Advertising Law

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Tony DiResta to Tackle the Legal Nuances of Corporate Blogging at Upcoming WOMMA Event

Tony DiResta – Manatt partner and Word of Mouth Marketing Association's General Counsel – will present on the current legal issues surrounding WOM and social media marketing at WOMMA's Talkable Brands Exchange on October 7, 2010.

Tony will hone in on what companies need to know about the use of corporate blogs and how to ensure their messages are compliant with FTC regulations. The event, to be held in New York City, will also feature presentations by Heather Hippsley, Assistant Director in the Division of Advertising Practices at the Federal Trade Commission; Karen Wickre, Senior Manager of Global Communications & Public Affairs at Google; Kelly Graham, Senior Manager of Global Social Media Marketing at Cisco; and Jay Walsh, Head of Communications at Wikimedia.

To register for this event, please click here.

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Pepsi Not "Friends" with Band War

The band War filed suit against PepsiCo in California state court in September for using its 1970's hit, "Why Can't We Be Friends," in a recent ad without permission, and it is seeking $10 million in damages.

Pepsi used the song as part of a "saturation" television broadcasting campaign of commercials for its Pepsi Max beverage starting in July.

The band recorded the Grammy-nominated song in 1975, and it claims in the suit that it has become their "signature song." According to the

complaint, "The theme of the song is an integral and interwoven part of a national, multi-media campaign, including heavy Internet presence."

It was played during the first U.S.-Soviet space mission as a symbol of friendship, and because "of its distinctive, lyric and musical content and massive public exposure, the [song] has attained a powerful secondary meaning to millions of music fans," according to the complaint.

In the commercial – a remake of a 1985 Super Bowl commercial – a Pepsi Max delivery driver attempts to befriend a Coke Zero driver when the two stop in a diner. While "Why Can't We Be Friends?" plays, the Coke driver samples – and enjoys – Pepsi Max.

The plaintiffs maintain that Pepsi's use of the song violates the Lanham Act and the band's right of publicity, as well as the collective bargaining agreements of both the Screen Actors Guild and the American Federation of Television and Radio Artists. The band seeks $10 million in damages, as well as punitive damages and injunctive relief.

In a statement, the company denied that it failed to receive permission to use the song.
"Pepsi has a long history of partnering with iconic celebrities and musicians and we value our relationship with the music and entertainment industry."

To read the complaint in *Brown v. PepsiCo*, click here.

To watch the Pepsi commercial, click here.

Why it matters: Could Pepsi have failed to get permission to use the song? The band's lawyers told reporters that even if the company and its agencies obtained the rights from the song's publishers, Pepsi should have also negotiated with the band.

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FDA Warns Electronic Cigarette Makers

The Food and Drug Administration sent warning letters on September 8, 2010, to five makers of electronic cigarettes, cautioning them that marketing claims suggesting the devices help people quit smoking are illegal.

The agency also sent a letter to the Electronic Cigarette Association, warning it that the agency intends to regulate electronic cigarettes and related products "in a manner consistent with its mission of protecting the public health," and reminding the makers of e-cigarettes that they must comply with the provisions of the Federal Food, Drug, and Cosmetic Act (FDCA).

E-cigarettes are drug-delivery devices, the agency said in the letters, which makes it illegal for the manufacturers to claim that the products can be used as a smoking cessation treatment without first receiving

approval from the FDA. The five companies receiving letters – E-CigaretteDirect LLC, Ruyan America Inc., Gamucci America, E-Cig Technology Inc., and Johnson's Creek Enterprises LLC – have all run ads making such claims but haven't conducted any clinical trials or shown any scientific evidence to support their claims, the letters stated.

In the letter to E-CigaretteDirect LLC, the agency said claims made on the manufacturer's Web site, such as "If you've tried the patch, gum and other methods that haven't worked for you, try the electronic cigarette" and "E-Cigarettes Reducing 400,000 American Deaths per year to 10,000," violate the FDCA.

Specifically, the claims are marketed as a product "intended both to affect the structure or function of the body and to mitigate, treat, or prevent disease," which makes it a "new drug" under the FDCA that requires the approval of an application with the FDA.

To read the FDA's warning letter to E-CigaretteDirect LLC, click here.

To read the FDA's letter to the Electronic Cigarette Association, click here.

Why it matters: While cigarette manufacturers face additional regulatory hurdles, advertisers should always be careful when making health-related claims.

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eBay Wins Again: Tiffany's Suit Dismissed (Again)

Ending six years of litigation, a U.S. District Court judge dismissed the false advertising suit brought by Tiffany & Co. against eBay.

The jeweler filed suit against the Internet auction site, claiming that it facilitated and advertised the sale of counterfeit "Tiffany" goods, which constituted direct and contributory trademark infringement, trademark dilution, and false advertising.

In April, the Second Circuit held that eBay did not violate Tiffany's trademark rights by allowing sellers to list used items from the retailer on its Web site. Click here for further background on the lawsuit.

The court also addressed the issue of whether eBay could be liable for false advertising if Tiffany could establish that eBay's ads misled or confused consumers.

The court concluded "that there is insufficient evidence in the extensive trial record to support a finding that the 'challenged advertisements were misleading or confusing.'"

The court noted that plaintiffs typically rely upon survey data that

demonstrates a substantial portion of consumers were in fact misled. Tiffany did not introduce any evidence that measured the effect of eBay's ads on the public.

Instead, Tiffany relied upon the declarations of three eBay customers who believed they bought counterfeit goods on eBay, testimony from a Tiffany employee that the company had received numerous e-mails complaining about counterfeit Tiffany goods on eBay, and 125 e-mails sent by customers to eBay complaining about counterfeit Tiffany goods.

"Even this evidence – deficient as it is to show the effect of the advertisements on consumers in general – does not reveal that *any* consumer was misled by eBay's advertisements. In fact, none of the three declarations submitted by the eBay customers refers to any eBay advertisements for Tiffany goods," the court said.

The court also dismissed Tiffany's alternative theories of false advertising – false by necessary implication and an intent by eBay to deceive consumers – and ordered that the case be closed.

To read the decision in *Tiffany & Co. v. eBay*, click here.

Why it matters: Unless Tiffany appeals the decision, it could be the final chapter in the six-year litigation between the companies. Judge Sullivan's opinion on false advertising claims serves as a powerful reminder to companies that when arguing consumers are confused, they need to produce actual evidence of consumer confusion based on the ads at issue.

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FTC Settles with Credit Card Marketers

The Federal Trade Commission settled charges against six credit card marketers that allegedly deceived consumers into paying for what the agency said were "bogus" cards and charged illegal fees.

The agency reached a settlement with the six defendants in Oregon federal court.

According to the FTC's complaint, the defendants targeted consumers with credit problems by using mailers that promised to "build" credit with a "GUARANTEED" $7,500 credit line and cash advance benefit.

Although the cards looked like typical credit cards, they could only be used to purchase products from the defendants' merchandise catalog, the agency said.

The defendants falsely claimed that the cards could be used to fully finance purchases and that they could improve the users' credit ratings, the FTC alleged, and that users would have access to a low-cost, no-fee, or guaranteed cash advance benefit.

In addition, the agency said the defendants falsely claimed that if consumers returned the card, they would receive a refund for the $120 activation fee.

Under the terms of the settlement, the defendants agreed to stop engaging in certain marketing practices and to the imposition of a $28.5 million judgment that will be suspended when the proceeds from sales of certain properties are surrendered.

Specifically, the defendants are barred from violating the Telemarketing Sales Rule, must disclose all fees and costs as well as the refund or cancellation policy before consumers are asked to pay, and cannot misrepresent any material fact in connection with the sale of any product or service.

Why it matters: Advertisers should be careful to comply with relevant FTC rules such as the Telemarketing Sales Rule, make all necessary disclosures, and reveal any material facts of their offers.

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