Advertising Law @ manatt

October 8, 2009

In This Issue

California Privacy Law Not Preempted by CAN-SPAM Act

On September 21 a California state court found that the federal CAN-SPAM Act of 2003 does not preempt California's state privacy law regarding the collection of an e-mail address during a credit card transaction.

In the case Powers v. Pottery Barn Inc., the court ruled that a putative class action against Pottery Barn could go forward under California's Song-Beverly Credit Card Act. The Act prohibits retailers from asking for "personal information" when a customer purchases an item with a credit card. Although addresses and telephone numbers are clearly covered, ZIP codes are not. When the Act was passed in 1971, e-mail did not exist.

CAN-SPAM, which regulates the sending and content of commercial e-mails, does not preempt a state law that only incidentally regulates e-mail, the court said. "Because Song-Beverly's regulation of what may be asked of credit card customers is not a regulation of what can be sent in commercial e-mails and is not in any manner specific to e-mail, we conclude Song-Beverly is not pre-empted by CAN-SPAM."

The court did not address whether e-mail addresses constitute "personal information" under

UPCOMING EVENTS

October 27, 2009
American Conference Institute's 3rd Annual Forum
on Sweepstakes Contests and Promotions

Speaker: Linda Goldstein

The Carlton Hotel

Song-Beverly, finding only that the allegations in the complaint were sufficient to avoid summary dismissal. The question could be a close one. Although e-mail addresses are considered personal information under a number of federal privacy laws, including HIPAA, COPPA, and Gramm-Leach-Bliley, one leading federal privacy bill, H.R. 2221 (the DATA Act), excludes e-mail addresses from its definition of personal information.

The court also rejected Pottery Barn's claim that the First Amendment protects its right to collect customer e-mail addresses, finding that any such right was outweighed by the state's "well-established and substantial" interest in protecting the privacy of its citizens. Lately marketers have been asserting a First Amendment right to access commercially valuable data, though so far without much success. For instance, in the recent case of IMS Health Inc. v. Ayotte, the First Circuit rejected a First Amendment challenge to a New Hampshire law banning the sale of prescription drug information that identifies doctors' prescribing patterns.

Why it matters: This lawsuit may be a harbinger of a wave of copycat complaints to come. It sends a signal to plaintiffs' lawyers that at least some courts may consider that CAN-SPAM does not necessarily preempt state law-based privacy claims over the practice of collecting e-mail addresses in various circumstances. Certainly, collecting an e-mail address is almost automatic in making a credit card purchase online, since retailers typically use the customer's e-mail address to send a confirmation.

back to top

Facebook Settles Class Action Over Ad Program

Facebook, the popular online social network, has settled a year-old class-action lawsuit over its alleged failure to provide sufficient information and privacy controls to users with regard to its ill-fated ad program, Beacon, which shared user information on third-party partner sites in Facebook news feeds.

As part of the settlement, Facebook has agreed to pay $9.5 million to set up an independent foundation to "fund projects and initiatives that promote the cause of online privacy, safety, and security." However, the plaintiffs' lawyers can potentially lay claim to up to a third of the settlement monies. Facebook has also agreed to shutter the few remaining vestiges of Beacon, which debuted about two years ago but failed to take hold after an onslaught of negative press.

"We look forward to the creation of the foundation and its work to educate Internet users on how best to control their privacy; engage in safe social-networking practices; and generally, enjoy themselves more online by having knowledge that gives them a greater sense of control," a statement from Facebook representative Barry Schnitt read. "We fully expect the foundation to team with other leading online-safety and privacy experts and organizations that have been working diligently in these fields."

In response to the early negative reaction, Facebook modified Beacon to allow more user control. It was too late to reverse the initial bad press. Most existing partners reneged and few others signed on. Surprisingly, at the time of the settlement, a "small number of customers" were still using Beacon, and will be transitioned out.

Ultimately, Facebook came up with a winning substitute for Beacon called Facebook Connect, the universal login standard that shares third-party activity on members' profiles. The privacy controls on Connect are clearer and more robust. It's also been marketed in a more palatable form – as a tool for members rather than an ad platform. It's free for third-party sites to implement, and with only a few exceptions, sites working with Facebook Connect code it in through the social network's application programming interface, rather than through a formal agreement. Offering Facebook users the opportunity to register and log in to other sites without separate usernames and passwords also provides convenience and security, since some users may feel more secure clicking on a "Connect with Facebook" button than registering for an account with a new service.

"We learned a great deal from the Beacon experience," the Facebook statement said. "For one, it underscored how critical it is to provide extensive user control over how information is shared. We also learned how to effectively communicate changes that we make to the user experience. The introduction of Facebook Connect – a product that gives users significant

New York, NY
for more information

...

November 5-6, 2009
31st Annual Promotion Marketing Law Conference

Topic: "The Battle of the Brands"

Moderator: Chris Cole

Fairmont Hotel
Chicago, IL
for more information

...

November 5-6, 2009
31st Annual Promotion Marketing Law Conference

Topic: "Sweepstakes & Contests: Lend Me Your Ear and I'll Sing You a Song..."

Speaker: Linda Goldstein

Fairmont Hotel
Chicago, IL
for more information

...

November 18-20, 2009
4th Annual Word of Mouth Marketing Association Summit

Topic: "FTC Developments"

Speaker: Anthony DiResta

Paris Hotel
Las Vegas, NV
for more information

...

January 21-22, 2010
6th Annual Film, TV & New Medial Law Conference

Topic: "Brand Integration Deals"

Speaker: Jordan Yospe

Millennium Biltmore Hotel
Los Angeles, CA
for more information

...

January 26-27, 2010
American Conference Institute's 23rd National Advanced Forum on Advertising Law

Speaker: Linda Goldstein

control over how they extend their Facebook identity on the Web and share experiences back to friends on Facebook – is an example of this."

Why it matters: Facebook's Beacon program was a major stumble for the social network, which did not recognize how much its users valued their privacy. Facebook learned from its mistake and has produced a new tool – Facebook Connect – that gives users more control while serving a function similar to Beacon.

back to top

Mom, May I Have More Brain Juice Please?

Nestlé is facing a class-action lawsuit accusing it of being a "snake oil salesman" that sells "Brain Juice" to parents based on the allegedly fraudulent claim that it will improve their children's brain function.

In the complaint, plaintiff Alexis Farmer alleges that she purchased Nestlé's "Juicy Juice Brain Development Fruit Juice" with its claims that it contains "DHA – an omega-3 fatty acid especially important for brain development in children under two years old." Farmer alleges that Nestlé makes a variety of claims in labels, on its Web site, and in a television spot centering on the theme that Juicy Juice Brain Development Fruit Juice contains DHA Omega-3, which, Nestlé claims, is critical for brain development.

As an example, the complaint describes a television commercial for Brain Juice "pictur[ing] a mother and young child. The mother repeatedly instructs the child to touch her nose, but the child does not. However, after the mother pours her child a glass of Brain Juice, the child points to the dog's nose and says 'nose.' This television advertisement implies that consumption of Brain Juice by a child can accelerate the pace at which that child learns skills associated with language, motor functions, memory, and the free association of thought and ideas," the complaint alleges.

The complaint further alleges that Nestlé's claims are unfounded. "In an effort to 'grab' some of those billions [of dollars in dietary supplements], unscrupulous marketing companies routinely toss a small amount of a particular substance into a preexisting product and advertise said product as though it could provide results beyond what would be a reasonable explanation," the complaint states. Farmer, who is seeking class-action status, accuses Nestlé of false and misleading advertising, unjust enrichment, fraud, and violations of civil codes.

Why it matters: In a bid to entice consumers, food marketers are increasingly touting the health benefits of their products. However, any such claims must generally be backed up by reliable and competent scientific studies. This is true whether the claims are express or implied.

back to top

E.U. Adviser Supports Google in Ad Keyword Case

A legal adviser to the European Union's highest court has backed Google in a high-profile trademark case, agreeing with the company's position that it should be permitted to sell brand names as keywords that trigger ads on a search results page.

Advocate General Luís Miguel Poiares Pessoa Maduro recommended that the European Court of Justice clear Google of charges of trademark infringement in several lawsuits in France brought by luxury goods companies such as LVMH Moët Hennessy Louis Vuitton. European brand owners have brought a number of lawsuits against search engines and online auction sites on the grounds that the use of their brand names undermines their value and makes it easier to sell fakes.

The sale of keywords triggering paid ads identified as "sponsored links" alongside search results generates the vast majority of Google's revenue. Online retailers, product review sites, and competitors buy brand names they do not own as keywords to bring searchers to their Web sites. But the use of trademarked keywords is a legal gray area because consumers never actually see the trademark. Rulings in European courts have gone both ways. The French courts referred the cases to the European tribunal for clarification on how to apply E.U. law to

New York Marriott Downtown
New York, NY
for more information

...

January 26-27, 2010
American Conference Institute's 23rd National Advanced Forum on Advertising Law

Speaker: Terri Seligman

New York Marriott Downtown
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

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

search-engine practices. A ruling is expected in the next few months. In the meantime, Google has stopped selling trademarked keywords in France and several other European countries.

Maduro opined that brand owners "do not have an absolute right of control over the use of their trademarks" online. "It is important not to allow the legitimate purpose of preventing certain trademark infringements to lead all trademark uses to be prohibited in the context of cyberspace," he wrote. Although he sided with Google on the trademarked keyword issue, he recommended the company be held accountable under individual European countries' laws if ads displayed by search engines, rather than the search terms themselves, contained trademark infringements.

Why it matters: The advocate general's opinion is nonbinding. Although the European court often goes along with such findings, it has also ignored them in cases involving trademarks. We anticipate that this is not the end of the ongoing battle between Google and other search engines over the use of trademarked keywords – the money involved is just too great and the courts too divided.

back to top

FDA To Examine Drug Makers' Use of Social Media

The Food and Drug Administration has announced that it will conduct a two-day public hearing in November on how pharmaceutical companies use the Internet and online social-media networks to market their products.

Despite the possibility of additional regulation, the industry applauded the hearings as the first move in a long-belated procedure that should finally result in guidelines for how drug marketers should operate in today's online environment.

The FDA has not looked at online drug advertising since 1996. Meanwhile, although still representing a small percentage of overall DTC spending, Internet-based spending continues to grow rapidly and the types of Web-based media have evolved as well.

The hearings will be held on November 12 and 13. "This meeting and the written comments are intended to help guide FDA in making policy decisions on the promotion of human and animal prescription drugs and biologics and medical devices using the Internet and social-media tools," the FDA's notice read. "The continually evolving nature of the Internet, including Web 2.0 and social-media tools, as well as their expansion to applications such as mobile technology, have raised questions and concerns over how to apply existing regulations to promotion in these newer media. FDA is evaluating how the statutory provisions, regulations, and policies concerning advertising and promotional labeling should be applied to product-related information on the Internet and newer technologies," the notice read. "Although the agency believes that many issues can be addressed through existing FDA regulations, special characteristics of Web 2.0 and other emerging technologies may require the agency to provide additional guidance to the industry on how the regulations should be applied."

The problem with the lack of regulatory guidelines for marketing on Twitter, Facebook, blogs, and Web sites came to a head in April when the FDA sent warning letters to 14 companies for search-engine ads that the agency said violated regulations regarding presentation of fair balance. The industry countered that the regulations requiring disclosure of risk information in print and broadcast ads should not be applied to Internet ads that contain only 12 words (in the case of Google) or 140 characters on Twitter.

Why it matters: The drug industry has complained that the FDA has been regulating DTC ads in new forms of Internet media in a haphazard and inconsistent fashion, and that the industry has lagged behind less regulated sectors in the use of social media, because of concerns of being hit with an FDA warning letter. DTC marketers say that the likely implementation of set guidelines is welcome news for drug companies.

back to top

Anheuser-Busch Drops Promos at Certain Colleges

Anheuser-Busch InBev is shelving its "Fan Cans" promotions in college communities, in response to complaints that the campaign, which sells cans of Bud Light in school

colors, promotes underage drinking and infringes on trademarks.

Both the Federal Trade Commission and the brewer have confirmed that they have discussed the issue. Regulators are concerned that cans will be marketed to minors. Industry regulations require at least 70 percent of the intended audience for an alcoholic beverage to be of legal drinking age, which is not the case on college campuses, an FTC spokeswoman said. The FTC declined to comment on whether it was conducting an investigation of the promotion.

In a statement, an Anheuser-Busch spokeswoman said the company informed the FTC that the cans would be sold through retailers where purchasers must be 21 or older. Despite the precautions, "certain cans are not being made available in communities where organizations asked us not to offer them," the company stated.

Anheuser-Busch launched the campaign last month, which coincides with the start of football season. The program puts school colors on Bud Light cans. Anheuser-Busch, which was bought by Belgium-based InBev last year, said the cans have no college logos, names, or other identifiers – just 27 color combinations. The program is nationwide, where the brewer's wholesalers choose to participate. The company estimates half of its wholesalers are participating.

According to the company, roughly 25 colleges represented by Collegiate Licensing Co. have sent the brewer formal letters asking it to stop the program at their campuses. Although it declined to specify the colleges, Boston College, the University of Wisconsin, Texas A&M University, the University of Colorado at Boulder, and a dozen schools represented by Licensing Resource Group, including Mississippi State, have confirmed that they sent letters to the brewer or local distributors asking that the campaign be pulled in their areas, expressing concerns over trademark infringement and underage drinking.

Why it matters: Anheuser-Busch probably was aware it was taking a chance in using college color combinations to sell Bud Light, since by their very nature, college populations are largely under 21 and color combinations can be trademarked. But college football games also attract their fair share of alumni and other fans who are of legal drinking age, and Anheuser-Busch can make a case that its promotion is aimed at these fans, since the cans are being sold only at retailers where purchasers are 21 or older. Nevertheless, the company seems to be walking a fine line, as evidenced by its discussions with the FTC and the number of colleges that have requested that the campaign be stopped in their areas – requests with which Anheuser-Busch is apparently complying.

back to top

Manatt Partner Clay Friedman Joins Faculty of PMA

November 5–6 /Chicago, IL

Mr. Friedman will serve as a panelist on a session titled, "Who's Sorry Now: Defending against FTC, State AG's, and Class Actions."

To Take Advantage of Manatt's VIP Discount, click here. Enter code: sprma

For more information click here

back to top