



April 7, 2010



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Manatt Adds Advertising Partner Marc Roth in New York

Marc S. Roth has joined the firm as a partner in Manatt's Advertising, Marketing and Media Division. Roth comes to the firm from Synapse Group, Inc., a subsidiary of the Time Warner Company, where he was Vice President and Chief Marketing and Compliance Counsel.

Marc's practice will focus on customer acquisition, retention and promotion based marketing programs, as well as regulatory defense. He will deepen the firm's considerable expertise in legal, regulatory and legislative issues surrounding affinity and loyalty marketing programs, emerging media and consumer privacy.

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The New York Times Profiles Manatt's Work in Branded Entertainment

Manatt counsel Jordan Yospe and his pioneering work on the integration of brands into entertainment are featured in a [front page story](#) in the April 5, 2010 issue of *The New York Times*. The story reports on Yospe's integral role in the development of a script for "The 28th Amendment," a feature film currently in production, on behalf of client advertisers.

For *The New York Times* piece, Yospe facilitated a rare, behind-the-scenes look at how he works with top Hollywood talent in identifying and 'casting' brands.

Manatt's cutting edge advertising and entertainment practices have positioned the firm at the forefront of the burgeoning business of



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UPCOMING EVENTS

April 9, 2010

matching brands with entertainment properties, including feature films, television, video games, music and webisodes.

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Manatt to Host the PMA's Entertainment Law Summit in Los Angeles

On April 29, Manatt will host an afternoon program on behalf of the Promotion Marketing Association designed for executive-level marketers and attorneys. Each session will outline essential best practices, and the afternoon will conclude with a networking cocktail reception. Topics include:

1. "Social Media: Will Buzz Make You or Break You?"

Featuring: *Linda Goldstein, Esq. Partner, Manatt, Phelps & Phillips and Chas Salmore, CEO, MWKS*

2. Music Download: Talent, Labels and Numerous Rights Holders

Featuring: *Evan Greene, Chief Marketing Officer, and Bobby Rosenbloum, Esq, General Counsel, from The Recording Academy. And Scott Perry, Founder, New Music TipSheet and MKTGideas*

3. Branded Entertainment: Managing the Issues

Featuring: *Jordan Yospe, Esq. Partner, Manatt, Phelps & Phillips, Tammy Brandt, Esq. Managing Counsel, Toyota Motor Sales and Eric Baum, SVP, Business & Legal Affairs, Sony Pictures Entertainment*

Seating is limited, so be sure to register ASAP and take advantage of Manatt's friend-of-the-firm discount of \$100 off the member and non-member rate. Enter promotion code: MAN-100 when you register [here](#).

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Pharmaceutical Companies Seek FDA Guidance on Social Marketing

Pharmaceutical companies recently filed written statements with the Food and Drug Administration, urging the agency to adopt guidelines for Web marketing and the use of social media.

In April 2009, the FDA sent warning letters to 14 companies for running ads in various search engines that the agency said violated regulations, like the need to include disclosure of risk information as required in print and broadcast ads. The industry responded by requesting guidance from the FDA in light of the ever-burgeoning world of social media. The companies argued 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, necessitating guidelines specific to social media and the Internet.

The agency decided to promulgate guidance on the promotion of FDA-

Palo Alto Area Bar Association & Manatt, Phelps & Phillips

Topic: "Enforcement Actions By State Attorney Generals: Are You Prepared?"

Speaker: [Clay Friedman](#)

Palo Alto, CA

Office of Manatt, Phelps & Phillips
[for more information](#)

April 14-15, 2010

American Conference Institute

Advertising, eMarketing &

Promotions for the

Pharmaceutical Industry

Speaker: [Linda Goldstein](#)

Philadelphia, PA

The Union League

[for more information](#)

April 21-23, 2010

ABA Antitrust Law Spring

Conference

Topic: "Mock Trial 2010: A Jury Review of Exclusionary Conduct"

Speaker: [Tom Morrison](#)

Washington, DC

[for more information](#)

May 19, 2010

Beverly Hills Bar Association

Entertainment Law Committee

Topic: "Brand Integration"

Speaker: [Jordan Yospe](#)

Beverly Hills, CA

[for more information](#)

June 10-12, 2010

regulated medical products using the Internet and social media tools, holding [public hearings](#) last November and accepting written comments on the issue through March.

Companies like Merck and Pfizer responded, suggesting various ways that the FDA could regulate pharmaceutical advertising online.

Industry trade group PhRMA, the Pharmaceutical Research and Manufacturers of America, requested that the FDA create something akin to the Good Housekeeping "seal of approval" for online ads. Consumers who see the seal on an advertisement would then know that the ad they are looking at was approved by the FDA. The group also seeks clearance for the use of microblog sites like Twitter.

"Right now there are no Internet-specific standards on how manufacturers can use these media," said Jeffrey K. Francer, assistant general counsel for PhRMA. "The lack of such standards is chilling the use of such technology."

The Word of Mouth Marketing Association, through Manatt, also submitted comments to the FDA, identifying four core principles for the FDA to use in its social marketing guidance.

First, companies have a fundamental interest in listening and participating in social media platforms concerning the medicines or products they provide, and the conditions these medicines and products address. Second, governmental regulation concerning such participation must only relate to those communications that constitute commercial, promotional activities sponsored by the companies. Third, any regulation must be narrowly and appropriately tailored to ensure that the communications are truthful, transparent, balanced, and not deceptive. And finally, any governmental regulation must account for the nature and navigational realities of various social media platforms, such as the ability to use links and space constraints in certain environments or platforms. The FDA has not issued a timeline for the guidelines to be issued.

Why it matters: The pharmaceutical industry is not alone in its struggle with social media and online advertising. All types of companies are facing questions about how to legally market their products to consumers in the absence of clear regulations, and pharmaceutical companies face an even greater burden: how to balance the value of using new media like Twitter or banner ads with their responsibility to provide disclosure of drug information. The FDA may soon provide some guidance.

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Facing Lawsuit and Investigation, Netflix Cancels Contest

Natural MarketPlace 2010

Topic: "The Claim Game- Vegas Edition"

Speaker: [Ivan Wasserman](#)

Las Vegas, NV

Las Vegas Convention Center

[for more information](#)

June 15-16, 2010

American Conference Institute

Litigating and Resolving

Advertising Disputes

Topic: "The Realities of Bringing and Defending a Lanham Act case in Federal Court Part 2: Litigating and Proving the Case"

Speaker: [Tom Morrison](#)

New York, NY

The Helmsley Park Lane Hotel

[for more information](#)

June 15-16, 2010

American Conference Institute

Litigating and Resolving

Advertising Disputes

Topic: "Pushing the Envelope: Case Studies Examining Advertising that has been the Focus of Recent Adversarial Proceedings"

Speaker: [Linda Goldstein](#)

New York, NY

The Helmsley Park Lane Hotel

[for more information](#)

Newsletter Editors

[Jeffrey S. Edelstein](#)

Facing an investigation by the Federal Trade Commission and a class action lawsuit, Netflix has dropped plans to run a second contest on its Web site.

In September 2006, the online DVD rental company launched the Netflix Prize contest. It gave 50,000 contestants data from almost 500,000 customers, like movie information and ratings. Competitors were then asked to create an algorithm that could predict 10 percent better than Netflix how the customers would rate other movies.

That contest ended in the summer of 2009, just before Netflix announced its plans for the second contest: a program to better predict movies that its customers would like.

For the second go-around, the company announced plans to release even more customer information, including demographics like age, zip code, gender, and previously rented movies.

The announcement quickly drew criticism from privacy advocates and led to a [class action lawsuit](#) as well as an FTC investigation.

The agency [contacted Netflix](#) with a number of concerns about the second contest, from a possible violation of Section 5 of the FTC Act to the concern that anonymized information could easily be re-identified to specific consumers.

Netflix responded by agreeing to drop the contest and follow "certain parameters" regarding its use of consumers' data in the future. For example, the company said it would not publicly release customer information for future contests and would contractually obligate researchers with specific limitations on data use.

In addition, a class action lawsuit was filed against the company, claiming that the first contest violated the federal Video Protection Privacy Act as well as California law and Netflix's own privacy policy. One of the plaintiffs, a closeted lesbian, claimed that the release of her information made it possible for her to be outed because of the "gay-themed" movies she had rented.

The company cancelled the second contest, which closed the FTC investigation, and it settled the lawsuit with undisclosed terms.

Netflix Chief Product Officer Neil Hunt announced the cancelation on the [company's blog](#) but left open the possibility of future contests.

"We will continue to explore ways to collaborate with the research community and improve our recommendations system so we can constantly improve the movie recommendations we make for you. So stay tuned," Hunt wrote.

Why it matters: With privacy rights on the top of the FTC's agenda and the subject of multiple high-profile lawsuits, Netflix's plans to release consumer information as part of its contest could not have

Partner
jedelstein@manatt.com
212.790.4533

Linda A. Goldstein
Partner
lgoldstein@manatt.com
212.790.4544

Terri J. Seligman
Partner
tseligman@manatt.com
212.790.4549

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](#)

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come at a worse time. Any company making significant changes to privacy practices and the use of customer information should be prepared to face scrutiny from the public, media, and FTC.

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Classmates.com Settles False Advertising Suit for \$9.5 Million

Reunion Web site Classmates.com has agreed to pay \$9.5 million to settle a class action accusing the site of false advertising.

The lawsuit, filed in 2008, claimed that a user would receive an e-mail from the site informing him that an old classmate wanted to get in touch. In order to receive the message and respond, however, users needed to upgrade their membership in order to check their Guestbook.

Users then paid to become a "gold" member, only to find out that no message was waiting in their Guestbook, the complaint alleged.

Under the agreement, all members of the site – an estimated 3.16 million people – will receive a \$2 credit toward the future purchase of a gold membership.

Subclass members – those who actually upgraded to the gold membership level after receiving a message from the site – will receive either a cash payment of \$3 or a \$2 credit toward the purchase or renewal of a gold membership.

The [settlement](#) also provided for injunctive relief, requiring Classmates.com to update its privacy policy and provide an explanation for its Guestbook feature.

Classmates.com admitted no wrongdoing under the settlement.

The settlement comes as the site faces a new class action lawsuit, filed in February.

The suit alleges that Classmates.com changed its default privacy settings and made more information about members – like their name and photo – publicly available. The plaintiffs claim that the new settings were not sufficiently explained and that they now face greater exposure to security risks, like identity theft.

Why it matters: While users' empty Guestbook may have reminded them of high school in more ways than one, Classmates.com's e-mail marketing tactic is not that unusual. Other companies – like dating Web sites – that use similar methods to encourage users to upgrade their membership, should take note of the settlement.

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Deaf Woman Files Suit Against eBay, Claiming Violation of ADA

A deaf woman filed suit against eBay, claiming that the site violates the Americans with Disabilities Act by requiring potential sellers to use a telephone to verify their identities before they can sell on the site.

eBay requires that sellers register with the site using a phone number in order to receive auditory PIN numbers. Sellers then enter the PIN online to verify their identities.

Melissa J. Earll [filed suit](#) against the online marketplace site last month, alleging that the registration process violates the ADA. Earll, who is profoundly deaf (the most severe categorization of deafness) and does not use a phone, claims that she tried on multiple occasions during the summer of 2008 to explain her issue to the company. She requested an alternative way to authorize her account, but eBay refused to accommodate her, the complaint alleges.

The suit, filed in federal court in Missouri, seeks class action status for all deaf or hard-of-hearing persons who were unable to register using eBay's telephonic system. Earll is seeking monetary damages, a declaratory judgment that the company violated anti-discrimination laws, and an injunction requiring the site to make its registration procedure accessible to deaf people.

"eBay has taken affirmative steps to discriminate against deaf and hard-of-hearing persons by creating a system they cannot use. The basis of this suit is not that eBay has passively failed to accommodate deaf and hard-of-hearing persons. Rather, the basis of the suit is that eBay has gone out of its way to design a system that deaf and hard-of-hearing persons cannot use," the complaint states. It also suggests that "solutions to this problem are easy and inexpensive to implement," such as a registration system that utilizes PINs both visually and aurally.

In a statement, eBay said that it believes its policies are "consistent with the Americans with Disabilities Act and related laws."

Why it matters: The suit is similar to that filed by blind consumers against Target, alleging that the company's Web site was not accessible and therefore violated the ADA. In the Target case, a U.S. District Court judge denied summary judgment for Target, ruling that the ADA can apply to a retail Web site if the site limits the ability of those with disabilities to enjoy the store's services. The company settled soon after, agreeing to pay \$6 million and make its Web site accessible. However, the ruling relied heavily on the connection between Target's Web site and its brick and mortar stores – leaving the application of the ADA to Web-only retailers like eBay an open question.

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