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November 14, 2008

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

IN THIS ISSUE

Reminder – We'll See You in Chicago on November 20 at the 30th Annual PMA Law Conference

Most of our clients and friends are aware that the PMA Law Conference is only a few weeks away. Linda Goldstein, chair of Manatt's Advertising, Marketing & Media Division, Kerrie Campbell, chair of the firm's Consumer Product Safety Group, and the entire Manatt team look forward to seeing you there.

Linda will lend her highly sought-after legal and marketing acumen to the program once again. Always informative and engaging, this year Linda will reveal everything you need to know to create successful and lawful sweepstakes, games, and contests and present solutions to the complex challenges in text messaging, fee-based skill contests, user-generated content, new hybrid models, and more.

The recently enacted Consumer Product Safety Improvement Act means coming to grips with many new regulatory requirements and enforcement initiatives. Kerrie will help guide you through the complexities.

CHAMBERS USA 2008

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UPCOMING EVENTS

November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for Sweepstakes, Games & Contests"

Speaker: Linda Goldstein

Topic:
"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Speaker: Kerrie L. Campbell

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Obama, Democrat Win Could Mean More Ad Rules

An Obama administration – and more Democrats in Congress – could mean a more tightly regulated advertising industry, ad execs say.

Dick O'Brien, Executive Vice President of the American Association of Advertising Agencies, told *AdAge* that U.S. Rep. Rahm Emanuel, D-Ill., who is slated to become Obama's chief of staff, spoke with the 4A's board of directors several weeks ago.

"He predicted that the first order of business in the new Congress will be shoring up the economy and bringing the deficit under control," O'Brien said. "Then, out of the blue, he volunteered that this would cause our industry some pain. When pressed to elaborate, he said that, in their quest for new revenue, one likely possibility would be to go to pharma and tell them they could keep the write-off for R&D or DTC, but not both."

Other concerns: A renewed push to limit ad profiling to protect consumer privacy and more antitrust scrutiny, among others.

DTC drug ads: Health care was a major election issue and ad execs are concerned that a Congressional look at the industry could result in sharp curbs on direct-to-consumer drug advertising. Democratic members of Congress have been pushing the Food and Drug Administration to take a more active and aggressive approach toward its review of the ads. With Democrats firmly in control of Congress, there could be a renewed effort to impose a moratorium on new drug advertising. Ad groups also worry that Congress will seek to limit the deductibility of DTC ads as business expenses, paving the way for similar measures aimed at other unpopular ad groups.

Privacy: Ad groups expect that privacy issues will receive far more scrutiny than under the Bush administration, which approved several deals that facilitated the ability of marketers to profile and target consumers.

Magnificent Mile
Chicago, IL
for more information

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December 4-5, 2008
Film & Television Law

Topic:
"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Speaker: Linda Goldstein

Topic:
"The Value of Fame: Understanding the Right of Publicity"

Speaker: Mark S. Lee

Century Plaza Hotel
Los Angeles, CA
for more information

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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

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Practice Group Members

INFO & RESOURCES

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FTC: Telephone companies and airlines are not under the FTC's aegis, and the agency's oversight of the financial services industry is limited. Sen. Byron Dorgan, D-N.D., has floated the idea of expanding the FTC's oversight and granting it additional authority to levy civil fines.

FCC: Obama has criticized the Bush administration's loosening of media ownership rules, and queried whether the FCC sufficiently understood the impact on minority media ownership and local programming and news.

Net neutrality: A ban on favoring certain content providers over others is virtually a given. The only question is whether the FCC or Congress will impose it.

Justice Department: Antitrust reviews of marketer and media-related deals are expected to intensify.

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After Warning, Starbucks Alters Election Day Promo

On the Saturday before the Presidential election, Starbucks launched an ad campaign announcing it would give a free tall cup of coffee to anyone who said they voted.

But then Washington state officials notified the retail coffee shop chain that state and federal election law bans any type of remuneration for voting.

By the end of the day on Monday, Starbucks revised its giveaway in Washington state, extending its free offer to anyone who came in. By Tuesday – election day – Starbucks opened up its free coffee promotion to the entire country.

A number of other retail food chains also offered freebies to voters, including Ben & Jerry's, Krispy Kreme, and Chick-fil-A. Ben & Jerry's subsequently extended its offer to everyone in the country.

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Brand Owners Protest New Top-Level Domains

Concerns about having to pay millions of dollars to safeguard their brands have prompted a number of big companies to

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fight the introduction of several new top-level domains to add to .com, .net, and .org.

Such companies contend that the new domains could exacerbate problems like typosquatting and identity fraud, and dramatically boost costs associated with an online presence.

The Internet Corporation for Assigned Names and Numbers, or ICANN, has announced its intention to launch an unlimited number of top-level domains to be named after popular subjects, industries, geographic locales, or even brand names, such as .bank, .hotel, .nyc, or .verizon.

Companies worry that if they don't register their trademarks – in all their variations, including misspellings – at each of the new domains, their brand names could be misused for scams, resulting in mistrust of their brands.

ICANN, a not-for-profit organization whose members include the registrars who operate the top-level domains, says it is taking feedback into account, but argues that existing domains are too crowded, making it hard for new businesses to purchase an appropriate domain name.

Companies are weighing whether to buy the rights to operate their own brand-specific domains, or register their marks for more generic domains, in order to stave off possible problems.

ICANN says it will carefully screen any applicant for a new top-level domain. The high costs associated with operating a new top-level domain – the fee is set at $185,000, plus the costs associated with managing a registry and marketing the new sites to consumers – may also discourage fraudsters from buying up a brand-specific domain. The more worrisome issue centers around generic domains such as .nyc and .bank. Observers expect the operators of these domains to offer trademark owners the opportunity to register their marks early for about $500 per domain, or about ten times as much as the public's cost.

Right now, 21 top-level domains, such as .com, .org, and .net, exist, along with country-specific names.

Because it is widely expected that users will stick to tried-and-true surfing habits, companies argue that the new domains serve little business purpose. Companies point out that prior launches of domains such as .eu or .asia cost them millions of dollars in preemptive purchases of domain names that, in the end, generated little traffic or new business.

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Digital Ad Firms Tussle Over Clients

Digital ad shop Agency.com LLC has filed a lawsuit claiming that competitor iCrossing, Inc. raided several of its top executives and clients.

In the lawsuit filed in state court in Dallas, Agency.com, a division of Omnicom Group, charges iCrossing with breach of contract, tortious interference, and conspiring to misappropriate proprietary information and trade secrets. It says iCrossing CEO Donald Scales, who had been CEO of Agency.com, poached Agency.com's employees and its clients.

The complaint, which asks for $19.5 million in damages, claims that the acts by iCrossing and Scales "led ultimately to the closing of Agency.com's Dallas office" and the "decimation of the firm's Chicago office."

In its complaint, Agency.com alleges that depositions of Scales and other iCrossing employees revealed that iCrossing and Scales offered jobs to "at least a dozen Agency.com employees before the restriction against iCrossing soliciting or hiring Agency.com employees expired." The complaint further alleges that Scales and several ex-employees of Agency.com solicited Agency.com clients on behalf of iCrossing and some of them did so "while still employed by Agency.com."

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Court Approves State Seizure of Gambling Sites

In a case with potential widespread ramifications, a Kentucky state judge ruled on October 16 that scores of betting Web sites have 30 days to block Kentucky users or face having their domain names transferred to the state.

The court threw out a motion by gambling sites, online poker players, and Internet trade associations to block the home state of the Kentucky Derby from seizing the domain names of 141 online gambling sites.

The court was not convinced that disruption of international online commerce by a Kentucky judge will create undue havoc. "The Internet, with all its benefits and advantages to modern day commerce and life, is still not above the law," the court wrote in a 44-page opinion.

Internet businesses are hoping the Web sites will appeal the court's ruling. The opinion tosses a "wild card into state and international law," said Jeremiah Johnson, president of the Internet Commerce Association. The trade group filed an amicus brief in the Kentucky lawsuit supporting the betting sites.

Kentucky Justice and Public Safety Cabinet Secretary Michael Brown said the state opted to go after Internet betting because it is illegal and siphons money away from Kentucky's legal gambling industry, including horse racing, the lottery, and charitable gaming.

On September 18, the court ordered the transfer of 141 domain names for gambling sites to the state, finding probable cause to believe the domain names hosted illegal betting sites. Various Internet gambling associations as well as the 141 sites quickly filed several motions to stop the state's takeover of the domain names. They argued that the court had no jurisdiction over online gambling and that a domain name was not a gambling device.

In its order, the court agreed with Kentucky that a domain itself is a gaming device. Johnson disputed this finding, arguing that Kentucky's gaming statutes were drafted before the advent of the Internet. "If you want to go after Internet gambling, then go over to the business behind the domain," Johnson said.

The court said gambling sites that block Kentucky users from access within 30 days of the order will not have their domain names transferred to Kentucky. The court also ordered lawyers representing the betting sites to provide the court with the identity of their clients. Many online gambling operations are incorporated in foreign countries. The court set a hearing for November 17.

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Internet Fraud Site Shuttered

The FBI late last month announced that a two-year-long global undercover operation against the Internet fraud forum DarkMarket has resulted in 56 arrests across the globe.

"In today's world of rapidly expanding technology, where cybercrimes are perpetrated instantly from anywhere in the world, law enforcement needs to be flexible and creative in our efforts to target these criminals," said FBI Cyber Division Assistant Director Shawn Henry in a statement. "By joining forces with our international law enforcement counterparts, we have been, and will continue to be, successful in arresting those individuals and dismantling these forums."

In their own announcement, U.K. authorities said they recently arrested five DarkMarket users, and 11 since the operation began in late 2006. According to the FBI, other arrests have been made in Turkey, Germany, and the United States.

DarkMarket allowed buyers and sellers of stolen identities and personal credit card information to do business. At its peak, it had 2,500 members, according to the FBI.

Documents uncovered by a German radio network recently revealed that DarkMarket had been surreptitiously run by an FBI cybercrime agent for the last two years, until its voluntary shutdown last month. The site leader, known as Master Splynter, was actually FBI cybercrime agent J. Keith Mularski, a member of a seven-agent cybercrime unit based at the National Cyber Forensics Training Alliance (NCFTA) in Pittsburgh.

DarkMarket members were under the impression that the site was run from Eastern Europe, despite a 2006 warning from uber-hacker Max Ray Butler, known then as Iceman and Aphex. Butler cracked the site's server and announced that he'd caught Master Splynter logging in from the NCFTA's office. Butler ran a site of his own, and the warning was generally dismissed as inter-forum rivalry, even when Butler was arrested in San Francisco last year on credit card fraud charges, and shipped to Pittsburgh for prosecution.

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Manatt Prevails for Retired Professional Football Players in Federal Court

A federal jury returned a historic verdict against the National Football League Players Association in the amount of $28.1 million (including $21 million in punitive damages) in favor of Manatt's clients, a class of more than 2,000 retired NFL players. The jury found that the union breached its contract with the retirees, violated its fiduciary obligations, and deliberately acted contrary to the interests of the retirees that the union promised to represent.

Manatt litigation partners L. Peter Parcher, Ronald S. Katz, and Chad Hummel led the trial team in this victory, which also included members of the Texas-based law firm, McKool Smith, to produce a result that class representative, former Green Bay Packer and Dallas Cowboy, and professional football Hall of Famer, Herb Adderley called "bigger than my two Super Bowl victories, because of the number of players involved."
"We are extremely gratified and pleased for the thousands of former NFL players – heroes, really, who built the game of pro football – who were betrayed by their union," said Katz. "The jury saw through the smoke screen that the union put up at trial and sent a clear message that, for years, these retired players were shamefully disrespected and ignored by their own union. We were very proud to be a part of setting things right."

This trial victory comes close on the heels of Manatt's $700+ million award for its client ICO Global Communications (Holdings) Limited against The Boeing Company and its Boeing Satellite Systems International subsidiary, which is the largest jury verdict to date in 2008.

"This is another significant victory on behalf of the firm's clients and is a testament to the skill and dedication of our firm's trial group, led in this case by Peter and Ron. The entire team did an amazing job in standing up to the resources of the most powerful union in professional sports and proving the case on behalf of the retired players," said Hummel, chair of Manatt's firmwide litigation division. "The verdict speaks yet again to the high quality of Manatt's national litigation practice."

The class action, *Herbert Adderley v. National Football League Players Association* (07-943, U.S. District Court, San Francisco), was initiated by Adderley, 69, who played in the 1960s and 1970s. Adderley led the class of retired players, who contended that they signed agreements entitling them to shares of licensing revenue from deals negotiated by the union. Over the years, the union actually paid little if anything to the players and ignored significant marketing opportunities, including Electronic Arts' wildly successful Madden Football video game franchise, that could have been extremely lucrative for retired players, favoring instead the financial interests of the union and its for-profit licensing subsidiary Players Inc.

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