Advertising Law manatt

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FTC Targets Acai Berry Affiliate Marketers

The Federal Trade Commission has announced a law enforcement sweep against affiliate marketers of acai berry weight-loss products by simultaneously filing 10 lawsuits against marketers who operated fake news Web sites with domain names like "BreakingNewsAt6.com" and featured investigative reports with headlines like "Acai Berry Diet Exposed: Miracle Diet or Scam?"

These sites typically presented an initially skeptical reporter who purported to be objective before concluding that the use of the product will result in a 25-pound weight loss in four weeks without changing diet or exercise, according to the FTC. "We are alleging that nearly everything about these Web sites is false and deceptive," said Charles Harwood, Deputy Director in the FTC's Bureau of Consumer Protection, at a press conference announcing the suits. "There never was any sort of test conducted by any independent reporter and the weight loss results reported on the site are impossible

to achieve." According to Harwood, the defendants spent millions of dollars on "attention-grabbing" ads appearing on high-volume Web sites that were viewed by consumers millions of times.

In a separate case, the Illinois Attorney General alleged that the defendants registered approximately 40 domain names to sell various acai berry products and misappropriated the image of a French news reporter for the fake news sites.

He further maintained that the affiliate marketers not only failed to disclose their financial relationship with the merchants of the products, who paid them a percentage of sales made from the sites, they included a section of "consumer comments" that were completely fabricated and used the logos and names of media outlets like CNN or Consumer Reports to give the sites credibility. Consumers paid between $70 and $100 for the products that enriched the defendants in excess of $10 million, Harwood said.

Harwood noted that some sites did have a form of disclosure which said they were advertorials." The FTC, however, views "those disclosures as [insufficient] to put consumers on notice they were advertisements," and contained words that were at best obscure and confusing to consumers. The FTC has already obtained temporary relief in half the suits, but has asked the courts to halt the deceptive practices and preserve the defendants' assets. "Our goal is to permanently end these practices," Harwood said.

To read the complaints in the FTC's lawsuits, click here.

Why it matters: The suits – filed in federal courts in Georgia, Illinois, Michigan, New York and Washington – could be expanded as the discovery process continues to include merchants if the FTC discovers they were associated with creating the claims. Steve Wernikoff, an FTC staff attorney in Chicago, commented at the press conference that while the suits are about Internet marketing, consumers should be wary of any advertising claims connecting acai berry to weight loss.

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Senate, House Get Privacy Bills

Senators John Kerry (D-Mass.) and John McCain (R-Ariz.) introduced a new consumer privacy bill to the Senate, the Consumer Privacy Bill of Rights Act of 2011, the first piece of bipartisan privacy legislation introduced this session.

Unlike other pending legislation, the law does not include a do-not-track provision, but requires companies to inform consumers about their online information collection practices and allow them to opt out of behavioral targeting. The legislation covers entities that collect, use, transfer or store covered information – defined as unique identifier information and personally identifiable information like names, addresses, e-mail addresses, and phone numbers – of more than 5,000 individuals over a consecutive 12-month period.

The proposed bill would also require consumers to opt in affirmatively before companies can collect both personally identifiable information and sensitive information – defined as information that carries a significant risk of economic or physical harm, or relates to a medical condition, health record, or religious affiliation. The legislation does not provide for private rights of action, although both the Federal Trade Commission and state attorneys general have enforcement authority.

Most importantly, the bill allows the FTC to approve a safe harbor program overseen by nongovernmental organizations. The program would have to achieve protection at least as rigorous as that provided in the bill.

One day later, Rep. Cliff Stearns (R-Fla.) introduced another piece of privacy legislation in the House, the Consumer Privacy Protection Act of 2011. Under his bill, companies that collect "personally identifiable information" – names, e-mail addresses, and phone numbers – must post their privacy policies and allow consumers to opt out of the sale or use of their information. The legislation joins the Do Not Track Me Online Act and Rep. Rush's Best Practices Act, a repeat proposal from last legislative session, but specifically excludes the use of "anonymous or aggregate data" from coverage.

To read the Consumer Privacy Bill of Rights Act of 2011, click here.

To read the Consumer Privacy Protection Act of 2011, click here.

Why it matters: Of the privacy legislation introduced to Congress to date, Sens. Kerry and McCain's bill has several advantages that include its bipartisan sponsorship, its

status as the only privacy bill currently pending in the Senate, and the fact that it tracks many of the points raised by the Obama Administration in support of a federal privacy law. The bill also received support from companies like Microsoft, HP, and eBay. Others, however, expressed concern about the proposed legislation. Linda Woolley, a Direct Marketing Association vice president, told the *Christian Science Monitor* that her organization "is wary of any legislation that upsets the information economy without a showing of actual harm to consumers." And Mike Zaneis, head of public policy for the Interactive Advertising Bureau, told *AdAge* that the bill "provides the FTC with far too much discretion in drafting and implementing rules."

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MMA Releases Guidelines for Mobile Coupons

In response to the increasing use of mobile commerce, the Mobile Marketing Association released guidelines for best practices for mobile coupons.

Mobile price promotions are defined as "electronic coupons or rebates that traverse the full redemption process without the requirement for conversion into a paper or other hard copy format," and can be distributed through a variety of formats, like SMS, MMS and bar code scanning. The guidelines emphasize that promotions should only be provided after consumers opt in or approve using a specific action, like sending a text message to the company or downloading an app. If an advertiser wants to "push" a promotion to consumers – by SMS messaging, for example – the consumers should have already approved or opted in to receive the message.

Companies are advised to avoid certain types of content in their promotions, like extreme profanity or content that contains misleading or fraudulent claims, or glamorizes alcohol abuse or illegal drug use. Companies that sponsor promotions targeted to children are advised to follow the Children's Advertising Review Unit Guidelines.

The guidelines also address specific product types and remind food marketers not to overstate, exaggerate or distort the nutritional value of foods. Alcoholic beverage companies should ensure that coupons are intended for adults of legal purchase age and should not convey "primary appeal" to underage consumers – (don't use the image of Santa Claus, for example). Those promoting dietary supplements, vitamins, and

pharmaceutical products should avoid using the words “safe,” “harmless,” “without risk,” or similar words and phrases. All coupons for pharmaceutical products should include the established name of the drug and should be confined to the symptoms and conditions for which the product is indicated. And dietary supplements and vitamins should use a disclaimer to ensure the coupon is not misleading: “This statement has been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.”

Advertisers should also use care when using the word “free,” the guidelines caution, and disclose any limitations to consumers. In addition, text messaging programs that deliver coupons should always disclose messaging and data charges that apply to the consumer, and if certain conditions are required to receive the free item (completing a survey, for example), those terms must be clearly and conspicuously disclosed.

To read the guidelines, click here.

Why it matters: The MMA said the goal of the guidelines was “to create an environment in which to launch and process mobile price promotions efficiently. This document intends to define the terms, general processes and best practices for all the parties participating in and enabling mobile coupons and rebates for uses to increase sales and promote consumer loyalty.”

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Free Kids’ Games Costing Parents Lots of Money? There’s an App for That

Alleging that Apple Inc. charges significant amounts of real money for products integrated into iPhone and iPad apps and games for children, a group of parents has filed a federal class action suit in California.

The suit claims that Apple induces children to download games by making them free and then designs the games to be “addictive” so that children pay real money for “game currency.” Children can take advantage of the fact that once they enter an iTunes password, they have a 15-minute window to make purchases without having to reenter their information, according to the complaint. Garen Meguerian, the lead plaintiff, claims that his 9-year-old daughter downloaded free games, including “Zombie Café,” “Treasure

Story," and "City Story," and then spent approximately $200 in game currency for "Zombie Toxin," "Gems," and "City Cash" in the span of a few weeks, without his knowledge. In another example, the suit references "Smurfs' Village," a free game where the object is to build a virtual village. The construction process is greatly sped up by the purchase of "Smurfberries," which cost real money and can be purchased in quantities of 50, for $4.99, up to 1,000, for $59.

"These games are highly addictive, designed deliberately so, and tend to compel children playing them to purchase large quantities of game currency, amounting to as much as $100 per purchase or more," according to the complaint. Many games, the suit claims, are designed to encourage the purchase of game currency "if the game is to be played with any success." The suit seeks to certify a nationwide class, alleges violations of California's law banning deceptive practices and fraudulent business acts, and requests restitution for the plaintiffs.

To read the complaint in *Meguerian v. Apple*, click here.

Why it matters: The suit notes that the Federal Trade Commission planned to investigate the allegations after Rep. Edward J. Markey (D-Mass.) and Sens. Amy Klobuchar (D-Minn.) and Mark Pryor (D-Ark.) all sent letters to FTC Chairman Jon Leibowitz asking the agency to investigate the games. In a response to Rep. Markey's letter, Leibowitz said the FTC would "look closely at the current industry practice with respect to the marketing and delivery of these types of applications. We fully share your concern that consumers, particularly children, are unlikely to understand the ramifications of these types of purchases." Apple subsequently began requiring password reentry for all individual transactions and also added a warning to users that free games might contain in-app content for sale. "Nevertheless, Apple continues to sell game currency to minors," the suit argues.

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Suit Filed Against Fiji Water Over Carbon Claims

A recent class action lawsuit over environmental claims demonstrates why advertisers should use caution when describing their products. The suit was filed

against Fiji Water, alleging that the company made false and deceptive environmentally beneficial claims about its bottled water.

Starting in 2007, Fiji began advertising its bottled water as "carbon negative." According to the suit, the company also claimed to be the "first and only major bottled water company to make this commitment, under which [it] will continue to offset 120% of [its] emissions." However, the plaintiffs argue that those claims are misleading because Fiji actually purchases carbon credits (or "forward crediting"), while consumers believe that the company currently removes more carbon than it releases.

The complaint also alleges that Fiji does "not remove more carbon pollution than they create; they simply claim credit for carbon removal that may or may not take place – up to several decades in the future." Furthermore the plaintiff asserts that "Reasonable consumers of Fiji water understand defendants' 'carbon negative' claim as meaning that Fiji water's *current* operations remove more carbon from the atmosphere than they release into it. This is simply not the case; in reality, Fiji water's operations do *not* remove more carbon from the atmosphere than they release into it."

The plaintiff, who claims she repeatedly purchased Fiji water based on the "carbon negative" claim, argues that Fiji captured a substantial segment of the multibillion-dollar bottled water market by distinguishing itself with its environmental claims, despite charging a premium for its water at $2.59 per bottle (competitors' prices range from $1.89 to $1.45).

To read the complaint in *Worthington v. Fiji Water*, click here.

Why it matters: Advertisers should use caution when making environmental claims, whether they relate to recycled materials or carbon offsets. In addition to private suits, "greenwashing" claims are on the radar of the Federal Trade Commission, which recently released proposed updates to its Guides for the Use of Environmental Marketing Claims. Under the FTC's updated Green Guides, marketers should "clearly and prominently disclose if [their] carbon offset represents emission reductions that will not occur for two years or longer."

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4As Releases Guidance on Patent Risk and Apps

The American Association of Advertising Agencies has issued a new guidance document that offers its constituents helpful advice about dealing with the threat of patent suits in the world of e-commerce.

The 4As released a guidance directive, “Web Functionality Software and Tools: Patent Infringement Risk Management,” that offers suggestions on how ad agencies can protect themselves against the increasing chance of patent litigation. Several suits have been filed against companies utilizing mobile device applications. Last year, GeoTag Inc. filed lawsuits against almost 400 companies, claiming their apps infringe the company’s patent on using geo-location data. Other suits have been filed over patents relating to product-placement advertising and the digital manipulation of photographs (for example, the OfficeMax app “Elf Yourself” resulted in a suit by PixFusion against the office supply company and its ad agency).

While an ad agency may design the app software themselves or license it from a third party, both the agency and the company are at risk for a patent suit. The numbers of patent applications and patent lawsuits continue to rise each year, and the 4As notes that the defense of such suits can cost millions of dollars. For this reason, the guidance emphasizes one key point: that ad agencies make clear in client agreements that clients assume all risks associated with patent infringement. The 4As also recommends that “agencies give serious consideration to adjusting price in situations where they take on risks that have not historically been factored into their pricing models.” If an agency decides to provide some form of indemnity from suit, the 4As suggests that the indemnity include a monetary cap and other limitations.

Agencies can further protect themselves by using market-tested components, watching for problems in the marketplace, purchasing patent infringement defense insurance, and in some situations, conducting a freedom-to-operate study where a particular function will be used repeatedly for several years.

To read the guidance, click here.

Why it matters: The threat of patent litigation poses a serious concern for ad agencies and marketers. While Congress is currently considering patent reform legislation that addresses some of the problems associated with patent trolls, for now the risks of potential litigation “can be reduced through appropriate contractual relationships with

clients and through a number of proactive steps that may help to identify and quantify risks," according to the 4As guidance. "Agencies, or at least parts of them, have become software development companies and face the risks that software development companies face. Accepting that reality and preparing accordingly is the best weapon agencies have in their arsenal."

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