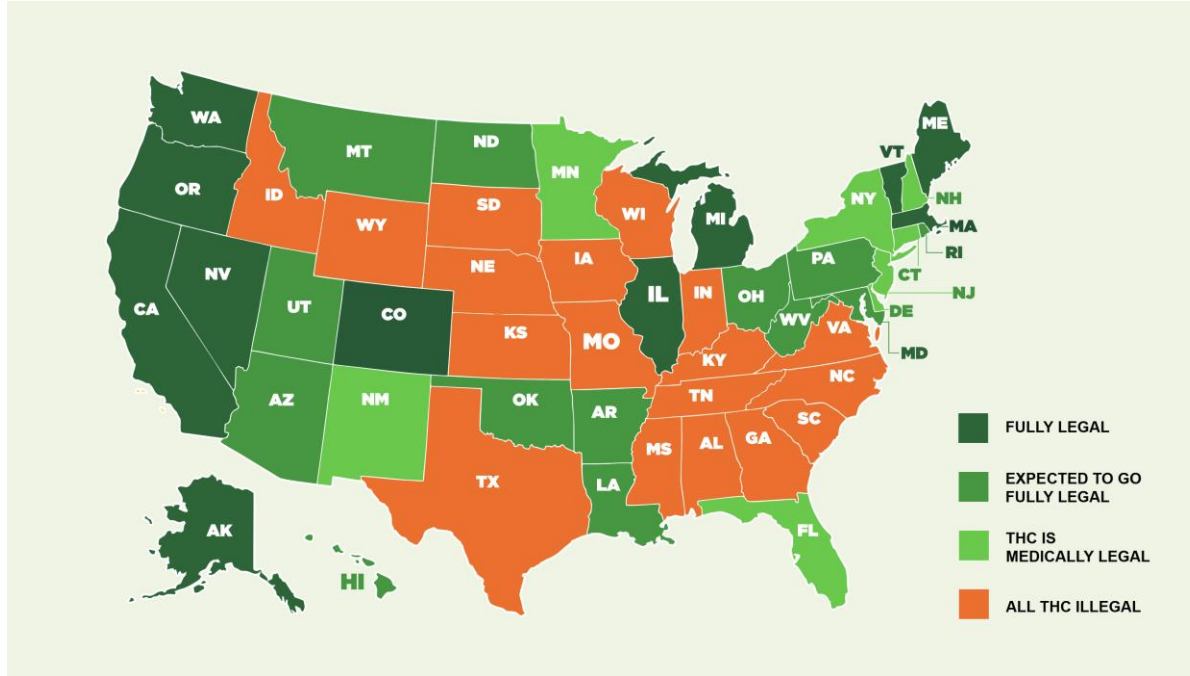


Advertising – Controlled Substances Act

- **CSA prohibits “placing” an ad for the sale of cannabis**
 - But who “places” an ad?
Brand? Agency? Publisher?
- **Publishers sell ads, not cannabis**
 - Consider what standard practices don’t fit within federal law



Advertising – State Law



- Growing number of legal states
- Nearly every state has specific ad restrictions

Advertising – State Law

■ Common themes

- No advertising to children
- Location restrictions
- Disclosures
- No deceptive or misleading advertising
- No promotion of overconsumption

■ Some quirks

- More stringent audience limits (MA)
- No depiction of cannabis or consumption (OR, IL)
- No fliers or in-person advertising (OR, NV)



Advertising – State Law

- **Additional Issues**
 - Alcohol and cannabis don't mix (beware of products containing alcohol or marketed as “cannabis beer”, etc.)
 - Beware of edibles marketed as food items (e.g., cannabis pizza)



Advertising – State Law

- **Developing area of law as states experiment with policy**
 - State requirements subject to frequent change; double check/consult counsel
 - Some requirements are vague or unclear
- **Case Study: California AB1417**
 - Liability to platforms for cannabis ads
 - Mandatory disclosures for cannabis websites
 - Ran afoul of Section 230

ASSEMBLY BILL

NO. 1417

Introduced by Assembly Member Blanca Rubio
(Coauthor: Assembly Member Low)

February 22, 2019

An act to amend Sections 26038 and 26151 of, and to add Section 26151.5 to, the Business and Professions Code, relating to cannabis, and making an appropriation therefor.


LEGISLATIVE COUNSEL'S DIGEST

AB 1417, as amended, Blanca Rubio. Cannabis advertisement and marketing.

The Control, Regulate and Tax Adult Use of Marijuana Act of 2016 (AUMA), an initiative measure approved as Proposition 64 at the November 8, 2016, statewide general election, authorizes a person who obtains a state license under AUMA to engage in commercial adult-use cannabis activity pursuant to that license and applicable local ordinances. The Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), among other things, consolidates the licensure and regulation of commercial medicinal and adult-use cannabis activities. MAUCRSA imposes duties on the Bureau of Cannabis Control in the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health with respect to the creation, issuance, denial, suspension, and revocation of licenses issued pursuant to MAUCRSA. *MAUCRSA authorizes those licensing authorities to issue a citation to a licensee or unlicensed person for any act or omission that violates or has violated a provision of MAUCRSA or a regulation adopted pursuant to MAUCRSA, as specified. MAUCRSA provides that these sanctions are separate from, and in addition to, all other administrative, civil, or criminal remedies. MAUCRSA authorizes those licensing authorities to recover from the licensee or person who was the subject of the citation costs of investigation and enforcement, as specified.*

Advertising – Private Restrictions

- **Media companies are all asking the same questions**
 - Different risk assessments
 - Different values
 - Different conclusions
- **Not all platforms permit cannabis advertising**



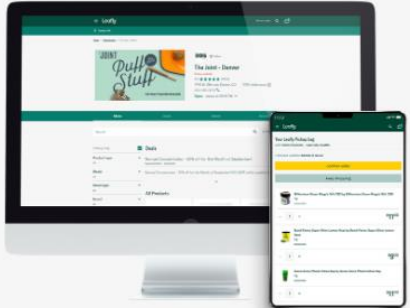
Market your brand

Effectively market your brand and elevate exposure through a variety of advertising and marketing solutions to a large, highly-motivated audience.

[discover our brand solutions](#)

Maximize reach and online traffic

Maximize your presence through targeted advertising and elevate in-store revenue potential with a variety of solutions, including an easy-to-use online reservation system that allows customers to order in advance for in-store pickup.



[discover our retail solutions](#)



Burger King ✓

@BurgerKing

Follow



spicy chicken nuggets are here. just in time for 4/20. how are you firing up? #FireUp420



6:32 AM - 20 Apr 2018

265 Retweets 852 Likes



63



265



852





Burger King ✓

@BurgerKing

Follow



spicy chicken nuggets are here. just in time for 4/20. how are you firing up? #FireUp420



6:32 AM - 20 Apr 2018

265 Retweets 852 Likes



63



265



852



Advertising – Practical Advice

- **Get familiar with the law**
- **Review standard practices**
 - Contract terms
 - Revenue models
 - Limits on content
 - Creative review
 - Indemnification
- **Develop strong policies**
 - Get everyone trained and compliant
 - Clear lines of review







Content Creation

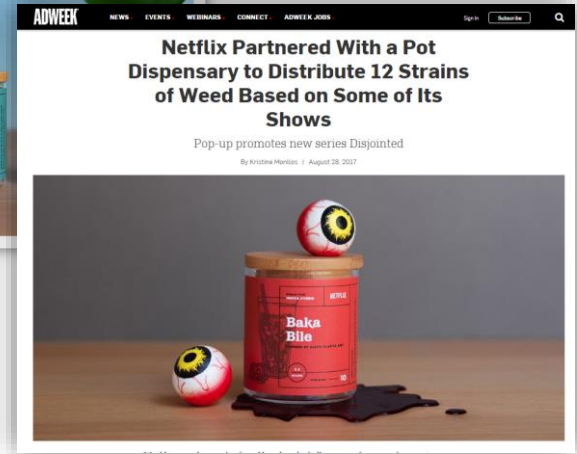
Content Creation

- **Unique risks of on-site cannabis**
 - Possessing cannabis is federally illegal
 - Work closely with counsel
- **Careful planning**
 - Employment law concerns
 - Dram shop liability
 - State law restrictions



Expressive Works And Non-Commercial Speech

- **First Amendment broadly protects bona fide non-commercial speech about cannabis**
 - News/Documentaries
 - Entertainment
 - Advocacy
 - Educational (museums, exhibitions)
- **Editorial vs. “native advertising”/“branded content”**





OKANAGAN VALLEY, B.C.

Bud Empire – History Channel



Weed Wars - Discovery Channel

Content Incorporating Cannabis Use by Talent

- Cooking shows
- Other unscripted programming
- Variety programming





Cooking on High - Netflix



Bong Appétit - Viceland

VICELAND



Bong Appétit - Viceland

Mitigating Risks When Incorporating Cannabis Into Content



- Criminal liability issues
- Civil liability issues from use
- Crew issues
- Employment issues

A close-up photograph of cannabis leaves, showing their characteristic serrated, palmate shape. The leaves are green with some yellowing, suggesting they are mature. The background is blurred, showing more of the plant. A solid green rectangular box is overlaid on the lower half of the image, containing the text "Intellectual Property" in white, bold, sans-serif font.

Intellectual Property

Intellectual Property Issues

- Patent
- Trademark
- Licensing



Intellectual Property Protection – Patents

- Patent protection is available for cannabis
- If inventions meets the other requirements for patent protection
- Patent protection is available for wide variety of technologies including
 - cannabis plants, growing systems, extracts, methods of making extracts, foods, veterinary products, and methods of treating various diseases and disorders
- Because cannabis is illegal at the federal level, patent enforcement cases against users, sellers or manufacturers of cannabis related products have been rare

Intellectual Property Protection – Patents

- Two options for plant patents
 - plant breeder (PVP) which grants the exclusive right to clonally propagate a specific strain or cultivar of plant; and
 - utility patents which are broader and grant exclusivity over all plants having specific new and non-obvious traits
- Patents seem a ripe opportunity and a good way to protect innovation in the industry



Intellectual Property Protection – Patents

- But, it is difficult for the USPTO to determine if material claimed in patents is “new” because most marijuana growers did not publicly disclose the traits of their strains
- Likely many patents will be wrongfully granted
- This scarcity of information may be an opportunity for marijuana breeders to get patents, but ...
- A flood of new patents may create a problem of frivolous litigation based on invalid patents increases the broader risk of operating in the industry



Z CUBED #5

IN-HOUSE

Genetics: Zkittlez and OZ Kush

Breeder: Dying Breed Seeds

Bud Structure: Christmas tree shaped nugs with a lime green hue.

Skelly's Notes: A small variation on one of our classics, Z Cubed #5 is a newly released phenotype from our original genetic hunt. Bred by Dying Breed Seeds with two of their best strains Zkittlez x OZ Kush. This phenotype is true to the original Zkittlez genetic with an artificial fruit sweetness and a little lemon pledge, but this time paired with a tiny OG kick. We like to call this strain the lime pheno because it's almost like a lime skittles flavor with fresh and bright fruits.

Intellectual Property Protection – Trademarks

- US Federal Trademark Registration is not available for cannabis
 - But some CBD products are registrable
- Employ alternative strategies:
 - Register for complementary goods e.g. vaporizers, apparel, storage containers, etc.
 - File “intent to use” and wait out possible changes in the law at the federal level
 - File state trademark applications
 - Rely on common law rights



Intellectual Property Protection – Trademarks

- Enforcement is tricky without the benefit of federal law and federal courts
- The infringement analysis must be analyzed on a state-by-state basis
 - You could have two brand owners for the same mark in different states
- Identifying priority – first use dates – can be difficult
 - Use of a brand prior to legalization in the state of operation may not confer priority



Intellectual Property – Licensing

- Trademark and technology licensing raises additional issues
 - IP licensing between non-license holders (i.e., those not licensed by the board of cannabis control) and cannabis license holders can implicate regulatory issues not found in other industries
 - “Control” of the business is an important issue under the cannabis regulatory scheme
 - “Control” is likewise critical for the trademark owner/non license holder to maintain its trademark rights
 - The key is to strike the right balance – but nothing has been tested

Intellectual Property – Licensing

- Trademark and technology licensing raises additional issues
 - Licensing of cannabis technology may result in
 - activity across state lines; and
 - the structure royalty payments must meet regulatory rules
 - (e.g., there is a problem when non-license holders receive a benefit from the cannabis business)

