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January 26, 2009

ADVERTISING LAW

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

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Privacy Groups Call for Mobile Marketing Probe

Privacy advocates recently filed a complaint with the Federal Trade Commission urging the agency to investigate and regulate mobile marketing practices that the organizations labeled as "unfair" and "deceptive" to users of mobile electronic devices.

"The Commission cannot continue to sit idly by and wait—as it has done with the concerns over privacy raised by online advertisers in the past—until market practices are so well ingrained that it is all but impossible to address them," the complaint by the Center for Digital Democracy and the U.S. Public Interest Research Group states.

"Companies are rushing headlong to develop new capabilities to target more effectively the growing number of device users, an audience now numbering over 267 million in the U.S. alone," the complaint states. It estimates that about \$1 billion was spent on advertising to mobile device users last year, a figure that is predicted to increase threefold by 2011.

The latest complaint adds to a 2006 complaint filed by the Center for Digital Democracy requesting that the FTC investigate and provide users with relief from online behavioral advertising practices. "Right before the Commission's eyes, many of the same consumer data



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Speaker: [Linda Goldstein](#)

New York Marriott East Side Hotel
New York, NY

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January 30, 2009

FDLI Conference

Topic:

collection, profiling and behavioral targeting techniques that raise concern in the more 'traditional' online world have been purposefully brought into the mobile marketplace," the complaint states.

The complaint cites a Mobile Advertising Alliance report stating that the personal, location-aware nature of cell phones gives the industry an advantage in reaching consumers through mobile advertising. The report states that a mobile advertising platform should exploit these advantages, the complaint alleges.

According to the complaint, some companies are also failing to adhere to the "opt-in" and "double-opt-in" procedures adopted by the industry to keep consumer information from being shared with advertisers.

In addition, many users do not "fully understand the privacy implications of every discount coupon, free download or ringtone offer that comes their way," the complaint states.

The complaint sets forth a number of recommendations for FTC action:

- Investigate the market impact of interactive, targeted advertising;
- Identify marketing practices that threaten consumer privacy;
- Look into opt-in procedures, ensuring that consumers are given full disclosure of the purpose for which data is being collected and used; and
- Promulgate agency policies that will put an end to current industry practices compromising consumer privacy rights, and recommend legislation toward this end.

Mike Wehrs, head of the Mobile Marketing Association, took issue with the complaint. "If you read the filing in detail—and I have—you see certain types of comments and platitudes, but nothing specific," he told *RCR Wireless News*. "There's not a single (example) of where something has gone wrong."

He added that the industry has behaved responsibly, although he admitted there was room for improvement. "Yes, there are things that can be made clearer (in mobile marketing)," he said. "Maybe we could send privacy policies via e-mail, and give consumers 48 hours to opt out."

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"What You Need to Know Now about Emerging Dietary Supplements Issues & Trends – Review of Recent Federal Trade Commission Enforcement Actions"

Speaker: [Ivan J. Wasserman](#)

L'Enfant Plaza Hotel
Washington, DC
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February 10-11, 2009

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Basics Seminar**

Topic:

"Basics of Promotion and Integrated Marketing"

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USA Weekend Magazine
535 Madison Avenue
New York, NY
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March 5-6, 2009

**PLI's Information Technology Law
Institute 2009**

Topic:

"Mobile Advertising and Web 2.0"

Speaker: [Linda Goldstein](#)

PLI New York Center
New York, NY
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March 11-13, 2009

The IAPP Privacy Summit 2009

Topic:

Viacom Apologizes for Attack Ads Aimed at Time Warner

Viacom apologized to Time Warner Cable last week for ads that ran in January 2 editions of newspapers in at least five major markets.

Print ads in newspapers in New York City; Cleveland; Orlando, Florida; Dallas; and Raleigh, North Carolina attacked Time Warner over a fee hike dispute. They appeared one day after the parties reached an eleventh-hour agreement in principle that resolved the dispute.

In a statement, Viacom said that it was unable to pull the previously placed ads because of "the timing of the agreement and the New Year's Day holiday." Viacom president and CEO Philippe Dauman said, "We apologize to Time Warner Cable and our viewers for any inconvenience or confusion these ads have caused. We look forward to continuing our positive and productive partnership with Time Warner Cable well into the future."

Viacom had threatened to pull all 19 MTV Networks channels at 12:01 a.m. on New Year's Day, when the previous carriage agreement with Time Warner Cable expired, unless Time Warner agreed to a 12% fee hike. Shortly after 1 a.m. that day, the parties announced that they had reached a tentative agreement. But Viacom's advance placement of the ads suggests that the media conglomerate did not anticipate resolving the dispute as quickly as it did.

Viacom also reportedly ran attack ads on CBS radio stations in the affected markets on January 2, using voices and spots from the *Colbert Report*, MTV shows, and other Viacom properties. The same day, the company also streamed banner ads on several of its channels telling Time Warner customers that they were in danger of losing 19 Viacom channels.

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H&R Block Settles Tax Refund Loan Charges

H&R Block has agreed to pay \$4.85 million to settle charges brought by California Attorney General Jerry Brown over loans it allegedly marketed as tax refunds.

According to the attorney general, H&R Block marketed high-cost refund anticipation loans as early tax refunds. The

"Sunday in the Park With FACTA: Navigating the Post-FACTA FCRA Regulatory Landscape"

Speaker: [Helen Foster](#)

Washington Marriott Wardman Park
Washington, DC
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March 16-18, 2009

PLI Practising Law Institute

Topic:

"Television, Video & User-Generated Content"

Co-Chair & Moderator: [Kenneth M. Kaufman](#)

New York, NY
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April 2-3, 2009

PLI's Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems

Topic:

"Mobile Advertising and Web 2.0"

Speaker: [Linda Goldstein](#)

PLI California Center
San Francisco, CA
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problem with such "refund anticipation checks," the attorney general alleged, is that they returned substantially less money to the tax filer than a refund would have, due to hefty fees charged by H&R Block. H&R Block also employed unfair collection practices, the complaint alleged.

H&R Block did not admit or deny guilt in the settlement, which resolves a 2006 lawsuit against the company.

The settlement requires H&R Block to employ "mystery shoppers" at 18 corporate-owned H&R Block offices in each of the next three years. The company has some 13,000 offices nationwide, including hundreds in California.

H&R Block has paid more than \$127 million to settle various class action lawsuits over its refund anticipation loan program.

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Insurers Criticize FTC Probe

An investigation by the Federal Trade Commission into how the insurance industry sets prices for homeowners coverage is drawing fire from trade groups that argue the probe is unnecessary and threatens consumer privacy.

The groups—the American Insurance Association, the Property Casualty Insurers of America, and the National Association of Mutual Insurance Companies—were responding to a December 23 decision by the FTC to subpoena nine insurers for data about credit-based insurance scores, which are akin to a credit rating that focuses on how much particular consumers cost their insurance companies.

In 2003, Congress asked the agency to investigate the use of credit-based insurance scores. A 2007 study by the Commission on automobile insurance found that insurers used the scores to ascertain which insureds were likely to be high risk, so they could charge those people more. According to the study, African-Americans and Hispanics tended to have lower scores than Whites and Asians, and subsequently tended to pay higher premiums for auto insurance.

The trade groups said the order was unwarranted and expensive, and endangered consumer privacy. They said that the FTC has ordered companies to provide vast amounts of data, including items such as social security numbers and mortgage information, with little explanation of how it would analyze, handle, and store the data.

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The groups expressed dismay that the FTC has opted for a compulsory process, instead of a voluntary one used in preparing prior studies by the agency and the Federal Reserve Board. They pointed out that the FTC, the Federal Reserve Board, and many state insurance departments have previously conducted similar studies and concluded that the use of credit scoring in setting insurance rates is not discriminatory.

The subpoenaed insurers include the nine biggest private providers of homeowners insurance: State Farm Mutual Automobile Insurance Company; The Allstate Corporation; Fire Insurance Exchange; Nationwide Mutual Insurance Company; The Travelers Companies, Inc.; United Services Automobile Association; Liberty Mutual Holding Company, Inc.; The Chubb Corporation; and American Family Mutual Insurance Company.

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Diamond Grading Firm Accuses Zales of False Advertising

GemEx, a diamond evaluation company, has filed a federal lawsuit charging jewelry retailer Zales with false and misleading advertising, which claimed that evaluations by a rival diamond grading firm are equivalent.

According to the complaint, the dispute centers on an analysis of Zales' Celebration Diamond. GemEx argues that it is the only company that can conduct a light performance analysis, and Zales has misled customers by asserting that reports provided by GemEx competitor GS Laboratories of America are just as good.

The lawsuit states that GemEx provided diamond grading reports to Zales for two years until last summer, when Zales switched to GS Laboratories for the analysis.

Diamond grading reports are intended to inform consumers about a diamond's brilliance, dispersion of colored light, and sparkle.

GemEx has patented technology to measure the light with a device called a BrillianceScope Analyzer, the complaint states. The company alleges that OGI Firetrace reports provided by GS Laboratories measure physical characteristics of a diamond, not actual light returned by it, yet Zales informed consumers that the reports measure light. Such claims

"disparage the quality of GemEx's services," the lawsuit said.

The complaint seeks unspecified damages and injunctive relief barring Zales from claiming that its diamond reports measure light.

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Facebook Unfriends Power.com

Facebook has sued a Brazilian start-up that is seeking to become the portal through which computer users reach all of their favorite networking sites.

The complaint, filed in federal court in San Jose, California, accuses Power.com of copyright and trademark infringement, unlawful competition, and violation of the Computer Fraud and Abuse Act.

Users provide their user names and passwords for social networks to Power.com, which then enters the sites as if it were the user, allowing the user to view pages without actually visiting the sites. The company has raised \$6 million from venture capital firm Draper Fisher Jurvetson and \$2 million from angel investors, including the well-known technology analyst Esther Dyson.

Facebook's complaint alleges that Power.com "is offering a product that solicits, stores and uses Facebook login information to access information stored on Facebook computers without authorization and to display Facebook copyrighted material without permission." It further alleges that Power.com e-mailed misleading ads to friends of Facebook users, bearing return addresses that ended with "facebookmail.com" and stating that they had come from "The Facebook Team."

Facebook says that it asked Power.com to use Facebook Connect, a service permitting Facebook users to access their Facebook identity and friends from other sites without providing those sites with log-in information. After Facebook filed the complaint, Power.com removed access to Facebook from its site and announced that it was working to adopt Facebook Connect by the end of January.

Power.com says that it is creating its own version of Facebook Connect, to be called Social InterConnect, that will allow users to freely share their account information for any site with any other site, without the host site needing to store the user

name and password.

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