Advertising Law

December 21, 2011

In This Issue

Manatt Partner Linda Goldstein to Serve as Faculty at ACI's National Forum on Advertising Law

On January 23-24, 2012, the American Conference Institute will hold its 25th National Forum on Advertising Law at which in-house counsel, marketing and advertising directors, brand managers and attorneys practicing in these areas will convene to explore strategies to enhance advertising practices while overcoming new regulatory challenges.

Linda Goldstein, Chair of Manatt's Advertising, Marketing & Media Division, will explore mobile marketing as a strategy to increase consumer engagement and brand awareness while also discussing the potential legal, regulatory and business risks that may arise in connection with the use of this medium. Joined by Paul Weisbecker (General Attorney, AT&T Mobility and Consumer Markets) and Ted Lazarus (Senior Counsel, Google Inc.), the presentation ("Capitalizing on the Mobile Marketing Message While Reducing Exposure to New and Unpredictable Liabilities") will offer practical tips for refining mobile marketing practices to comply with changing laws and regulations.

The conference will be held in New York, NY. For more information or to register for this event, click here.

back to top

SPECIAL FOCUS: The FTC Declines to Bring Action Against Advertiser for Blogging Campaign

The Federal Trade Commission (FTC) recently decided *not* to pursue enforcement action against Hyundai Motor America in connection with a campaign it initiated whereby bloggers were provided gift certificates as an incentive to include links to the car manufacturer's Web site in their blogs and/or comment about Hyundai ads aired during Super Bowl XLV.

In a letter sent to counsel for Hyundai in mid-November announcing its decision not to take action, the FTC noted that while bloggers were provided with gift certificates, Hyundai was not initially aware of the incentives. In fact, the actions of most concern were taken by an individual working for a media firm hired to conduct the blogging campaign. The FTC ultimately decided not to pursue further action

Newsletter Editors

Linda A. Goldstein
Partner
Email
212.790.4544

Jeffrey S. Edelstein
Partner
Email
212.790.4533

Marc Roth
Partner
Email
212.790.4542

Practice Area Links

Practice Overview
Members

Upcoming Events

January 24-25, 2012
ACI's 25th National Advanced Forum on Advertising Law
Topic: "Capitalizing on the Mobile Marketing Message While Reducing Exposure to New and Unpredictable Liabilities"
Speaker: Linda Goldstein
New York, NY
For more information

Awards

Recognized for Excellence in the areas of Advertising, Marketing and Media

Named a Top Practice Nationally for Marketing and Advertising

Practice leaders included among the prestigious *Best Lawyers* in the country

based on a number of factors, including the established social media policies of Hyundai and the media firm, and prompt actions taken by the firm to halt the misconduct upon learning of it.

This letter follows a line of investigations initiated by the FTC since 2009, when it revised its guides on the use of testimonials and endorsements. The revised guides make clear that where there is a material connection between an advertiser and an endorser, the relationship must be disclosed if consumers may not reasonably be aware of such a connection based on the context of the communication containing the endorsement. The FTC has taken the position that a gift to a blogger for posting specific content to promote an advertiser's goods or services constitutes a material connection that would not reasonably be expected by readers of the blog, and should therefore be disclosed.

These issues were first addressed in April 2010 when the FTC completed an investigation of women's retailer Ann Taylor surrounding its use of bloggers who were given gift bags and entry in a sweepstakes to promote the company's clothing line. There, too, the FTC elected *not* to take action since Ann Taylor had adopted a written policy regarding its interaction with bloggers, even though not all bloggers complied. This matter put the industry on notice that the FTC intended to pay close attention to the actions of bloggers and the companies that engage them for promotional purposes.

Since Ann Taylor, the FTC has initiated several actions against companies that have resulted in legal action and formal settlements. In those cases, the defendants either paid third parties or instructed its employees to blog about and post positive reviews about the company's and/or clients' products. In each of these instances, the third parties and employees did not disclose their connection to the company. The FTC observed in one case that despite the defendant company's having a social media policy that required bloggers to disclose their connection to the company, the policy was not enforced. While each of these settlements included injunctive relief, one matter required payment of a $250,000 penalty.

The Hyundai matter is noteworthy because it appears to be a departure from the FTC's longstanding position of holding advertisers responsible for the work of their ad agencies and media firms. Indeed, the FTC noted in its letter that the "actions with which we are most concerned here were taken not by Hyundai employees, but by an individual who was working for a media firm hired to conduct the blogging campaign." However, the agency ultimately decided not to pursue action since Hyundai "did not know in advance about the use of incentives, that a relatively small number of bloggers received the gift certificates, and that some of them did, in fact, disclose this information." The FTC also noted that Hyundai and the media firm have established social media policies, requiring endorsers to disclose any material connections. The agency also considered the prompt actions taken by the media firm in question to address the matter upon learning of any misconduct.

Why it matters: Companies that use social media, or any advertising forum, to promote their products and services should carefully plan and monitor all actions taken by their agencies and media firms in order to

avoid potential liability. While the FTC ultimately elected not to pursue a case against Hyundai, the facts presented in this case were unique and other situations may not be viewed as favorably by the Commission. It is therefore incumbent upon advertisers to be involved in the planning and implementation of social media marketing campaigns and to monitor performance, as the FTC will likely continue to hold advertisers responsible for their campaigns, even if conducted by an outside agency. At a minimum, advertisers should ensure that they establish and distribute to their agencies a social media policy that requires all endorsers of their obligation to disclose any incentive they receive to promote the advertiser's products or services. Such diligent action by advertisers at the forefront may mitigate the threat of legal action on the back end.

back to top

California Book Sales Subject to New State Law, Possible Liability

Under a new state law slated to take effect January 1, 2012, entities who sell books to California residents could face liability and civil fines for improperly disclosing customer information.

The California Reader Privacy Act prohibits booksellers from releasing personal information about customers to a third party without a court order – even to the police or a government agency.

"Personal information" as defined by the law includes any information that relates to, or is capable of being associated with, a particular user's access to or use of a book service or book, as well as unique identifiers like an IP address. Any information that identifies, relates to, describes, or is associated with a particular user is also protected, and the law explicitly includes both traditional books and e-books.

Covered entities include all book services that have a primary purpose to provide the rental, purchase, borrowing, browsing, or viewing of books; excluded are those whose book service sales do not exceed two percent of the store's annual gross sales of consumer products sold in the United States.

The law also requires businesses to compile a report if they receive more than 30 requests for information per year.

Most importantly, the law applies to consumers who reside in California – so booksellers based out of state and national businesses who sell to state residents are all bound by the law.

Fines of up to $500 can be awarded against a bookseller who violates the law. Consumers whose information was improperly disclosed may also file a civil suit.

The law includes exceptions if a government entity asserts that there is an imminent danger of death or serious physical injury requiring the immediate disclosure of the requested personal information; a consumer may also give informed, affirmative consent to specific disclosure for a particular purpose. In addition, the Reader Privacy Act's warrant requirement applies only to California state and local government entities and does not restrict warrantless searches or information-gathering by agents of the federal government (the FBI, for

example).

To access consumer information, third parties must first obtain a court order and give the bookseller the opportunity to contest the request.

While the law was backed by the Electronic Frontier Foundation and the American Civil Liberties Union, industry groups like the American Booksellers Foundation for Free Expression declined to endorse the law.

Other groups, including the American Booksellers Association, the Northern California Independent Booksellers Association, and the Southern California Independent Booksellers Association, actively opposed the legislation, arguing that while they supported the idea of increased protections for reader privacy they felt independent booksellers should not face liability for releasing such information.

Smaller booksellers often have young or inexperienced staff who are not familiar with police requests for information like an Internet or corporate bookseller would be and are more vulnerable to police pressure, the groups said.

To read the California Reader Privacy Act, click here.

Why it matters: The California Reader Privacy Act reflects the current legislative focus on privacy rights for consumers, albeit in the specific context of book records. Although the protections are limited to California residents, the law will have a coast-to-coast impact on national chains and other booksellers who sell in the state.

back to top

Settlement Over Organic Cosmetics

Eleven cosmetic companies – including Kiss My Face and Pacifica – settled lawsuits claiming that their products were falsely advertised as organic when they failed to meet the standards under California law.

The Center for Environmental Health (CEH) brought suit against 26 personal care companies earlier this year alleging that the defendants violated the California Organic Products Act (COPA). The act mandates that at least 70 percent of a product contain organic ingredients in order to be labeled as such. The Oakland, California-based nonprofit organization claimed that the defendants prominently placed the word “organic” on their products’ front labels while listing ingredients in a “substantially smaller font” on the back label, with an asterisk next to the organic ingredients. For example, Hold Up Styling Mousse by Kiss My Face used the word “organic” on its front label, but of 16 ingredients listed on the back label, only one is certified organic, according to the complaint. That ingredient – camellia sinensis – is the twelfth most predominant ingredient and, as such, falls far below the 70 percent required under the California law.

According to the complaint, other products manufactured by the defendants contain no organic ingredients, and worse, some contain ingredients that are actually harmful to consumers’ health. Under the settlements, the companies agreed to comply with COPA either by increasing their use of organic ingredients or by changing their labels for all products manufactured after March 31, 2012. In addition, the

defendants agreed to make records about their organic ingredients available to CEH for inspection on or before that date.

In addition to Kiss My Face and Pacifica, settling companies included Boots, E.T. Brown, At Last Naturals, Himalaya, RenPure, Suki, Stearns, and Cosway. Litigation is ongoing in the other suits, which include 23 remaining defendants.

Why it matters: CEH said that the complaints were the first suits filed under California's Organic Products Act, which took effect in 2008, but will have a national effect because of the size of the state's market in the United States economy. As evidenced by the CEH lawsuit and regulatory activity (including a National Advertising Division decision reviewing the use of "fair trade" seals on organic personal care products, disputes over "organic" include a wide variety of products.

back to top

FTC Commissioner Reviews a Year in Privacy

At a recent meeting of the International Association of Privacy Professionals in Washington, D.C., Federal Trade Commission Commissioner Julie Brill discussed several of the hot privacy issues from the past year, including settlements with online giants like Google, Twitter, and Facebook, and told attendees that while the Children's Online Privacy Protection Act remains "vitally relevant," reforms are necessary in order for the law to remain effective in the age of social media.

Referencing the recent settlement with Facebook over privacy violations, Brill analogized to a child grabbing a toy from a playmate. "Taking is not sharing," she said. "Sharing cannot be forced. Most privacy problems online arise when companies forget that basic principle of the playroom." Brill also emphasized actions taken by the agency pursuant to COPPA and challenged a recent report which found that parents help their children to violate age restrictions on Facebook, concluding that the statute was no longer viable in the "Facebook age."

Brill disagreed with the report's conclusion, saying that parental involvement actually reinforces the intent of COPPA – to provide power to parents to make choices about how their children share data online. "COPPA is not perfect," Brill told attendees. "But the answer is not to abandon the law. Rather, if there are holes in COPPA, let's fix them."

The FTC's approach is to update COPPA to apply to mobile technology as well as provide "more streamlined, meaningful information to parents," Brill said.

Emphasizing the need for choice, Brill also addressed the agency's decision to support a "robust" Do Not Track mechanism "that gives consumers real choices and information about how their browsing data is collected, stored, and used." Going forward, Brill encouraged privacy professionals to stay on the same page, as the "lexicon must be clear about exactly what companies can and cannot do with information about a consumer who has chosen not to be 'tracked' – and that includes understanding both how data is collected and how it is used once collected." She also expressed a need to define "commonly accepted practices" in order to guide both consumers and companies

engaging in behavioral advertising and online tracking.

Reiterating her earlier point, Brill reminded her audience that “it all boils down to the tenet of the toddler room: share, don’t take.”

To read the full text of Commissioner Brill’s remarks, click here.

Why it matters: Brill’s remarks summarized some of the noteworthy FTC privacy actions over the last year and emphasized her belief in one key tenet for consumers: choice.

back to top