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Analysis

Product Demonstrations Deliver Reward...and Risk

Every marketer knows that nothing drives sales like showing the product in action. Product demonstrations are arguably among the most important selling points in direct response marketing. However, write Venable partners **Jeffrey D. Knowles** and **Randall K. Miller** in the May edition of the *DRMA Voice*, the persuasive power of these demonstrations also brings inherent risk because they have become favorite targets for competitor challenges and consumer class action plaintiffs' attorneys.

Knowles and Miller draw on several recent self-regulatory challenges and consumer class actions to highlight risk mitigation best practices in development and substantiation of product demonstrations.

[Click here](#) to read the full text of the column by Knowles and Miller.

Sometimes the Claim is in the Eye of the Beholder

A public service message in Spain garnered media attention this week because the novel ad uses a lenticular image to deliver starkly different anti-child abuse messages to different audiences. The ad displays a child abuse awareness message to adults. However, anyone reading the ad who is under four and a half feet tall sees an image of a bruised child and the message "if somebody hurts you, phone us and we'll help you" alongside the foundation's phone number. The ad highlights the fact that two audiences can "see" advertising claims differently, write Venable partners **Amy Ralph Mudge** and **Randall M. Shaheen** in a recent post to Venable's advertising law blog, www.allaboutadvertisinglaw.com.

Advertising claims are usually interpreted with regard to the "reasonable consumer." However, there are some times when claims that might mislead a reasonable consumer may not be misleading because they are intended for an audience with special knowledge. It is more often the case, Mudge and Shaheen write, that audience targeting can be problematic because of the difficulty of segregating audiences and prescriptions on advertising to certain groups.

Although some technologies provide novel ways to segregate audiences, a thorny question is at what point does the technology work so imprecisely that a company can no longer claim it "targets" certain groups. Questions like this, they write, will likely keep lawyers and regulators busy for the foreseeable future.

[Click here](#) to read the full text of the post on Venable's advertising law blog, www.allaboutadvertisinglaw.com.

[Click here](#) to watch a YouTube video about the Spanish ad.

Viacom v. YouTube Decision Maintains DMCA Safe Harbor for Video Site

On April 18, 2013, the U.S. District Court for the Southern District of New York again held that internet video site YouTube is subject to the safe harbor provisions of the Digital Millennium Copyright Act (DMCA) as an internet service provider despite alleged general knowledge of extensive copyright infringement, write Venable attorneys **Meaghan Hemmings Kent** and **Martin L. Saad** in the April edition of Venable's *IP Buzz* newsletter.

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Honors and Awards

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2012



Law Firm of the Year, National
Advertising, *U.S. News and World
Report*, 2011-2012



Top-Tier Firm *Legal 500*



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The case was initiated in 2007 by Viacom and others against YouTube for the alleged hosting of copyright infringing materials. In 2010, the District Court determined on summary judgment that YouTube fell within the safe harbor of the DMCA. The decision was later vacated by the Second Circuit and remanded. The Second Circuit focused on whether there was knowledge of "specific infringements" rather than generalized knowledge of infringement. The Circuit Court asked the District Court to address four specific issues; on remand District Court held for YouTube on all four.

The judge's opinion explained that the DMCA safe harbor provision was enacted because internet service providers provide a useful function, but that the volume of works placed through their services would mean that they could easily "ignorantly" provide access to infringing material. Because of this, he wrote, the DMCA safe harbor provision places the burden on the copyright owner to identify and notify the service provider of the specific infringing works.

While this decision is a win for service providers, write Hemmings Kent and Saad, it will be a frustrating loss for copyright owners. They note that Viacom has already indicated it intends to appeal this decision.

[Click here](#) to read the full text of the client alert.

TCPA Claims Still Unavailable in New York

On May 1, 2013, a judge in the U.S. District Court for the Eastern District of New York denied a motion to reconsider his earlier decision dismissing claims arising under the Telephone Consumer Protection Act (TCPA) and accompanying rules and regulations for lack of subject matter jurisdiction, write Venable partners [Edward P. Boyle](#) and [Michael C. Hartmere](#) in a recent post to Venable's advertising law blog, www.allaboutadvertisinglaw.com.

In *Bank v. Independence Energy Grp. LLC*, the court had dismissed the TCPA claims in reliance on a Second Circuit precedent, *Holster III v. Gatco, Inc.*, which interpreted the TCPA to bar claims in New York federal court because New York State's civil procedure rules do not permit statutory class actions.

In denying the motion to reconsider, Boyle and Hartmere write, the court addressed an issue not covered in its prior decision and held that *Holster III* decision was still valid despite the Supreme Court's subsequent decision in *Mims v. Arrow Financial Services, LLC*, which held that federal and state courts have concurrent jurisdiction over private actions brought under the TCPA. The plaintiff in *Bank* has stated publicly that he will appeal the decision to the Second Circuit.

[Click here](#) to read the full text of the blog post, which explores the *Holster III* and *Mims* decisions in greater detail.

[Click here](#) to read Venable's client alert about the initial *Bank* decision dismissing the TCPA claims.

News

Venable Adds Two Prominent Government Financial Enforcement Attorneys

Over the past month, Venable has welcomed as partners two prominent government enforcement attorneys, [Allyson B. Baker](#) and [Michael J. Rivera](#), who focus their practices on allegations of fraud in the financial marketplace.

Rivera recently joined Venable from his role as Chief Investigative Counsel at the Special Inspector General for the Troubled Asset Relief Program (SIGTARP).

While at SIGTARP, Rivera managed more than 150 investigations conducted by SIGTARP's Investigations Division. He was responsible for criminal and civil investigations and prosecutions related to the government's Troubled Asset Relief Program (TARP), accounting fraud, bank fraud, loan fraud, securities fraud, mortgage servicer misconduct, fraudulent advance-fee schemes, money laundering, obstruction of justice, perjury and tax fraud.

In addition to his principal role overseeing investigations and TARP programs, Rivera served as SIGTARP's representative to President Obama's Financial Fraud Enforcement Task Force and its bank,

mortgage, and securities working groups. He also led SIGTARP's establishment of working groups with the Consumer Financial Protection Bureau (CFPB), which resulted in successful joint enforcement actions and the issuance of consumer protection alerts.

In April, Baker joined Venable from the CFPB's Office of Enforcement where she was among the initial team of enforcement attorneys who helped formulate agency policies regarding investigations and litigation in the aftermath of the financial crisis.

While at CFPB, she served as lead counsel on one of the agency's first enforcement actions, which also resulted in its largest settlement to date. Prior to joining the CFPB in 2011, Ms. Baker served as a Trial Attorney in the Department of Justice's Civil Tax Division.

Both Baker and Rivera will work with Venable's CFPB Task Force, which is headed by [Jonathan L. Pompan](#) and [Suzanne Fay Garwood](#). The task force brings together Venable's deep experience and bench in matters involving consumer financial services, advertising and marketing law, privacy and data security, and government investigations and enforcement actions and brings that experience to bear in its representation of consumer financial institutions before the CFPB.

[Click here](#) to read the press release announcing Baker's arrival at the firm.

[Click here](#) to read the press release announcing Rivera's arrival at the firm.

Upcoming Events

[Merchant Acquirers' Committee 2013 Conference - Las Vegas](#)

May 14-16, 2013

This year's MAC Conference is addressing "Controlling the Tidal Wave of Fraud." Please join Venable partner [Jamie Barnett, Rear Admiral \(Ret.\)](#) when he presents "Cyber Security and the Arrival of the Mobile Payments Era," a discussion of present threats from cyberspace. Also, Venable partner [Jeffrey D. Knowles](#) will present "Toto, We Are Not in Kansas Anymore," about regulatory and court challenges to payment companies.

[Click here](#) to register.

[ERA'S Government Affairs Fly-In 2013 - Washington, DC](#)

May 21-23, 2013

Please join Venable at the Electronic Retailing Association's 2013 Government Affairs Fly-In. The event presents an outstanding opportunity to learn more about the regulatory and legislative efforts affecting the electronic retailing industry and to meet with lawmakers and senior agency officials. Venable's [Jeffrey D. Knowles](#) will be among the dozen senior-level speakers from Capitol Hill, federal agencies, industry self-regulatory bodies, policy think tanks, and the electronic retailing industry.

[Click here](#) to learn more and to register.

[Internet Retailer Conference and Exhibition 2013 - Chicago](#)

June 4-7, 2013

The 9th annual Internet Retailer Conference and Exhibition, the world's largest e-commerce event, will analyze the social, mobile, global, personal, interactive, and managerial changes that e-commerce players are bringing to the new retail economy. Please join Venable attorneys at booth #464 to learn how the firm can help you grow your business and avoid the pitfalls of conducting commerce via the Internet.

[Click here](#) by June 2 to take advantage of discounted registration as a guest of Venable.

[Click here](#) to subscribe to Venable's Advertising and Marketing RSS feed and receive the Venable team's insight and analysis as soon as it is posted.

Visit Venable's advertising law blog at www.allaboutadvertisinglaw.com.

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