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Advertising Law

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Report: Google to Pay $22.5 Million Fine to FTC Over Privacy Violations Summit

Google will settle charges that it violated the privacy of millions of consumers to the tune of $22.5 million, according to a recent report in ***The Wall Street Journal***.

Last fall, a graduate student revealed that Google, among others, was circumventing Safari’s no-tracking browser settings by using hidden code to install a cookie to track users’ browsing habits. The company acknowledged the practice but said that it was unintentional and that it had removed the cookies. The Federal Trade Commission began an investigation in February.

Although the installation of the cookie itself was arguably not a deceptive practice, Google had informed users that Safari would block tracking cookies. Its failure to honor that statement constituted a violation of last year’s consent decree with the FTC.

In the case that gave rise to the consent decree, the FTC alleged that Google used deceptive tactics and violated its own privacy policy when it launched Buzz, its social networking feature. As part of the settlement, Google was the first company required by the agency to implement a comprehensive privacy program. The company was also barred from future misrepresentations to users about its privacy policies.

The agency calculated the fine by aggregating the number of iPad, iPhone, and Mac users at a rate of $16,000 per day.

In a statement, Google said that it would not comment “on any specifics” of a settlement. “However, we do set the highest standards of privacy and security for our users. The FTC is focused on a 2009 help center page published more than two years before our consent decree, and a year before Apple changed its cookie-handling policy. We have now changed that page and taken steps to remove the ad cookies, which collected no personal information, from Apple’s browsers.”

According to *The Wall Street Journal* report, the $22.5 million fine would be the largest penalty levied against a single entity in FTC history.

Why it matters: The settlement reinforces the FTC’s current focus on privacy as well as its willingness to enforce the terms of its consent decrees. Companies should use caution when drafting their privacy policies and ensure that they are living up to their promises – or face an enforcement action.

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“Barefoot” Class Actions Run into Court

After the numerous false advertising class action suits that have been filed over so-called “toning shoes,” the next round of footwear cases is targeting “barefoot” running shoes.

A national class action was filed against Vibram FiveFingers, regarding its claims that its barefoot shoes replicate the benefits of barefoot running, improve posture, and prevent injury because they are designed to fit the foot like a glove.

According to the complaint, “there is no scientific evidence which substantiates or proves that wearing FiveFingers will provide [the advertised benefits] in any greater degree than with conventional running shoes.” The plaintiffs further allege that runners must change their running styles to run with a forefoot strike pattern, a long and painful process that can lead to serious injuries.

The suit seeks restitution, disgorgement, a corrective advertising campaign, and a halt to the advertising campaign.

A similar suit was filed against Adidas over its adiPURE “barefoot” shoes in New York federal court in June.

The shoe giant launched the line to take advantage of the increasing popularity of Vibram’s product, the plaintiffs claim, but Adidas “has not conducted any comprehensive medical or scientific studies to examine the health benefits claims it makes regarding adiPURE.”

Named plaintiff Joseph Rocco alleges that he suffered compound fractures in his foot after running in the Adidas shoes for a few months by having to adopt an altered running style needed in “barefoot” shoes.

Rocco declined to pursue compensation for his personal injuries, but instead seeks statutory damages of $200 per plaintiff for violations of Oregon state law, as well as reimbursement and injunctive relief, pursuant to Pennsylvania’s consumer protection act.

To read the complaint in *Safavi v. Vibram*, click here.

To read the complaint in *Rocco v. Adidas*, click here.

Why it matters: “Barefoot” shoes appear to be the next target for consumer class action attorneys after the wave of litigation filed against “toning” shoes last year. In those cases, plaintiffs said that claims of toning shoes providing extra strength to leg and buttock muscles made by defendants like New Balance, Skechers, and Target were unsupported by scientific evidence. Reebok also entered into a $25 million settlement with the Federal Trade Commission over similar charges. Advertisers must be prepared to substantiate claims and ensure that studies used in support produce accurate, verifiable results.

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$9M Netflix Privacy Settlement Gets Preliminary Approval

A federal judge has approved a $9 million settlement in a class action suit alleging Netflix violated the Video Privacy Protection Act by keeping former customers’ personal information and video rental history past the statutorily allowed time period.

Under the VPPA, video service providers must delete information about former users after one year. The plaintiffs – consolidated from six different class actions – claimed that Netflix kept a “veritable digital dossier” of former subscribers, including their credit card numbers, billing and contact information, and a highly detailed account of their programming viewing history.

After mediation, the parties reached a settlement, to which U.S. District Court Judge Edward J. Davila granted preliminary approval.

Netflix declined to admit fault but agreed going forward to "decouple" the rental history from subscribers' identification data one year after cancellation of the service.

The $9 million will establish a common fund which will pay settlement expenses, incentive awards for named plaintiffs, and attorneys' fees. The remainder will be distributed to cy pres recipients selected by the parties that are "not-for-profit organizations, institutions, or programs that educate users, regulators, and enterprises regarding issues relating to protection of privacy, identity, and personal information through user control."

Calling the settlement "fair, reasonable, and adequate," the judge certified a class estimated to be "tens of millions" of current and former subscribers.

"In light of the minimal monetary recovery that would be realistically recoverable by individual settlement class members and the immediate benefits offered to the class by the injunctive relief and cy pres donations, the settlement agreement is deserving of preliminary approval," he wrote.

Judge Davila also said the settlement terms compared favorably to other online consumer privacy cases, including class actions against Google and Facebook, which settled for $8.5 million and $9.5 million in cy pres charitable payments, respectively.

To read the settlement order in *In re: Netflix Privacy Litigation*, click here.

Why it matters: Although Judge Davila gave his preliminary approval to the settlement (a final approval hearing was set for December 2012), it may still face challenges. Class settlements that are heavy on cy pres payments and light on plaintiffs' compensation have recently been the subject of greater scrutiny. One recent example: Facebook's proposed settlement over its "Sponsored Stories" ad feature, where the social network agreed to pay $20 million to a settlement fund, of which the plaintiffs would not receive a penny. The proposed terms have received several objections and generated negative publicity for similar settlements.

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NAD Cleans Up Vacuum Claims

In a challenge brought by Dyson, the National Advertising Division recommended that vacuum cleaner manufacturer Euro-Pro Operating discontinue claims for its Shark Navigator Freestyle Vacuum, including claims that the product "never loses cleaning power" and has "true upright performance."

The advertiser argued that the Navigator runs on batteries and "never loses power" over the life of the battery, approximately 24 minutes. Consumers do not expect that the cordless vacuum works indefinitely, Euro-Pro said.

While the NAD agreed that the claim would not be construed by consumers as a claim of everlasting or indefinite cleaning power, it also said the claim communicated a "bolder message" than was intended.

"Reasonable consumers could take away the message that the Navigator will not lose its cleaning power for an unusually long time – rather than within 24 minutes," the NAD said.

Turning to the "true upright performance" claim, the NAD said that consumers could assume that the vacuum "is fully substitutable for an upright vacuum," notwithstanding the ineffective disclaimers on the product packaging attempting to limit the claim by referencing vacuum testing standards.

Euro-Pro's disclaimer "is not clear and conspicuous. It appears in very small print below [a photograph]. Furthermore, the disclaimer refers to [vacuum testing protocols], which are not known by or understandable to ordinary consumers," the NAD said.

Both claims should be discontinued, the NAD recommended.

A third claim, that the Euro-Pro is “best in class runtime” should be modified, the NAD concluded. Again, the advertiser attempted to qualify the claim by limiting it to the five top-selling vacuums in the market. But once again, the NAD said the disclosure was not sufficiently clear and conspicuous. “The language appears on the bottom of the package in significantly smaller font than the main claim,” the NAD explained.

Accordingly, the advertiser should modify the claim to make the disclaimer clear and conspicuous.

To read the NAD’s press release about the decision, click here.

Why it matters: The decision provides important guidance to advertisers about disclaimers. As the NAD wrote in its decision, “Disclaimers should be both ‘clear and conspicuous’ and ‘effectively communicated’ and cannot contradict or ‘significantly limit the message conveyed by the claim.’ Furthermore, the limiting language must be displayed in a manner that is readily noticeable, readable, and understandable to the audience to whom it is disseminated.”

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Just Tweet It: Nike Butts Heads With UK Advertising Regulators Over Twitter

After the United Kingdom’s Advertising Standards Authority ordered Nike U.K. to halt sponsored tweets of two of its athlete endorsers, the company has appealed the decision to the ASA’s independent reviewer.

In June, the ASA concluded that consumers could not readily determine whether tweets by two Nike-sponsored soccer players – also known as footballers across the pond – were marketing communications for Nike or merely personal statements by the players. Wayne Rooney tweeted, “My resolution – to start the year as a champion, and finish it as a champion…#makeitcount gonike.me/makeitcount” and Jack Wilshere stated, “In 2012, I will come back for my club – and be ready for my country. … #makeitcount gonike.me/makeitcount.” Make It Count is the name of a Nike campaign to promote Nike Fuel, a new line of products.

Nike argued that the Twitter followers of the footballers would not be misled about the relationship between the company and the players, as it was well known that both were sponsored by Nike. In addition, Nike said that because the Nike URL was included in the tweets, followers could differentiate between the marketing tweets and non-marketing tweets by the players, which did not refer to their professional capacity as footballers and did not contain the Nike URL or the “#makeitcount” hashtag.

But the ASA disagreed, saying that the Nike reference was not prominent and could be missed by a Twitter user scrolling quickly through his or her Twitter feed each day.

“We considered there was nothing obvious in the tweets to indicate they were Nike marketing communications,” according to the decision. “In the absence of such an indication, for example #ad, we considered the tweets were not obviously identifiable as Nike marketing communications.”

Because the ASA determined the tweets violated the UK’s advertising code by failing to be recognizable as marketing communications, it ordered Nike to halt the ads and ensure that its future advertising was “obviously identifiable as such.”

Nike appealed the decision to the ASA’s independent reviewer, saying the company does “not believe that Twitter followers were misled because it was clear that the messages were connected to Nike’s ‘Make it count’ message.”

Announcing its decision to appeal, Nike emphasized the “evolving” guidance in the area of Twitter marketing. A spokesperson for the ASA disputed Nike’s comment, however, telling *Advertising Age* that “This is not a new, uncharted area. The tests were very much the same as the ones we use elsewhere on the Internet.”

To read the ASA’s decision, click here.

Why it matters: The decision marked the first time the ASA upheld a complaint involving Twitter and was shortly followed by a similar decision, where the ASA upheld a complaint against a hairdressing chain which encouraged an actress to tweet about her free haircut. The ASA said that without using a hashtag like “#ad” or “#promo,” the tweets were not obviously identifiable as marketing communications.

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