Advertising Law

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March 28, 2011

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CBBB Steps Up Online Enforcement

The Council of Better Business Bureaus (CBBB) announced plans to increase monitoring and enforcement of the advertising industry's online activities.

The Internet-based Advertising Accountability Program monitors the marketplace for compliance with the industry principles, the Self-Regulatory Program for Online Behavioral Advertising.

The self-regulatory principles require companies to provide "enhanced notice" to consumers and utilize an icon for interest-based ads, signaling to consumers that the site may be collecting their data. Consumers can also click on the icon, a lower-case "i" with a triangle around it, to receive more details about the advertiser's data collection practices and choose to opt-out of future targeted advertising.

The CBBB will monitor the marketplace externally, as well as review non-compliance reports from consumers. Inquiries into potential non-compliance will also be conducted and the CBBB will report non-compliance to the government.

To help with monitoring, the CBBB contracted with Evidon, Inc., which will provide the technology for online monitoring.

The CBBB also announced the appointment of Eugenie N. Barton, who will oversee the program.

“These services will provide the accountability program with a bird’s eye view of online interest-based advertising and an early warning system to detect potentially problematic data collection,” Barton said in a statement. “We will be monitoring everyone engaged in interest-based advertising – advertising networks, advertising agencies, Web publishers, advertisers and service providers.”

To read more about the program, click here.

Why it matters: Companies engaged in online behavioral advertising should be prepared for the program’s monitoring and enforcement efforts. “We want people to be in compliance now,” Lee Peeler, chief executive of the CBBB’s National Advertising Review Council and Executive Vice President of its National Advertising Self-Regulation group, told *The Wall Street Journal*. “It is really important to have someone checking and objectively reporting on whether the companies are actually following those principles.” The stepped-up program is yet another attempt by the industry to stave off government regulation or federal privacy legislation, as lawmakers are considering multiple bills.

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Judge Halts Enforcement of Colorado E-Commerce Law

A federal court judge granted a preliminary injunction against a Colorado law that required e-commerce sites and other out-of-state retailers to disclose information about state residents’ purchases to the authorities.

The Direct Marketing Association filed suit challenging the law, arguing that it interfered with interstate commerce, relying on a 1992 U.S. Supreme Court decision holding that state governments cannot require retailers to collect state tax unless they have a physical presence in the state, which has been interpreted to mean a brick-and-mortar store.

The law, which took effect last March, requires retailers with more than $100,000 in annual sales that do not have a physical presence in Colorado and that do not otherwise collect Colorado state taxes on sales to Colorado residents to notify Colorado customers that they owe a state tax on their purchases.

Retailers must also send an annual report to customers who spent more than $500 in the previous calendar year each January detailing their purchases from the prior year with the amount of Colorado sales tax they owe, and submit a report to the state with information about all in-state purchases. Penalties range from $5 to $10 per violation.

Agreeing with the DMA that it had a substantial likelihood of prevailing on the merits of its claims, U.S. District Court Judge Robert E. Blackburn granted a preliminary injunction against enforcement of the law.

"The Act [and accompanying regulations] impose a notice and reporting burden on these out-of-state retailers and that burden is not imposed on in-state retailers," he wrote.

Although the state argued that it had a legitimate interest at stake – increased tax revenue – the court said non-discriminatory alternatives existed.

Noting that the estimated first-year cost for companies to comply with the law ranged from $3,100 to $7,000, the court said that monetary loss was an irreparable injury because if the law is struck down, retailers will be unable to recover their costs.

To read the court's order in *Direct Marketing Association v. Huber*, click here.

Why it matters: In a press release, the DMA said that it will continue the suit in order to have the law definitively declared unconstitutional. The fight in Colorado is mirrored in states around the country that have enacted similar legislation in attempts to raise state revenue. A 2008 New York law was challenged by Amazon and is currently under consideration by a state appellate court; the company is also fighting the state of North Carolina, which requested purchase information by state residents dating back to 2003 from the company.

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Courtney Love Settles Twitter Defamation Suit

Courtney Love has agreed to settle a Twitter defamation lawsuit by paying $430,000 to a clothing designer she tweeted was a "total scumbag, lying ripoff" and a prostitute.

The dispute began when Dawn Simorangkir, a designer, claimed Love owed her $4,000 for clothing.

Love responded with comments on Myspace and Simorangkir's Web site as well as a Twitter rant, tweeting to her roughly 40,000 followers that the designer was an "asswipe nasty lying hosebag thief," who lost custody of her own child, had a history of assault and battery, and used Love for her fame. "She has received a VAST amount of money from me over 40,000 dollars and I do not make people famous and get raped TOO!" read another Love tweet.

Simorangkir sued for defamation.

Love had argued that the tweets were an expression of her opinion but the designer said that Love had influence as an entertainer.

The case was scheduled for trial, but the parties settled for a total of $430,000.

Simorangkir's attorney, Bryan Freedman, told *The Hollywood Reporter* that "the amount of the settlement says it all. Her reprehensible defamatory comments were completely false and $430,000 is quite a significant way to say I am sorry. One would hope that, given this disaster, restraint of pen, tongue and tweet would guide Ms. Love's future conduct."

Love's attorney, James Janowitz, responded to the *THR* that because the $430,000 was an extended payout deal, "it's a very modest settlement," adding that the plaintiff had asked for "vastly more." "They got out with an amount that left them bragging rights but nothing else," he said.

Why it matters: The case presented an as-yet untried legal question: what constitutes defamation on Twitter? The question remains open, although one Illinois judge has ruled that a single tweet was nonactionable as a matter of law. In that case, a landlord brought suit after a tenant tweeted that her apartment was moldy. In another case, the creator of the Cookie Diet sued Kim Kardashian for libel and defamation over two tweets she made about the company. The cases all serve as a reminder that despite its 140-character limit, there is still room for potential liability on Twitter, and statements made via social media remain subject to legal action.

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Four Loko Faces Class Action Over Deceptive Marketing

Phusion Projects, the maker of beverage Four Loko, was served with a complaint in a California class action accusing the company of deceptively marketing the drink to look like non-alcoholic energy drinks, using vibrant colors and designs and fruit flavor names.

In addition, the suit claims the company failed to warn consumers of the particular dangers of drinking caffeinated beverages with high alcoholic content.

Often referred to as "blackout in a can," Four Loko contains 6 to 12 percent alcohol by volume along with 135 mg of caffeine, according to the complaint, delivering the equivalents of one cup of coffee and four to five beers.

According to the complaint, the advertising, labeling, packaging, marketing, promotion, and selling of Four Loko violated California law because Phusion Projects used fruit flavor names for the drinks – like "Four Loko Fruit Punch," the version purchased by the named plaintiff – vibrant colors and designs to package and label the beverage, and promoted the placement of its drinks near non-alcoholic energy drinks.

These acts also deceptively represented that Four Loko posed no greater risk to the health of consumers than other non-caffeinated alcoholic beverages, the suit alleges.

The suit seeks a corrective advertising campaign and monetary damages, including a refund for each class member who purchased Four Loko during the last four years.

Calling the suit meritless, the company said in a statement that it intends to defend itself "vigorously."

"We have always disclosed the contents of all of our products and we did not make any misrepresentations about our products. As a responsible member of the alcoholic beverage industry we have gone above and beyond federal and state labeling requirements to make sure consumers know what our product is so that it can be consumed responsibly. We work alongside our distributors and the stores that sell our products to ensure they are marketed, sold and consumed safely and responsibly," the company said.

To read the complaint in *Richardson v. Phusion Projects*, click here**.**

Why it matters: The class action suit is the latest blow to Phusion Projections, following an earlier lawsuit alleging that Four Loko caused the death of a college student, as well as federal and state actions. Both the Food and Drug Administration and the Federal Trade Commission sent warning letters to the company, expressing concern about the alcohol/caffeine mix, and several states banned the drinks. In November, Phusion Projects agreed to remove caffeine and other stimulants from its products, and announced it would only sell non-caffeinated versions of the drink in the future.

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