Advertising Law

manatt

December 28, 2010

In This Issue

New California Law Governs Auto Renewals

A new law took effect in California governing automatic renewals that requires companies to make greater disclosures and obtain affirmative consent from consumers prior to their being charged.

Under the new law, SB 340, companies are required to: (1) clearly and conspicuously disclose the material offer terms in visual proximity to the request for consent before a consumer subscribes; (2) obtain a consumer's affirmative consent to the terms before the consumer is charged; (3) provide a confirmation to the consumer that includes the terms, a description of the cancellation policy, information on how to cancel and, if the offer includes a free trial, that the consumer may cancel before being charged; and (4) provide a "cost-effective, timely and easy-to-use" method for canceling, including a toll-free telephone number, e-mail address, or a postal address, if the company directly bills the consumer.

“Material terms” include information that the subscription will continue until the consumer cancels, a description of the cancellation policy, information about the recurring charges, the length of the renewal term, and the minimum purchase obligation, if one exists.

The law requires that the terms be presented either in larger type than the surrounding text or in contrasting type, font, or color from the surrounding text of the same size, or set off from the surrounding text in a manner that clearly calls attention to the terms.

In the case of a material change in the terms of the automatic renewal offer, a company must provide consumers with clear and conspicuous notice of the change and information about how to cancel. And if a company sends any goods, merchandise or products to a consumer under an automatic renewal agreement without first obtaining the consumer’s affirmative consent, the goods are deemed an unconditional gift.

A violation of the new law, which took effect December 1, will subject a company to civil remedies pursuant to California’s Business and Professional Code.

To read the text of SB 340, click here.

Why it matters: In addition to the new law in California, companies offering automatic renewals or free trials are facing increasing regulation from other jurisdictions and scrutiny from the Federal Trade Commission. Companies that offer automatic renewals should remember to disclose all material terms in a clear and conspicuous manner and make sure that consumers understand their opportunities to cancel.

back to top

FTC Settles Over Disclosure of Children's Information

The Federal Trade Commission settled with EchoMetrix, Inc., which it had charged with failing to adequately inform parents that their children's information was made available to third parties.

EchoMetrix's "Sentry" software program allows parents to monitor their children's online activities. The FTC alleged that the company shared the information it had gathered from the software with third-party marketers.

The information was shared with advertisers and marketers who used EchoMetrix's "Pulse" system, a Web-based market research software program that the company advertised as a means of learning what consumers are saying or thinking "in their own words – at the moment they say it." According to the FTC, EchoMetrix failed to adequately disclose to parents that it shared the information with third parties.

Although the company did state that Sentry "uses information for the following general purposes: to customize the advertising and content you see, fulfill your requests for products and services, improve our services, contact you, conduct research, and provide anonymous reporting for internal and external clients," the FTC maintained that a "vague statement" roughly 30 paragraphs into a multipage end user license agreement was simply not enough to put the consumer on notice.

Both the Electronic Privacy Information Center and the Center for Digital Democracy filed complaints with the FTC, alleging that the company violated the Children's Online Privacy Protection Act and engaged in unfair and deceptive trade practices regarding the marketing of Pulse services. Under the terms of the settlement, EchoMetrix agreed not to use or share information it collected and to destroy any information transferred to its marketing database. The company must also comply with reporting and recordkeeping provisions so that the FTC can monitor its compliance.

To read the final order in *FTC v. EchoMetrix*, click here.

Why it matters: Companies must make clear disclosures about their plans to use consumer information, particularly when children are involved.

EchoMetrix recently settled with New York Attorney General Andrew Cuomo over similar charges, and it agreed to pay the state $100,000 and refrain from analyzing or sharing any of the data to which it has access. Privacy remains a hot-button topic, and children's privacy, even hotter; EchoMetrix's settlements come as the FTC reviews COPPA, which children's advocacy groups and parental organizations are seeking to expand.

back to top

Twitter Not Directed at Children

The Children's Advertising Review Unit (CARU) determined the social networking and microblogging site Twitter does not target children under the age of 13 and therefore the age-screening requirements of CARU's Online Privacy Protection Guidelines and the protections of the Children's Online Privacy Protection Act do not apply to the site.

CARU expressed concern that a user had to enter a full name, username, and e-mail address when signing up for a Twitter account – but the site did not screen for age, a practice that could be a violation of CARU's guidelines on Online Privacy Protection, as well as COPPA, both of which require age screening to determine whether verifiable parental consent has been obtained.

Twitter described itself as a "general audience site" and said that if it does learn from time to time that someone under the age of 13 had established an account, it uses an established procedure to terminate the child's account and delete his or her information. The instances of such cases "has been miniscule," Twitter said, noting that it does not make any effort to appeal to users under 13 years of age and that its privacy policy expressly states that its service is not directed towards children.

Although registered members of Twitter can follow and tweet to celebrities and groups of interest like Nickelodeon TV, Nintendo, and the Jonas Brothers, CARU determined that the site does not direct its service toward children under the age of 13 in any meaningful way, and should not expect a significant number of visitors under age 13. While CARU did note that the site contained some user-generated content that would appeal to children, “the overall net impression of the site was that it was a general audience site and not directed to children” and Twitter’s homepage does not contain child-friendly images or subject matter that would appeal to children.

Why it matters: The decision is an important reminder that even general audience Web sites are subject to the provisions of COPPA and that CARU actively monitors social media – Twitter was reviewed as part of CARU’s “routine monitoring practices” and not because of a complaint. Companies should carefully consider whether their sites might appeal to children and consequently draw the scrutiny of CARU, especially in the case of Twitter, when some content could be directed towards children.

back to top

Facebook Issues New Promotions Guidelines

Facebook released new promotions guidelines on December 1 instructing companies on how to conduct and publicize promotions on the site.

Under the new guidelines, an advertiser cannot administer a promotion – defined as collecting entries, conducting a drawing, judging entries, or notifying winners – through Facebook, except by using an application box in a tab on a Facebook page or on the canvas page of the application. Advertisers cannot automatically enter users into a promotion by requiring them to “like” the advertiser’s page, or check the advertiser’s page, and entry in a promotion also cannot be conditioned upon a user’s providing content on Facebook, like a status update, photo, or wall post.

Businesses can, however, require entrants to “like” a page or check into their place before providing their full entry information, and can use a third-party application as an entry platform upon a user’s providing content (for example, a photo contest where a user uploads a picture to a third-party application to enter the contest). The guidelines also ban advertisers from using Facebook to communicate with a winner through messages, chat, posts on profiles or pages. Instead, a business can collect an e-mail or postal address as part of the promotion to contact the winner.

Other prohibitions include using Facebook's name, trademarks, trade names, copyrights, or other intellectual property; communicating or administering a promotion if it is open or marketed to users under the age of 18; and conducting a promotion where the prize or any part of it includes items like alcohol, tobacco, prescription drugs, or firearms.

A disclosure must be placed adjacent to any promotion entry field that Facebook in no way sponsors, endorses, administers, or is associated with the promotion, and advertisers are required to explain how the user's information will be used. The promotion rules must also include a complete release of Facebook by each entrant and participant.

To read Facebook's updated promotions guidelines, click here.

Why it matters: The new guidelines offer businesses greater opportunities to administer a promotion on Facebook while, at the same time, provide Facebook users with additional privacy protections. Companies interested in taking advantage of accessing the more than 500 million members of Facebook should familiarize themselves with the new guidelines.

back to top

Groups File Complaint Over Online Health Marketing

In a complaint filed with the Federal Trade Commission, the Center for Digital Democracy, Consumer Watchdog, World Privacy Forum, and U.S. Public Interest Research Group (collectively "the Group") allege that health marketers are violating Internet users' privacy by tracking their online activity to target them with ads "precisely honed to a particular illness or condition."

The 144-page complaint argues that behavioral advertising for pharmaceutical products raises greater concerns than other types of merchandise. According to the complaint, "[W]hile the online medium provides medical information to those seeking access to resources and support, it has been structured to engage in aggressive tactics that threaten privacy, raise questions about the fair presentation of independent information, and advance the sales of prescription drugs and over-the-counter products."

The Group highlights specific practices that they argue put consumers at risk. They include targeting medical or disease conditions, where a consumer who expresses a particular health concern is digitally profiled, tracked, and served ads and content; monitoring consumer conversations via social media about medical conditions, pharmaceuticals, and treatments; using unbranded online medical condition Web sites that appear to provide independent information but are actually sponsored by a company whose products are used to treat the condition; and distributing free online newsletters and discount coupons to collect personal information that is used for profiling and targeting. Other Group concerns include "e-detailing," the practice of targeting nurses, physicians, and other health professionals with digital marketing techniques designed to influence their drug-prescribing habits, implementing of word-of-mouth marketing campaigns that are in fact sponsored by pharmaceutical companies seeking to drive sales of their products, and the growing use of electronic health records.

The complaint names several companies, including WebMD, Google, Microsoft, Yahoo, AOL, Quality Health, Everyday Health, and Health Central. The Group asked the FTC to investigate how pharmaceutical companies use the online data they collect and to review their privacy policies. In addition, the Group urged the Commission to work with the Food and Drug Administration to develop a set of policies to regulate the behavioral targeting of health-related products. Finally, the complaint also seeks an examination by the FTC of whether the agency's endorsement guidelines are violated when advice is given to consumers from seemingly independent bloggers who fail to disclose that they are paid or sponsored by pharmaceutical companies.

To read the complaint, click here.

Why it matters: The FDA has recently sent several warning letters to drug companies citing them for online advertising violations. In August, the agency sent a warning letter to Novartis about a widget on the company's Web site for the drug Tasigna that enabled visitors to share information with their Facebook friends. With respect to their obligation to issue risk warnings, pharmaceutical companies requested that the agency issue guidelines on social media marketing. They argue that it is impossible to convey the risk information required in other forms of advertising in a 140-character tweet or an Internet banner ad.

back to top

Be Careful Where You Spray Paint

Cities across the country are cracking down on "street marketing" efforts, according to a recent report by *The Wall Street Journal*.

Companies are seeking cheap and creative ways to advertise, according to the report, but cities facing the expense of enforcing anti-graffiti laws – as well as the cost of removing corporate logos from sidewalks – are taking an aggressive stance by making arrests and imposing fines. While many companies argue the graffiti efforts are temporary or artistic, local governments are unhappy at the trend of "corporate graffiti," especially "ads" in support of corporations like Microsoft, companies that can presumably afford to advertise in more traditional formats.

The report cited a number of recent examples of companies that find themselves in legal trouble for their marketing efforts. In November, Microsoft and one of its marketing agencies, GoGorilla Media of New York, used "chalk art" to promote San Francisco and New York concerts by Katy Perry and Maroon 5 related to the launch of its Windows Phone 7. While a Microsoft spokesperson told *The Wall Street Journal* that the chalk designs were temporary and had all been successfully removed, local vendors complained and San Francisco's public works department sent the company a cease-and-desist letter.

Also last month, the San Francisco City Attorney's office said it reached a $45,000 settlement with Los Angeles-based Davis Elen Advertising, which glued fake money onto city streets this summer to promote the social networking game Mafia Wars for Zynga game network. And in New York, independent contractors working with Havaianas were jailed by police for vandalism after stenciling chalk ads on city sidewalks.

Why it matters: While creative marketing efforts can pay off with consumers, companies should be cognizant of local graffiti laws when considering a street marketing campaign. Given the current budget woes of many municipalities, the odds of being fined for any damage or clean-up costs are increased.

[back to top](#)

Seventh Circuit Clarifies Attorneys' Fees Under the Lanham Act

In a case brought by a home health care provider against a treatment device retailer, the Seventh Circuit clarified what constitutes an "exceptional" case for purposes of awarding attorneys' fees under the Lanham Act.

Noting a split in the circuits and their application of different tests for exceptionality, the Seventh Circuit clarified its standard by declaring that reasonable attorneys' fees may be awarded to the winning party "if the losing party was the plaintiff and was guilty of abuse of process in suing, or if the losing party was the defendant and had no defense yet persisted in the trademark infringement or false advertising for which he was being sued...."

The court said that a similar standard should apply to both plaintiffs and defendants, as "[p]redatory initiation of suit is mirrored in predatory resistance to valid claims." The court cautioned that courts should not conduct an elaborate inquiry into the state of mind of the party from whom reimbursement is sought. "It should be enough to justify the award if the party seeking it can show that his opponent's claim or defense was objectively unreasonable – was a claim or defense that a rational litigant would pursue only because it would impose disproportionate costs on his opponent – in other words only because it was extortionate in character if not necessarily in provable intention," the court explained.

The case involved a home health care provider that purchased infrared lamps for $6,000 each which were designed to relieve pain and improve circulation. The plaintiff alleged that the defendant's sales reps had falsely represented that the lamp had been approved by the Food and Drug Administration for treatment of peripheral neuropathy. While the lamps were FDA-approved and intended for such treatment, the FDA had not approved the lamps for that specific purpose.

But the court said that the Lanham Act claim had "no possible merit" as it was the plaintiff's decision to prescribe the device to patients as an off-label usage. It also noted that the plaintiff had attempted to coerce the defendant into a price reduction to continue purchasing the lamps. The court therefore affirmed the award of attorneys' fees.

The plaintiff also objected that it should not be liable for the full $72,747 in fees because some of the costs were incurred defending state law claims in the suit other than the plaintiff's Lanham Act claim. But the court said that the work the defendant's lawyers had performed could not be separated from its work defending the other claims.

To read the decision in *Nightingale Home Health v. Anodyne Therapy*, click here.

Why it matters: The Seventh Circuit expressed surprise at the lack of agreement among the federal circuits on the standard for what constitutes an "exceptional case" under the Lanham Act for purposes of attorneys' fees. The Fourth, Sixth, Tenth, and D.C. Circuits have different tests of exceptionality that depend on whether the plaintiff or the defendant prevailed in the suit, while the Second, Fifth and Eleventh Circuits require the prevailing party – whether plaintiff or defendant – to prove that their opponent litigated in bad faith or that the suit was a fraud. And the First, Third, Eighth and Ninth Circuits similarly do not distinguish between prevailing plaintiffs and defendants, but unlike the other circuits, they do not require a showing of bad faith.

back to top