



January 10, 2013

**Issue Editors**

**Jeffrey D. Knowles**  
jdknowles@Venable.com  
202.344.4860

**Roger A. Colaizzi**  
racolaizzi@Venable.com  
202.344.8051

**Gary D. Hailey**  
gdhailey@Venable.com  
202.344.4997

**Gregory J. Sater**  
gjsater@Venable.com  
310.229.0377

**In This Issue**

**Jeffrey D. Knowles**  
jdknowles@Venable.com  
202.344.4860

**Ellen Traupman Berge**  
etberge@Venable.com  
202.344.4704

**Lisa Jose Fales**  
ljfales@Venable.com  
202.344.4349

**Thomas E. Gilbertsen**  
tegilbertsen@Venable.com  
202.344.4598

**Amy Ralph Mudge**  
amudge@Venable.com  
202.344.4743

**Randal M. Shaheen**  
rmshaheen@Venable.com  
202.344.4488

**Ari N. Rothman**  
anrothman@Venable.com  
202.344.4220

**Molly T. Cusson**  
mtcusson@Venable.com  
202.344.4215

**Analysis**

## Old Rules Still Apply to New Technologies

From texting to blogging to tweeting and pinning, it is a challenge for marketers to keep pace with the rapidly changing times and technologies, write Venable partners **Ellen Traupman Berge** and **Lisa Jose Fales** in the December edition of *ABA Antitrust* magazine. While it is easy for marketers to forget regulatory compliance or lull themselves into thinking that regulators are not paying attention to social media and mobile marketing, nothing could be further from the truth.

In their article, "The More Things Change, the More They Stay the Same: Applying Section 5 to Emerging Marketing Practices," Fales and Berge provide a detailed roadmap of how the principal federal statute governing advertising and marketing practices applies to marketers' use of affiliate marketer networks, blogging, texting and tweeting, mobile marketing and more.

[Click here](#) to read the article and learn more about the Federal Trade Commission's (FTC) guidance for marketers' use of these emerging tools, not only when the guidance is clear, but also when it is not.

## NAD Says It Won't Demur Just Because a Regulator OKs Language

Just because a regulatory agency approves a marketer's packaging, it does not mean that the marketer is safe from a competitor challenge, write Venable partners **Amy Ralph Mudge** and **Randal M. Shaheen** in a recent post to Venable's advertising law blog, [www.allaboutadvertisinglaw.com](http://www.allaboutadvertisinglaw.com).

The National Advertising Division's (NAD) procedural rules say "complaints regarding specific language in an advertisement, or on product packaging or labels, when that language is mandated or expressly approved by federal law or regulation...are not within NAD/CARU's (Children's Advertising Review Unit) mandate." However, during a recent competitor challenge to a pet product, the industry self-regulatory group clarified that it will only pass on a case if the regulator-approved language at issue is required by law or approved for use by all industry participants.

[Click here](#) to read the full post on Venable's advertising law blog and learn more about NAD's reasoning on the issue as well as the competitor challenge that prompted the clarification.

## Toys“R”Us Settlement Exposes Dark Side of Refund Policies

"Buy one, get one" offers: we've all seen them and, no doubt, many of us have been involved in advertising them, write Venable partners **Jeffrey D. Knowles**, **Amy Ralph Mudge** and **Randal M. Shaheen** in the January edition of *DRMA Voice*. However, they ask, what happens with these offers when a consumer decides to return one of the products but keep the other? A group of California consumer plaintiffs felt they should have their full purchase price refunded and keep the additional second item for free.

The group filed a consumer class action alleging that Toys“R”Us and Babies“R”Us violated California Civil Code Section 1723, which requires that retailers must conspicuously display their refund policy if it does not meet common consumer expectations. The case settled recently.

## Honors and Awards

Top ranked in *Chambers USA* 2012



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



Top-Tier Firm *Legal 500*



For more information about Venable's award-winning Advertising and Marketing practice, please visit our website at [www.Venable.com/Advertising-and-Marketing](http://www.Venable.com/Advertising-and-Marketing)

[Click here](#) to learn more about the case as well as strategies the Venable attorneys recommend to avoid similar class actions.

## Hollister Gift Card Decision Examines Individual, Common Questions in Class Actions

On January 3, 2013, the California Court of Appeals held that the trial court in *White v. Hollister Co.* had wrongly denied class certification to a proposed class of consumers who received gift cards during a 2009 promotion. The gift cards themselves lacked an expiration date, and Hollister had refused to redeem cards that were presented after the expiration date.

Venable attorneys [Thomas E. Gilbertsen](#), [Ari N. Rothman](#) and [Molly T. Cusson](#) write in a recent client alert that the appellate decision has important lessons for marketers and their counsel. Although all proposed class members were exposed to a common misrepresentation (the lack of an expiration date on the card), Hollister's use of numerous methods of notification such as store signage, gift card sleeves and one-on-one interactions with store staff raise significant questions about whether individual questions about notification predominate over common ones as to many class members. The remanded case will present significant challenges to class certification as to 21,000 of the proposed class members.

[Click here](#) to read the Venable attorneys' analysis of the *White* decision and learn why Hollister's numerous representations about the cards' expiration dates may pose a significant obstacle to class certification.

## FTC Gives a New Year's Gift to Apparel Retailers

Just in time for the new year, the FTC has announced a new enforcement policy statement designed to put retailers who import textile products on the same footing as those who source textiles domestically or from American importers, write Venable partners [Amy Ralph Mudge](#) and [Randal M. Shaheen](#) in a recent post to Venable's advertising law blog, [www.allaboutadvertisinglaw.com](http://www.allaboutadvertisinglaw.com).

The Textile, Wool and Fur Labeling Acts require that garments be labeled with the fiber content, country of origin (if imported) and other requirements. The Acts allow retailers a safe harbor if they receive, in good faith, guarantees from manufacturers assuring that the products are correctly labeled or promoted. With this change, the FTC says it will not pursue enforcement actions against retailers that directly import such products unless they "knew or should have known" that the products were incorrectly labeled or promoted.

[Click here](#) to read the blog post by Mudge and Shaheen and learn more about the ways private labeling and advertising practices can limit the safe harbor.

[Click here](#) to read the FTC's enforcement policy statement.

---

## Upcoming Events

### [Affiliate Summit West 2013 - Las Vegas](#)

January 13-15, 2013

Join Venable attorneys at this conference which provides educational sessions on the latest affiliate-marketing industry issues and fosters a productive networking environment for affiliate marketers.

To register, please [click here](#).

### [COPPA: The Final Word - Washington, DC](#)

January 14, 2013

[Venable's Washington, DC office](#) is hosting this informative session covering the sweeping changes to the Children's Online Privacy Protection Act (COPPA) Rule. Speakers include an attorney from the FTC's Bureau of Consumer Protection. The event is sponsored by Aristotle and co-hosted by the Direct Marketing Association, the Association of National Advertisers, the Interactive Advertising Bureau, the American Association of Advertising Agencies and the Entertainment Software Association.

This in-person event can also be heard via live audio conference. To RSVP for either option, please contact Michele Berry at [myberry@Venable.com](mailto:myberry@Venable.com) or 202.344.4224.

[Electronic Retailing Association Network LA: Beach Access - Santa Monica, CA](#)

January 16, 2013

Venable is a proud sponsor of this event. Please join us and direct-to-consumer marketing leaders for an evening of connections and cocktails.

For more information, please [click here](#).

#### **State of the Net Conference - Washington, DC**

January 22-23, 2013

Venable is sponsoring this conference, which is the largest information technology policy conference in the U.S. and the only one with more than 50 percent of Congressional staff and government policymakers in attendance. Join the attorneys of Venable's [Privacy and Data Security Group](#) at this important event.

[Click here](#) to learn more.

#### **Electronic Retailing Association Great Ideas Summit - Miami**

February 25-27, 2013

Venable is proud to sponsor the VIP Reception of ERA's Great Ideas Summit 2013. Also, please join Venable partner [Jeffrey D. Knowles](#) as he presents the educational session "Up, Down and Sideways - How Enforcement Actions Traverse the Value Chain" on Tuesday, February 26. Meet the attorneys of [Venable's Advertising and Marketing Group](#) on the show floor at booth #304.

[Click here](#) to learn more about ERA GIS 2013 and register.

---

[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](http://www.allaboutadvertisinglaw.com).

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | [www.Venable.com](http://www.Venable.com)

© 2013 Venable LLP. This alert is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address. ATTORNEY ADVERTISING.

575 7th Street, NW, Washington, DC 20004

© 2013 Venable LLP | [www.Venable.com](http://www.Venable.com) | 1.888.VENABLE