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ADVERTISING LAW

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

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FTC Fines ValueClick \$2.9 Million Over Ad Claims

ValueClick, Inc., the Internet advertiser, has agreed to pay a record \$2.9 million fine in a settlement with the Federal Trade Commission over charges that it made deceptive claims in online ads and emails. The fine is the largest to date in a case based on the 2003 CAN-SPAM Act.

Under the settlement announced by the agency on March 17, 2008, ValueClick must also clearly and conspicuously disclose the costs and obligations consumers must incur to receive any "free" items and is prohibited from future violations of the CAN-SPAM Act.

The settlement also bars ValueClick from making deceptive claims about the security of the consumer data it collects, and requires that it implement and maintain a comprehensive security program, including independent third-party auditing, for 20 years.

The settlement resolves FTC charges that ValueClick's use of misleading commercial emails promising free gifts and its failure to disclose that consumers must spend large amounts of money to receive the "free" products violated the CAN-SPAM Act and the FTC Act.

Specifically, the agency said that Hi-Speed Media, a ValueClick subsidiary, used deceptive emails, banner ads, and pop-ups

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

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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.

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

Topic:
"Navigating the Potholes: The Evolving Landscape for

telling consumers they were eligible for “free” gifts, including laptops, iPods, and high-value gift cards, to lure them to their Web sites. Once on the sites, consumers were forced to navigate through a morass of burdensome and expensive third-party offers—such as car loans and satellite TV subscriptions—which they were obligated to “participate in” at their own expense, in order to receive the promised “free” merchandise.

The FTC also charged that ValueClick, Hi-Speed Media, and another ValueClick subsidiary, E-Babylon, misrepresented that their security measures for handling consumers’ financial data met industry standards. According to the FTC, the companies posted online privacy policies that assured customers their information was encrypted, when in fact they either did not encrypt the data at all or employed a nonstandard and insecure form of encryption. The agency also alleged that a number of the companies’ e-commerce Web sites were vulnerable to SQL injection, a widespread type of hacker attack, in contrast to the companies’ pledges that they employed reasonable security measures.

The ValueClick case is the FTC’s third involving the use of misleading offers of “free” products by Internet-based “lead generation” companies, and its 18th case involving the data security practices of a company handling sensitive consumer information.

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E.U. Probes U.S. Online Betting Laws

The European Union will look into U.S. online gambling laws in response to complaints that the Unlawful Internet Gambling Enforcement Act of 2006, or UIGEA, infringes global trade rules.

The probe, launched March 18, 2008, could potentially propel the E.U. to file a complaint with the World Trade Organization.

The UIGEA is a federal law that prohibits banks and credit card companies from processing payments to overseas betting houses. European gambling operations assert that their expulsion from the profitable American market via the UIGEA, while domestic gambling firms, particularly those offering betting on horse races, are still allowed to do business here, violates WTO rules by unfairly discriminating against them.

In 2006, in a proceeding initiated by the tiny Caribbean nation of Antigua and Barbuda, the WTO ruled that Washington had

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

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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

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the right to ban offshore betting in the interest of public order and morals. But it said the U.S. was breaking international trade law by barring foreign-based Internet gambling companies while giving a pass to U.S.-based remote betting on horse and dog racing. The U.S. then struck a deal with the E.U., Japan, Canada, and other countries in December 2007, permitting it to opt out of WTO gambling rules in return for compensating its trading partners in other areas.

Federal prosecutors continue to probe the pre-ban activities of several major European online gambling houses, claiming that those activities violated U.S. law. The European companies counter that prior to the 2006 ban, international trade laws allowed them to operate in the United States. Accordingly, they assert that the U.S. government's investigations and arrests aimed at them and their executives, but not against U.S.-based businesses, violate WTO rules.

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U.K. Repeals Ban of Violent Video Game

A U.K. agency has reluctantly reversed an earlier decision banning Rockstar Games' ultraviolent game "Manhunt 2."

The ruling by the British Board of Film Classification, which comes nine months after its initial decision, authorizes the sale of the video game to consumers over 18 years of age. The "certificate 18" rating follows a final ruling by the Video Appeals Committee to release the game. It is slated to appear on U.K. shelves later this year.

The game revolves around a man (the player) who wakes up in a living nightmare where he is being stalked for sport and must sneak through the shadows and kill by whatever means he can to fight his way out. In June 2007, the BBFC denied Rockstar the right to distribute Manhunt 2 in the U.K., citing the game's "bleakness and callousness of tone." In October 2007, the board rejected a revised version of the game.

Rockstar appealed to the Video Appeals Committee, which voted 4-3 to allow the game's distribution on the condition that it is sold only to consumers over age 18.

"As I have said previously, we never take rejection decisions lightly, and they always involve a complex balance of considerations," said BBFC Director David Cooke. "We twice rejected Manhunt 2, and then pursued a judicial review challenge, because we considered, after exceptionally thorough examination, that it posed a real potential harm risk.

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However, the Video Appeals Committee has again exercised its independent scrutiny. It is now clear, in the light of this decision, and our legal advice, that we have no alternative but to issue an 18 certificate to the game.”

In a statement, Rockstar Games said it was “pleased” that Manhunt 2 would finally be available in the U.K. and pledged to market it “responsibly.” It will release a less violent version than originally designed, although hackers have been able to undo similar revisions in some U.S. versions.

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Corporate Sponsors of Children’s Hospital Draw Critics’ Fire

The Nationwide Children’s Hospital in Columbus, Ohio, is facing criticism from a coalition of children’s advocates for agreeing to name its new emergency room after Abercrombie & Fitch, in exchange for a \$10 million donation.

Two years ago, Abercrombie donated \$10 million to the hospital toward construction of the center. The hospital plans to recognize another retailer, Limited Too, for its \$5 million donation, with the Limited Too & Justice Main Lobby. The hospital itself is named after an insurance company that donated \$50 million.

But it’s the hospital’s relationship with Abercrombie, which is known for its sexy ads and provocative clothing, that particularly irks the coalition.

The 15 groups and 80 individuals, including the Campaign for a Commercial-Free Childhood and Parents for Ethical Marketing, are urging the hospital to revisit its two-year-old decision to take the donation. The hospital plans to start construction of the emergency and trauma center this year.

In a letter sent March 11, 2008, to hospital management, the coalition wrote, “It is troubling that a children’s hospital would name its emergency room after a company that routinely relies on highly sexualized marketing to target teens and preteens. ... The Abercrombie & Fitch Emergency Department and Trauma Center marries the Abercrombie brand to your reputation ... A company with a long history of undermining children’s well-being is now linked with healing.”

The coalition has also launched a media and letter-writing campaign to press its opposition to the use of the Abercrombie name.

Tom Lennox, a spokesperson for Abercrombie & Fitch, who has also served on the hospital foundation's board of trustees since 2005, said in a statement, "We are proud of our long-standing relationship with the hospital and pleased to help secure its bright future."

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Celebrity Ad Campaign Seeks to "Stop Junk Mail"

Conservation group ForestEthics has launched an ad campaign to back do-not-mail bills pending in several states, with the support of celebrities such as Darryl Hannah, Alicia Silverstone, and Adrian Grenier, star of HBO's "Entourage." Eighteen do-not-mail bills have been introduced in 15 states.

As part of its effort, ForestEthics has set up donotmailus.org. So far, nearly 20,000 people have signed a petition supporting do-not-mail registries. On its site, ForestEthics argues that direct mail is "wasteful, annoying and environmentally destructive" and "fosters identity theft."

"The production of the 100 billion pieces of junk mail that Americans annually receive requires more than 100 million trees, while producing as much global warming emissions as 3.7 million cars. Moreover, this deforestation is occurring in forests that play vital roles in the fight against climate change: the Canadian Boreal and Indonesian Tropical Forest. ... Junk mail distributed in the United States currently accounts for 30% of all the mail delivered in the world, though 44% of it goes to landfills unopened," ForestEthics claims.

The direct mail industry counters that according to statistics provided by the Environmental Protection Agency, direct mail comprises just 2.4% of the total municipal solid waste produced in the U.S. each year. Through recycling efforts, 53.4% of the paper consumed in the U.S. in 2006 was recovered. The industry also argues that a sharp reduction in direct mail would cost the USPS jobs and raise the price of mail. In 2006, about \$6 billion was spent on direct mail advertising, accounting for 21% of all ad expenditures.

In lieu of government opt-out lists, a growing number of private organizations, such as catalogchoice.org, ProQuo.com, greendimes.com, 41pounds.org, Catalogend.com, and DirectMail.com, offer direct mail opt-out services.

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