Advertising Law

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In This Issue

Status Update: Facebook Seeks to Add Children

Legislators and regulators are expressing concern following a report that Facebook is considering options that would allow children under the age of 13 to use the social media site.

Currently the site does not allow users age 12 and under. But a 2011 study found that more than 7 million children under the age of 12 already participate on the site, notwithstanding the age requirement. The majority of parents of the young participants acknowledge that they helped their children to enroll.

Facebook is considering technological options for children under 12, including connecting a child's account to his or her parents' account, establishing parental controls of children's accounts for things like apps and friending, and keeping younger users' pages ad-free.

Lawmakers immediately expressed concern about Facebook's plan.

Facebook should proceed "with an abundance of caution," Rep. Mary Bono Mack (R-Calif.) warned in a statement. "Very strict privacy protocols must be in place before younger children are allowed on social networking sites."

Reps. Ed Markey (D-Mass.) and Joe Barton (R-Texas), co-chairs of the Bi-Partisan Congressional Privacy Caucus, sent a letter to Facebook CEO Mark Zuckerberg questioning how the site could allow use by children and still comply with the Children's Online Privacy Protection Act.

"Permitting children under 13 to use the social networking site raises a number of important questions about how Facebook would comply with COPPA," the Congressmen wrote. "While Facebook provides important communication and entertainment opportunities, we strongly believe that children and their personal information should not be viewed as a source of revenue."

The lawmakers queried what specific information Facebook would collect from those aged 12 and younger, how verified consent would be obtained from their parents, and whether Facebook plans to target younger users with advertisements.

The company refused to comment on the specifics of the report, but did

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Topic: "Beauty Product Claims, Testimonials and Before & After Images – Stand Out, But Stay Legal"
Speaker: Ed Glynn
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July 24–27, 2012
15th Annual Nutrition Business Journal Summit
Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman
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issue a statement: “Many recent reports have highlighted just how difficult it is to enforce age restrictions on the Internet, especially when parents want their children to access online content and services. We are in continuous dialogue with stakeholders, regulators and other policymakers about how best to help parents keep their kids safe in an evolving online environment.”

To read the letter from the lawmakers, click here.

Why it matters: Facebook faces significant hurdles before the plan becomes a reality. COPPA mandates that parental consent be obtained before a Web site can collect data from children under 13 and prohibits such information from being shared with third parties. The Federal Trade Commission is currently considering revisions to the Federal Trade Commission Act that would strengthen its requirements. The company would also face a skeptical public aware of its track record of privacy violations, including a recent settlement with the FTC.

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NLRB Speaks Again on Social Media

In its third letter offering guidance to employers on social media, the National Labor Relations Board said employees cannot be prohibited from discussing their jobs on Facebook or Twitter and should not be told not to friend coworkers.

The memorandum, issued by Acting General Counsel of the NLRB Lafe Solomon, focused on recent cases challenging the social media policies of seven companies seeking to regulate employee usage of sites like Facebook and Twitter. With topics ranging from intellectual property to privacy, the agency found portions of six of the companies’ social media policies unlawful. It upheld the entire policy of just one company.

Examining General Motors’ social media policy, the NLRB said that a provision “instructing employees to ‘Think carefully about “friending” co-workers’ is unlawfully overbroad because it would discourage communications among co-workers.”

Further, the carmaker’s rule requiring an employee to receive permission prior to posting photos, music, videos, quotes, or personal information – including employer logos and trademarks – is also unlawful, the NLRB said. Without further explanation, employees might believe that such limitations could include photos of picket signs containing the company’s logo or employees working in unsafe conditions, which would constitute protected activity. “Although the employer has a proprietary interest in its trademarks, including its logo if trademarked, we found that employees’ non-commercial use of the employer’s logo or trademarks while engaging in [protected activity] would not infringe on that interest,” Solomon wrote.

In a second case, McKesson Corp. cautioned employees in its policy about the use of copyrighted material, urging them to “respect all copyright and other intellectual property laws.” While the NLRB determined that such an admonition was lawful, a portion of the rule requiring prior permission before reusing content and images from other parties was unlawful.

Clearwater Paper Corp.’s policy raised problems when it urged

employees to “avoid harming the image and integrity of the company.” The provision is unlawfully overbroad, as employees could reasonably construe it to prohibit protected criticism of the company’s labor policies or its treatment of employees, the agency said.

And Dish Network ran afoul of labor and employment laws in its policy, which prohibits communication with the media and members of the press, including blogs, forums, and message boards, or speaking at a conference or seminar. “Employees have a protected right to seek help from third parties regarding their working conditions. This would include going to the press, blogging, speaking at a union rally, etc.,” Solomon wrote.

In contrast, Walmart’s social media policy was found to be completely lawful, the agency said. A section titled “Be Respectful” could have been overly broad with its suggestions to be “fair and courteous” when posting comments, complaints, photographs, or videos, the memo noted. But Walmart’s policy “provides sufficient examples of plainly egregious conduct that employees would not reasonably construe to rule to prohibit [legitimate] conduct,” like tips to avoid posts that “could be viewed as malicious, obscene, threatening, or intimidating,” the NLRB said.

To read the memo from the NLRB, click here.

Why it matters: Companies updating or drafting social media policies can look to Walmart’s policy for guidance, particularly the company’s use of examples. “Rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful,” the NLRB said.

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The Happiest – and Healthiest? – Place on Earth

At a press conference with the First Lady, Disney announced its “Magic of Healthy Living” guidelines, which will limit the advertising of food that does not meet the company’s updated nutritional standards in all media aimed at children under 12, including on Disney television, radio stations and Web sites.

The company also plans to reduce the amount of sodium by 25 percent in children’s meals sold at its theme parks, to create public service announcements about healthy eating, and establish the “Mickey Check” for Disney-licensed food products that meet its criteria of limited calories, sugar, sodium and saturated fat. The Mickey Check – an image of the classic Mouse ears accompanied by a check mark – and slogan “Good For You – Fun Too!” will appear on licensed food products, with recipes on Disney’s Web site, and on menus and products sold at Disney’s parks by the end of the year.

First Lady Michelle Obama praised the plan. “This new initiative is truly a game changer for the health of our children,” she said in a press release. “This is a major American company – a global brand – that is literally changing the way it does business so that our kids can lead healthier lives. With this new initiative, Disney is doing what no major media company has ever done before in the U.S. – and what I hope

every company will do going forward. When it comes to the ads they show and the food they sell, they are asking themselves one simple question: 'Is this good for our kids?'"

Disney said its nutritional standards track the recommendations proposed last year by a group of federal agencies as well as the self-regulatory efforts by the Children's Food and Beverage Advertising Initiative. For example, to comply with the Disney advertising standards, cereals must contain less than 10 grams of sugar per serving, juice cannot have more than 140 calories per 8-ounce serving, and snacks cannot have more than 150 calories per 1-ounce serving.

The changes in ad restrictions will not take effect until 2015 due to existing advertising contracts.

To read Disney's guidelines, click here.

Why it matters: Disney acknowledged that it will likely lose ad revenue because of its new guidelines, but its new standards could cause a ripple effect among other broadcasters and sellers seeking to compete in the "family friendly" market. The change is "not altruistic. This is about smart business," Robert A. Iger, chairman of Disney, said at the press conference.

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NYC Considering Ban on Large, Sugary Drinks

New York City Mayor Michael Bloomberg recently proposed a ban on the sale of large, sugary beverages in the city's restaurants, street carts, theaters, delis and sporting venues.

The law would define sugary drinks as beverages "sweetened with sugar or another caloric sweetener that contain more than 25 calories per 8 fluid ounces" and would apply to drinks sold in containers larger than 16 ounces.

Drinks sold in grocery or convenience stores would not be affected, and neither would alcohol, fruit and juice drinks, and drinks that contain at least 51 percent milk.

The ban – the first of its kind – could take effect in March 2013, with a possible fine of $200 per violation if the city's Board of Health approves it.

Retailers and beverage companies alike quickly pushed back against the proposal.

The American Beverage Association and the National Restaurant Association launched full-page newspaper ads decrying the ban as creating a "nanny state" and rejecting the idea that such drinks can help lead to obesity. Scott DeFife, executive vice president of policy and government affairs for the NRA, suggested that the drive behind the ban be put to use elsewhere. "Public health officials in New York should put all of their energies into public education about a balanced lifestyle with a proper mix of diet and exercise rather than attempting to regulate consumption of a completely legal product enjoyed universally," he said in a statement.

"There is no silver bullet in America's fight against obesity, and hyper-

regulation such as this misplaces responsibility and creates a false sense of accomplishment," DeFife added.

Why it matters: Despite the controversy and pushback from industry groups and consumers alike, the proposal has a strong chance of being approved. The chairman of the New York City Board of Health indicated his support for the ban and Mayor Bloomberg, who is leaving after three terms in office, may not be overly concerned about pleasing constituents. Prior health-related restrictions put in place by the Mayor – like bans on trans fats and smoking in restaurants – received similar reactions, only to become models for other cities across the country.

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Microsoft's IE 10 Will Default to "Do Not Track"

Microsoft announced that the tenth iteration of Internet Explorer will feature "Do Not Track" as its default setting.

"We believe that consumers should have more control over how information about their online behavior is tracked, shared, and used," Brendan Lynch, the chief privacy officer of Microsoft, wrote in a blog post.

Users who browse with IE 10 will not be automatically tracked and will therefore need to affirmatively opt in to receive behavioral advertising.

The company will be the first browser to offer Do Not Track as the default setting. Mozilla's Firefox, Google Chrome and the current version of Internet Explorer offer it as an option for users.

The Federal Trade Commission, which has advocated for Do Not Track, praised the move. "Microsoft's Do Not Track option in its upcoming version of Internet Explorer is yet another step forward in giving consumers choice about their browsing data," Jon Leibowitz, chairman of the FTC, said in a statement. "Despite this positive development, industry should honor consumer choice not just for receiving targeted ads, but for all tracking other than for expected purposes like security. I remain hopeful that industry will provide an effective Do Not Track solution by the end of the year."

But advertising groups disagreed, calling the move contrary to the spirit of the industry's agreement to honor Do Not Track as an opt-in option.

The industry supports "consumer choice, not a choice made by one browser or technology vendor," the Digital Advertising Alliance's General Counsel told *The Wall Street Journal*. Instead of having Do Not Track dictated by the browser, consumers should be given a choice whether or not to be tracked, he added.

"This action by Microsoft is absolutely not helpful and actually represents a setback for consumer protection," Interactive Advertising Bureau President and CEO Randall Rothenberg told *AdExchanger*.

The Association of National Advertisers suggested that Microsoft reconsider. "We request that Microsoft reconfigure IE 10, which is now in preview mode, to contain a default 'off' browser setting for its 'Do Not Track' function," the group said in a statement. "This change in mode will provide consumers a real choice as to whether they do or do not want tailored advertising, the information to make a reasoned

choice, and therefore will be consumer empowering."

To read Microsoft's announcement of the policy change, click here.

Why it matters: Microsoft's policy change leaves advertisers with a difficult choice: hope that consumers change their default settings in IE 10, or reject the settings and continue to track users. The company's decision also kinked up the process among groups and advocates attempting to establish a consistent definition of Do Not Track and a uniform system across multiple browsers. The World Wide Web Consortium, or W3C, told *Ad Age* that Microsoft's default settings will render the browser noncompliant with the group's recommendations. Despite the pushback, Microsoft's position hasn't changed. In a blog post following the criticism, Lynch said Do Not Track would remain the default setting for IE 10. "We agree with those who say this is all about user choice," he wrote. "However, we respectfully disagree with those who argue that the default setting for [Do Not Track] should favor tracking as opposed to privacy."

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Albert Einstein, Marilyn Monroe and the Right of Publicity

Rumored to have known each other intimately in life, Albert Einstein and Marilyn Monroe have now symbolically met in death in the courtroom. A court has ruled that Einstein and his estate possess rights that other courts have held Marilyn Monroe and her estate do not. And Einstein can thank New Jersey for the difference.

The Central District of California recently ruled that right of publicity claims brought by The Hebrew University of Jerusalem against General Motors for the unauthorized use of Albert Einstein's image in a magazine advertisement would survive a motion for summary judgment brought by GM. The district court concluded that Einstein had a postmortem right of publicity under New Jersey law, rejecting the very same arguments that had been made by the Estate of Marilyn Monroe in the process. *Hebrew University of Jerusalem v. General Motors LLC*, __ F. Supp. 2d__, 2012 WL 907497 (C.D. Cal. 2012).

Click here to read further analysis from Manatt's Mark Lee and Erin Witkow in our Intellectual Property Law newsletter.

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Noted and Quoted . . . Cole Authors Article on Landmark Google AdWords Decision

E-Commerce Law Reports **recently sought Manatt litigation partner Chris Cole's analysis of the Fourth Circuit's watershed ruling in *Rosetta Stone Ltd. v. Google Inc.* The court held that Google's sale of trademarked terms to competitors for use in "Sponsored Links" through its AdWords advertising platform may give rise to trademark infringement claims. The plaintiff, Rosetta Stone, is therefore entitled to present evidence in support of its claims that Google infringed its marks by displaying them along with search results in sponsored advertising links for counterfeit Rosetta Stone products.**

In an article published in June 2012, Cole writes that “we can expect more litigation against Google and its advertisers to follow unless Google rescinds its 2009 changes to the AdWords policy. Other web search portals and social media sites should also pay attention [to this ruling].”

To read the full article, click here.

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