Advertising Law

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In This Issue

How Much for That Twitter Account in the Window?

A new lawsuit has companies wondering: Who owns a Twitter account?

PhoneDog, a Web site that reviews mobile products and services, claims that it owns the rights to a Twitter account launched by a former employee.

While working as a product reviewer and video blogger for PhoneDog, Noah Kravitz signed up for a Twitter account with the handle, “@PhoneDog_Noah.” By the time Kravitz left the company, the account had more than 17,000 followers. Prior to leaving, Kravitz changed the name of the account to “@NoahKravitz.”

After freelancing for a period of time, Kravitz took a job with a PhoneDog competitor and continued to use the Twitter account.

PhoneDog responded with a lawsuit. The company argued that it provided to employees on a need to know basis confidential information, including passwords to PhoneDog’s Twitter accounts, including all @PhoneDog_NAME Twitter accounts used by PhoneDog’s employees.

The company further alleged that Kravitz had misappropriated trade secrets because the Twitter followers were the equivalent of a stolen customer list.

“The costs and resources invested by PhoneDog Media into growing its followers, fans and general brand awareness through social media are substantial and are considered property of PhoneDog Media LLC,” the company said in a statement to the *New York Times*.

Interestingly, PhoneDog’s complaint also attempted to put a specific monetary value on Twitter followers. Relying on “industry standards,” the company said that Kravitz owes it $2.50 per follower, or approximately $42,500 per month.

Kravitz’s actions were “designed to disrupt, and [have] in fact disrupted, PhoneDog’s economic relationships with its existing and prospective users,” according to the complaint.

In addition to compensatories – $340,000, or eight months of Kravitz’s use of the account at $42,500 per month – the suit seeks punitive

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Practice Area Links

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Upcoming Events

March 7-11, 2012
Engredea's Ingredients and Innovation Conference (co-located with ExpoWest)
Topic: "Talkin' 'bout the Regulations" and "Business 401 Workshop: Negotiating the Regulations"
Speaker: Ivan Wasserman
Anaheim, CA
For more information

March 12, 2012
PLI's Counseling Clients in the Entertainment Industry 2012 Seminar
Topic/Speaker: "Video Games and Computer Entertainment," Marc Roth
Topic/Speaker: "Television, Video & User-Generated Content," Kenneth Kaufman
New York, NY and via webcast
For more information

March 19-20, 2012
ACI's Legal & Regulatory Summit on Food & Beverage Marketing & Advertising
Topic: *"From Weight Loss to Healthy Eating* - How to Prevent Health Claim Nightmares: Practical Guidance for Structuring Claims that Will Withstand Government Scrutiny and Private Litigation*"*
Speaker: Linda Goldstein
Washington, DC
For more information

May 4, 2012
New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar
Topic: "Mobile Marketing - Certainties & Uncertainties"
Speaker: Marc Roth
New York, NY
For more information

Awards

Recognized for Excellence in the areas of Advertising, Marketing and Media damages and an injunction restraining Kravitz from using the Twitter account.

While the suit garnered publicity for its unusual premise, U.S. District Court Judge Maria-Elena James found it solid enough to deny Kravitz's motion to dismiss.

PhoneDog specifically alleged "that a significant amount of its income is derived from advertisements on its website, and 'advertisers pay for ad inventory on PhoneDog's website for every 1,000 page views generated from users visiting PhoneDog's website.'"

Kravitz's conduct resulted in diminished traffic to the Web site via the Twitter account, PhoneDog claimed, which decreased the number of page views and discouraged advertisers from paying for ad inventory.

Therefore, Judge James said PhoneDog had established its economic relationships that suffered due to Kravitz's actions.

She declined to dismiss the suit and allowed the case to move forward.

To read the complaint in *PhoneDog v. Kravitz*, click here.

To read the court's order denying Kravitz's motion to dismiss, click here.

Why it matters: The issues presented by the case – who owns a Twitter account, employer or employee, and what is the value of a Twitter follower? – are relevant for any company engaging in social media. If the case continues, it could define the ownership rights of companies using Twitter or Facebook for product or company branding.

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Target Steps into a Lawsuit Over Toning Shoes

Following in the footsteps of previous litigation against New Balance, Reebok and Skechers over their toning shoes, a plaintiff has filed a class action against Target alleging that the retailer's "TrimStep" footwear was deceptively advertised.

The suit, filed on behalf of a national class in Minnesota state court, challenges Target's claims that its shoes "encourage muscle toning in the legs, improve posture, reduce stress on feet, knees and back and promote a healthy, active lifestyle."

Consumers paid a premium for the shoes, according to the complaint, which not only failed to achieve the promised results but may actually have caused or exacerbated the very health problems they claim to alleviate.

When the toning shoe trend took off in 2009, Target attempted to capitalize on the trend by launching its own line of footwear.

The suit asserts that Target used a variety of media – including point of sale displays, the Internet, and product packaging – to promote the benefits of its shoes, which included improved posture, reduced stress on feet and joints, and increased muscle toning in the legs.

However, clinical evidence subjected to peer review found no significant difference between a test group in toning shoes and a control group in regular shoes in either pain reduction or increased balance, according to the complaint. Additional studies found no evidence that toning shoes reduce joint loading or encourage muscle toning, the suit contends.

The plaintiff purchased her TrimStep rocker bottom footwear in the spring of 2011 for approximately $40. The suit seeks to enjoin Target from deceptively advertising and marketing the TrimStep footwear, as well as damages of less than $5 million.

To read the complaint in *Laughlin v. Target Corp.*, click here.

Why it matters: Makers of toning footwear should not be surprised by the suit, given similar filings against Skechers and New Balance, as well as a $25 million FTC settlement by Reebok over claims that it made false and unsubstantiated claims about its toning shoes.

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Will California Legalize Alcohol-Related Sweepstakes?

The lone state to currently ban residents of legal drinking age from entering contests and sweepstakes conducted by alcoholic beverage makers may soon join the rest of the country.

The California legislature is considering a bill that would allow its residents to take part in such promotions as long as certain requirements were met.

The bill, SB 778, would amend the state's Alcoholic Beverage Control Act to permit authorized vintners, breweries and distilled spirit manufacturers "to conduct, sponsor, or participate in a consumer contest or sweepstakes…offering the chance to win prizes."

Specifically, the sweepstakes advertising would have to comply with the state's Department of Alcoholic Beverage Control's regulations and alcoholic beverages could not be awarded as prizes.

Caps, corks, labels, cartons, cases and other purchase materials could not be used to redeem prizes and neck hangers could include an entry form only if similar entry forms were available at the point of sale or where an alternative means of entry was available.

The bill would not allow for marketing schemes where consumers earn points based on purchases made over a period of time that can be redeemed for prizes or additional contests or sweepstakes entries.

The California ban has been in effect for 13 years after complaints that heavier consumption led to better prizes. The state effectively banned contests by adopting rules that capped prizes at 25 cents for beer, $1 for wine and $5 for liquor. Although beverage manufacturers filed suit, challenging the rules, they were upheld in court.

Proponents argue that the legislation would help boost California brands – particularly in the Napa Valley wine region – by allowing them to take part in such contests, which typically offer all-expenses-paid trips or cash prizes.

But the bill is not without its detractors, who claim that the promotion of alcoholic products in sweepstakes or contests glamorizes consumption and could lead to a rise in underage drinking.

The state Senate unanimously passed the legislation in late January and the bill is now under consideration in the General Assembly.

To read SB 778, the proposed legislation, click here.

Why it matters: The legislation has support from trade groups like the Wine Institute and Family Winemakers of California and has sailed through the legislature so far. Despite the concerns of opponents, the fact that such sweepstakes and contests are legal in all 49 other states – and the argument that it will support local industry – weigh in favor of its passage.

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Mobile Device Privacy Subject of New Legislation

In late January, Congressman Ed Markey (D-Mass.) released a draft bill that would require mobile companies to obtain prior, express consent from users before monitoring software can be installed on their mobile phones.

The bill was prompted by a revelation that Carrier IQ software, designed to help wireless service providers identify and diagnose service problems, could also be used to track every keystroke made by users of devices like the Android, Blackberry, and Nokia phones.

The response was immediate. Multiple class action lawsuits were filed, legislative requests for information were made, inquiries by European lawmakers were announced and a federal hearing was held.

Rep. Markey sent a letter to the Federal Trade Commission in December requesting that the agency investigate the situation.

The Mobile Device Privacy Act will address "the threat to consumers' privacy posed by electronic monitoring software on mobile phones," Rep. Markey said in a press release. "While consumers rely on their phones, their phones relay all sorts of information about them, often without their knowledge or consent. I am concerned about the threat to consumers' privacy posed by electronic monitoring software on mobile phones, such as the software developed by Carrier IQ."

The bill would require mobile companies to disclose to users the existence of monitoring software when a consumer buys a mobile phone, after the sale if such software is later installed, and if a consumer downloads an application that contains monitoring software.

The type of information collected by the software, the identity of third parties that receive the data, and how the information will be used must also be disclosed.

Prior to the collection or transmission of any information, a consumer's explicit consent is required.

The Federal Trade Commission would have one year from the date of the bill's enactment to promulgate regulations pursuant to the legislation, including the manner in which the notice is given to consumers.

The legislation provides for enforcement by the FTC, the FCC and the state Attorneys General, and authorizes private right of action with damages of $1,000 per consumer per violation.

To read the Mobile Device Privacy Act, click here.

Why it matters: Rep. Markey, as co-Chair of the Bi-Partisan Congressional Privacy Caucus, continues to focus on consumer protection and privacy issues. The draft bill is his latest foray into privacy legislation, having already formally introduced the Do Not Track Kids Act in May 2011. That bill would expand the protections of the Children's Online Privacy Protection Act (COPPA) and ban online behavioral advertising to individuals under age 18.

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Negative Option Sales Defendants Settled with FTC

Two individual defendants and their associated companies reached a settlement with the Federal Trade Commission, agreeing to pay almost $10 million over charges they engaged in negative option sales in violation of the Federal Trade Commission Act.

Using information from Web sites that claimed to match consumers with payday lenders, the defendants enrolled consumers in negative option programs for an initial fee of $49.99 with weekly or monthly recurring fees of up to $19.98, the agency alleged.

After consumers submitted their personal information on the sites, a pop-up box appeared titled "Terms and Conditions," which the FTC said consumers believed to be part of the payday loan application.

According to the Commission, consumers were asked to provide an authorization to use their card, but the text did not include any mention of the defendants or their continuity programs.

The defendants then used the consumers' bank account information obtained through their payday loan applications to create and deposit "remotely created checks" to pay for the continuity programs.

And when consumers called the customer service line to complain, the FTC said either no one answered the phone, or they would be put on hold for an extended period of time, or attempts were made to dissuade them from requesting their money back.

In addition to paying a $9.9 million fine, the defendants are subject to extensive limitations on their marketing activities. They are banned from:

- marketing secured loan products;
- obtaining consumers' account information from third parties;
- charging consumers without clearly disclosing all material terms before account information is provided;
- charging consumers without their consent;
- disclosing consumers' account information for any commercial purpose other than the transaction for which it was obtained; and
- failing to clearly disclose information about the transaction, like the seller's name, a description of the product or service, the fact that the consumer will be charged and for what amount, and the terms of any refund or cancellation policy.

Further, the defendants are prohibited from misrepresenting the purpose for which consumers' account information will be used; from misrepresenting any material terms of a credit card purchase or their refund or cancellation policy. They are also prohibited from claiming any benefits of a product or service unless it is substantiated.

To read the complaint in *FTC v. Moneymaker*, click here.

To read the settlement order, click here.

Why it matters: The agency said in a press release that the action was part of its ongoing efforts to "stamp out online fraud" and shut down entities targeting payday loan seekers and other consumers struggling during the recession.

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