manatt

April 14, 2008

ADVERTISING LAW @MANATT

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

IN THIS ISSUE

William Kovacic Is Named FTC Chairman

William E. Kovacic has been appointed the new Chairman of the Federal Trade Commission.

Kovacic, who assumed his new duties on March 30, has served as one of the FTC's Republican Commissioners since 2006. He replaces Deborah Platt Majoras, who stepped down to join Procter & Gamble as its Deputy General Counsel.

Kovacic's appointment is not expected to cause any major policy shifts at the Commission. As one of the three Republican Commissioners, he often sided with Majoras. The remaining Commissioners are J. Thomas Rosch, a Republican, Pamela Jones Harbour, an Independent, and Jon Leibowitz, a Democrat.

Observers do not anticipate that the White House will nominate another Commissioner at this late date in the administration, since any nominee would have to be confirmed by the Senate, a potentially contentious procedure. Kovacic's appointment did not require Senate approval since he was already on the Commission.

Before joining the FTC as a Commissioner, Kovacic taught law at George Washington University and at George Mason University. Over the past three decades Kovacic has held three different jobs at the FTC, including General Counsel

UPCOMING EVENTS

October 21, 2008
ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

For more information

...

October 22, 2008
D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

For more information

...

November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

from 2001 to 2004.

back to top

No Fines for Companies over Data Breaches

Three companies will avoid paying fines to settle federal charges over two separate data breach incidents.

TJX Companies, owner of retail discount chains T.J. Maxx and Marshalls, has settled FTC charges over a security breach last year that exposed at least 45.7 million cards to possible fraud. The company will not have to pay a fine, although it is required to put comprehensive information security programs in place and submit to biannual information audits for 20 years.

In a separate settlement, data broker Reed Elsevier PLC and its Seisint subsidiary struck a similar deal with the agency over a breach involving its LexisNexis unit, agreeing to install information security programs and conduct biannual audits while escaping any fines.

According to a March 27 press release from the agency, it had charged all three companies with failing "to provide reasonable and appropriate security for sensitive consumer information."

In the press release, FTC Chairwoman Deborah Platt Majoras said,
"These cases bring to 20 the number of complaints in which the FTC has charged companies with security deficiencies in protecting sensitive consumer information."

Last March TJX revealed that a security breach of its computer system exposed at least 45.7 million credit cards to possible fraud. In court filings, several banks that have sued TJX over the breach estimated that number at more than 100 million.

In the breach involving Reed Elsevier's LexisNexis subsidiary, unauthorized individuals using stolen passwords and IDs broke into Seisint databases in 2005 to access personal information about hundreds of thousands of people.

The FTC said it did not fine the companies because it lacks the power to levy fines under the FTC Act. For the last three years it has asked Congress for such authority to no avail.

In January 2006 consumer data provider ChoicePoint Inc. was

Sweepstakes, Games & Contests"

Linda Goldstein

Topic:
"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Kerrie L. Campbell

Marriott Downtown Magnificent Mile
Chicago, IL

For more information

...

December 4-5, 2008
Film & Television Law

Topic:
"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Linda Goldstein

Topic:
"The Value of Fame: Understanding the Right of Publicity"

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

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

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

fined $15 million in a settlement of FTC charges over a security breach. Because ChoicePoint is a credit reporting agency, the agency brought charges under the Fair Credit Reporting Act, which grants it the ability to issue monetary penalties.

back to top

Comcast Will Not Obstruct File-Sharing Traffic

Internet service provider Comcast announced on March 27 that it will no longer delay or stop certain types of online file-sharing traffic. Instead, it said, it will treat all Internet traffic on its servers equally.

The company has been facing pressure from the public and the Federal Communications Commission to revise its controversial practice of interfering with peer-to-peer file-sharing traffic.

In its announcement, Comcast said it will work with BitTorrent, the company started by the developer of the P2P file-sharing protocol, to improve methods for online transfers of large files.

Comcast has been hindering the BitTorrent file-sharing protocol, which together with eDonkey comprises about a third of all Internet traffic. Although illegal sharing of copyrighted files accounts for most of that traffic, file sharing is also gaining popularity as a cheap way to distribute video and other legal content.

After an investigation in October by the Associated Press confirmed Comcast's practices, the company has faced sharp criticism from "net neutrality" and consumer advocates, who argue that Comcast had unfairly assumed a gatekeeper role for the Internet. They also blamed Comcast for hindering the delivery of Internet video, an emerging rival to Comcast's main business of cable TV. Comcast countered that its practices were needed to keep file-sharing traffic from overburdening local cable lines.

Comcast said that by the end of the year it will no longer target files based on the type of protocol used, and will look into other options. One such alternative: delaying file transfers for the heaviest downloaders, without regard to considering protocol. Comcast said it also was exploring placing monthly limits on downloads, with extra charges for

. Practice Group Members

INFO & RESOURCES

. Subscribe
. Unsubscribe
. Sarbanes-Oxley Act
. Newsletter Disclaimer
. Technical Support
. Manatt.com

subscribers who go over their limit. Competitive pressure, however, may prevent Comcast from adopting either option.

BitTorrent admitted that Internet service providers need to manage their networks. "While we think there were other management techniques that could have been deployed, we understand why Comcast and other ISPs adopted the approach that they did initially," Eric Klinker, BitTorrent's chief technology officer, said in a statement.

back to top

Web Site Not Liable for Spam Sent by Affiliates

In a rare victory for an accused spammer, a Seattle jury found on March 24 that an adult Web site operator was not liable for unsolicited sexually explicit commercial e-mails sent by affiliates.

The Federal Trade Commission charged Impulse Media with violating the CAN-SPAM Act. The case turned on the issue of whether Impulse Media "initiated" the hundreds of illegal e-mails sent by its affiliates by deliberately paying or inducing them to send the messages.

In the trial, Impulse Media pointed to its anti-spam policies and said it ended relationships with affiliates that violated its policies. It said its affiliates were expected to generate referrals using links from other Web sites, not e-mails. It also pointed out that of its thousands of affiliates, just four had sent the illegal e-mails.

The Justice Department countered that affiliates didn't have to read the program agreement detailing the anti-spam rules, and that terminated Impulse Media affiliates could reenlist with the company.

back to top

TaylorMade Teed Off by Rival's Ad Claims

TaylorMade-adidas Golf has sued its smaller competitor Nickent Golf over claims in a recent ad campaign.

The ads state in large type:

> #1 Driver Model
> Nationwide Tour

Underneath, in smaller type, appears:

> The 4DX T-Spec driver finished as the #1 driver model
> at the Moonah Classic, February 21, 2008,
> according to the Darrell Survey.

In a statement, TaylorMade says that Nickent's ads appear "designed to lead consumers to believe that its 4DX driver is the No. 1 driver model on the PGA Tour and Nationwide Tour." The company is requesting a court order that Nickent pull current ads and issue "corrective advertising," as well as unspecified damages.

In fact, TaylorMade states in its complaint filed March 20 in California state court in San Diego that its drivers are by far the more popular choice for PGA pros. "The reality is that—by a tremendous margin—more professionals on the PGA Tour in 2008 have used TaylorMade drivers than drivers made by any other manufacturer, including Nickent (655 instances of use for TaylorMade drivers, compared to just 18 for Nickent drivers)."

"Likewise, more professionals on the 2008 PGA Tour have used TaylorMade's Burner driver than any models made by Nickent . . . .Finally, while Nickent attempts to base some of its broad claims on statistics from just two of the only four Nationwide Tour events played this year to date, the truth is that at every Nationwide Tour event played this year to date, more professionals played TaylorMade drivers than any other brand."

Nickent has denied the charges. "There has been no misleading information disseminated by Nickent, as the Darrell Survey, the mechanism responsible for keeping track of golf club equipment usage at professional events, clearly shows that the Nickent 4DX T-Spec was the No. 1 driver model at the Nationwide Tour Moonah Classic with 28 clubs in play," the company said in a statement.

"It was the first time Nickent has taken the No. 1 driver model distinction on the Nationwide Tour and it was deemed worthy of a small advertising campaign, especially since the event was the Nationwide Tours' most recent . . . .Nickent operated within accepted advertising standards. The golf industry is historically rich with challenges from competitors on one another's tour claims, so this action is no surprise to us . . . .The numbers displayed in the TaylorMade press release are irrelevant for Nationwide driver model counts, and it is our belief they did this in an effort to confuse the issue at hand,” Nickent stated.

back to top