Advertising Law @ manatt

July 20, 2010

In This Issue

Manatt Partner Tony DiResta to Share Insight in Three-Part Webinar Series on Social Marketing Compliance

On July 29, August 3 and August 5, 2010, Manatt partner Tony DiResta will join an esteemed faculty to address best practices and policies on managing, adapting to and meeting the challenges of the ever-changing social marketing landscape.

Tony, who also serves as General Counsel to the Word of Mouth Marketing Association (WOMMA), will co-present with Pete Blackshaw, Executive Vice President of Digital Strategic Services at NM Incite; Wayne Keeley, Director of the Children's Advertising Review Unit of the Council of Better Business Bureaus (CBBB); Peter Marinello, Director of the National Advertising Review Council's (NARC) Electronic Retailing Self Regulation Program; and Paul Rand, President and CEO of the Zócalo Group, in the webinar series titled, "Compliant and Successful: Aligning Marketing and Legal Around Word of Mouth and Social Media." The webinar is hosted by WOMMA, the Better Business Bureau (BBB) and NARC.

For more information, please click here.

back to top

Advocacy Groups to FTC: Strengthen, Broaden COPPA

Seventeen advocacy groups formally requested that the Federal Trade Commission increase privacy protections for children on the Internet by broadening the definition of "personal information" and extending the reach of the Children's Online Privacy Protection Act (COPPA).

COPPA, which took effect in 2000, prohibits Web sites from collecting or disseminating personal data about children under 13 without their parents' permission. The FTC is required to review the Act every five years, but has made no previous changes.

Now, ten years after enactment, a coalition of nonprofits and children's advocacy groups, including the Center for Digital Democracy, Consumers Union, and the American Academy of Pediatrics, has filed comments during the review process seeking major changes to COPPA. Specifically, the coalition said that COPPA's reach should be extended to new technologies, including mobile phones, interactive television, online gaming consoles, and other digital platforms, and that the definition of "personal information" should be broadened to include cookies, IP addresses, and geolocation data.

The groups also suggested that the FTC develop a separate set of privacy protections for children between the ages of 13-18, in line with the Fair Information Practices principles created by the Organisation for Economic Co-Operation and Development, which would provide some protections to teenagers, albeit less stringent than COPPA. In addition, the coalition said that major Web sites, ad networks, and social networks should be required to file regular reports about their data collection practices with the FTC.

Other groups also weighed in with suggestions, including Common Sense Media, a parental organization that wants COPPA to be extended to all children under the age of 18, and the Center for Democracy & Technology (CDT). CDT argued that the definition of "personal information" should not be expanded to include IP addresses and that data collected for behavioral advertising purposes should not be considered personal information because of the industry's self-regulatory standards, which already ban behavioral advertising to children without parental consent. The National Cable and Telecommunications Association (NCTA) submitted comments suggesting that change to COPPA was unnecessary. The NCTA told the FTC it opposes the expansion of "personal information" and said no major changes to the law are necessary, as COPPA has been working well.

To read the comments submitted by the coalition of advocacy groups, click here.

UPCOMING EVENTS

July 29, August 3 and August 5, 2010

WOMMA, BBB and NARC Webinar Series

Topic: "Compliant and Successful: Aligning Marketing and Legal Around Word of Mouth and Social Media"

Speaker: Tony DiResta

for more information

August 15-17, 2010

Affiliate Summit East

Topic: "How to Avoid Becoming a Regulatory Target"

Speaker: Linda Goldstein

New York, NY

for more information

September 24, 2010

ACI Conference

Topic: "Sweepstakes, Contests, and Promotions"

Speaker: Linda Goldstein

New York, NY

for more information

Newsletter Editors

Jeffrey S. Edelstein
Partner
jedelstein@manatt.com
212.790.4533

Linda A. Goldstein
Partner
lgoldstein@manatt.com
212.790.4544

Terri J. Seligman
Partner

Why it matters: Changes to COPPA could have a significant impact, and the comments submitted by various groups indicate that any update to the law could be controversial. Children's advocacy groups and parental organizations seeking expansion of the law and a broader definition of "personal information" are butting heads with industry and privacy advocates, who argue that limited Internet access or increased age verification impacts privacy rights and implicates First Amendment concerns.

back to top

Federal Bill Would Regulate Online Taxation

Reps. Rick Boucher (D-Va.) and Lamar Smith (R-Tex.) introduced federal legislation that would regulate the taxation of goods and services online.

The bill, H.R. 5649, or the Digital Goods and Services Tax Fairness Act of 2010, would prohibit taxes on certain transactions and forbid state and local government from taxing long-distance customers, as the tax could be levied only by the jurisdiction where the customer's tax address is located.

Approximately 23 states and the District of Columbia currently levy some form of sales tax on digital purchases like e-books, music, apps, and ringtones. In a statement announcing the introduction of the bill, the legislators said their goal was to end duplicative taxation of Internet transactions. "Presently, consumers and businesses engaged in digital commerce may be subject to multiple, confusing and burdensome taxation because of inconsistent rules across the thousands of state and local jurisdictions," said Rep. Boucher, chair of the House Communications Subcommittee, and Rep. Smith, ranking member of the Judiciary Committee.

Under the legislation, taxes could only be imposed on the retail sale of digital goods and services. Currently, several states consider digital content to be tangible property, and therefore subject to taxation, but the legislation would prevent states from imposing personal property taxes on digital goods and services. The legislation also contains an exemption for digital health, energy management, and educational services from all local and state taxes.

To read the bill, click here.

Why it matters: The bill would provide relief for online digital retailers that are currently facing an influx of state and local tax regulations. States seeking to increase tax revenue have been quick to pass legislation, which complicates online transactions and creates administrative burdens for online sellers. But retailers are fighting back, cutting ties with in-state affiliates to avoid having to pay taxes and

tseligman@manatt.com
212.790.4549

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

Practice Group Overview
Practice Group Members

Info, Resources & Links

Subscribe
Unsubscribe
Newsletter Disclaimer
Manatt.com

challenging the laws. Amazon has fought legal battles in New York and North Carolina, and the Digital Marketing Association recently filed suit against the state of Colorado, claiming its e-commerce notice and reporting regime interferes with interstate commerce.

back to top

Third Time's Not the Charm for Crunch Berries Suit

A federal judge dismissed a class action brought by consumers claiming they were misled to believe that Cap'n Crunch's Crunch Berries breakfast cereal contained nutritional value derived from real fruit, calling the suit "nonsense."

This was the third lawsuit against PepsiCo's Quaker Oats Company claiming that Crunch Berries' packaging deceives consumers and makes false advertising claims.

In his complaint, plaintiff Roy Werbel alleged that "the colorful Crunch Berries on the [cereal box], combined with the 'berry' in the product name, conveys only one message: that Cap'n Crunch has some nutritional value derived from fruit."

However, U.S. District Court Judge Saundra Brown Armstrong disagreed. "It is obvious from the product packaging that no reasonable consumer would believe that Cap'n Crunch derives any nutritional value from berries. As an initial matter, the term 'Berries' is not used alone, but always is preceded by the word 'Crunch,' to form the term, 'Crunch Berries.' The image of the Crunch Berries…shows four cereal balls with a rough, textured surface in hues of deep purple, teal, chartreuse green, and bright red. These cereal balls do not even remotely resemble any naturally occurring fruit of any kind," she wrote.

The judge also noted that there were no representations on the product packaging that the Crunch Berries were derived from real fruit, nor were there any depictions of any fruit on the cereal box. "[T]here is simply nothing in the Cap'n Crunch packaging that would lead a reasonable consumer to believe that the brightly colored cereal balls depicted on the product cover and described as Crunch Berries are, in fact, made or derived from real berries or fruit," the court said, dismissing the suit.

To read the complaint in *Werbel v. PepsiCo*, click here.

To read the order dismissing the case, click here.

Why it matters: This was the third lawsuit filed by the same law firm claiming consumers were misled by the product packaging on Crunch Berries cereal, and the third dismissal. While Cap'n Crunch has avoided walking the plank, food manufacturers should remember to ensure they use accurate descriptions of their products and do not mislead the

reasonable consumer.

back to top

EU Issues Opinion on Behavioral Advertising

The European Union's Article 29 Working Party recently released an opinion on the way European Union rules apply to online behavioral advertising, addressing topics like cookies and consent. The Opinion provides interpretation of Article 5(3) of the EU e-Privacy Directive, which had to be implemented by EU member states by June 11.

First and foremost, the Opinion makes clear that prior opt-in consent is needed for behavioral advertising. "Ad network providers should swiftly move away from opt-out mechanisms and create prior opt-in mechanisms. Mechanisms to deliver informed, valid consent should require an affirmative action by the data subject indicating his/her willingness to receive cookies and the subsequent monitoring of their surfing behaviour for the purposes of sending him tailored advertising," the Opinion said. Valid consent may not be obtained through default Web browser settings unless the settings reject third-party cookies by default and "convey clear, comprehensive and fully visible information" – neither of which most Web browsers currently do, the Opinion noted.

Instead, the Opinion suggested that ad network providers create a prior opt-in mechanism that requires users to accept both the storage of cookies and the use of cookies to track their browsing across the Internet. Notice must be provided that explicitly states the ad network that will place the cookie and describes how the information will be used once it is collected. Companies should also ensure that consent expires after a period of time, the Opinion said, although it declined to suggest an appropriate period, and companies must offer users "the possibility to revoke it easily."

Although consent does not need to be obtained every time an individual visits a participating Web site, the Opinion said companies should repeatedly provide information, using symbols or related messages on the Web page, to remind users that their behavior is being monitored. The Opinion also laid out other obligations for those engaging in behavioral advertising, such as the deletion of information after it is no longer needed for the purpose for which it was collected.

To read Opinion 2/2010 on online behavioral advertising, click here.

Why it matters: The Working Party's Opinion could be influential here in the United States, where the FTC is considering whether – and how – to regulate behavioral advertising. The Opinion does represent a substantial change to the current landscape of behavioral advertising, but left room for ad networks to be creative about their opt-in

mechanisms.

back to top

Gripe Site Wins Dismissal – and Attorney's Fees

In a cybersquatting and trademark infringement suit brought against the owner of a pair of gripe sites, a U.S. District Court judge dismissed the suit and ordered the plaintiff to pay the defendant's legal fees.

Career Agents Network sells recruiting industry business opportunities, offering training, software, and other support services to entrepreneurs who purchase membership in its network. One such entrepreneur, unhappy with his experience, purchased two domain names: careeragentsnetwork.biz and careeragentnetwork.biz. On both sites he posted the following paragraph:

"WARNING: If you are considering investing in this 'opportunity', be aware that it is highly improbable that you will earn enough to cover your investment. If you proceed with this company you have been warned by those that know and have lost $20,000-$150,000 by trusting them and their 'plan.'"

CAN then filed suit, alleging trademark infringement in violation of the Lanham Act as well as cybersquatting.

However, the court said that the defendant's sole intent was to express an opinion about the plaintiff's business practices, and that there was no evidence that the defendant attempted to divert potential clients to bolster his own business. Further, U.S. District Court Judge Robert H. Cleland said he could not even "imagine" how the defendant could have profited from the use of the plaintiff's marks in his domain name and that his critical commentary was not a "commercial use" constituting a trademark violation. "[I]t strains credulity that [the defendant] set up these domain names as a means of generating business. The website did not contain links to [the defendant's] website, or even mention [the defendant's] business as an alternative to [the plaintiff]," the court said.

The defendant then sought more than $36,000 in legal fees as the prevailing party in a Lanham Act suit. Finding the lawsuit was "oppressive," Judge Cleland ordered the plaintiff to pay, although he reduced the amount to just over $23,000. Once the plaintiff learned who owned the gripe sites – a consumer, not a competitor, the court said – the cybersquatting claim was "without merit." The plaintiff's motivation for bringing the suit supported the award of attorney's fees because the suit "attempted to extract a price for the exercise of [the defendant's] First Amendment rights," Judge Cleland added.

To read the summary judgment opinion, click here.

To read the order granting attorney's fees, click here.

Why it matters: Judge Cleland's decision to award attorney's fees sends a message to companies who might be considering filing a lawsuit against a gripe site. He determined that the plaintiff's lawsuit was "oppressive" and "without merit." Judge Cleland also specifically cited deterrence as a reason he chose to award the fees to the defendant. "Granting attorney fees will therefore 1) encourage consumers to exercise and defend their First Amendment right to criticize matters with which they disagree or are dissatisfied, 2) encourage attorneys to defend against abusive uses of the Lanham Act even where a defendant cannot afford to pay out of pocket, and 3) discourage plaintiffs from misusing the Lanham Act to oppress critical speech," he wrote.

back to top