Advertising Law

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Manatt's Ken Kaufman to Lead Webinar on Intellectual Property Issues in Entertainment Transactions

On September 21, 2011, Ken Kaufman, a partner in Manatt's entertainment practice, will participate in a 90-minute webinar discussion highlighting significant intellectual property issues that affect entertainment transactions, with a particular emphasis on agreements for the creation and licensing of content, and mergers and acquisitions in the entertainment arena.

Hosted by the ABA Forum on the Entertainment & Sports Industries, "Addressing Intellectual Property Issues in Entertainment Transactions" will be held from 12:00 pm – 1:30 pm ET.

For more information or to register for the webinar, click here.

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FTC Settles First Suit over Mobile Apps

In its first case involving mobile apps, the Federal Trade Commission settled with a mobile app developer and owner over charges that they violated the Children's Online Privacy Protection Act (COPPA) by collecting information from children under the age of 13 without their parents' prior consent.

The defendants agreed to pay $50,000 to settle the charges.

In its complaint, the agency alleged that the defendants – owner Justin Maples and W3 Innovations, doing business as Broken Thumbs Apps – collected and permanently maintained tens of thousands of e-mail addresses from apps like Emily's Girl World, Emily's Dress Up, and Emily's Runway High Fashion.

The agency said there were more than 50,000 app downloads for games like "Truth or Dare," all of which were listed in the "Games-Kids" section of Apple's App Store and were directed to children.

The apps also included features like a blog, which encouraged users to

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Practice Area Links

Practice Overview
Members

Upcoming Events

September 13-15, 2011
2011 ERA D2C Convention
Topic: "Tools and Metrics for Developing a Truly Integrated Marketing Campaign"
Speaker: Linda Goldstein
Las Vegas, NV
For more information

September 21, 2011
ABA Forum on the Entertainment & Sports Industries Webinar
Topic: "Addressing Intellectual Property Issues in Entertainment Transactions"
Speaker: Ken Kaufman
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

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Recognized for Excellence in the areas of Advertising, Marketing and Media post “shout-outs” to friends, ask advice, submit art and pet photographs, and write comments on blog entries that provided users the chance to freely post personal information, the agency said.

According to the FTC, the defendants failed to provide notice of their information-collection practices and did not obtain verifiable consent from parents prior to collecting, using, or disclosing their children’s personal information, all in violation of the COPPA Rule.

“The FTC’s COPPA Rule requires parental notice and consent before collecting children’s personal information online, whether through a website or a mobile app,” FTC Chairman Jon Leibowitz said in a statement about the settlement. “Companies must give parents the opportunity to make smart choices when it comes to their children’s sharing of information on smart phones.”

In addition to the $50,000 civil penalty, the defendants agreed to refrain from future violations of COPPA, agreed to delete all personal information collected in violation of the Act, and consented to compliance monitoring for a three-year period.

To read the consent decree in *U.S. v. W3 Innovations*, click here.

Why it matters: The suit was the agency’s first action involving mobile apps and should serve as notice to businesses that the FTC has apps and related privacy issues on its radar. The suit follows through on testimony earlier this year by the agency that it had “a number of active investigations into privacy issues associated with mobile devices, including children’s privacy.”

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Red Flag: Suit Against NASCAR Alleges TCPA Violations

A federal class action lawsuit was filed against NASCAR alleging that it violated the Telephone Consumer Protection Act by sending unsolicited text messages advertising a mobile app that would enable plaintiffs to watch car races on their phones.

The suit, filed in California, seeks maximum statutory damages of $1,500 per message for the estimated tens of thousands of class members.

The plaintiff alleged that she never provided her cellular phone number to the defendant, nor provided any type of prior express consent to receive sales solicitations although she received an unsolicited ad regardless.

The text message read “FREE NASCAR Spring Cup Mobile lets you watch the action from Daytona live on your phone. Download now. [link] Reply END to stop.”

After replying “END,” the plaintiff alleged she received a second text message, this time confirming she had been removed from the program.

Both texts violated the TCPA, according to the complaint, and the plaintiff incurred charges for receiving them.

The suit seeks to certify a class of persons who over the last four years received the first unsolicited message and a subclass of those who received the second, confirmatory message.

Arguing that the defendant's actions were knowing and/or willful, the suit seeks trebled damages of $1,500 for each violation of the TCPA, as well as injunctive relief to halt the defendant's unsolicited texts.

To read the complaint in *Jaber v. NASCAR*, click here.

Why it matters: Lawsuits over unsolicited text message are increasingly common, and courts have uniformly held that such messages sent without "prior express consent" violate the TCPA. Marketers who send unsolicited text messages without prior express consent from consumers could face a costly lawsuit.

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M'm, m'm Settlement! Of Campbell's 'Low Sodium' Suit

In a preliminary settlement agreement, Campbell Soup Co. has agreed to pay $1.05 million in a class action suit brought by plaintiffs who alleged the company misleadingly labeled its soups as having "lower sodium," even though the sodium content was equal to its regular soups.

Filed last year in New Jersey federal court, the suit alleged that Campbell's marketed two of its condensed tomato soups as healthier than its regular version and charged a premium for the products. But despite its label claim that it contained "25% less sodium" than the regular version, the less sodium condensed tomato soup contained 480 mg of sodium per serving – the same amount as the regular soup. The Campbell's Healthy Request condensed tomato soup purported to be "Low in fat," but contained 1.5 g of fat per serving and 0.5 g saturated fat per serving, more than the regular condensed soup (0 g fat or saturated fat per serving).

The complaint alleged violations of New Jersey state law and sought treble damages for a class period dating back to 2004.

In early August, U.S. District Court Judge Jerome B. Simandle granted preliminary approval to a settlement.

Campbell's agreed to provide $1.05 million for the settlement fund and an additional $350,000 in attorneys' fees; class members – limited to purchasers since July 1, 2009 – can receive a maximum recovery of $10 or $0.50 per can. In addition, the company agreed to make changes to its labels to "avoid inconsistent comparisons between the same varieties of reduced sodium condensed and regular condensed soup."

A final settlement approval hearing is set for November 29.

To read the complaint in *Smajlaj v. Campbell Soup Co.*, click here.

To read the order granting preliminary approval of the settlement, click here.

Why it matters: Suits against companies marketing health and nutrition claims have kept plaintiffs' attorneys busy in recent years. In addition to the Campbell Soup suit, plaintiffs have targeted Snapple and Ben & Jerry's over "All Natural" labels and have alleged that Nutella falsely marketed its hazelnut spread as healthy for children when it is really "the next best thing to a candy bar."

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Tobacco Companies Sue over FDA Images on Warning Labels

Five tobacco companies filed suit on constitutional grounds against the Food and Drug Administration on August 16 over its new rule requiring graphic warning labels – including images – on cigarette packaging and advertising.

Under the new rule, promulgated by the agency pursuant to the Family Smoking Prevention and Tobacco Control Act, at least 50 percent of cigarette packaging must be covered by a warning label on which one color image appears – such as a man blowing smoke out of a tracheotomy hole and a post-autopsy body – along with a written warning like "Cigarettes are addictive" or "Smoking can kill you." In addition, the label must contain information for a smoking cessation hotline.

The suit, filed in D.C. District Court by Lorillard, R.J. Reynolds, Commonwealth Brands, Santa Fe Natural Tobacco Co., and Liggett Group, seeks an injunction to stay the September 22, 2012 effective date of the rule, as well as a declaration the rule violates the First Amendment.

"Rather than providing uncontroversial factual information to allow consumers to make an educated decision about whether to use tobacco products, the 'warnings' cross the line into governmental anti-smoking advocacy," according to the complaint.

The new warnings are "unprecedented," the plaintiffs argued, and are "precisely the type of compelled speech that the First Amendment prohibits. While the government may require plaintiffs to provide purely factual and uncontroversial information to inform consumers about the risks of tobacco products, it may not require plaintiffs to advocate against the purchase of their own lawful products."

Because of the First Amendment rights implicated by the rule, the government failed to satisfy the standard of heightened judicial scrutiny necessary to sustain the rule.

According to the tobacco companies, the FDA underestimated the costs associated with the proposed warnings, including the costs to the plaintiffs, the loss of jobs in cigarette manufacturing and lost profits to retailers, as well as the cost increases related to health care and Social Security as a result of increased longevity. R.J. Reynolds estimates that it alone will expend more than $11 million and over 4,000 hours of employee time to comply with the new rule.

The companies also argue that the studies sponsored by the FDA prior to issuing its rule demonstrated that none of the graphic warnings were effective across all demographics and that the vast majority of the warnings had no statistically significant effect on beliefs about the health risks from smoking or smokers' intentions to quit. The images themselves "employ cartoons, actors, and/or technological manipulations," as well as "emotionally-charged graphics," the suit contends, that exaggerate the effects of smoking and related diseases.

The suit seeks to set aside the FDA rule on First Amendment grounds and requests the court to enjoin the agency from enforcing it.

To read the complaint in *R.J. Reynolds v. FDA*, click here.

Why it matters: The tobacco companies may find support for their argument in U.S. Supreme Court decisions. In their complaint, the plaintiffs cite to a 2011 Supreme Court decision, *Sorrell v. IMS*, in which the justices held that the state of Vermont violated the First Amendment when it passed a law requiring the consent of drug prescribers before their nonpublic, identifying information could be sold. Because the law imposed content and speaker-based burdens on speech, it was subject to heightened judicial scrutiny, which the state's reasoning failed to withstand, the Court said in a 6-3 opinion. "[T]he State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers," Justice Anthony Kennedy wrote for the majority.

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NARC to Begin Enforcement of Online Behavioral Advertising Principle

The National Advertising Review Council announced that it plans to begin formal enforcement of the ad industry's Self-Regulatory Principles for Online Behavioral Advertising.

The announcement followed a staff advisory opinion letter from the Federal Trade Commission that the agency has no present intention to challenge the program under competition laws.

Under the Principles, companies that collect or use data for online behavioral advertising purposes are required to use the Advertising Option Icon in or around their ads, as well as provide notice to consumers about data collection and allow consumers to opt out of receiving targeted ads.

The Council of Better Business Bureaus said it plans to use a vendor to monitor companies it reasonably believes are engaged in online behavioral advertising and will make confidential inquiries into a company's possible areas of noncompliance.

If the CBBB finds that a company is not in compliance, it will recommend steps to achieve compliance. Only if incidents of noncompliance go uncorrected will they be publicly reported and referred to the appropriate regulatory authorities. A company that fails to comply might also lose its membership in one of the trade organizations involved in the Digital Advertising Alliance, the group that released the Principles.

The FTC said that the enforcement program is unlikely to restrain trade in an unreasonable way and has the potential to benefit consumers by increasing transparency of, and consumer control over, certain aspects of online behavioral advertising.

"[T]he accountability program is intended to enhance consumers' understanding and control of [online behavioral advertising]," and will impose "relatively minor burdens on companies participating in [online behavioral advertising]," the agency said.

To read the FTC's opinion letter, click here.

Why it matters: The FTC letter noted that the program "does not preclude adoption of, and poses little risk of 'crowding out,' other systems for protecting consumers" with respect to online behavioral advertising, such as browser-based "do not track" systems. However, perhaps in recognition of the several pieces of pending federal legislation addressing privacy concerns and the possibility of a mandated do not track mechanism, the letter cautions that "[s]hould it later appear, however, that collective adoption and enforcement of the principles operates as an impediment to adoption of complementary or superior consumer protection, we might then reconsider this opinion."

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