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

IN THIS ISSUE

- New York Orders Chain Restaurants to Post Calories
- ICANN to Clamp Down on Domain Name Abuse
- FTC Fines Internet Ad Company $200,000
- FTC Goes After Alleged MySpace Hijackers
- It's Official: Huntington Beach Is Surf City USA

New York Orders Chain Restaurants to Post Calories

No longer will New Yorkers be able to enjoy the guilty pleasure of a hamburger, large fries, and milk shake in blissful ignorance of the calories they're consuming. Nor will they be able to delight guilt-free in a triple venti caramel macchiato with extra foam or any number of other tasty but fattening treats.

On January 22, 2008, the New York City Board of Health voted unanimously to require all city chain restaurants to post calorie data on their menus.

The new rule will apply to restaurants with 15 or more outlets, which is about 10 percent of all city restaurants, according to a news release from the city's health department. Some restaurants already make the calorie counts of menu items available, but beginning March 31 they will have to put the numbers on menu boards and menus.

The idea behind the new regulation is that the information will help fight obesity in New York City, in which 54 percent of adults are overweight or obese, according to a 2005 Community Health Survey. In October, the Department of Health argued that "calorie information provided at the time of food selection would enable New Yorkers to make more informed, healthier choices."

The order follows months of litigation. The New York Restaurant Association sued the Board of Health last year in an attempt to block the measure, arguing that it would infringe on its members' First Amendment rights. A spokesman for the association said the group is "considering

UPCOMING EVENTS

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"When Retired Players Su From Coscarart v. Maj League Baseball to Parrish NFLPA"

Ronald S. Katz

"Morality and an Agreement Mortality--Taking Appropriat Measures to Avoid th Termination of an Endorseme Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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October 22, 2008
D.C. Bar CLE Seminar

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Kenneth M. Kaufman

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

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November 20-21, 2008
PMA's 30th Annua Promotion Marketing La Conference

Topic:
"Navigating the Potholes: Th Evolving Landscape f Sweepstakes, Games

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options, one of which is the intent to pursue further litigation against the city."

back to top

ICANN to Clamp Down on Domain Name Abuse

Businesses may soon find it easier to register a desired Web site name, thanks to a decision by the group that oversees the domain name system.

Last month, the Internet Corporation for Assigned Names and Numbers (ICANN) agreed to make the Web site name registration process more expensive for so-called domain tasters, who take advantage of loopholes to register — and profit from — millions of domain names without paying for them.

Under the current rules, users have up to five days to sample a domain name before committing to buy it, typically at a cost of around $6.25 per year. An additional 20-cent surcharge goes to ICANN, but the group has always refunded the fee if the user declines to buy the name within five days of claiming it.

Until now. Under the new policy, which is expected to take effect later this summer, ICANN won't refund the 20-cent fee.

The idea behind the grace period is to allow users who made a spelling or other mistake to get their money back and return the domain. But some have built their entire business around exploiting that policy, using computer programs to grab millions of domains at a time and only paying for and registering a tiny fraction of them that earn enough money through ad traffic to justify the registration cost.

John Levine, former member of ICANN's at-large advisory committee and author of *The Internet for Dummies*, said the policy change will effectively kill the domain tasting business. "[M]ost tasters only keep about one domain for 100,000 they taste, but until now the tasting cost them nothing," Levine said. Under the new policy, tasters would lose 20 cents on every domain they taste but do not register. That means the cost of tasting 100,000 domain names will jump from zero to $20,000.

Most domain tasting abuses have been committed by a relatively small number of registrars. According to VeriSign, which manages the dot-com registry, in January 2007, the top 10 domain tasting registrars accounted for 95 percent (45.4 million of a total of 47.8 million) of deleted names.

Charging small fees has already been shown to rein in domain

Contests"

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Chicago, IL

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December 4-5, 2008
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"Product and Music Placement, Branded Entertainment: Issues and Litigation"

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

Mark S. Lee

Century Plaza Hyatt Regency
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OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... more

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tasting. In June, the Public Interest Registry, which manages dot-org domain names, added a five-cent surcharge for registrars that deleted or dropped more than 90 percent of their registered domains after the five-day grace period. In the month before that policy took effect, nearly 92 percent of the dot-org names were dropped after the five-day grace period. By August, that figure had fallen to less than 30 percent.

In addition to frustrating those with more legitimate reasons to secure a domain name, domain tasters have been faulted for hurting the Internet ad industry. Some of the largest domain tasters also have been accused of "typosquatting," registering domains that contain slight misspellings of corporate trademarks, with the aim of drawing traffic to pay-per-click Web sites, many of which serve ads for the trademark holder's competitors. Many of those registrars also engage in a more egregious form of domain tasting known as "domain kiting," in which registrars drop tasted domains within the five-day grace period, and then immediately re-register them.

back to top

FTC Fines Internet Ad Company $200,000

Member Source Media, an online advertising firm, has agreed to pay $200,000 to settle charges by the Federal Trade Commission that it used deceptive junk e-mails and ads to lure users to its Web sites, in violation of the federal CAN-SPAM Act.

The agency claims that Member Source Media would send spam promising prizes such as a free iPod or a $500 Visa gift card. The company would also buy ads on Web sites informing users they had been chosen to win similar prizes, the FTC contends.

Upon clicking on the ads or the URLs embedded in the e-mails, users would be sent to Web sites offering them the promised products only if they browsed several pages of optional offers, the FTC reports. After doing this, the Commission says, the consumers were then told they must participate in third-party promotions "that require them to do things such as purchase products, subscribe to satellite television service or apply for multiple credit cards."

Under the settlement with the FTC, Member Source Media will pay a $200,000 civil penalty and will be required to "clearly and conspicuously disclose in its ads and on its promotional Web pages" that consumers must actually spend money before they receive their "free" product. The settlement also bars any future violations of the CAN-SPAM Act, which forbids the use of deceptive subject lines in promotional e-mails.

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A Member Source Media spokesperson says the company is pleased it has reached a settlement but denies it sent any spam. The company says it has no idea who sent the e-mails and claims it did not authorize them. The spokesperson acknowledges the company was responsible for the Web ads that the FTC claims were deceptive, but maintains its ads were in compliance with federal regulations. The spokesperson also says the company is glad that the FTC is "clarifying" its regulations and emphasizes that Member Source Media is now complying with them.

back to top

FTC Goes After Alleged MySpace Hijackers

The Federal Trade Commission has asked a federal court to require a company that allegedly "hijacked" MySpace users to abide by earlier orders that barred unfair and deceptive practices.

Walter Rines, business partner Sanford Wallace, and Rines' company, Online Turbo Merchant, diverted users of MySpace.com to other Web sites and barraged them with ads to earn advertising commissions, the FTC claims. The defendants used pagejacking, phishing, and other methods to target MySpace users, in violation of a previous court order, the FTC said in a news release.

In a January 23 filing, the agency asked a New Hampshire federal court to order the defendants to give up the money they earned from their MySpace scheme.

In October 2005, the FTC charged Odysseus Marketing and its owner, Rines, with luring consumers to their Web site by offering free software, including a program that supposedly allowed them to engage in anonymous peer-to-peer file sharing. The software was bundled with spyware that intercepted and replaced search results and barraged consumers' computers with pop-up ads, the FTC said. The software also stole users' personal information, and users were unable to locate or uninstall the spyware through reasonable means, the FTC said. A year later, Odysseus and Rines agreed to a permanent injunction banning them from redirecting users' computers; changing any Web browser's default home page; and modifying or replacing the functions of any computer application. The settlement required the defendants to get consumers' express consent before downloading or distributing any content to their computers.

In its recent filing, the FTC alleges that Rines, his company, and Wallace knew of the permanent injunction and violated that order by diverting users from MySpace.com to their Web sites.

back to top

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It's Official: Huntington Beach Is Surf City USA

Santa Cruz shop owner Bruce Noland and the Huntington Beach Conference and Visitors Bureau have reached a ceasefire in their year-and-a-half legal battle over which California beach town has the right to use the catchy term Surf City USA.

All the details have not been released, but the settlement grants Huntington Beach exclusive rights to the Surf City USA trademark.

It means Noland has to modify his "Surf City USA" T-shirts. The new shirts say "Surf City Santa Cruz, California, USA, Original."

"We changed the T-shirt ever so slightly," he said. "I think the shirts are actually better now."

Squabbling over the Surf City USA name intensified in 2004 when the Huntington Beach Bureau announced it was seeking to trademark the name as part of a marketing campaign. Santa Cruz leaders and residents responded with a litany of arguments that it deserves the title more than its Southern California brethren.

On Santa Cruz's side: bigger, better waves; home of the first recorded surfing by Hawaiians; the place the wetsuit was invented; and more surfers per capita. But Huntington Beach had Jan and Dean's 1963 hit "Surf City USA" to boast of.

Of course, neither town could claim to have spawned surfing. That honor goes to Hawaii, which stayed out of the dispute.

The debate seemed mostly about pride until September 2006, when Noland started selling a T-shirt with the logo emblazoned across the front. The Huntington Beach Bureau demanded that Noland stop selling the T-shirts. Noland, in turn, sued the Bureau for an invalid trademark while the Bureau countersued for trademark infringement.

The settlement "means I drop my lawsuit over their invalid trademark, and they drop their lawsuit against me for infringing on the trademark," Noland said. "It's kind of ridiculous it went this far because we have to share the Pacific Ocean."

back to top

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