Advertising Law manatt

April 8, 2011

In This Issue

Editors: Linda A. Goldstein | Jeffrey S. Edelstein | Marc Roth

Manatt to Participate in the ACCA-SoCal Inaugural Entertainment & Sports Law MCLE Seminar

On April 13, 2011, Manatt's advertising and entertainment litigation partners and their esteemed co-panelists will lead a lively discussion focused on crisis management strategies for corporate counsel, an event hosted by the Association of Corporate Counsel, Southern California Chapter.

With Manatt's Litigation Division Chair Chad Hummel serving as moderator, Linda Goldstein (Chair of the Advertising, Marketing and Media Division), Mat

Rosengart (Co-Chair of the Entertainment Litigation practice), Rick Levy (Chief Business Development Officer & General Counsel, Office of the Chairman, International Creative Management), and Mark Fabiani (Principal, Fabiani & Lehane, LLC), will address tactics for enabling corporate counsel to be thoroughly prepared for the decisive moments they may face in their practices – when government investigations are commenced, when news media are inquiring, or when crucial litigation is looming or instituted.

The panel will conduct an in-depth discussion on the evolving legal landscape in the new "social media" age and provide real-world practical guidance that will enable clients to (a) have the right legal, investigative and media team in place, (b) formulate media strategy, (c) manage corporate personnel, and (d) design and implement internal policies and procedures to prevent the most likely crises from occurring and in turn, limit legal and reputational risk.

The event will be held at Raleigh Studios, 5300 Melrose Ave., Hollywood, California, with networking beginning at 4:45 pm, and the first panel starting at 5:30 pm. For more information or to RSVP, please contact Betty St. Marie: socalacc777@gmail.com.

back to top

Manatt Attorneys to Provide Insight on False Advertising Litigation Strategies at ACI Conference

On June 21-22, 2011, a who's who of the nation's advertising bar will convene at the American Conference Institute's Litigation and Resolving Advertising Disputes conference, to be held in New York.

They will share their tried-and-true strategies for bringing and defending false advertising allegations, including how to develop winning arguments for federal Lanham Act cases and how to succeed in National Advertising Division (NAD) proceedings.

Advertising, Marketing and Media Division Chair Linda Goldstein will take the stage with Kathleen Dunnigan (NAD staff attorney) to explore "Inside Strategies for Effectively Utilizing the NAD to Resolve Advertising Disputes." Manatt partner Chris Cole will join Kathryn A. Meisel (Assistant General Counsel, Johnson & Johnson) and other preeminent litigators to participate in a panel discussion, "Winning Your Lanham Act Case in Federal Court: Plaintiff and Defense Success Strategies."

NOTE: Be sure to take advantage of Manatt's friend-of-the-firm discount by using the code provided in the registration materials available here.

back to top

Privacy Developments: Obama Administration Wades In, Another Draft Bill

Privacy continues to be a hot topic in Washington with the Obama Administration backing the idea of a "Consumer Privacy Bill of Rights" and a draft privacy bill released by Sen. John Kerry (D-Mass.).

At a recent hearing of the Senate Commerce Committee addressing "The State of Online Consumer Privacy," Assistant Secretary in the U.S. Department of Commerce Lawrence Strickling spoke in support of privacy legislation.

According to Strickling, the Administration's plan would track the report issued last December by the Commerce Department and would vest authority for rulemaking with the Federal Trade Commission, which would also be tasked to create a "Safe Harbor" program.

"The Department has concluded that the U.S. consumer data privacy framework will benefit from legislation to establish a clearer set of rules for the road for businesses and consumers, while preserving the innovation and

free flow of information that are hallmarks of the Internet," he told the Committee.

Sen. Kerry also spoke at the hearing, announcing his intention to introduce privacy legislation during the current congressional session. Soon after, a draft version of the bill was released.

Cosponsored by Sen. John McCain (R-Ariz.), the Commercial Privacy Bill of Rights Act as currently drafted would grant the FTC rulemaking authority on privacy issues, and it includes a provision giving the agency the ability to operate a Web site where consumers could opt out of online behavioral advertising.

It would also require companies to notify consumers about data collection and provide "reasonable access" to their data.

Information protected by the legislation includes personally identifiable information (PII), as well as any information collected in connection with PII that can be used to identify an individual, including birth date, geographical address, biometric data, unique persistent identifiers, telephone numbers (other than work phone numbers), credit card account numbers, and e-mail addresses if consumers' names are part of them.

Companies would also be required to attempt to minimize the amount of information collected and retained about consumers.

The bill does not include a private right of action for consumers and preempts state laws. Monetary penalties depend on the type of violation but are capped at between $2 million and $3 million.

To read the text of Assistant Secretary Strickling's testimony, click here.

To read draft legislation of the Commercial Privacy Bill of Rights Act, click here

Why it matters: The Obama Administration's support for privacy legislation increases the chances of passage during this congressional session. However, the specifics of such a bill remain in flux. When Sen. Kerry introduces his bill to the Senate, it will join three other pieces of privacy legislation currently pending in Congress.

back to top

FTC Settles with Ad Company Over Online Tracking

The Federal Trade Commission settled with Chitika, an online advertising company, over charges that the company recommenced the practice of following Internet users just 10 days after they had opted out of online tracking.

Chitika's privacy policy informed consumers that it collected their data and allowed them to opt out of tracking and receiving cookies by clicking on an "opt out" button. After clicking, consumers received a message stating, "You are currently opted out."

But the FTC alleged for an almost two-year period, the opt out lasted only 10 days. Under the terms of the proposed settlement, Chitika is barred from making any misleading statements about its data collection and the ability of consumers to control the collection. In addition, the company must include a hyperlink in every targeted ad that includes a clear opt out mechanism for consumers, with the ability to opt out for at least five years.

Chitika also agreed to destroy all identifiable user information during the relevant time period, from May 2008 to February 2010, and inform consumers who tried to opt out during that period that their efforts were not effective.

In a statement, the company said its opt outs were intended to last for 10 years, but due to an error in the process, they were mistakenly limited to 10 days. During the relevant time period, Chitika said it received only 30 opt out requests per month.

"Chitika believes very strongly in Internet users' privacy," the company said in its statement.

To read the consent order in *In re Chitika*, click here.

Why it matters: As reported by *Mediapost.com,* Maneesha Mithal, the FTC Director of the Division of Privacy and Identity Protection, recently remarked that the FTC's case against Chitika and a recent settlement with Twitter are examples of how the agency might address future privacy enforcement. In the Twitter action, the company came under scrutiny for failing to keep users' information secure. The *Chitika* case demonstrates that companies which fail to live up to their privacy policies will also be a target of FTC action.

back to top

NAD: Gillette Must Modify or Discontinue Comparative Claims

Gillette should modify or discontinue claims for its Fusion ProGlide Razors, the National Advertising Division recommended regarding a challenge brought by competitor Schick.

Challenged claims included "Fusion ProGlide has been engineered with Gillette's thinnest blades ever so it glides for less tug and pull" and "New Gillette Fusion ProGlide turns shaving into gliding with thinner blades for less tug and pull* and an effortless glide (*leading blades vs. Fusion)."

Gillette argued that the "leading blades" claim referred to the first four blades of the Fusion ProGlide, which contains five blades. The "leading blades" term is used in patent filings, Gillette said, and was not misleading to consumers.

But the NAD disagreed.

"NAD determined that all of the advertisements reasonably convey the message that all of the blades in ProGlide are Gillette's thinnest (and thinner than the leading product), not simply the first four blades," the panel said, noting that some of the print and Internet ads included a circle around all five blades, reinforcing its conclusion. Consumers do not typically read patent documents, the NAD noted, and would not be familiar with the meaning of the term "leading blades."

NAD therefore recommended that Gillette modify its "leading blades" claim "to make clear that it is referring only to the first four blades in its cartridge."

The NAD also addressed the issue of whether the phrase "leading blades" could be understood by consumers to mean "leading product" in the performance claim.

The language in the ads does not make clear whether the "leading" product is a Gillette product, i.e., the Fusion, or a competitor's product, the NAD said. After reviewing the Nielsen market share data for razors, the panel determined that for the relevant time period Fusion was not the leading brand. NAD stated: "Further, given that [the Schick] Hydro was also a leading product at certain time points, the advertiser would need to provide testing comparing the thinness of its blades as against those of Hydro. The record makes clear that the advertiser failed to provide such testing."

Gillette should "make clear that the basis of comparison is to its Fusion razor to avoid any unsupported product performance comparisons as to competing razors," the NAD said.

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

Why it matters: "In the absence of consumer perception evidence, NAD uses its expertise to determine the express and implied messages reasonably conveyed in an advertisement," the panel said.

back to top

Retailer Settles Over Fake "Consumer" Reviews

After claiming that Legacy Learning Systems, Inc., and its owner deceptively advertised its guitar-lesson DVDs by using affiliates to promote the products through endorsements on blogs and online articles, the Federal Trade Commission has settled with the defendants for $250,000.

Legacy used "Review Ad" affiliates who promoted its learn-to-play-guitar-at-home DVDs with positive endorsements in blog posts, articles and other online editorial material, the agency alleged. The copy contained hyperlinks to the defendants' Web site, and the affiliates received commissions based on sales from referrals, which the FTC estimated generated $5 million in sales for the company.

However, in violation of the FTC's guidelines on endorsements and testimonials, the affiliates failed to disclose that they were paid for their work, and instead held themselves out as ordinary consumers or independent reviewers, the agency said. The defendants also failed to implement a reasonable monitoring program, according to the FTC, to ensure affiliates were in compliance with the guidelines.

For example, one review said, "Read my Independent Review and Discover the Truth of Learn & Master Guitar Now! Rank: #1 . . . . Simply the best beginner course available, Learn & Master Guitar is well structured, well paced, and contains an appropriate level of music theory and techniques to develop your musicianship."

Under the proposed settlement, Legacy and its owner, Lester Gabriel Smith, will pay $250,000.

The company also agreed to ongoing monitoring by the agency, and it must submit semiannual reports about the top 50 revenue-generating affiliate marketers to ensure that the affiliates are disclosing that they earn commissions for sales and are not misrepresenting themselves in their online reviews. In addition, the defendants must similarly monitor a random sample of 50 other affiliate marketers for compliance, and submit a monthly report to the FTC.

To read the consent order in *In the Matter of Legacy Learning Systems*, click here.

Why it matters: "Whether they advertise directly or through affiliates, companies have an obligation to ensure that the advertising for their products is not deceptive," David Vladeck, Director of the FTC's Bureau of Consumer Protection, said in a statement about the settlement. "Advertisers using affiliate marketers to promote their products would be wise to put in

place a reasonable monitoring program to verify that those affiliates follow the principles of truth in advertising." Since the revised endorsement guidelines went into effect in 2009, the agency has investigated retailer Ann Taylor for giving gifts to bloggers (though no charges were filed) and settled with Reverb Communications last September over claims the public relations firm illegally advertised its clients' gaming applications by having employees pose as consumers and post positive reviews on iTunes.

back to top

Netflix Faces Suits by Former Users

Video rental provider Netflix faces multiple lawsuits claiming that the company violates the Video Privacy Protection Act – as well as various California state laws – by keeping consumers' personal information, like credit card numbers and rental histories, after they cancel their accounts.

Over the last few months five suits have been filed in California federal court, each seeking class-action status.

In the first suit, filed in late January, Jeff Milans, a former Netflix user, brought suit, calling the company's stored information a "veritable digital dossier" on former subscribers, containing credit card numbers, billing and contact information, user name and password, and a highly detailed account of the individual's programming viewing history.

Under the VPPA, videotape service providers must destroy personally identifiable information "as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected."

But Netflix maintains such information for at least two years, according to the complaint, and former subscribers who log into their Netflix account are greeted with their previously input credit card information and a detailed history of the video programming they ordered.

The suits seek statutory damages of $2,500 per violation under the VPPA and $3,000 per violation under the California Consumer Records Act, as well as punitive damages.

To read the complaint in *Milans v. Netflix*, click here.

Why it matters: The *Milans* complaint noted that the plaintiff's suit is not the first privacy controversy Netflix has faced. In 2010 the company received a warning letter from the Federal Trade Commission after Netflix announced it would release video viewing information about subscribers as part of a contest to improve its video recommendations to consumers. Netflix subsequently cancelled the contest and agreed to follow certain parameters regarding its use of consumers' data in the future.

back to top