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Third Circuit Hands Splenda Partial Win

The maker of Splenda, the number one artificial sweetener, won a partial victory on December 24 when a federal appellate court partially reversed a lower court's denial of the company's request to enjoin a generic manufacturer from using "virtually identical" packaging.

The defendant, Heartland Sweeteners, also scored a couple of points in *McNeil Nutritionals v. Heartland Sweeteners*. The U.S. Court of Appeals for the Third Circuit found at least some of its packaging wasn't similar enough to Splenda's trade dress to warrant an injunction.

Heartland Sweeteners packages generic sucralose for five supermarket chains: Stop & Shop, Giant, Tops, Food Lion and Safeway.

The appellate court upheld the lower court's finding that the Food Lion and Safeway packages were not similar enough to lead to consumer confusion. But as for the products from the other three stores, the Third Circuit reversed the lower court's finding that McNeil failed to prove a likelihood of consumer confusion, and sent the case back for reconsideration.

The court found that the lower court "committed clear error" in applying the so-called Lapp factors—the 10-factor test set

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forth in the Third Circuit's 1983 decision, *Interpace Corp. v. Lapp Inc.*, used to determine whether the plaintiff in a false advertising Lanham Act case has shown a likelihood of confusion.

"The district court clearly erred in the ultimate balancing of the Lapp factors because it did not adequately heed our oft-repeated statement that 'the single most important factor in determining likelihood of confusion is degree of similarity,'" the court wrote.

The lower court found that although Heartland's packaging for Stop & Shop, Giant and Tops stores was similar, likelihood of confusion wasn't established because consumers are accustomed to seeing store-brand products side-by-side on supermarket shelves with national brands.

The appellate court disagreed, however, writing, "The danger in the district court's result is that producers of store-brand products will be held to a lower standard of infringing behavior, that is, they effectively would acquire per se immunity as long as the store brand's name or logo appears somewhere on the allegedly infringing package, even when the name or logo is tiny. In the case of the Food Lion and Safeway packages, the court said, "a store-specific signature is prominently displayed on them, thereby substantially reducing the degree of similarity and hence the likelihood of confusion."

The court said the test for whether a store-brand product violates trade dress laws differs from the test for other products, but won't result in total immunity.

"Arguably under our holding, store brands can 'get away' with a little more similarity than other defendants' products when they display prominently a well-known label, e.g., a store-specific signature, on their packages, but they cannot copy the national brands to such a degree of similarity, then merely affix a tiny differentiating label, as to become entirely immune to infringement actions," the court wrote.

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Sites Ignore New FTC Privacy Guidelines at Their Peril

In December, the Federal Trade Commission (FTC) asked Web sites to voluntarily do two things: (1) enhance disclosure about user data they collect, and (2) ask permission before monitoring user Web activity.

But there's voluntary and there's "voluntary." When the

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federal government asks companies to get on board with a new program, they are well advised to do so. These guidelines, experts say, are no exception.

In fact, the FTC has suggested it will regard any sites that fail to comply as offering inadequate privacy safeguards.

Until now, the online marketing industry has been largely self-regulated.

Even privacy watchdogs suggest consumers aren't as concerned about the issues as they should be. But if privacy advocates and the FTC make enough of a fuss to attract Congress' attention, all bets are off. If marketers ignore the FTC requests, say some experts, the online ad industry's practices could be the subject of legislation.

"The announced principles are a lot tougher on the industry than most observers expected," privacy expert Peter Swire told Ad Age. "Companies are going to have to give consumers a realistic choice on whether they want to be tracked online." Swire said the FTC is sending a signal that the industry shouldn't ignore, because Congress is now aware of the issue.

Some of the major points of the FTC's proposed "enhanced principles" are as follows:

- Each site collecting behavioral data for ad tracking should provide a clear, consumer-friendly and prominent statement disclosing data being collected and letting consumers choose whether to let their information be collected.

- Any company collecting or storing behavioral-ad consumer data must provide reasonable security for that data and retain it only as long as is necessary to fulfill a legitimate business or law-enforcement need.

- Web sites may use sensitive data—medical information, or children's activities online—for behavioral targeting only if consumers specifically opt in.

- Marketers who decide to alter their privacy guidelines to use information in a new way must get consumer consent again before using that information.

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Q-Ray Loses Appeal of Multimillion-Dollar False Ad Judgment

A Chicago federal appellate court has confirmed a multimillion-dollar judgment against the marketer of the Q-

Ray bracelet, calling its therapeutic claims "a form of fraud."

QT Inc. sold more than a million bracelets between January 2000 and June 2003 through infomercials that claimed the "ionized bracelet" could relieve pain caused by everything from arthritis to chemotherapy. The Federal Trade Commission (FTC) sued QT and Que Te "Andrew" Park, its chief executive, in 2003 for false advertising—citing a Mayo Clinic study that said the bracelet, which sold for $50 to $250 each, worked no better than a placebo.

In September 2006, a federal magistrate judge in Chicago sided with the FTC and ordered the company to give up an estimated $22.5 million in profits and also give a full refund to consumers who purchased bracelets over the Internet. The refunds could push the judgment to $87 million.

Five months after losing in court, QT filed for bankruptcy protection, citing the FTC as its largest creditor. But it continues to sell bracelets over the Internet, relying on customer testimonials.

In its appeal, QT and Park argued that the magistrate judge subjected the bracelet's claims to excessively rigorous standards of proof. They also suggested that the judge overlooked the placebo effect of the bracelet—that some consumers benefited from the bracelet for no apparent medical reason.

In a lively opinion that reads as a broad endorsement of FTC enforcement standards and the subsequent injunction, the chief judge of the Seventh U.S. Circuit Court of Appeals said the company made claims beyond those that could be supported by a placebo effect. "They made statements about Q-Rays, ionization and bio-energy that they knew to be poppycock," Judge Frank Easterbrook wrote in the opinion. He continued, "Defendants might as well have said: 'Beneficent creatures from the 17th Dimension use this bracelet as a beacon to locate people who need pain relief, and whisk them off to their homeworld every night to provide help in ways unknown to our science.'" He added: "Since the placebo effect can be obtained from sugar pills, charging $200 for a device that is represented as a miracle cure but works no better than a dummy pill is a form of fraud."
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Public Citizen Sues FDA Over Cipro, Levaquin Warnings

Consumer advocates Public Citizen sued the Food and Drug Administration (FDA) on January 3 in a bid to force the agency

to act on a petition seeking stronger warnings on certain antibiotics.

In August 2006, Public Citizen petitioned the agency, stating that products like Bayer's Cipro and Johnson & Johnson's Levaquin should carry a "black-box" warning and that medication guides provided to consumers should also bear the warning.

Cipro and Levaquin belong to a class of antibiotics known as fluoroquinolones. The drugs are sold by several drug makers under various brand and generic names.

The drug labels do caution of the risk of tendon ruptures but not in a black box form, considered the FDA's sternest warning. A black box warning appears in bold type inside a black box to make it more prominent. It typically appears at the top of drug labels. Any black box product ads must also contain the warning.

Johnson & Johnson has said it believes the current tendon warning is adequate while Schering-Plough Corp., which markets Cipro in the U.S. as part of an agreement with Bayer, has said it won't comment on Public Citizen's petition.

Public Citizen said the tendon warning is buried in a list of possible adverse reactions to the drugs and is not adequate to warn consumers and healthcare providers of the risk. The current tendon warning was added after Public Citizen petitioned the agency asking for such a warning in 1996.

The lawsuit, filed earlier this month in the U.S. District Court for the District of Columbia, says the agency is violating the Administrative Procedure Act by not acting upon the petition. The lawsuit asks the court to force the FDA to act on the petition.

In the petition, Public Citizen said its review of the FDA's adverse event database showed 262 cases of tendon ruptures, 258 cases of tendonitis, and 274 cases of other tendon disorders reported between November 1997 and December 31, 2005, associated with fluoroquinolone antibiotics. About 61% of the reported tendon problems were associated with Levaquin and 23% with Cipro.

Since 2005, Public Citizen said an additional 74 tendon ruptures have been reported to the FDA.

An adverse event report, however, doesn't necessarily mean a particular product has caused a problem and requires

additional follow up. The FDA uses such reports to flag possible safety problems with drugs and medical devices.
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Lacoste's Crocodile Tears

French clothing giant Lacoste has lost a three-year battle to prevent a U.K. dental practice from using a grinning crocodile as the logo on their practice's welcome sign.

Lacoste claimed the cartoon crocodile was too similar to its own famous logo, and could cause consumer confusion damaging its business.

The battle began in 2004 when Dr. Tim Rumney and Dr. Simon Moore first applied to register the new logo—a plain green crocodile with white teeth—for their local dental office. Lacoste objected, saying the logo was too similar to their own green crocodile logo, which is pictured side-on with gaping red jaws.

The dentists represented themselves and won at an initial hearing in May 2007. Lacoste appealed and lost late last year.

Dr. Rumney told a local newpaper that he was happy the situation has been resolved but astonished by the length of time it took to reach this conclusion. "I suppose it is a big success for our business but we certainly did not regard it as taking anyone on."

He added: "We do not consider ourselves to be in the same market place at all and do not see that we are treading on any toes. We chose the sign with little second thought."

Lacoste was ordered to pay £1,000 toward the dental practice's legal costs at the initial hearing as well as a further £450 toward the costs of the second hearing.
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