Advertising Law

October 6, 2011

In This Issue

- New Guidelines for Social Networking, Digital Marketing of Alcohol
- CARU Refers Three Movies for Ads Targeted to Those Under 13
- NAD Weighs In On Toothbrush Whitening Claims
- Michaels Settles for $1.8M Over "Continuous" Sales Ads
- Court Halts Operations, Freezes Assets of "Free Trial" Sites
- Quarterback's Suit Against EA Dismissed
- NARC Announces Procedures for OBA Review
- Senate Committee Approves Government's Food Guidelines
- Privacy Groups: Government Should Reject Industry's Self-Regulatory Program
- Noted and Quoted...*The New York Times* Calls Upon Linda Goldstein on Strategies to Curtail Guerilla Marketing

New Guidelines for Social Networking, Digital Marketing of Alcohol

The Distilled Spirits Council of the United States recently issued new guidelines for responsible alcohol advertising and marketing on social networking sites and other digital platforms.

The guidelines, which became effective September 30, apply to all branded digital marketing communications – both paid and unpaid – of DISCUS member companies, including Web sites, blogs, mobile communications, and apps.

Under the guidelines, participating entities are required to have consumers confirm their ages before marketers can engage them in direct dialogue (a process known as "age-gating") and to regularly monitor brand pages and sites, removing inappropriate user-generated content when needed. In addition, the guidelines instruct that companies should clearly identify their brand marketing as such in digital marketing communications or product promotions, such as blogs, and utilize visible instructions "urging" consumers to forward downloadable digital content only to those over age 21.

Companies must also update their privacy policies to improve data collection practices and the use of personal information, according to the guidelines, and consumers are required to affirm they are of legal purchase age before the company collects any information from them. Such information cannot be sold or shared with third parties unrelated to the brand advertisers, the guidelines state. And consumers must affirmatively "opt in" prior to receiving a direct digital marketing communication as well as have the ability to then "opt out" of such communications.

The guidelines, developed in coordination with the European Forum for Responsible Drinking, will be applicable to marketing on sites like Facebook, Twitter, and YouTube.

Newsletter Editors

Linda A. Goldstein
Partner
Email
212.790.4544

Jeffrey S. Edelstein
Partner
Email
212.790.4533

Marc Roth
Partner
Email
212.790.4542

Practice Area Links

Practice Overview
Members

Upcoming Events

October 11, 2011
WOMMA's Talkable Brands Exchange
Topic: "Sweepstakes and Contests Game Plan Preparedness"
Speaker: Linda Goldstein
New York, NY
For more information

October 12-14, 2011
The Conference Board's Council of Senior International Attorneys
Topic: "Implementing Social Media Initiatives Internationally"
Speaker: Linda Goldstein
New York, NY
For more information

October 26-27, 2011
ACI Social Media, Business Technology and the Law Conference
Topic: "You Better Disclose That: Ensuring that Your Company is Closely Adhering to the FTC's Endorsement and Testimonial Guidelines"
Speaker: Marc Roth
New York, NY
For more information

November 14-16, 2011
PMA Marketing Law Conference
Topic: "What's New in the Game Today - New Twists on Traditional Sweeps, Contests and Promotions," Linda Goldstein; "The Perils of Partners - Affiliate/Advanced Consent Marketing," Marc Roth; "Courting Disaster - Mock Trial of Promotional Mishaps," Chris Cole
Chicago, IL
For more information

Awards

Recognized for Excellence in the areas of Advertising, Marketing and Media

Under the preexisting DISCUS Code, advertising and marketing for alcoholic beverages should be placed in media only where at least 71.6 percent of the audience is reasonably expected to be of legal purchase age. DISCUS noted that the most recent Nielsen online syndicated data from August 2011 found that all three sites met the threshold for alcoholic beverage marketing, with 82.22 percent of Facebook's audience over 21, 86.86 percent for Twitter, and 80.96 percent for YouTube.

To read the guidelines, click here.

Why it matters: DISCUS said that in light of "constantly evolving" technology, the guidelines will be regularly reviewed and updated as needed. "Social media has become an increasingly important marketing channel to reach adult consumers of legal purchase age," Peter Cressy, DISCUS president, said in a statement. "These new digital guidelines reflect our companies' strong commitment to extend their responsible marketing practices to these emerging media platforms." A spokesperson for DISCUS told *The Wall Street Journal* that the organization plans to investigate companies that are reportedly not in compliance with the guidelines and will publish the results of the inquiries on its Web site.

back to top

CARU Refers Three Movies for Ads Targeted to Those Under 13

The Children's Advertising Review Unit has referred advertising for three separate movies – *Transformers: Dark of the Moon*, *Green Lantern,* and *Captain America: The First Avenge* – as part of its routine monitoring practices.

CARU said that *Transformers* and *Captain America,* both films rated PG-13, aired television advertising during *Hole in the Wall*, a show on the Cartoon Network that airs at 7:30 p.m. *Transformer* received its rating for "intense prolonged sequences of sci-fi action, violence, mayhem and destruction, and for language, some sexuality and innuendo," while *Captain America* received its rating for "intense sequences of sci-fi violence and action."

The airing of both commercials "raised concerns regarding the appropriateness of advertising a film rated PG-13 to children," the panel said.

In addition, *Green Lantern* cosponsored a "Got Milk?" ad that appeared in the August 2011 issue of *SI Kids* magazine, a publication intended for children under 13 years of age. *Green Lantern* received its PG-13 rating for "intense sequences of sci-fi violence and action."

Looking to Section 5 of the CARU Guidelines' Core Principles, CARU emphasized that "Products and content inappropriate for children should not be advertised directly to them," and that under Section (i) of the

The LEGAL 500 UNITED STATES
Named a Top Practice Nationally for Marketing and Advertising

THE BEST LAWYERS IN AMERICA
Practice leaders included among the prestigious *Best Lawyers* in the country

General Guidelines, “Advertisers should take care to ensure that only age-appropriate videos, films and interactive software are advertised to children, and if an industry rating system applies to the product, the rating label is prominently displayed.”

Because all three advertisements were intentionally placed, CARU referred the ads to the Motion Picture Association of America for further review.

To read the press release about *Captain America,* click here.

To read the press release about *Green Lantern,* click here.

To read the press release about *Transformers*, click here.

Why it matters: Under the terms of an agreement with the MPAA, CARU will ask an advertiser to pull an ad for a film rated PG-13 that was inadvertently placed during children’s programming. If the advertiser complies, the inquiry by CARU is closed. But where the placement of the ad was intentional – as it was in the three movie advertisements – CARU refers the matter to the MPAA for a determination of whether the film, despite its rating, is appropriate to be advertised to children.

back to top

NAD Weighs In On Toothbrush Whitening Claims

The National Advertising Division recently recommended that Johnson & Johnson Healthcare Products modify certain performance claims for its REACH Total Care + Whitening Toothbrush, which the NAD found contained misleading statements about its teeth whitening properties.

In an challenge brought as part of the NAD’s routine monitoring program, the NAD examined claims that the REACH toothbrush “whitens and removes stains” and “each time you brush you’re whitening and removing stains.” According to Johnson & Johnson, the bristles in its REACH toothbrush were embedded with calcium carbonate that removed plaque and provided whitening benefits.

Looking to prior decisions discussing tooth bleaching products, the NAD explained the difference between bleaching products, which affect intrinsic changes to the shading and coloring of teeth by removing stains, and whitening toothpastes, which function differently by removing extrinsic stains that affect the perception of whiteness. Because Johnson & Johnson submitted two studies that demonstrated its bristles provide a consumer meaningful difference, the NAD said Johnson & Johnson could support its claim that “Ordinary toothbrushes clean teeth. REACH whitens them.”

However, NAD concluded that claims that the toothbrush “whitens *and* removes stains” were misleading. “By use of the conjunctive ‘and,’ consumers could reasonably take away the implied message that not only does the advertiser’s REACH toothbrush remove surface (extrinsic) stains for noticeably whiter teeth by the infusion of calcium carbonate into its bristles, but also has the ability to actually *whiten the tooth intrinsically* by its innovate bristles or by some other means,” the NAD said. “Since it is undisputed that the advertised product removes only

extrinsic stains by mechanical means (abrasive action) only," in order to avoid the potential for consumer confusion, the NAD recommended that the advertiser modify its claims "whitens and removes stains" and "each time you brush you're whitening and removing stains" by removing the conjunctive 'and' "to better reflect the evidence offered in support of these claims."

In addition, if Johnson & Johnson chooses to discontinue those claims and rely solely on the "Ordinary toothbrushes clean teeth. REACH whitens them" claim, the NAD said that the company must in close proximity clarify the claim that the whitening is achieved through the removal of stains.

To read the NAD's press release about the decision, click here.

Why it matters: "It is well established that an advertiser is obligated to support all reasonable interpretations of claims made in its advertising including messages it may not have intended to convey," the NAD noted.

back to top

Michaels Settles for $1.8M Over "Continuous" Sales Ads

Arts and crafts retailer Michaels reached a $1.8 million settlement with the State of New York over allegations that the company deceived consumers into believing they were receiving discounts when they were in fact paying the regular store price.

The settlement includes $800,000 in civil penalties and a donation to state schools worth $1 million in arts and crafts supplies. The company also agreed to change its advertising practices.

According to New York State Attorney General Eric T. Schneiderman, Michaels advertised its "custom framing" as a sale product for at least 104 consecutive weeks, using newspaper flyers, in-store banners, and signs to advertise that the framing service was either at least 50 percent off or a certain dollar amount off.

State law prohibits never-ending sales, the AG said, and Michaels' actions violated Section 350-D, the false advertising provision of the state's business law.

"For years, Michaels duped consumers into thinking they were receiving huge discounts, when in fact, they were simply paying the regular store price," said Schneiderman. "Through deceptive advertising practices, this company violated the law and took advantage of hardworking consumers trying to save money."

The AG's office began tracking the company's marketing materials in 2009 and found that Michaels advertised the custom framing sale in at least one form every day over a two-year period for its 48 stores in New York.

Why it matters: Companies that engage in promotional pricing should check relevant state law to ensure that their practices are not in violation of advertising regulations.

back to top

Court Halts Operations, Freezes Assets of "Free Trial" Sites

A U.S. District Court has frozen the assets and halted operations of an online firm that the Federal Trade Commission alleged tricked consumers with "free" or "risk-free" offers for weight-loss pills and tooth whiteners, among other products.

The preliminary injunction against defendant Jesse Willms and 10 companies under his control is based on the sites' use of "negative option" sales to generate more than $450 million from consumers, the agency said.

The defendants used deceptive tactics to obtain consumers' credit or debit card information and then charged consumers a monthly recurring fee for various "bonus" offers, the FTC alleged.

According to the complaint filed in May, the defendants made offers of "free trials" for products ranging from acai berry weight-loss pills to teeth whiteners to work-at-home schemes, and access to government grants and free credit reports to penny auctions. Consumers were typically charged for the free trial as well as a recurring monthly fee, usually $79.95, the agency said.

Pending trial, the defendants are barred from conducting negative option and continuity plan sales or making "free trial" or "bonus" offers under the preliminary injunction, as well as prohibited from misrepresenting the costs of a product, failing to disclose the amount and timing of fees and the terms and conditions of any refunds, misrepresenting any product endorsement or testimonial, and charging consumers without their express consent.

"Not only has [the FTC] shown a likelihood that defendants have engaged in misleading marketing practices, but it has also shown that defendants have moved substantial funds to offshore companies and bank accounts," U.S. District Court Judge Marsha J. Pechman wrote in the preliminary injunction order.

Because of such actions, she found that the agency had shown enough evidence to justify the asset freeze and the halt to operations.

To read the preliminary injunction order, click here.

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

Why it matters: Companies that make "free trial" or "bonus" offers should make sure that all material terms and conditions related to billing are clearly disclosed to consumers, as the FTC continues to crack down on continuity plan and negative option sales.

back to top

Quarterback's Suit Against EA Dismissed

A New Jersey federal judge granted summary judgment for video game company Electronic Arts in a suit brought by a former Rutgers University quarterback who claimed that the company misappropriated his likeness as a virtual player in EA's NCAA Football video game.

Ryan Hart argued that Electronic Arts violated his right of publicity by

using his physical attributes like his height and weight, his speed and agility rating, jersey number, and choice of accessories (a helmet visor and left wristband) for a character in four versions of the video game. The video game manufacturer – facing several similar suits – argued that video games are protected expressive works under the First Amendment.

The court agreed, relying in part upon the recent U.S. Supreme Court decision in *Brown v. Entertainment Merchants Association*, which found that video games deserve the same First Amendment protection as other formats like books, plays, and movies. Applying the transformative test, U.S. District Court Judge Freda Wolfson wrote that there "are sufficient elements of EA's own expression found in the game that justify the conclusion that its use of Hart's image is transformative and, therefore, entitled to First Amendment protection." Viewing the video game as a whole, the court found that NCAA Football includes several creative elements apart from Hart's image, including virtual stadiums, athletes, coaches and fans, and game commentary.

The court also concluded that, even focusing on Hart's image alone, the game is transformative. "It is true that the virtual player bears resemblance to Hart and was designed with Hart's physical attributes, sports statistics, and biographical information in mind. However, as noted, the game permits users to alter Hart's virtual player, control the player's throw distance and accuracy, change the team of which the player is part by downloading varying team names and rosters, or engage in 'Dynasty' mode, in which the user incorporates players from historical teams into the gameplay," the court wrote. These additions, in the court's view, make the game transformative.

In granting summary judgment, the court stated that the "malleability of the player's image in NCAA Football suggests . . . that the image serves as an art-imitating-life starting point for the game playing experience. On balance, on the facts of this case, [EA's] First Amendment right to free expression outweighs [Hart's] right of publicity."

To read the decision in *Hart v. Electronic Arts, Inc.*, click here.

Why it matters: The court distinguished the decision in a similar California suit where the court denied EA's motion to dismiss, ruling that because the Hart case had reached the summary judgment stage, it had a more robust factual record than the California court. In addition, the judge found it significant that the California court failed to address that the virtual image may be altered into various formulations: "I find this aspect of the game significant because it suggests that the goal of the game is not for the user to 'be' the player."

back to top

NARC Announces Procedures for OBA Review

The National Advertising Review Council has announced the publication of procedures for the Online Interest-Based Advertising Accountability Program, administered by the Council of Better Business Bureaus. The Accountability Program seeks to set standards and implement enforcement mechanisms for

companies that engage in online advertising based on consumers' Web-surfing behavior.

The procedures provide a step-by-step explanation of the enforcement process and information about how inquiries are initiated, as well as the content, format, and public reporting of such inquiries.

According to the mission statement for the Accountability Program, it "will monitor covered entities' compliance; institute inquiries into cases of potential non-compliance; work with covered entities to expeditiously resolve instances of non-compliance; and publish cases of non-participation or uncorrected non-compliance and refer such cases to the appropriate government agency." The NARC said it anticipates "inquiries and review will focus primarily on OBA issues directly related to the Transparency and Control Principles."

The NARC said that deliberations, meetings, proceedings, and records of the Accountability Program will be confidential, with the exception of the decision and the press release that will be issued with it.

If the subject of the inquiry elects not to participate in the Accountability Program, the CBBB will compile a fact record and evaluation that it will then forward to the appropriate government agency. Reports of such a referral – and the accompanying press release – may also be released.

Any entity or individual, including the Accountability Program itself, can initiate an inquiry under the procedures. The subject of the inquiry will be notified and have 15 business days to provide either a written statement that it will not participate or a signed participation agreement. If it chooses to participate, the subject of the inquiry must then submit its response.

The challenger may respond in turn, and if so, the subject of the inquiry may respond to the challenger. The Accountability Program may also request a meeting or further information in the inquiry.

After a decision has been reached, the NARC said that any changes to OBA practices recommended by the Accountability Program will serve as guidance to all other covered entities. If the Accountability Program recommends that a subject's OBA practices be discontinued or modified, it may subsequently request a report on the entity's progress in implementing the recommendations.

To read the procedures, click here.

Why it matters: Companies that engage in online behavioral advertising are now on notice that they could be subject to review of their practices. "Any company that engages in OBA should be in compliance with the principles," Genie Barton, vice president and director of the Accountability Program, said in a statement. "Accountability Program staff has been actively working with companies to assist them in meeting their compliance obligations. With these new procedures in place, we are now conducting formal inquiries into instances of possible non-compliance while continuing our efforts to educate companies about the requirements of the Program."

back to top

Senate Committee Approves Government's Food Guidelines

In the continuing battle over the federal government's proposed guidelines on marketing food to children, the Senate Appropriations Committee voted to support the guidelines despite opposition from House lawmakers.

In April the Interagency Working Group – made up of the Federal Trade Commission, the Food and Drug Administration, the Centers for Disease Control and Prevention, and the Department of Agriculture – released a preliminary report suggesting a set of guidelines on nutrition criteria of foods marketed to children and teenagers.

The voluntary guidelines call for food and beverage companies to modify the content of their products to meet nutrition standards or eliminate the marketing of such products to children under age 18.

Groups like the American Association of Advertising Agencies and the Association of National Advertisers, as well as manufacturers, joined together to object to the guidelines. In comments submitted in opposition to the guidelines, the ANA argued that while voluntary, the guidelines would amount to de facto regulations and require "massive re-engineering of the entire food industry based on nutrition standards that go far beyond any ever approved by a government agency."

The groups also said the guidelines would violate their First Amendment rights.

Legislative support for the guidelines appears mixed.

In the House, lawmakers added language to the appropriations bill to cut funding for the program and require further study before implementation of the guidelines.

But in the language approved by the Senate Committee as part of its appropriations bill, the Interagency Working Group will submit its final report by Dec. 15, which would move implementation of the guidelines forward.

Why it matters: Legislators appear divided for now on the guidelines. Supporters of the guidelines have also begun to lobby lawmakers, with a group called the Food Marketing Workgroup sending a letter in support of the guidelines in early September. The letter, from 36 law professors, attempts to rebut the industry's First Amendment argument, and it was sent to the agencies that make up the Interagency Working Group, as well as the White House and Congress. "We wanted the agencies of the Interagency Working Group to know that it [the food and advertising lobby] is not the only view on the Hill," Margo Wootan, who heads up the Food Marketing Workgroup and also serves as the Director of Nutrition Policy at the Center for Science in the Public Interest, told *AdWeek*.

back to top

Privacy Groups: Government Should Reject Industry's Self-Regulatory Program

In a letter sent to the director of the Federal Trade Commission and the chairman of the European Union's Article 29 Working

Party, groups like Consumers Union and the Center for Digital Democracy requested that the officials reject the self-regulatory privacy program instituted by the ad industry.

The self-regulatory principles created by the Digital Advertising Alliance require companies to provide "enhanced notice" to consumers and utilize an icon for interest-based ads that provide a signal to consumers that the site may be used to collect their data. The principles further require that consumers be given the ability to click on the icon, a lower case "i" with a triangle surrounding it, to receive more details about the advertiser's data collection practices and choose to opt out of future targeted advertising.

But the letter, sent on behalf of the TransAtlantic Consumer Dialogue, a forum of American and European consumer organizations which makes joint policy recommendations to the governments to promote consumer interests, criticized the program. "Consumers in both the US and EU are offered limited options based on principles crafted by the digital marketing industry and 'enforced' by groups that do not represent consumers or governments and that are completely lacking in any independence from the industry they are intended to monitor."

Expressing concerns about the efficacy of the behavioral advertising icon, the groups argue that the icon is "an insufficient means of notice" to users about the wide range of data collection taking place online. According to the letter, research has shown that very few users click on the icon, let alone opt out of being tracked. Even if users choose to opt out, the letter said, the tool is based on cookies, a nonpermanent solution that can be forgotten should the consumer delete the cookies from his or her browser.

The self-regulatory system was "principally designed to enable the expansion of [online behavioral advertising]-related data practices," the letter said. Instead, the groups advocated that officials take a new path for regulation, that include an investigation of the various threats to consumer privacy, in particular new trends like the growth of real-time tracking, and the development of a global common standard for protecting privacy in the digital marketplace. "We respectfully urge you to reject the current [online behavioral advertising] self-regulatory regime as inadequate, and work with industry and consumer privacy groups to ensure that significant revisions are made to protect consumer privacy," the letter concluded.

To read the letter, click here.

Why it matters: The letter is only the latest battle in the war over regulation of consumer privacy, with several pieces of legislation pending and multiple hearings scheduled on the topic in Washington. In response to the letter, legal counsel to the DAA told *MediaPost* that the Better Business Bureau's National Advertising Review Council, which will enforce the self-regulatory program, has "100% independence" from the advertising industry. "The Better Business Bureau has done effective self-regulation independent of the industry for years," he said.

back to top

Noted and Quoted...*The New York Times* Calls Upon Linda Goldstein on Strategies to Curtail

Guerilla Marketing

On September 15, 2011, *The New York Times* turned to Linda Goldstein, Chair of Manatt's Advertising, Marketing & Media Division, for insight on guerilla marketing campaigns cropping up during New York's Fashion Week.

Rather than paying for an official Fashion Week sponsorship, some marketers decided to take their brands to the streets, offering pedestrians and consumers free food, cosmetics samples or mini-makeovers. In light of these tactics, official sponsors are wise to consider defensive strategies. "For companies that we've worked with that do multimillion-dollar sponsorship events, there's a lot of thought that goes into controlling against ambush marketing," said Ms. Goldstein.

To read the full article, click here.

back to top

This newsletter has been prepared by Manatt, Phelps & Phillips, LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

ATTORNEY ADVERTISING pursuant to New York DR 2-101 (f)
Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.
© 2011 Manatt, Phelps & Phillips, LLP. All rights reserved.

Unsubscribe