Advertising Law

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In This Issue

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IAB Members Pledge to Follow Self-Regulatory Principles

The Interactive Advertising Bureau Board of Directors recently voted unanimously to require all members to sign a new code of conduct that necessitates their compliance with the industry's self-regulatory principles.

Current members will have up to six months to make the pledge; new members must become compliant within three months of joining the group.

In 2009 a number of industry groups released the Self-Regulatory Principles for Online Behavioral Advertising, which are "intended to provide IAB Members with a set of best practices and guidelines."

The principles require third parties and service providers to provide clear, meaningful, and prominent notice that describes their online behavioral advertising data collection and use practices, including descriptions of the types of data they collect, the purposes for which it will be used, and whether it will be transferred to a nonaffiliate for behavioral advertising purposes. Members must also implement an easy-to-use opt-out mechanism and retain data only as long as necessary to fulfill a legitimate business need, or as required by law.

The principles also require members to post a clear and prominent notice of their cookie-based behavioral advertising at the publishers' sites, within or around the targeted ads themselves, and again at the place on the page where the data is collected. In addition, companies must obtain consumers' consent to track their data online, although consent can be demonstrated on an opt-out basis in the majority of situations.

"The IAB believes an industry as young, dynamic and vibrant as this one, an economic engine of the U.S., responsible for so much employment and innovation, needs to be responsible and that self-regulation is in the best interest of our members," Mike Zaneis, Senior Vice President, Public Policy and General Counsel, said in a press release about the new code of conduct. "We are pleased that our members have embraced this groundbreaking commitment."

Overview and enforcement of the principles will be led by the Council of Better Business Bureaus. Companies that fail to follow the code of conduct will face a minimum six-month suspension and could face an enforcement action by the Federal Trade Commission. Zaneis told MediaPost Publications that the FTC could open a case "if the companies state they are doing one thing, but are not living up to their statement."

To read the IAB code of conduct, click here.

Why it matters: The pledge to follow the principles is a further attempt by the industry to stave off federal regulations and/or legislation. With two pieces of privacy legislation already introduced in this session of Congress – including the Do Not Track Me Online bill – and more on the way, industry groups are doing what they can to convince legislators that new laws or rules are unnecessary.

back to top

Illinois Court Revives Light Cigarette Class Action

An Illinois appellate court has revived a light cigarette class-action suit against Philip Morris in which plaintiffs allege that the company's deceptive advertising harmed them by conveying that "light" and "low tar or nicotine" cigarettes were safer than average cigarettes.

In 2003 a trial court awarded $10.1 billion to the plaintiffs, who claimed that Philip Morris violated the state's Consumer Fraud Act by using deceptive marketing to advertise its "light" and "low tar or nicotine" cigarettes.

The tobacco company appealed, arguing that the use of the terms "light" and "low tar" had been authorized by the Federal Trade Commission. It relied on two consent decrees in enforcement actions the agency had brought against other cigarette manufacturers.

The Illinois Supreme Court reversed the verdict in 2005, and the U.S. Supreme Court denied the plaintiffs' petition for certiorari.

But on December 15, 2008, the justices explicitly rejected the defense used by Philip Morris in the Illinois case and found that the FTC "itself disavows any policy authorizing the use of 'light' and 'low tar' descriptors" in *Altria Group, Inc. v. Good.*

Three days later the Illinois plaintiffs filed a petition for relief from judgment under a special provision of state civil procedure, arguing that the *Good* decision undermined the Illinois Supreme Court's decision.

A trial court disagreed, holding that the statute of limitations on such a petition had expired. The appellate court reversed. The time limit began when the trial court's final order dismissing the suit was entered, it said, and therefore the suit was timely.

"[W]hat the plaintiffs are alleging is essentially that there are facts which, if brought to the trial court's attention during the original trial in this matter, would have caused the supreme court to rule differently in its December 2005 decision," the court said. It remanded the case to the trial court for further proceedings.

To read the Illinois appellate court's decision in *Price v. Philip Morris*, click here.

To read the U.S. Supreme Court's decision in *Altria Group, Inc. v. Good*, click here.

Why it matters: While the Illinois appellate court's decision kept the suit alive, the plaintiffs still face several obstacles to achieve a repeat billion-dollar verdict, including an appeal by Philip Morris. "The court's decision today was based solely on a procedural question around a timing issue and not the merits of the plaintiffs' request to re-open this closed case," Murray Garnick, associate general counsel for Philip Morris's parent company, Altria Group, Inc., said in a statement. "This case ended in 2005 when the Illinois Supreme Court reversed the damages award against Philip Morris USA. Since that time, the plaintiffs have made multiple unsuccessful attempts to re-open the case. We believe that the plaintiffs' latest attempt is equally without merit."

back to top

Can a Facebook Friend Request Violate the Lanham Act?

In a new twist, a New York day spa is alleging that a California competitor engaged in false advertising by sending Facebook friend requests to its existing fans.

California-based Complexions Day Spa and Wellness Center sent a takedown notice to Facebook in January claiming that New York's Complexions, Inc.'s Facebook page violated its trademark rights. Facebook complied.

The New York spa retaliated by filing suit in New York federal court seeking a declaratory judgment that its name, in use since 1987, does not infringe on that of the California spa.

The New York spa also claims that by sending Facebook friend requests to the New York company's roughly 1,000 existing fans just days before the company's page was removed by Facebook, the California spa had violated the Lanham Act.

"Defendant's actions were deliberately calculated to deceive, mislead and confuse Plaintiff's customers into falsely concluding that Defendant's business is affiliated or related to Plaintiff's business," according to the complaint. "Defendant's actions were deliberately calculated to create a false impression that instances of actual mistake have occurred between Plaintiff's business and Defendant's business in order to unfairly gain an advantage in any legal action that might result between these parties."

The New York spa seeks a judgment that will permit its continued use of the Complexions mark in its trade territory, noting that there are 24 other third-party-operated salons and spas around the country using the Complexions mark or some variation. It also seeks restoration of the New York spa's Facebook page (with Facebook named as an additional defendant).

To read the complaint in *Complexions, Inc. v. Complexions Day Spa and Wellness Center*, click here.

Why it matters: The claim poses an interesting question that a court has yet to consider. The plaintiff will have to establish that the loss of Facebook friends resulted in actual, compensable damage. It argues in the complaint that the Facebook page constituted “a valuable trade asset” of its business, and that the loss of the page has caused the company damages in lost sales and marketing potential.

back to top

FTC Fights Work-From-Home-Be-Your-Own-Boss-Scams

The Federal Trade Commission recently announced several actions under “Operation Empty Promises,” a campaign against companies that falsely promise opportunities to “be your own boss” and guaranteed jobs.

The agency joined forces with several other agencies, including the Department of Justice and the Postal Inspection Service, as well as 11 state attorneys general to announce a total of 90 enforcement actions.

The FTC filed complaints in three enforcement actions, including one against Ivy Capital and 29 named codefendants, which the agency alleged used telemarketers to convince consumers to purchase a business coaching program through available credit on their credit cards. The program was worthless, according to the FTC complaint, and some consumers paid up to $20,000 for software programs that did not work properly and coaches who did not have the expertise the company promised.

In a second complaint filed against the National Sales Group and its owners, the FTC alleged that the defendants used online job boards to advertise nonexistent sales jobs. According to the FTC complaint, telemarketers for the company claimed that they recruited for Fortune 1000 employers, and defrauded consumers out of at least $8 million by overcharging or charging on a recurring basis for background checks or other services.

The FTC alleged in a third complaint that one company, Business Recovery Services LLC, violated the Telemarketing Sales Rule by selling hundreds of variations of do-it-yourself kits to help consumers recover money they had lost to work-at-home schemes. Priced up to $499, the company's kits misrepresented the nature and effectiveness of their services and took advance fees from consumers.

In addition to the three new cases, the agency announced the shutdown of one operation and settlements or final court orders in six other cases, as well as 48 criminal actions by the DOJ, 7 actions by the Postal Inspection Service, and 28 state law enforcement actions.

To view a video of FTC attorney Daniel Hanks discussing the campaign, click here.

For more details on the campaign and to read the complaints, click here.

Why it matters: "The victims of these frauds are our neighbors – people who are trying to make an honest living," David C. Vladeck, Director of the FTC's Bureau of Consumer Protection, said at a press conference announcing the campaign. "Under pressure to make ends meet, they risked their limited financial resources in response to the promise of a job, an income – a chance at a profitable home-based business. But these turned out to be empty promises – and the people who counted on them ended up with high levels of frustration and even higher levels of debt." The agency said Operation Empty Promises is an ongoing, multiagency campaign that has been ramped up due to the economic downturn and higher unemployment.

back to top

Judge Resoundingly Rejects Classmates.com Settlement

A U.S. District Court judge rejected the proposed settlement in a class-action suit against Classmates.com that would have required the site to pay up to $9.5 million for false advertising, saying it "offered very little to class members."

The suit, filed in 2008, claimed that the site deceived customers into purchasing "gold" memberships by sending an e-mail that an old classmate wanted to get in touch. Users paid to join the site only to find that no one was looking for them, according to the suit.

Last April, U.S. District Court Judge Richard A. Jones gave preliminary approval to a class settlement that required the site to update its privacy policy and provide additional disclosures. All registered users of the site – estimated at roughly 50 million people – would be given the right to claim a $2 coupon toward the purchase of paid membership.

A subclass of users – those who had actually upgraded and paid for their membership after receiving a message from the site, estimated at about 3 million people – would be offered an additional $3 cash payment.

Classmates.com admitted no wrongdoing under the settlement and capped its total cash payout at $9.5 million. Given the number of individuals who failed to respond to the notice of the settlement or decided to opt-out of the class, Classmates.com would have wound up paying only about $52,000.

Following the final approval hearing, Judge Jones refused to sign off on the settlement.

The $2 coupon "is hard to conceive [of] as a benefit to the class," he wrote, noting that it will either go unused by a majority of class members (who never spent a dime on the site) or "will transform a non-paying registered user into a paying Classmates customer. This is the hallmark of a promotion for Classmates, not a benefit conferred in a bilateral resolution of a dispute."

And the additional $3 cash payment for a subclass of plaintiffs "seems designed to ensure that Classmates would pay very little in cash compensation," the court said, and "provides relatively little incentive to participate in the settlement."

Further, the injunctive relief "is notable in that it does not stop any of the practices that led to this action. It does not require Classmates to stop sending deceptive e-mails. It does not require Classmates to stop compromising the security of its users' accounts. Instead, it requires more disclosure, disclosure that is highly unlikely to make a difference to class members. This is a marginal benefit at best," Judge Jones wrote.

The court also noted that while the vast majority of potential class members did not react to notice of the settlement, those who did responded in an "overwhelmingly negative" manner. Class members "mocked" the $2 coupon, dismissed the $3 payment as "paltry," and the record "does not contain a single favorable word from a prospective class member about the injunctive relief," the court said.

To read the court's rejection of the settlement in *In Re Classmates.com*, click here.

Why it matters: Judge Jones criticized every element of the parties' proposed settlement and even questioned the plaintiffs' valuation of the claims of potential class members, noting that class counsel focused on the amount that class members paid for their site membership. He reminded class counsel that it had included an additional claim based on Washington's Commercial Electronic Mail Act, which provides statutory damages of $500 per violation for deceptive e-mails. "There are, of course, numerous obstacles to recovering statutory damages for a putative class action as large and geographically dispersed as this one. But the possibility of a $500 award puts the settlement offer of $3 (to about 3 million people) and an offer of a weak injunction and a $2 coupon for Classmates' benefit (to about 50 million people) in a much different perspective," Judge Jones wrote. While the parties have since informed the court they have renegotiated and reached an agreement in principle to settle the litigation upon new terms, they face a skeptical judge.

back to top