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

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DISH Network Charged With Do Not Call Violations

The Federal Trade Commission and four states have charged DISH Network Corporation with violating Do Not Call Registry laws.

In a March 25 announcement the agency said DISH Network has been making telemarketing calls to Do Not Call phone numbers, either directly or through authorized dealers, since 2003. The FTC also said the company's automated messages violated the federal Telemarketing Sales Rule. The complaint was filed jointly with attorneys general from California, Illinois, Ohio, and North Carolina in federal court in Illinois.

The government is seeking a permanent injunction banning DISH Network from violating automated message and Do Not Call restrictions, and requiring that it monitor its dealers to prevent future violations. It is also seeking unspecified civil penalties.

In a statement, the satellite television provider said it complied with the law and should not be held responsible for violations by independent retailers. "An independent audit demonstrates that DISH Network is in compliance with 'do-not-call' laws, has proper controls in place, and is well within the safe-harbor provisions of the law," the Englewood, Colorado-based company said.

"We also believe that the FTC is equating merely doing business with an independent retailer to 'causing' or 'assisting and

UPCOMING EVENTS

April 2-3, 2009
PLI's Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems

Topic:
"Mobile Advertising and Web 2.0"

Speaker: Linda Goldstein

PLI California Center
San Francisco, CA
for more information

facilitating' violations by that retailer," DISH Network said. "We look forward to resolving these differences of opinion through the judicial process."

The agency said it also filed two related lawsuits against two of DISH Network's marketing dealers, Vision Quest and New Edge Satellite.

Last year the FTC brought similar charges against two other DISH Network partners—Planet Earth Satellite and Star Satellite. Those cases were settled for a total of $95,000 in fines.

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Motherhood Viewers: Seen but Not Heard

In the Motherhood, a new ABC sitcom that debuted last week, had its genesis two years ago as an online video series. Its transformation into a traditional network sitcom marks it as the first Internet series to make it to TV. With one major difference: viewers are no longer invited to submit their real-life stories for possible inclusion on the program.

On the now discontinued MSN.com edition of *Motherhood*, brief vignettes about funny, stressed-out moms were inspired by stories from viewers submitted via an online forum. Initially, ABC also invited viewers to suggest story ideas on its *Motherhood* Web site, saying they "might just become inspiration for a story by the writers."

When the Writers Guild of America got wind of ABC's request for story ideas, it notified the network that what it was doing was "not permissible" under ABC's contract with the WGA. ABC quickly yanked the "inspiration" language off the Web site.

The episode underscores the differences between the Internet video universe, which typically features short, cheap videos that welcome viewer interaction, and traditional television. Most TV and movie studios do not accept viewer ideas, out of concern that they could face a copyright–infringement lawsuit later.

The rub is that viewer submissions can help create a sense of community around a series. The Web edition of *In the Motherhood*, which actively sought and incorporated viewer ideas, was created by MindShare Entertainment, a unit of the media services agency MindShare, as a product–placement vehicle. The second season drew more than 16 million views, or 5.5 million per

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April 22-23, 2009
Food and Drug Law Institute 52d Annual Conference

Topic:
"Food Advertising: Campaigns and Claims"

Speaker: Christopher A. Cole

L'Enfant Plaza Hotel
Washington, DC
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April 29, 2009
American Advertising Federation Webinar

Topic:
"Budget Busters: Bongs, Blogs, and Brand Wars."

Speaker: Jeff Edelstein

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June 4-6, 2009
American Advertising Federation National Conference 2009

Speaker: Jeff Edelstein

Crystal Gateway Marriott
Arlington, VA
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June 18-19
ABA Antitrust Section's Consumer Protection Conference

Topic:

episode.

Although ABC developed a new story line for the TV version, it initially embraced the interactive aspect of the Web edition, informing online visitors that "our show writers want to hear from you!" To forestall potential legal problems, it included a lengthy contract requiring viewers submitting an idea to acknowledge that they were not members of the WGA and to waive any right to on–screen credit.

The WGA objected, saying in a statement that companies with a guild contract "cannot ask someone to write and deliver literary material without paying at least the applicable minimum for it."

ABC responded to the WGA's objections by deleting references to the show's writers. In a bid to rebuild the *Motherhood* community, it will continue to post viewer–submitted stories on the show's Web site. In a statement, the network said that in a break during the half–hour show each week, cast members will thank three random users for submitting their stories online. But their ideas may not provide direct inspiration to the *Motherhood* writers in the same way they did for the online show.

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WTO Issues Mixed Ruling in China Piracy Dispute

The World Trade Organization issued a formal ruling on March 20 finding that China failed to protect and enforce intellectual property rights in some cases but not others.

The decision—a formal adoption by the WTO's dispute settlement body of a January 26 ruling—came in response to a 2007 complaint by the United States against China over rampant entertainment and software piracy and counterfeiting.

As is the case with many trade disputes, the verdict was mixed, with both sides chalking up wins in some aspects of the dispute and losses in others.

The dispute panel agreed with the United States that China broke WTO rules by refusing to grant copyright protection to films, music, and books that state censors had not approved for sale. The panel also ruled that China could not permit the public auction of counterfeit items seized by Chinese customs authorities, with the requirement that phony brands or trademarks be taken off.

Use, Misuse, and Disregard of Evidence of Actual Confusion in Federal and State Regulatory Proceedings

Speaker: Christopher Cole

Georgetown University Law Center
Washington, D.C.
for more information

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June 25-26, 2009
Food and Drug Law Institute
Introduction to Drug Law and Regulation:
A Program on Understanding How the Government Regulates the Drug Industry

Speaker: Ivan Wasserman

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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

China successfully refuted a key U.S. claim—that Chinese copyright pirates and counterfeiters have no fear of criminal prosecution because the threshold for lawsuits is too steep.

The United States and China both issued statements trumpeting their victories and downplaying or ignoring their defeats in the case.

"Today, the membership of the WTO agreed that China must bring its intellectual property rights enforcement regime into conformity with its WTO obligations," Ron Kirk, the new U.S. Trade Representative, said in a statement. "As this dispute demonstrates, the United States will not hesitate to use all appropriate tools at our disposal to ensure that our industries, authors, and artists are protected—and that our trading partners observe their WTO commitments."

China had a different take on the ruling. "The expert group report rebutted the great majority of the U.S. side's claims and broadly vindicated China's intellectual property system," spokesman Yao Jian said in a statement issued on the ministry's Web site (www.mofcom.gov.cn).

After the January ruling, China said it would not appeal, stating that it would cooperate with other countries on copyright matters.

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NAACP Urges Big Advertisers to Push Ad Industry Diversity

The NAACP has sent letters to 25 big advertisers urging them to put pressure on their ad shops to diversify their ranks.

The March 23 letters went to the top 25 ad spenders of 2007—which collectively spent more than $52 billion on advertising in the U.S.—according to the Madison Avenue Project, the NAACP's initiative to increase African–American representation in the ad industry.

In one such letter, NAACP interim general counsel Angela Ciccolo asked the company CEO to "instruct your advertising agencies to use diverse teams in creative and account management positions" and to address the relative lack of African Americans in advertising "as forcefully and effectively as its importance to your firm and the nation requires." The letter also invited the company to identify a

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senior executive to meet with the NAACP about the diversity initiative.

The NAACP is partnering with Cyrus Mehri of the Washington, D.C., civil rights firm Mehri & Skalet on the Madison Avenue Project. In January Mehri and Ciccolo announced they were working together to bring a possible employment discrimination class action against unspecified ad shops. Mehri said litigation is still an option, although the current economic climate—which has hit the ad industry hard—suggests it is not the most auspicious timing for a lawsuit. The latest move may be a way to keep the pressure on without having to launch any lawsuits, given their high costs and uncertain outcome.

The letters cite findings from a 73–page report by the project that details alleged gaps in representation, income, and promotion opportunities between black and white employees. For instance, the report claims that entry–level African–American employees, on average, make 80 cents for every dollar earned by their white counterparts in the ad industry.

The Madison Avenue Project was spurred by a 2004 investigation by the New York City Commission on Human Rights into racial discrimination in the ad industry. The probe was settled in September 2006, when 16 major ad agencies agreed to take specified measures to combat racial discrimination over a three–year period. According to the NAACP, the actual result has been a "minimalist" response.

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E.U. to Anheuser–Busch: This Bud's Not for You

In a setback for Anheuser-Busch InBev, an E.U. court has rejected its bid to register the "Budweiser" name in the European Union.

The decision is the latest installment in an epic battle between Anheuser–Busch and its smaller rival, Czech state–owned brewer Budweiser Budvar NP, over the Budweiser name. In 1996 Anheuser–Busch sought to trademark Budweiser with the E.U. for "beer, ale, porter, malted alcoholic, and nonalcoholic beverages." Budvar complained that the trademark was identical to its trademark, which it registered with the E.U. in 1991, five years before Anheuser–Busch, to be used for "beers of any kind."

The E.U.'s Office of Harmonization for the Internal Market agreed

with Budvar and rejected Anheuser–Busch's application. On March 25 the Court of First Instance upheld the trademark office's decision.

In December Anheuser–Busch lost another case in its efforts to protect its most iconic beer brand, when the E.U. court rejected a Europe–wide trademark application for the name "Bud."

An Anheuser–Busch spokeswoman said the court's ruling will have little practical impact on the brewer's ability to market Budweiser under the trademark "Budweiser" or "Bud" in most E.U. countries. "The decision does not impact the Budweiser and Bud rights AB InBev still owns in individual member states," she said. "These national trademarks remain strong and intact." AB InBev owns either the Budweiser or Bud trademarks in 23 of the 27 E.U. countries, she said.

Anheuser–Busch and Budvar have been fighting a century–long legal battle over the use of the famous Budweiser brand, to which both companies claim a historical right. The companies are involved in about 40 lawsuits worldwide.

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