

Advertising Law

February 9, 2012

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Nutella Settles False Ad Suit for \$550,000 and Label Changes

The maker of Nutella hazelnut spread has agreed to change its labeling and advertising and fund a \$550,000 account to settle a class-action suit over the product's marketing.

Last February the mother of a four-year-old child filed suit contending that Ferrero falsely advertised Nutella as healthy for children, even though the product contains significant amounts of saturated fat and processed sugar. She alleged that the use of images of whole wheat bread, juice, and fresh fruits combined with a statement that Nutella is "an example of a tasty yet balanced breakfast" was deceptive because the hazelnut spread is in fact "the next best thing to a candy bar."

After more suits were filed and a federal court judge refused to dismiss the consolidated cases – ruling that the plaintiffs provided sufficient details about Ferrero's advertising campaign and their reliance upon it – the parties reached a settlement. Ferrero agreed to establish a \$550,000 interest-bearing fund to pay consumers restitution of \$4 per jar purchased during the class period up to a maximum of \$20 per customer.

Additionally, the company will change its product label to include the Grocery Manufacturers Association's "Nutrition Keys" indicating the quantity and content of calories, saturated fat, sodium, and sugar in Nutella, based on serving size. The company will also remove the phrase "An example of a tasty yet balanced breakfast" on Nutella's label and replace it with "Turn a balanced breakfast into a tasty one."

Changes will also be made to the Nutella Web site (modifying the language on pages addressing nutrition), and existing television ads will be replaced. Under the terms of the settlement, Ferrero provided the class counsel with three possible storyboard mock-ups and draft scripts for a future television advertisement. Class counsel agreed that the proposals cure the alleged deficiencies in the existing commercials.

U.S. District Court Judge Marilyn L. Huff certified a class of California citizens who purchased Nutella products since August 1, 2009, and granted preliminary approval of the settlement, pending a final approval hearing in July.

To read the joint motion in support of the settlement, click [here](#).

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Upcoming Events

February 13-14, 2012

**Law Seminars International:
Developing Applications for Mobile
Devices**

Topic: "Privacy: Practical Tips for Ensuring
Regulatory Compliance"

Speaker: [Linda Goldstein](#)
San Francisco, CA

[For more information](#)

March 7-11, 2012

**Engredea's Ingredients and Innovation
Conference (co-located with
ExpoWest)**

Topic: "Talkin' 'bout the Regulations" and
"Business 401 Workshop: Negotiating the
Regulations"

Speaker: [Ivan Wasserman](#)
Anaheim, CA

[For more information](#)

March 12, 2012

**PLI's Counseling Clients in the
Entertainment Industry 2012 Seminar**

Topic/Speaker: "Video Games and
Computer Entertainment,"

[Marc Roth](#)

Topic/Speaker: "Television, Video &
User-Generated Content," [Kenneth
Kaufman](#)

New York, NY and via webcast

[For more information](#)

March 19-20, 2012

**ACI's Legal & Regulatory Summit on
Food & Beverage Marketing &
Advertising**

Topic: "From Weight Loss to Healthy
Eating - How to Prevent Health Claim
Nightmares: Practical Guidance for
Structuring Claims that Will Withstand
Government Scrutiny and Private
Litigation"

Speaker: [Linda Goldstein](#)
Washington, DC

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Awards



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To read the court's order granting preliminary approval of the settlement, click [here](#).

Why it matters: Nutella's settlement represents the conclusion to one of the myriad of class actions over false advertising of health and nutrition claims currently pending. Companies like [Kashi](#), [Snapple](#), and [Frito-Lay](#) are all currently facing similar litigation.

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FTC Settles More Acai Berry Suits

Continuing its crackdown against the affiliate marketers of acai berry supplements, the Federal Trade Commission recently announced settlements with six Web site operators.

The defendants agreed to make clear that their fake news Web sites – with domain names like "BreakingNewsAt6.com" and headlines that read "Acai Berry Diet Exposed: Miracle Diet or Scam?" – were not objective journalism, but commercial messages. Federal courts in Georgia, Illinois, New York, and Washington had already halted the operations of the defendants and four other entities after the FTC launched an [enforcement sweep](#) against the marketers last April.

The sites typically presented an initially skeptical reporter who purported to be objective before concluding that the use of the product would result in a 25-pound weight loss in four weeks without changing diet or exercise, according to the FTC. Consumers paid between \$70 and \$100 for the products. Instead, the agency alleged the sites were "nothing more than advertisements deceptively enticing consumers to buy the featured acai weight-loss products from online merchants."

Under the terms of the proposed settlements, the defendants are barred from making future deceptive claims about health-related products, including both acai berry supplements as well as colon cleansers they marketed. The defendants will also pay a total of \$500,000 for violating the FTC Act with their deceptive ads, according to the settlement documents. The settlements actually impose monetary judgments in the full amount of the commission received by the defendants for their deceptive marketing, but that total was suspended due to the defendants' financial condition. Federal courts have already approved the settlements.

To read more about the settlements, including the orders in each case, click [here](#).

Why it matters: The settlement resolves more of the lawsuits filed by the FTC last year and exemplifies the agency's "ongoing crackdown on bogus health claims," as mentioned in a press release about the proposed settlements. Just a week earlier the [FTC settled](#) with online acai berry marketer Central Coast Nutraceuticals, which agreed to pay \$1.5 million for consumer refunds after making claims that its Acai Pure supplements would result in rapid and substantial weight loss.

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DAA Launches Behavioral Advertising Ad Campaign

To better educate consumers about behavioral advertising and



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the industry's self-regulatory program, the Digital Advertising Alliance recently launched the "Your AdChoices" ad campaign.

The campaign includes information on the benefits of targeted advertising and attempts to educate consumers about the "advertising option" triangular icon used by member companies that allows consumers to opt out of behavioral ads. For example, one banner ad in the campaign reads "Will the right ads find you?" with an image of a person reading a book seated on a park bench next to a person dressed as a bookstore ad.

Ads direct consumers to a Web site – www.youradchoices.com – that has three educational videos ("Meet the AdChoices Icon," "What Is Interest-Based Advertising?" and "Your AdChoices and You") and a detailed explanation of the consumer choice mechanism. The site explains "interest-based advertising," described as "advertising intended for you, based on what you do online." Videos highlight the benefits of behavioral advertising, like coupons, promotions, and offers, as well as explain how consumers can choose to opt out of such ads using the icon.

The campaign attempts a humorous approach: after informing consumers to look in the corner of their online banner ads to find the icon, it notes places they won't find the icon – like print ads, tattoos, and African safaris. The Self-Regulatory Program for Online [Behavioral Advertising](#) launched in 2010. More than 400 companies now participate, the DAA said, and the advertising option icon is served in more than 900 billion ad impressions per month.

To watch the videos and learn more about the ad campaign, click [here](#).

Why it matters: DAA general counsel Stu Ingis told *The New York Times* that the campaign provides an important message: "We're on record as publicly committing to the Federal Trade Commission, to members of Congress, and to consumers that education is a key component to a lot of the uses of data." Education of consumers will "provide further support for the fact that the self-regulatory framework is making great progress," he added. Critics disagreed. "I don't think these ad campaigns help Internet users protect their privacy online," Marc Rotenberg, executive director of the Electronic Privacy Information Center, told *The New York Times*. "I think they're made to justify certain business practices."

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Google Searches Out Controversy Over Changes to Privacy Policy

Google's recent announcement that the company plans to update its privacy policy and combine user information across all of its products – including Android, Gmail, and YouTube – has stirred up controversy.

The changes, set to take effect March 1, will result "in a simpler, more intuitive Google experience," the company said in a blog post. But consumer advocates and lawmakers immediately expressed concern about the potential for privacy violations.

"Google has eliminated its last pretense that it protects consumer

privacy," John Simpson, director of Consumer Watchdog's privacy project, said in a statement. "Instead of a privacy policy Google has finally admitted they have a profiling policy – and every Internet user is a target to be spied on." A group of eight legislators, including Reps. Cliff Stearns (R-Fla.), Henry Waxman (D-Calif.), Joe Barton (R-Texas), and Ed Markey (D-Mass.), sent a series of questions to the company about the new policy. "We want to make sure [the policy change] does not make protecting consumer privacy more complicated," the lawmakers wrote.

They asked for information about how user information is collected and how it will be used, as well as the company's process for sharing data and archiving user information. Whether or not users can opt out of the new data sharing system, either globally or on a product-by-product basis, also raised questions for the legislators, who further queried whether Google plans to offer distinct privacy protections for children and teens. "We believe that consumers should have the ability to opt out of data collection when they are not comfortable with a company's terms of service and that the ability to exercise that choice should be simple and straightforward," the lawmakers wrote.

Google responded with a defense of its policy changes, arguing that "users continue to have choice and control." Individuals can use services such as Search, Maps, and YouTube without signing in and sharing personal information, the company said. For users that sign in, they can edit or turn off search history, switch Gmail chat to "off the record," or modify the way Google tailors ads, wrote Pablo Chavez, Google's director of public policy, in the company's response to the lawmakers. Further, the company is not selling user information, nor are the existing privacy settings of users being changed, he wrote.

To read the letter from the lawmakers, click [here](#).

To read Google's letter in response, click [here](#).

Why it matters: In their letter, the lawmakers also reference [Google's recent settlement](#) with the Federal Trade Commission over the company's inappropriate disclosure of personal information via its social networking tool, Buzz. "Implementing this product with appropriate consumer protections proved challenging for Google. Providing this protection becomes even more important if Google is consolidating the collection of users' information across multiple products," the legislators wrote. Reps. Markey and Barton went a step further, sending a [subsequent letter to the FTC](#) requesting an investigation into whether Google's new privacy policy violates the terms of the company's settlement with the agency. "This new policy and omission of a consumer opt-out option on a product-by-product basis raise a number of important privacy concerns," Markey and Barton wrote.

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MMA Releases In-App Privacy Guidelines

The Mobile Marketing Association has finalized guidelines for creating and maintaining in-application privacy policies.

Calling it the "first guidelines document of its kind that addresses the core privacy issues and data process of many mobile applications," the

guidance focuses on three areas: privacy principles and consumer-friendly language; ways to inform users on how data is obtained and used; and guidance on security and confidentiality of information.

App developers should begin with a description of the types of data that the app obtains, such as name and e-mail address, and how that information is used. Developers should attempt to draw a distinction between data that is user-provided and data that is automatically collected by the app (such as the IP address of the mobile device), the guidelines suggest. And if the application collects information from or for social network platforms – friend lists, photos, or check-ins – the app should ensure that it obtains prior consent from the user.

The guidelines distinguish between the collection of precise, real-time location information, which requires specific notice to the user and a description of how the data will be used, and non precise location information (such as a zip code or city name), which can be included in the list of data collected by the app. The guidelines also instruct app developers to explain to consumers under what circumstances and for what purposes user information will be shared with third parties and to develop a privacy policy that informs consumers about their opt-out rights.

The guidelines note that retroactive, material changes to privacy practices generally require the prior consent of the user but that forward-looking changes simply require notice. App developers should also ensure that they are in compliance with the Children’s Online Privacy Protection Act, particularly if the application has features (such as the use of cartoon characters) that may cause the app to be perceived as being directed at children under age 13.

Finally, the MMA emphasizes that the guidelines are a starting point for most mobile applications but may not be sufficient to cover all types of apps. “We strongly encourage those using this model policy to consult an attorney and/or privacy professional when crafting your own policy,” to the guidelines state.

To read the guidelines, click [here](#).

Why it matters: The guidelines are the first in a series of privacy policy guidelines the MMA is creating, CEO Greg Stuart said in a press release. “Mobile app developers asked for clear, transparent policy language that consumers can quickly and fully understand,” he said, which provides “the app development community the meaningful support they need.”

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This newsletter has been prepared by Manatt, Phelps & Phillips, LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

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