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ADVERTISING LAW @MANATT
NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

IN THIS ISSUE

Top Brand Integration Lawyer Joins Manatt In Los Angeles

Jordan Yospe expands the firm's reach in advertising and entertainment industries.

LOS ANGELES, CA, AND NEW YORK, NY – May 5, 2008 – Manatt, Phelps & Phillips, LLP, the national law and consulting firm, announced today that **Jordan Yospe** is joining the firm as counsel in the advertising, marketing & media practice group. Yospe was formerly general counsel, head of business and legal affairs for Mark Burnett Productions, prior to founding The Brand-Aide Entertainment Group. He will be based in the firm's Los Angeles office and will also work closely with Manatt's transactional entertainment practice group.

A pioneer in brand integration, particularly in the area of film, television and new media, Yospe will focus on sourcing relevant television, movie, video gaming and internet-specific projects for brands, negotiating integration agreements, and supervising integrations from pre through post-production to ensure brand messaging.

"Jordan truly bridges the worlds of advertising and entertainment," said **Linda Goldstein**, the New York based chair of Manatt's firm-wide advertising, marketing & media practice group. "His abilities, experience and connections will

UPCOMING EVENTS

October 21, 2008
ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

For more information

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October 22, 2008
D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

For more information

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November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

be a valuable resource to our clients – both brand holders and content providers – particularly in the rapidly developing areas of online media and convergence."

At Mark Burnett Productions, Yospe oversaw all domestic and foreign business and legal affairs for the company's projects, including groundbreaking reality programming such as Survivor and The Apprentice. He also supervised the company's merchandising, licensing, music, and product placement deals. Yospe helped to establish and manage the company's enormously successful brand integration unit.

"I have worked closely with Linda and the other talented lawyers at Manatt on projects in the past, and am thrilled to be joining such a dynamic, respected firm," said Yospe. "The entertainment landscape is changing almost daily, providing new and considerable opportunities from a brand integration perspective. I look forward to helping clients on both sides of the equation to capitalize on those opportunities."

Yospe earned his J.D. from Boston University School of Law, where he served as editor of the American Journal of Law and Medicine. He earned his B.A. with honors from the University of Oregon's Clark Honors College.

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EU Wants Better Code of Conduct for Video Games

The European Union's executive body is giving the video game industry two years to develop an industry code of conduct that does a better job of shielding children from violent images.

In an April 22 press conference announcing the initiative, EU Information Society Commissioner Viviane Reding said, "Creators have to enjoy freedom of expression but at the same time it's an industry that impacts society."

School shootings, such as a November incident in Finland, have prompted public concern that video games can trigger aggressive behavior, and have spurred several countries to prohibit the sale of ultraviolent games like *Manhunt 2*, Reding said. At the same time, Reding noted that the industry is booming. Within the next couple of years, it is forecast that global revenues will reach 30 billion euros ($47.5 billion), of which one-third will come from the 27-nation EU.

Although the EU executive body has the authority to recommend legislation, it decided it would give the industry two years to develop a widely accepted code of conduct. It also urged the industry to advertise its symbols for age

Sweepstakes, Games & Contests"

Linda Goldstein

Topic:
"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Kerrie L. Campbell

Marriott Downtown Magnificent Mile
Chicago, IL

For more information

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December 4-5, 2008
Film & Television Law

Topic:
"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Linda Goldstein

Topic:
"The Value of Fame: Understanding the Right of Publicity"

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

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OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... more
. Practice Group Overview

appropriateness more heavily. The current age classification system—Pan European Games Information (PEGI)—has the support of more than 200 industry members and is used in 20 EU countries. There is also an online version but with far fewer industry backers.

Although the EU Commission wants the public to become more aware of PEGI's age symbols, it admits that no decisive proof exists that violent video games affect the behavior of children.

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NJ Court Requires Subpoena for Internet User Data

The New Jersey Supreme Court has ruled that a valid subpoena is needed for Internet service providers to disclose personal information about their subscribers.

In its decision dated April 21, the court ruled that the New Jersey constitution provides its residents with more protection against unreasonable searches and seizures than the U.S. Constitution.

A lawyer representing the American Civil Liberties Union, Electronic Frontier Foundation, and the Electronic Privacy Information Center, among other groups that filed amicus briefs in the case, said it was the first ruling in the country to recognize a reasonable expectation of privacy for Internet users.

The 7-0 decision affirmed lower court rulings that constrained police from learning the identity of an employee accused of retaliating after an argument with her supervisor by altering the supervisor's access codes to a supplier's Web site. Police obtained the employee's identity through her Internet service provider, Comcast Corporation, by tracing her computer's Internet protocol address, which only Comcast could identify.

A municipal court issued a subpoena for the data, but higher courts found that a grand jury subpoena was needed because an indictable offense was involved. Accordingly, the New Jersey Supreme Court threw out the employee's 2005 indictment on a charge of theft by computer, although it ruled that prosecutors could continue to seek the information via a grand jury subpoena.

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Slim-Fast Sues Slimquick

The company that makes Slim-Fast, the popular weight-loss product line, has sued several Canadian companies for their use of the names Slimquick and Slimquick Laboratories to

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market weight-loss products and dietary supplements.

In a lawsuit filed in Manhattan federal court, Unilever Supply Chain Inc. and Conopco Inc., the licensee for the Slim-Fast mark, charges that the use of the Slimquick and Slimquick Laboratories names "have already caused confusion in the marketplace" and infringes on their Slim-Fast trademark. The defendants market diet pills under the name Slimquick which are sold as a "female fat burner" and come in several versions, including Original Slimquick, Slimquick Night, and Slimquick Extreme.

"Consumers have been misled by defendants' unauthorized and infringing use of Slimquick and Slimquick Laboratories to believe that defendants' Slimquick and Slimquick Laboratories brand products are sponsored by, licensed from, or otherwise affiliated with plaintiffs and/or plaintiffs' Slim-Fast products," the lawsuit says.

The defendants include Global Health Technologies Inc., Wellnx Life Sciences Inc., Wellnx DR, NX Care Inc., and NX Labs Inc.

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Telemarketers Fined for Transmitting Fake Caller ID

Two individuals and one corporate defendant have been fined $530,000 for several violations of the Federal Trade Commission's Telemarketing Sales Rule ("TSR") and its Do Not Call ("DNC") provisions, including the transmission of false or no caller ID information.

The case marked the first time the agency has charged a telemarketer with transmitting phony caller ID information. Under the DNC provisions of the TSR, telemarketers must transmit accurate caller ID information so consumers can contact them to stop unwanted calls.

The case arose from a telemarketing scheme by defendants Srikanth Venkataraman, Sridhar Bhupatiraju, and Scorpio Systems to sell mortgage loans, refinancing, and other products and services to U.S. consumers. Scorpio allegedly called numbers on the Do Not Call Registry, failed to transmit its telephone number and name to recipients' caller ID service, and failed to pay the fee required to access the Registry. The telemarketer transmitted either no caller ID or a phony caller ID number – 234-567-8923 – preventing consumers from contacting it.

The final court order bans the defendants from violating the TSR in the future, states that they agree not to contest any of

the facts alleged by the FTC, and makes them liable for their TSR violations. The order also imposes suspended fines of $530,000 against each of the individual defendants and $160,000 against the corporate defendant – reflecting the total gross revenues from their scheme. Based on the defendants' inability to pay, however, the order requires Venkataraman to pay $15,000, Bhupatiraju to pay $10,000, and Software Transformations (a successor corporation to Scorpio Systems) to pay $20,000. It also contains a right to reopen the case if the FTC finds the defendants have misrepresented their financial condition.

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Rival Must Use "Negative Keywords" in Search-Related Ads

In an apparent first, a Florida federal court has ordered a company to use "negative keywords" in its online search-related advertising, to avoid being confused with another company's trademark.

The order arose out of a dispute between Orion Bancorp of Florida and Orion Residential Finance over the latter's use of "Orion" to market financial services and products. Orion Bancorp took its rival to court, arguing that the name was confusingly similar to its own. Orion Residential Finance apparently sent a lawyer to the hearing but never filed a response, and the judge eventually issued a default judgment against it. In addition to the typical bans on the use of "Orion" in signs, promotional materials, and slogans, the order included domain names and online advertising.

The District Court for the Middle District of Florida prohibited Orion Residential from "purchasing or using any form of advertising including keywords or 'adwords' in internet advertising containing any mark incorporating Plaintiff's Mark, or any confusingly similar mark, and shall, when purchasing internet advertising using keywords, adwords or the like, require the activation of the term 'ORION' as negative keywords or negative adwords in any internet advertising purchased or used."

In keyword-triggered online advertising, ads appear on search result pages when triggered by the use of a certain term in the search itself. It is still unsettled whether using a competitor's trademarked terms as a keyword is legal, since the consumer never actually sees the keyword.

"Negative adwords" are keywords that, when searched for, prevent the ad from being displayed. Google calls them "Negative Keywords" and Yahoo! calls them "Excluded

Words." The "negative keyword" ruling means that Orion Residential advertising would be explicitly prevented from showing up after searches for the term "Orion," but could appear for any other keyword searches.

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Amazon Sues New York Over Online Sales Tax

In a widely anticipated move, Internet retailer Amazon has sued the state of New York over a new law designed to require Amazon and other online retailers to collect sales tax on items shipped to New York addresses, even when the retailer has no offices or employees in the state.

The law, enacted April 9, affects Internet vendors that use New York-based affiliate marketing programs to solicit sales. In its complaint filed in state court in Manhattan, Amazon asks for a declaratory ruling that the law is "invalid, illegal and unconstitutional."

Affiliates are typically Web sites that link to a retailer's site and get a commission for sales made by the referrals. Under the new law, if a vendor makes at least $10,000 a year in revenue from New York-based affiliates, it must collect New York sales taxes on all products shipped to state residents.

Theoretically, New York consumers must report purchases from out-of-state Internet retailers on their state tax returns, but the administrative hurdle of collecting those taxes from individuals has proved insurmountable.

The state estimates that forcing out-of-state retailers to collect the tax would produce additional income of $50 million a year.

Amazon argues that the law violates the Commerce Clause of the U.S. Constitution, as interpreted by *Quill v. North Dakota*, in which the U.S. Supreme Court held in 1992 that a retailer must have a "physical presence" within the state to be responsible for collecting that state's sales taxes.

Specifically, Amazon takes issue with New York's characterization of Amazon's affiliates as representatives of the company who are soliciting sales by placing ads on their sites. According to New York, such affiliates are enough to give Amazon the physical presence within the state required under *Quill*.

In its complaint, Amazon rejects this characterization, saying it "lacks any physical presence in New York." It argues that the *Quill* case held that advertising alone is not sufficient to

establish physical presence in a state. According to Amazon, its affiliates are not actively soliciting business for the company. Rather, they are merely resident advertisers, who "indirectly" refer customers to Amazon's product pages in exchange for commissions.

Amazon also cited language from its standard affiliate agreement stating that "nothing in this agreement will create any partnership, joint venture, agency, franchise, sales representative or employment relationship between the parties." It further argues that it has no way of verifying which of the thousands of Web sites registered in the program under a New York address are actually legal residents of the state.

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Lawsuit Alleges Snapple Lemonade Is 'Fake'

A lawsuit filed in California state court in Los Angeles claims that Snapple Beverage Corp. defrauds consumers by marketing Snapple Lemonade as "all natural" and "made from the best stuff on Earth," though it contains less than 1 percent lemon juice.

The plaintiffs, who seek class-action status, allege that instead of lemon in its "all natural" lemonade, Snapple uses citric acid and corn syrup to make "all of their Fake Lemonade."

"The label is adorned with pictures of lemons and the cited phrases, and the phrase 'juice drink with natural flavors.' ... An inconspicuous disclaimer about the 'Nutrition Facts' panel discloses and admits that the product actually contains 'less than 1% juice,'" the complaint states. "Adding 'less than one percent' juice does not make this product 'lemonade,' a 'juice drink,' or an 'all natural' product. Indeed, there is no readily identifiable reason for adding 'less than 1% juice' except possibly to make a misleading claim that the Product is a juice drink."

A class action pending in New Jersey state court makes similar assertions about Arizona Beverage Co.'s marketing of its "100% natural" Arizona Iced Tea drinks.

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Lawsuit Over Gerber Fruit Juice Snacks Advances

In April the Ninth Circuit allowed a class action against Gerber Products Co. to move forward. The lawsuit accuses the company of falsely advertising its Gerber Fruit Juice Snacks as "nutritious" and "made with real fruit juice," bolstered by

images of oranges, peaches, strawberries, and cherries on the packaging. However, the main ingredients are corn syrup and sugar, and the only fruit juice is concentrated white grape juice.

The plaintiffs also argue that Gerber's description of the product as a "snack" is misleading, saying it is more appropriately labeled a "candy," "sweet," or "treat." After the suit was filed, Gerber changed the name to Fruit Juice Treats, although it denied any connection between the lawsuit and the name change.

Last year a district court dismissed the complaint, ruling that a reasonable consumer could simply read the ingredients to see that the packaging description was "puffery." The appellate court disagreed, reasoning that busy moms (and dads) should not have to examine ingredient lists for labeling irregularities.

"We do not ... think that a busy parent walking through the aisles of a grocery store should be expected to verify that the representations on the front of the box are confirmed in the ingredient list," the court wrote. "We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception."

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FTC To Focus on Marketing of Subprime Mortgages

The Federal Trade Commission will intensify its review of the marketing of subprime mortgages and similar financial instruments.

FTC Bureau of Consumer Protection Director Lydia Parnes made the statement in an April 29 hearing of the Senate Commerce Committee. She said the move was in response to concerns that regulators were not taking enough steps to curtail misleading marketing.

"For the past several months we have been questioning ourselves on whether we could have done more," Parnes said, adding that the agency will shift its staff to provide additional scrutiny to the financial sector. Although the agency does not have oversight of the federally chartered banks that issue mortgages, it does regulate marketing by mortgage brokers and companies.

Senator Byron Dorgan, D-N.D., is sponsoring a bill that would

extend the FTC's oversight to banking and telecommunications, provide it with new authority to impose fines, and bolster its capacity to issue regulations. Senator Dorgan's bill also adds to the size of the FTC staff and provides state attorneys general with new ability to act on behalf of the agency. He blamed the lack or failure of regulations for much of the current subprime crisis.

Parnes responded that although the FTC would welcome more authority, the agency has already stepped up its examination of the financial services sector and has 12 pending investigations.

Ira Rheingold, executive director of the National Association of Consumer Advocates, said the subprime mortgage woes arise from an industrywide incentive system that emphasizes closing loans, even bad ones. "What most people don't understand is how really screwed up the mortgage market really is," he said. "The incentives are completely perverse."

Bill Himpler, executive vice president of the American Financial Service Association, questioned whether the proposed legislation went too far and that giving state attorneys general the authority to enforce FTC regulations could result in 50 different interpretations of what is and is not allowed.

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