Advertising Law @ manatt

March 8, 2010

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What Does the Subway-Quiznos Settlement Mean For the Future of User-Generated Videos?

This closely watched case involving the intersection of the Communications Decency Act ("CDA") and the Lanham Act has settled, soon after the court denied defendant's motion for summary judgment. *Doctor's Assocs. Inc. v. QIP Holder Inc.*, D. Conn., No. 3:06-cv-1710, settlement 2/23/10. In its opinion, the U.S. District Court for the District of Connecticut held that it could not conclude, as a matter of law, that the defendant was not responsible for the creation and development of user-generated videos that the plaintiff alleged contained false and misleading claims about its products.

The case involved an advertising campaign conducted by Quiznos highlighting the differences between its sandwiches and those of its direct competitor Subway. Quiznos produced its own commercial comparing its products to Subway's and created a Web-based contest called the "Quiznos vs. Subway TV Ad Challenge." The contest, which was accessible via three domain names, including "meatnomeat.com," invited entrants to create videos demonstrating why they think Quiznos is better, which Quiznos would post on the site. Quiznos also posted four sample videos of its own creation.

The contest included Official Rules, which transferred ownership of the videos to Quiznos. The Rules also prohibited "disparaging statements" about Quiznos and Subway or either of their products.

UPCOMING EVENTS

Notwithstanding the fact that Quiznos undertook to vet all entries prior to posting them, several videos were posted that Subway claimed included false and misleading statements about its products, including claims that Subway's sandwiches didn't include much meat and were stale.

Subway brought a false advertising action against Quiznos under Section 43(a) of the Lanham Act and the Connecticut Unfair Trade Practices Act, arguing that Quiznos was responsible for the content of the contest entries and therefore responsible for the false claims about products contained in them. Quiznos defended the action on the ground that it was immune from liability for the videos under the CDA, which provides, in pertinent part, that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." An "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

Here the critical issue was whether Quiznos merely published the users' contest-entry videos or was actively responsible for the creation and development of the allegedly false and disparaging claims contained in the videos. In denying defendant's summary judgment motion, the court concluded that the meatnomeat.com domain name, the sample videos posted by Quiznos to "shape" the contest submissions, and Quiznos's express invitation to contestants to submit entries demonstrating why Quiznos is better all could lead a reasonable jury to conclude that Quiznos actively solicited disparaging content and thus was responsible for the creation and development of the videos and therefore not immune from liability under the CDA.

Why it matters: Although the settlement of the case still leaves significant questions open about the intersection of the Lanham Act and the CDA, the court's opinion leaves no doubt that advertisers that solicit user-generated content, particularly content making comparative claims against competitors, should be mindful of the risk of being treated as the creator of that content and thus unable to claim immunity from liability. Certainly, relevant factors would be the direction provided to users about the type of claims desired, examples provided on the site to users, and how vigorously the advertiser enforces its posting guidelines (or, in the case of a contest involving user-generated contest, its Official Rules).

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Extending Those 15 minutes: NY Considers Law on Postmortem Rights

The New York State Legislature is considering a law that would

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Social Media Marketing Summit
Speaker: Anthony DiResta
for more information

March 13, 2010
Supply Expo 2010
Topic: "Live from D.C.: It's Make Your Claims Right!"
Speaker: Ivan Wasserman
for more information

March 15-17, 2010
Practising Law Institute CLE Program
Topic: "Counseling Clients in the Entertainment Industry"
Speakers: Alan Brunswick, Kenneth Kaufman
New York, NY
PLI New York Center
for more information

March 18-19, 2010
Minority Corporate Counsel Association
9th Annual CLE Expo 2010
Topic: "Green Litigation & Corporate Sustainability Programs: Beware the Trojan Horse"
Speaker: Linda Goldstein
Chicago, IL
Chicago Marriott Downtown
for more information

April 14-15, 2010
American Conference Institute
Advertising, eMarketing & Promotions for the Pharmaceutical Industry
Speaker: Linda Goldstein
Philadelphia, PA
The Union League
for more information

April 21-23, 2010
ABA Antitrust Law Spring Conference
Topic: "Mock Trial 2010: A Jury Review of Exclusionary Conduct"
Speaker: Tom Morrison
Washington, DC
for more information

extend publicity rights to celebrities after their death.

S06790 would also make the rights retroactive 70 years prior to the effective date of its enactment and would allow celebrities to transfer their right of publicity by will or by prior contract, including the use of a residual provision in a testamentary instrument.

The bill would reverse *Shaw Family Archives v. CMG Worldwide*, a 2007 case that held that Marilyn Monroe's estate and its agent couldn't enforce postmortem rights in New York. In that case, the estate filed suit against photographer Sam Shaw (who took the iconic image of Marilyn Monroe holding down her skirt while standing on a steam grate) after the photo was used on a T-shirt sold at Target and other images were sold on a Web site. The estate argued that it was the successor-in-interest to Monroe's postmortem right of publicity devised through the residual clause of her will and therefore, the use of her picture, image, or likeness without its permission was a violation of its rights.

But a U.S. District Court judge ruled that because neither California, Indiana, nor New York recognized postmortem publicity rights in 1962 when Monroe died, the estate could not have inherited them. (Monroe's will was filed in New York, but she died in California, which has since enacted postmortem publicity rights, albeit not retroactively; Indiana – where the suit was originally filed – established a postmortem right of publicity in 1994 that was also prospective in nature.)

S06790 was introduced in early February and has been referred to committee.

Why it matters: With the passage of the legislation, New York would join a growing number of states that recognize the postmortem right of publicity. The retroactive component could prove to be a boon to celebrity estates.

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The Buzz on Google's New Service: Privacy Complaint, Lawsuit

Barely a week after launching its social networking service, Buzz, Google faced a complaint filed with the Federal Trade Commission, followed by a class-action lawsuit alleging privacy violations.

Google Buzz was launched as the company's answer to MySpace and Facebook, but was instantly attacked by critics.

As originally presented, Buzz was automatically added to all Gmail (Google's e-mail system) users, and the program then turned users' frequent e-mail users into followers.

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The users' information and followers were also made public by default, including their photos and information shared in other Google products, like the Picasa photo-sharing site.

In response, the Electronic Privacy Information Center filed a complaint with the FTC, requesting an investigation into whether any consumers were harmed, and seeking to have enrollment in Buzz be optional.

Buzz "violated user privacy expectations, diminished user privacy, contradicted Google's own privacy policy, and may have also violated federal wiretap laws," according to EPIC's complaint.

An e-mail address book could reveal the names of a user's doctor, lawyer, romantic partner, a journalist's confidential sources, or other personal information, the complaint noted.

Just days later, a putative class action was filed in U.S. District Court in San Francisco, alleging that Buzz violated federal privacy law by disclosing to the public users' e-mail contacts.

"An individual's e-mail contacts may be a different group of people (for example, professional contacts) than the group with whom a user would want to be in a social network," according to the complaint. "By implementing the Buzz program, Google forced upon its Gmail users Google's own definition of a proper social network, all in an effort to jump-start Google's entry into a new consumer market."

Specifically, the suit alleges violations of the Electronic Communications Privacy Act, the Stored Communications Act, the Computer Fraud and Abuse Act, and public disclosure of private facts. Gmail had 31.2 million users in January, according to the complaint, which looks to include all those users whose accounts were automatically linked to Buzz.

Google issued a series of apologies on its blog and has twice tweaked its program since the initial rollout. Now new users are presented with a list of "suggested" followers.

"We've already made a few changes based on user feedback, and we have more improvements in the works," said Victoria Katsarou, a spokeswoman for the company. "We look forward to hearing more suggestions and will continue to improve the Buzz experience."

Despite the changes, both the FTC complaint and the class action claim that Google is not doing enough, saying the modifications do not go far enough to address privacy concerns.

Why it matters: Given the myriad of privacy issues Facebook has faced over the last few months, Google's troubles with its new social networking program come as no surprise. Companies that engage in social networking or deal with any form of personal information should proceed with caution, as privacy has become a hot-button topic for both the FTC and consumers.

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Court Denies NCAA Motions to Dismiss in Suits Over Image Rights for College Athletes

In consolidated cases, a U.S. District Court has allowed two class-action lawsuits brought by former college athletes against the National Collegiate Athletic Association and video game company Electronic Arts to proceed.

In the first case, former UCLA basketball star Ed O'Bannon filed an antitrust suit against the NCAA and the Collegiate Licensing Company, alleging that they engaged in anticompetitive conduct in violation of the Sherman Act. O'Bannon claimed that student athletes are required to sign various NCAA forms that relinquish their rights in perpetuity to the commercial use of their image – even after they graduate and are no longer subject to NCAA regulations.

The forms enable the NCAA and CLC to enter into licensing agreements with companies that distribute products containing student athletes' images. That exclusivity illegally limits trade, O'Bannon claimed.

The NCAA sought to dismiss the suit, but U.S. District Court Judge Claudia Wilken disagreed.

She ruled that O'Bannon had stated sufficient facts to go forward with his suit by identifying the releases signed by student athletes, which allowed the NCAA and CLC to enter into agreements that do not compensate them for the use of their images.

She ruled that O'Bannon also identified the relevant market – the collegiate licensing market in the United States – which included numerous agreements entered into by the NCAA and its members, like the broadcast of athletic events, which student athletes are excluded from.

In a consolidated case, Judge Wilken issued a second decision in a lawsuit brought by Samuel Keller, a former starting quarterback for Arizona State University and the University of Nebraska.

Keller filed a putative class action against the NCAA and CLC, but he also named video game company Electronic Arts, maker of the game "NCAA Football." Keller claimed EA, with the blessing of the NCAA, made its video games more realistic by designing the virtual football players to resemble real-life college football players, from jersey numbers to physical characteristics and even biographical information.

He claimed the defendants violated his rights of publicity under California law. EA argued to the court that its game was protected by the First Amendment because it had made a transformative use of the athletes' images.

Again, Judge Wilken disagreed.

"EA's depiction of plaintiff in 'NCAA Football' is not sufficiently transformative to bar his California right of publicity claims as a matter of law. In the game, the quarterback for Arizona State University shares many of plaintiff's characteristics. For example, the virtual player wears the same jersey number, is the same height and weight and hails from the same state. . . . EA does not depict plaintiff in a different form; he is represented as what he was: the starting quarterback for Arizona State University," she wrote.

Why it matters: If successful, the lawsuits would be a serious blow to the way the NCAA and CLC license rights in conjunction with college sports. Both suits seek disgorgement of profits and a permanent injunction against the defendants from using plaintiffs' images.

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FTC Warns 11 Companies Marketing Omega-3 Supplements

The Federal Trade Commission sent letters to 11 companies warning them that they could be breaking the law by marketing various Omega-3 fatty acid supplements as benefiting children's brain and vision function and development.

The FTC advised the companies to review their product packaging and advertising, which could be in violation of the FTC Act.

Examples of some of the claims at issue include that consumption of the product would improve, enhance, or support children's cognitive functions, attention span, concentration, mental focus, learning ability, intelligence, memory, mood, visual acuity, and eye health.

The letters were sent as a result of an FTC investigation of Northwest Natural Products' advertising and promotion of a line of children's vitamins called "L'il Critters Omega-3 Gummy Fish."

Specifically, the FTC examined whether the company had adequate substantiation for its claims. In response, the company modified all of its marketing materials.

Absent scientific proof to substantiate health-related claims for products, the FTC warned the recipients of its letters that enforcement action could be taken.

Why it matters: Under the Obama Administration, the FTC continues to step up its enforcement efforts across the board, and the letters are the latest example. Companies making health-related claims should be careful to substantiate their claims, or face FTC scrutiny.

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WOMMA Releases New Guide for Social Media Marketing

The Word of Mouth Marketing Association released a Guide to Disclosure in Social Media Marketing in an effort to help companies navigate the FTC's new rules on endorsements and testimonials. Manatt Partner and WOMMA General Counsel, Tony DiResta, and Gabe Martinez, also of Manatt, provided substantive review of the document, not only to ensure the accuracy of its content, but to make it as useful for compliance and legal departments as possible.

In December, the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising went into effect, which applied to blogs and other social media platforms that utilized word-of-mouth marketing.

Under the new rules, endorsers – including bloggers – are required to disclose any material connection they might have to the company whose products they are writing about.

WOMMA released its guide to help word-of-mouth marketers disclose their material connections.

The guide emphasizes the need for clear and prominent disclosures on all forms of media. Disclosure language should be easily understood and unambiguous, while the placement of disclosures should not be hidden deep in text or on the page, but easily viewed, the guide suggests.

In addition, the font of disclosures should be in a reasonable size and color that consumers can read.

The guide includes sample disclosures for blogs, online discussions, status updates (like on Facebook), microblogs (like Twitter), video- and photo-sharing Web sites, and podcasts.

For example, the model disclosure for product reviews suggests that bloggers write, "I received [product or sample] from [company name] to review" or "I was paid by [company name] to review."

The guides further suggest that for product review blogs, bloggers create a "Disclosure and Relationships Statement" section that discloses how the blogger works with a company in accepting and reviewing its products, and post the statement prominently on the blog.

Why it matters: The FTC's new requirements are a sea change for those using word-of-mouth marketing on social media platforms. WOMMA's model disclosures offer helpful guidance for any marketers concerned about how to comply with the new requirements.

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