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ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

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FTC Study: Spending on Kid Marketing Much Lower Than Thought

A newly released report by the Federal Trade Commission served as a major boost for children's food marketers in their effort to avoid regulation over the childhood obesity issue.

The report found that marketers are spending \$8.4 billion less on kids' food and beverage products than previously believed. Ad groups said the study showed ad spending was far less of a factor in the childhood obesity "crisis" than critics claimed.

The report also suggested that federal regulation was not needed in this area. Instead, the FTC urged more companies to join the industry's voluntary self-regulation group, the Children's Food and Beverage Advertising Initiative, established by the Council of Better Business Bureaus in November 2006. Under the initiative, which has been joined by 14 companies, marketers pledge to either stop marketing to kids or limit ads to more nutritious products.

In the report the FTC examined company-provided marketing documents to find that in 2006, food and beverage companies spent \$1.6 billion marketing to children aged 16 and younger, as opposed to an earlier estimate of \$10 billion made in a study by a college professor.

The \$10 billion figure has been widely referenced. It was cited

UPCOMING EVENTS

October 21, 2008

ACI: Sports Sponsorship Advertising and IP

Topic:

"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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October 22, 2008

D.C. Bar CLE Seminar

Topic:

"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

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November 20-21, 2008

**PMA's 30th Annual
Promotion Marketing Law
Conference**

Topic:

"Navigating the Potholes: The Evolving Landscape for

in an earlier government study from the National Academies of Science Institute of Medicine that has served as a basis for complaints by federal lawmakers about kid food marketing.

FTC officials offered several reasons for the \$8.4 billion discrepancy, including the availability of actual company marketing data, the ability to look specifically at marketing to kids, and the agency's decision to exclude coupon discounts or the \$360 million spent in 2006 on promotional toys included in children's meals. A consumer group official said the college professor's study also included children's food marketing aimed at parents.

The FTC report released late last month found that food marketers spent \$870 million targeting kids under 12 and \$1 billion targeting teenagers. Of those amounts, \$300 million targeted both age groups, making the total spent by the 44 companies in the study \$1.6 billion.

Of the total, the report found that \$746 million was spent on TV spots. Carbonated beverages, fast-food restaurants, and breakfast foods accounted for \$1.02 billion. The report also found that about 80 TV shows, movies, and animated characters cross-promoted with food and beverage products.

The FTC raised concerns in just one area – the definition of a children's program. The agency observed that *American Idol*, *American Dad*, *Family Guy*, and *The Simpsons* "commanded the largest percentage share of teens 12-17 in the audience during the 2005-06 television year." The shows are still counted as adult programs for self-regulation purposes because only 20 percent of their combined audiences are children.

"The data serve to illustrate the point that children and teenagers are exposed to a great deal of advertising that may be targeted to a general audience comprised mainly of adults," the report noted.

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Court Strikes Down Ban on Ads for Alcohol

A little-noticed decision by a federal court in Virginia could serve as a major boost for marketers of alcoholic beverages.

In a March 31 ruling, *Educational Media Company at Virginia Tech, Inc., v. Swecker*, the U.S. District Court in Richmond found that the Virginia Alcoholic Beverage Control Board's

Sweepstakes, Games & Contests"

Linda Goldstein

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Kerrie L. Campbell

Marriott Downtown Magnificent Mile
Chicago, IL

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December 4-5, 2008 Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Linda Goldstein

Topic:

"The Value of Fame: Understanding the Right of Publicity"

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

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limits on alcohol ads in college publications are an unconstitutional infringement on free speech, even where 40 percent of the readership is underage.

The ruling also underscores the significant evidentiary hurdle faced by governments defending laws seeking to limit truthful alcohol ads and the need to narrowly tailor such laws.

The case arose from two Virginia Department of Alcoholic Beverage Control (ABC) provisions that banned beer, wine, and mixed drinks ads in college student publications unless in the context of an ad for a "dining establishment" and limited to the words "A.B.C. on-premises," "beer," "wine," "mixed beverages," or "cocktails."

The lawsuit was brought by the American Civil Liberties Union of Virginia on behalf of the owner of Virginia Tech's *Collegiate Times* and the University of Virginia's *Cavalier Daily*. Plaintiffs argued that the alcohol ad ban unfairly interfered with their ability to raise revenues needed to put out the papers.

ABC lawyers argued that the rules were enacted to curtail illegal drinking by underage students. The court rejected that contention, finding no evidence that the ad ban had any impact on underage drinking and that other legitimate ways existed for the state to reduce student drinking, including educational programs, increased taxation on alcohol, and counter-advertising.

The court applied the Supreme Court's test in *Central Hudson Gas & Electric v. Public Service Commission* for restrictions on commercial speech, which requires such restrictions to be based on a substantial governmental interest, to directly and materially advance the governmental interest asserted, and to be "a reasonable fit between the means and the end of the regulatory scheme."

It found that the challenged regulations did not pass the *Central Hudson* test, in part because purporting to link alcohol use on college campuses with alcohol ads in college papers simply "ignore[d] the vast world of electronic media and the Internet."

The ACLU of Virginia's challenge was similar to a case brought in Pennsylvania in 2004, in which the University of Pittsburgh's student paper, *Pitt News*, challenged an alcohol ad ban. The court held that the restrictions violated the First Amendment because they unjustifiably imposed a burden on media associated with universities and colleges but not on

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Good-bye Scrabulous, Hello Wordscraper

Last month board-game maker Hasbro filed a copyright infringement complaint against the creators of a Scrabble-like game on Facebook called Scrabulous. Shortly after the lawsuit was filed, the application's inventors, two brothers in India, took the game down in the United States and Canada. A couple of days later, the game returned in a redesign that included a few new options and a new name: Wordscraper.

The lawsuit by Hasbro, which owns the North American rights to Scrabble, came shortly after video-game maker Electronic Arts released an official Scrabble game for Facebook users as part of a licensing deal with Hasbro. On the day Scrabulous was taken offline, the official game was not working well. EA said the application had been the target of a malicious attack.

The lawsuit filed in Manhattan federal court named as defendants Rajat and Jayant Agarwalla, the brothers who created the program, along with their Web design and technology company RJ Softwares. Hasbro claimed that Scrabulous violates its copyright and trademarks. Separately, Hasbro had requested that Facebook block the game.

Mattel owns Scrabble rights outside the United States and Canada and did not join the lawsuit.

The Scrabulous controversy differs from the lawsuits over peer-to-peer file-trading software applications such as Napster and Grokster, which allowed online users to trade exact digital copies of music or video files. Although there's not much dispute that Scrabulous was a direct knockoff of Scrabble, the question of copyright infringement is less clear-cut. Whether the differences in Wordscraper are enough to protect the game's designers from legal action remains to be seen. The new game includes many of the options that attracted Facebook users to the original Scrabulous, but it uses a different point system than Scrabble, uses circles instead of squares, and has a few other differences.

Even if Wordscraper passes muster, another interesting question is whether Hasbro has a case against the makers of Wordscraper in the event Wordscraper manages to snap up many or most of the former users of Scrabulous by riding on the latter's coattails (if it does). Scrabulous was one of the

most popular activities on Facebook before it was yanked offline late last month, with some 500,000 daily users.

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COPA Struck Down Yet Again

Once again a 1998 law aimed at protecting children from Internet pornography has gotten the thumbs-down from a federal court.

The July 22 decision by the Third U.S. Circuit Court of Appeals in Philadelphia striking down the Child Online Protection Act as unconstitutional is the latest development in a decade-long legal battle.

COPA, which has never gone into effect, would bar users from making harmful content available to minors over the Internet. The act was passed the year after the Supreme Court ruled that the Communications Decency Act – also aimed at protecting children from explicit Internet material – was unconstitutional.

In its decision the federal appeals court found that COPA infringes on First Amendment rights because filtering technologies and other tools for parental control provide a less restrictive way to protect children from inappropriate Internet content. The court also ruled that the law is overly broad and vague.

Critics of the law contend that it would effectively require all Web sites to provide only family-friendly content, because no practical way exists for Web sites to prevent children from accessing sites that are inappropriate for them but lawful for adults.

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Supermarkets Squabble Over “Real Deal” Ad Campaign

Stop & Shop Supermarket Co. has sued Whole Foods Market, claiming its rival violated its trademark and copied its marketing campaign.

In its complaint filed in federal court in Boston, Stop & Shop alleges that weeks after it launched its “Real Deal” ad campaign providing shoppers with money-saving tips, Whole Foods kicked off its own program called “The Real Deal” to

advertise its own money-saving suggestions. The grocery chain alleges further that Whole Foods' in-store signage, which says "Real Steal" on discounted items, causes consumer confusion. The lawsuit requests a court order to stop Whole Foods from continuing "The Real Deal" promotion.

In June Stop & Shop rolled out its "Real Deal" campaign, offering savings on typical summertime products like paper plates, ketchup, and soda, in an effort to tackle high food and gas prices. The company said that the program is scheduled to run through Labor Day.

Whole Foods launched "The Real Deal" program in July. With the tag line, "How to Get More for Less," the campaign features discounts, coupons, tips, and budget recipes for shoppers, as well as a "Real Deal" customer tips page on its Web site.

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