Advertising Law

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In This Issue

Brits Ban Makeup Ads with Digital Technology

The British Advertising Standards Authority upheld complaints filed by a member of Parliament and banned from publication two L'Oreal advertisements that it deemed misleading.

The ads featured Julia Roberts for Lancôme and Christy Turlington for Maybelline, and the complaints objected to the digital technology used in the ads.

In the Maybelline magazine ad, parts of Turlington's face were covered in Maybelline "The Eraser" foundation and other parts were uncovered. The sections with foundation had fewer wrinkles. Small print at the bottom of the ad said "Illustrated effect."

The ASA determined the ad was misleading because the image had been digitally manipulated and was therefore not representative of the results the product could achieve.

L'Oreal acknowledged that post-production techniques had been used and that the image had been digitally retouched, but noted that crow's feet and expression lines were still visible on Turlington's face. In addition, the image was "consistent with the public perception" that Turlington is a "beautiful woman with a naturally fantastic complexion," the company said.

The ASA was not persuaded and added that "[t[he information Maybelline provided regarding the digital re-touching of the image was insufficient to establish whether the difference between the 'blocks' was an accurate representation of the results the product could achieve."

The Roberts ad was a two-page magazine ad for "Teint Miracle" Lancôme foundation and featured an image of Roberts' face. The company conceded that the image, taken by well-known photographer Mario Testino, utilized flattering light to reduce the appearance of imperfections, but it also noted that Roberts has "naturally healthy and glowing skin." Lancôme said the ad was "an aspirational picture" of what could be achieved by using the product.

While the ASA acknowledged Roberts' beauty, "the image was produced with the assistance of post-production techniques," and Lancôme did

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Topic: "There is No Retweeting From the Law"
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not provide information about what effects those enhancements had on the final image.

“On the basis of the evidence we . . . received we could not conclude that the ad image accurately illustrated what effect the product could achieve, and that the image had not been exaggerated by digital post production techniques. We therefore concluded the ad was misleading,” the ASA said.

To read the ASA’s adjudication in the Maybelline ad, click here.

To read the ASA’s adjudication in the Lancôme ad, click here.

Why it matters: In finding that both ads breached the advertising standards code for exaggeration and misleading ads, the British regulators signaled their intention to take a hard stance on airbrushing and postproduction techniques.

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Groupon Faces Scrutiny Over Privacy, Gift Certificates

Groupon is currently facing both state and federal scrutiny. The Connecticut attorney general is evaluating whether the company’s business model runs afoul of state gift card law and federal legislators are questioning the company’s privacy practices.

Attorney General George Jepsen requested information from the company about its business practices, noting in a press release that “it appears what Groupon sells or offers may fall within the definition of a gift certificate under Connecticut law,” which prohibits gift cards with expiration dates.

Jepsen requested that the company explain the terms under which Groupons are sold to and redeemed by consumers, how much revenue is generated by those sales in Connecticut, and how frequently expiration dates are imposed on the sale of goods and services at a discount.

“Discounts on goods and services are good for Connecticut consumers, but only if they are getting the benefit of what they are entitled to under Connecticut law,” Jepsen said. “I have not prejudged Groupon or reached any conclusions. I am hopeful that any issues can be resolved through discussion and cooperation.”

The company also drew a request for information from Reps. Ed Markey (D-Mass.) and Joe Barton (R-Tex.) in a letter asking about the company’s privacy policy and data security.

The questions came after the company announced in July that it planned to start collecting more information about its users and sharing it with business partners.

Specifically, lawmakers questioned whether Groupon plans to establish an opt-in consent model to the data sharing, how it will determine users’ ages, and whether the company will mandate that business partners adhere to its privacy policy.

"Groupon offers discounted prices on personalized deals, but it shouldn't discount the protection of customers' personal information," Markey said in a statement about the letter. "We must ensure that consumer information is safeguarded, with clear, distinct permissions and the ability for customers to 'opt-in' before their information is shared with third parties."

To read AG Jepsen's letter to Groupon, click here.

To read Reps. Markey and Barton's letter, click here.

Why it matters: Groupon is no stranger to the controversy as to whether its Groupons constitute gift cards. In 2010, a consumer filed a class action against the company alleging that it violates state and federal gift certificate laws that prohibit or restrict expiration dates. The case settled for a confidential amount, but the company changed its terms of service to require that merchants honor any Groupons for the period of time required by the relevant gift card law in the state in which it was purchased. Despite the change, a similar lawsuit was filed earlier this year in California federal court. Also, privacy is a hot-button topic in Washington, particularly with Reps. Markey and Barton, who introduced the Do Not Track Kids Act earlier this year. The legislation would ban online behavioral advertising to persons under age 18 and expand the protections of the Children's Online Privacy Protection Act (COPPA).

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Court: No Private Class Actions Under TCPA

A New Jersey appellate court recently ruled that a plaintiff could not bring a class action suit when pursuing a private cause of action under the federal Telephone Consumer Protection Act.

The plaintiff, a local New Jersey business, filed suit under the act after it received an unsolicited one-page fax from the defendant advertising its restaurant. According to the complaint, the faxing was the result of a "blast fax," whereby the defendant caused the advertisement to be sent to 4,649 businesses. The plaintiff brought a class action suit on behalf of all recipients of the faxed advertisement and sought the $500 statutory damages available to private claimants under the TCPA for all members of the class.

The appellate court, affirming the lower court's dismissal of the class action claims, concluded that the plaintiff could not maintain a class action under the TCPA's private remedy provision, because the class action was not "superior to other available methods for the fair and efficient adjudication of the controversy" and, therefore, lacked the superiority requirement for class certification.

The court stated, "A class action suit is not a superior means of adjudicating a TCPA suit. Class actions are generally appropriate where individual plaintiffs have 'small claims' which 'are, in isolation, too small . . . to warrant recourse to litigation.' In such instances, 'the class-action device equalizes the claimants' ability to zealously advocate their positions.' That equalization principle remedies the incentive

problem facing litigants who seek only a small recovery."

The court further noted that "by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief. As the motion judge observed, 'the nature of the harm . . . as near as I can tell, is about two cents worth of paper and maybe a little ink and toner.' . . . Ultimately, we note that the same facts required to prevail on an individual TCPA claim – an unsolicited fax was received from a sender with whom the recipient had no prior business relationship – are identical to the facts that would have to be proven to merely identify a single class member. We discern no superiority in such a situation."

To read the decision in *Local Baking Products v. Kosher Bagel Munch*, click here.

Why it matters: The court's decision exposes the rift in both state and federal courts on the issue of whether plaintiffs may bring class actions under the TCPA. Seven states – Arizona, California, Florida, Indiana, Missouri, North Carolina, and Oklahoma – have reported decisions allowing class certification for TCPA claims; the New Jersey decision adds it to the five other states – Colorado, Connecticut, New York, Ohio, and Texas – that have denied certification. The federal courts are similarly split, the decision noted. The Fifth Circuit has reversed certification of a class and district courts in Indiana and Pennsylvania have denied certification. A federal court in Washington, however, has certified a class under the act.

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CARU Recommends That Web Site Better Protect Children's Online Privacy

The Children's Online Advertising Review Unit (CARU) recommended that Magic Box International modify its Web site, www.gogocrazybones.com, to better protect children's online privacy and come into compliance with the Children's Online Privacy Protection Act (COPPA).

A television commercial for Go Go Crazy Bones toy figures directed users to visit the company's site, which was geared toward children aged 4 to 13.

The site included a feature, Club Go Go's, that required users to register in order to create their own characters, play games, and upload photos. Registration required the user to provide an e-mail address, user name, password, country and state, and users could also opt-in to receive an e-mail newsletter from the site.

There was no request for a parent's e-mail address, and the site itself contained hyperlinks to follow Go Go Crazy Bones on Twitter.

CARU expressed concern that the site collected personally identifiable information without first obtaining verifiable parental consent, and that the Twitter link could lead to inappropriate content for children under 13.

Because the Twitter Web site "is not intended for use by children under

13 years of age and the site does not age screen to determine the age of its visitors before allowing them to register and provide personally identifiable information," CARU determined that the hyperlinking was not in compliance with its guidelines.

Magic Box agreed to remove the link to Twitter from its site, the panel said.

CARU also said the collection practice violated both its guidelines and COPPA even though the site said the registration information was only used internally and was not publicly disclosed or shared with third parties.

Going forward, Magic Box will only collect a parent's e-mail address during the registration process and will not allow children to sign up to receive the Club Go Go's e-mail newsletter.

Why it matters: "Operators of Web sites for children or children's portions of general audience sites should not knowingly link to pages of other sites that do not comply with CARU's guidelines," the panel noted. In addition, sites "collecting personally identifiable information from visitors under the age of 13 must obtain consent from parents prior to collecting such information."

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Muhammad Ali, Seafood Chain File Trademark Suits

Two new trademark infringement suits were recently filed, with Muhammad Ali squaring off against the manufacturer of an e-reader and Wendy's facing a suit from a seafood chain.

Muhammad Ali filed a federal suit against Kobo Inc., the Canada-based manufacturer of an electronic reading device.

Kobo used the boxer's famous quote, "float like a butterfly, sting like a bee" in a full-page advertisement in a major newspaper, which, according to the suit, falsely implied Ali's endorsement, infringed upon his trademarks, and violated his right to publicity. The ad featured the wording, credited to Ali, as well as reviews of the e-reader from tech publications, like "A real contender – Computerworld" and "The look of a winner – Gizmodo."

"Each statement is a reinforcement of the persona of Muhammad Ali," according to the complaint.

Muhammad Ali Enterprises, the holder of Ali's intellectual property rights, has two federal trademarks for the phrase, the complaint notes, that cover a variety of products like journals, t-shirts, hats, toys, and games. The marks have been licensed to "blue chip" companies, like Gatorade and Epson, to include in their advertising.

Calling Ali "one of the most famous and iconic personalities in the United States, and in the world," the suit seeks an injunction, the destruction of any marketing materials used by Kobo, and compensatory and punitive damages.

In a second suit, Pincher's Crab Shack, a seafood chain, filed suit against fast food company Wendy's, alleging that the company

misappropriated the seafood chain's tagline "You Can't Fake Fresh."

Florida-based Pincher's has used its "fresh" logo since 2004. Now trademarked, it appears in signage at each restaurant location, on the company's Web site and menus, and in radio and television ads.

Wendy's recently began using the phrase in its ads where a Wendy's employee holds up a sign reading "You can't fake fresh." In addition, the company began using the phrase "You can't fake real" on its Web site, a tagline that Pincher's argues is "fruit of the poisonous tree" in that it is the progeny of the first infringing use of its mark.

The parties market to "exactly the same group of consumers," the suit argues, and the 15-count complaint alleges trademark infringement, unfair competition, and violation of Florida's business laws.

To read the complaint in *Muhammad Ali Enterprises v. Kobo, Inc.*, click here.

To read the complaint in *Phelan Holdings, Inc. v. Wendy's International*, click here.

Why it matters: In these cases, the plaintiffs will have to establish, respectively, that consumers believed that Muhammad Ali endorsed Kobo's e-reader and were confused about Wendy's use of the same phrase used by Pincher's Crab Shack.

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