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ADVERTISING LAW

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

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Company Fined \$200,000 For Pretexting

At the request of the Federal Trade Commission, a federal court has ordered an online information broker to pay \$200,000 for illegally obtaining, advertising, and selling confidential consumer phone records.

The January 28, 2008, decision by a Wyoming federal judge also banned AccuSearch, dba Abika.com, from future illegal pretexting and ordered that it notify the individuals whose records were sold.

In May 2006, the FTC charged AccuSearch, and its principal, Jay Patel, with violating federal law by selling consumers' phone records to third parties without the consumers' knowledge or authorization. According to the FTC complaint, the defendants advertised on their Web site that they could obtain the confidential phone records of any individual—including details of outgoing and incoming calls—and make that information available to their clients for a fee. To obtain such information, which is not legally available to the public, the FTC alleged that the defendants caused others to use "false pretenses, fraudulent statements, fraudulent or stolen documents or other misrepresentations, including posing as a customer of a telecommunications carrier," to induce the carriers to disclose the confidential records.

In its ruling, the court found that the defendants' obtaining and selling confidential phone records without consumers' knowledge or consent was "necessarily accomplished through illegal means," and that the defendants knew that the phone records were being obtained surreptitiously, the FTC said in a release.

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 Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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October 22, 2008

D.C. Bar CLE Seminar

Topic:

"Copyright Law and Litigation"

Kenneth M. Kaufman

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

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November 20-21, 2008

PMA's 30th Annual Promotion Marketing Law Conference

Topic:

"Navigating the Potholes: The Evolving Landscape for Sweepstakes, Games

The court found this practice caused substantial injury to consumers, including serious health and safety risks experienced by some consumers from stalkers and abusers; economic harm associated with changing telephone carriers and upgrading security on their accounts; and various "substantial and real" emotional harms. It further concluded that consumers had no way to avoid these harms, writing that "confidential consumer phone records were sold through Abika.com despite considerable efforts by consumers to maintain the privacy of those records."

Rules promulgated by the Federal Communications Commission in 2007 now require carriers to obtain "explicit consent" from a customer before disclosing phone records.

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MySpace Wins More Space In Controversial Dispute

MySpace has won the right to the MySpace.co.uk domain name despite another firm having registered it six years before the social networking Web site launched.

The ruling, by domain registry Nominet's dispute resolution service, has caused controversy because U.K.-based Total Web Solutions registered the MySpace.co.uk name in 1997, long before the U.S. site existed.

At first glance, the ruling may seem counterintuitive. But the arbitrator, Antony Gold, found that while TWS had initially used MySpace.co.uk to offer email services and mini-Web sites to subscribers, it had changed its model to exploit MySpace's popularity.

TWS started to use the MySpace.co.uk address to lead to a "parked" Web page with ads for social networking Web sites including MySpace. The arbitrator decided that this was evidence of abusive registration, and that TWS was profiting unfairly from the association with MySpace.

TWS argued that MySpace.co.uk had been used for hosting ads before the social networking Web site was founded, and that it should not be punished for its recent popularity. It claimed that the types of ads on the MySpace.co.uk Web site are determined by algorithms linked to search terms by Internet users, which in recent years have been dominated by people looking for MySpace.

The arbitrator disagreed, saying it was not relevant that TWS did not select the specific ads. Because it owned the Web site, TWS was responsible for those ads and income made off the back of MySpace.

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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

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December 4-5, 2008
Film & Television Law

Topic:

"Product and Music Placement Branded Entertainment: Issue and Litigation"

[Linda Goldstein](#)

Topic:

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

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

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OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, broadcast or cable company, a e-commerce business, or retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

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Amex: My Life. My Card. My Slogan.

American Express legally has the rights to its “My Life. My Card.” ad campaign featuring celebrity cardholders such as Robert De Niro and Tiger Woods, a federal appeals court said on February 4.

The Second U.S. Circuit Court of Appeals said American Express did not violate the rights of Stephen Goetz, who mailed a proposal to the company on July 20, 2004, with the slogan “‘My Life, My Card’ American Express delivers personalized cards to its cardholders!”

Goetz, who was a consultant for a company called Mez Design at the time, created the idea of enabling credit card customers to personalize their cards by choosing a picture to be printed on the card’s face, the appeals court said.

Separate from Goetz’s inquiry, the court noted, ad shop Ogilvy Group proposed the “My Life. My Card.” campaign to American Express on July 22, 2004, and began a preliminary trademark search for the expression on July 29. Goetz registered for a patent in September 2004.

In November 2004, American Express started using the slogan in a worldwide multimedia ad campaign.

Although it never responded to Goetz’s proposal, American Express sued him in Manhattan federal court for a declaratory judgment that it had not misappropriated the slogan and that Goetz could not make a claim for infringement. In February 2006, the court granted American Express’s motion, dismissing Goetz’s counterclaims for misappropriation and trademark infringement. The court ruled Goetz had not used the slogan as a trademark, noting that he did not contest that American Express independently conceived the slogan.

The appeals court agreed, in part because Goetz never made actual use of the “My Life, My Card” concept: “Goetz employed the slogan ‘My Life, My Card’ to generate interest among potential licensee credit card companies and not to differentiate the origin of his goods or services.” The slogan served as “a mere advertisement for itself as a hypothetical commodity,” the court wrote, noting that there “can be no trademark absent goods sold and no service mark without services rendered.”

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Trial Lawyers Sue Each Other Over Discarded Name

Two rival groups of trial lawyers are fighting over a name in a venue familiar to everyone involved—the courtroom.

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The dispute began last year, when, in a bid to rebrand itself, the largest trial lawyers' organization dropped the words "trial lawyers" from its title and substituted "justice." Thus, the Association of Trial Lawyers of America (ATLA) became the American Association for Justice (AAJ).

Around the same time, another group of trial lawyers founded an organization of their own. This past fall they solicited thousands of AAJ's 56,000 members to join. The group's name: The American Trial Lawyers Association, or TheATLA. The group's Web site is <http://www.TheATLA.com>.

TheATLA says it is not trying to piggyback on the (former) name of the country's best-known trial lawyer group or even to compete with AAJ. "The name defines who we are and what we do," said J. Keith Givens, TheATLA's main founder and a senior partner in the national law firm founded by the late Johnnie Cochran, of O.J. Simpson fame. Givens asserted that AAJ abandoned the name ATLA last year, freeing up its use. Besides, he said, his group is TheATLA, which is different.

AAJ disagrees. In November, it sued in federal court in Minneapolis to force TheATLA to drop the name, contending it was confusing AAJ members and infringing a trademark AAJ has held since 1976 on the acronym ATLA. The complaint also demands that AAJ get any profits that TheATLA collects, as well as damages, "trebled where permissible," and attorneys' fees.

A separate organization, the Irvine, California-based American College of Trial Lawyers, also went to federal court in November in Montgomery, Alabama, to prevent the Givens group from calling itself the American Trial Lawyers Association, a name it says is too close to its own.

Givens said the new organization is gaining members and could eventually generate significant income. The organization would have up to 100 lawyers per state as members, each paying dues of \$250. That would put TheATLA's income from dues alone at more than \$1 million annually; advertising in publications and at conferences would produce additional revenue.

The fight over the name is a replay of legal wrangling that took place 35 years ago. Then, the American College of Trial Lawyers blocked a group from calling itself the American Trial Lawyers Association. With the court's permission, the group adopted the name Association of Trial Lawyers of America, which it kept until renaming itself AAJ last year.

AAJ was eager to eliminate "trial lawyers" from its title because of the poor public perception of the term. But it still wants to keep ATLA to itself. The current fight came to a head

after Givens' group began to mail membership invitations to the country's leading trial attorneys this past fall, including many current members of AAJ.

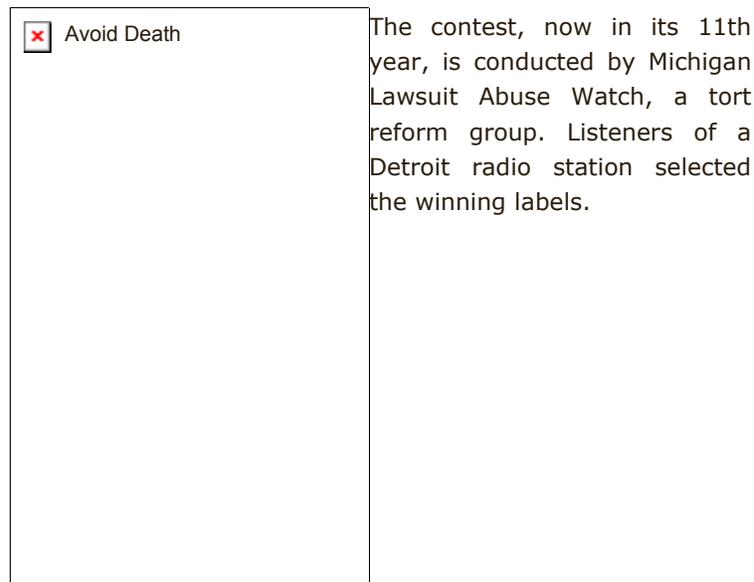
Givens said he does not intend to compete with either AAJ or the American College of Trial Lawyers. He is a member of AAJ, a former member of its governing board, and continues to encourage people to join AAJ, he said.

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“Danger: Avoid Death” Tops Wacky Warning Label Contest

A label on a small tractor that warns “Danger: Avoid Death” has captured the dubious honor of the nation's wackiest warning label in the annual Wacky Warning Label Contest.

The illustration that accompanies this warning is almost as great as the warning itself:



If you need to be reminded to save your own life, you probably shouldn't be operating heavy machinery in the first place.

Second place went to a label found on an iron-on T-shirt transfer that says “Do not iron while wearing shirt.”

Third place went to a label for a baby stroller equipped with a small storage pouch, warning “Do not put child in bag.” Oh, so that's what the seat is for ... Thanks for clearing that up.

Honorable mention went to a warning label on a letter opener that says “Caution: Safety goggles recommended.”

Another honorable mention went to a warning for the Vanishing Fabric Marker, cautioning that it “should not be

used as a writing instrument for signing checks or any legal documents, as signatures will fade or disappear completely.”

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