

ADVERTISING LAW

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

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Motrin Ad Gives Moms a Headache

Johnson & Johnson’s McNeil Consumer Healthcare subsidiary has pulled an ad campaign for its popular over-the-counter pain remedy Motrin.

The campaign, which was introduced on September 30 on Motrin’s Web site and in several magazines, was supposed to be a lighthearted and humorous approach to the experience (and pain) of carrying an infant. But recently, the ad caught the attention of the online mom community—and the reaction was not positive. Within two days, McNeil announced that it was pulling the ads.

The ads poked fun at baby slings, likening them to a fashion accessory and implying that they caused pain. “Supposedly it’s a real bonding experience,” the online ad said, “but what about me?” Still, the ad goes on to say, the pain may be worth it because wearing a baby “totally makes me look like an official mom.”

Some moms failed to see the humor in an ad that made fun of what they considered to be a smart mothering choice that, in fact, is relatively pain free, has been around for decades, and provides a child-bonding opportunity for both mothers and fathers. The backlash appears to have started in mid-



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Speaker: [Mark S. Lee](#)

Century Plaza Hotel
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November with mom blogger Jessica Gottlieb, after she was tipped off to the ads and started expressing her outrage on Twitter. Twitter is a service that allows users to tweet, or put up microposts that are picked up by followers via cell phone, IM, or the Web. Gottlieb's tweet was quickly picked up by other mom Twitters, who likewise expressed their irritation at the campaign (with other Twitterers, of course, backlashing against the backlash). The next day, another mom blogger named Katja Presnal collected tweets from annoyed moms and edited them into a short YouTube video titled, "Motrin Ad Makes Moms Mad," which has already been viewed tens of thousands of times.

Within two days of the backlash, McNeil Consumer Healthcare temporarily took down Motrin.com and announced that it was ending the ad campaign, and McNeil Vice President of Marketing Kathy Widmer started e-mailing apologies to bloggers.

Amy Gates posted a note she got from Widmer on her momblog, Crunchy Domestic Goddess. "We certainly did not mean to offend moms through our advertising. Instead, we had intended to demonstrate genuine sympathy and appreciation for all that parents do for their babies," Widmer wrote.

When the Motrin site was restored, in lieu of the ad, a message from Widmer appeared. "On behalf of McNeil Consumer Healthcare and all of us who work on the Motrin brand, please accept our sincere apology," the message said. "We are in the process of removing this ad from all media."

The ad, spoofs, and consumer video responses can be found on YouTube by searching "Motrin" and "mom."

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Spam Response Rate Is Low, but Still Worth the Effort

A study in which researchers infiltrated an infamous pharmaceutical spam botnet revealed that, while the response rate to spam is really low, it's still enough to generate millions of dollars per year.

Computer scientists at the University of California at Berkeley and San Diego infiltrated the Storm botnet—a collection of compromised computers running spam software—and modified its command and control system by inserting their

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NEWSLETTER EDITORS

[Jeffrey S. Edelstein](#)

Partner

jedelstein@manatt.com

212.790.4533

[Linda A. Goldstein](#)

Partner

lgoldstein@manatt.com

212.790.4544

OUR PRACTICE

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own links in spam messages to a Web site they created. The Web site would report a sale to the researchers while returning an error code to anyone who attempted a purchase.

Several spam campaigns containing the researchers' code sent 69 million e-mails each. Of the 350 million e-mail recipients, 10,522 visited the researchers' site, but only 28 tried to buy anything. Although a response rate of .0000081 percent is extremely low, the average purchase price was \$100.

Based on an estimate of how much spam Storm sends each day, the researchers figured it could generate revenue of \$7,000 per day or \$3.5 million annually. However, because that amount is less than the cost of sending out that much spam, the researchers surmised that the spammers must also be operating the Web sites, or getting a percentage of the profits. It also suggests that spammers and Storm network operators may operate on tight profit margins, meaning, in turn, that their campaigns are "economically susceptible to new defenses," the researchers said.

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Targeted Ad Service Sued for Privacy Violations

NebuAd Inc., a start-up company that has developed a product permitting Internet service providers to closely track the online surfing habits of their subscribers, is now facing a lawsuit by customers claiming the product violated their privacy rights.

Fifteen plaintiffs have filed a complaint in San Francisco federal court against NebuAd and six ISPs that briefly used its product. They are seeking class action status and more than \$5 million in damages.

NebuAd's product was aimed at allowing ISPs and others to develop ad campaigns targeted to individual users. In a beta trial, NebuAd installed its hardware on ISP data hubs and then reported the results to the ISPs. The ISPs' subscribers were not informed that their Web surfing habits were being tracked by the product.

"Like a vacuum cleaner, everything passing through the pipe of the consumers' internet connection was sucked up, copied and forwarded to the California processing center," stated the lawsuit, which charges NebuAd and the ISPs with violating

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federal and state privacy laws.

After privacy advocates and federal lawmakers voiced concerns about the technology over the summer, the six ISPs named in the lawsuit each told Congress it had dropped NebuAd's technology. The ISPs are Bresnans Communications, Cable One, CenturyTel, Embarq, Wow!, and Knology.

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Court Stops Sale of Keystroke Tracking Software

A federal court in Orlando, Florida, has enjoined the sales of RemoteSpy, software that surreptitiously tracks and records keystrokes on a personal computer, the Federal Trade Commission has announced.

Florida-based CyberSpy Software has sold the RemoteSpy program for more than three years, according to the FTC's complaint, which also names as a defendant CyberSpy CEO Tracer R. Spence (no apparent relation to Spencer Tracy). The FTC acted against the company after the Electronic Privacy Information Center, a Washington, D.C.-based civil liberties advocacy group, filed a complaint in March 2008.

On November 6, the court issued a temporary restraining order banning sales of RemoteSpy and ordering CyberSpy to disconnect any servers recording sensitive personal information for RemoteSpy customers. According to the complaint, CyberSpy violated regulations forbidding the installation of software without user consent and the surreptitious collection of personal data. The FTC is seeking a permanent ban on the sale of RemoteSpy and forfeiture of CyberSpy's revenues.

RemoteSpy is a fairly typical keylogger program. Using the slogan, "Spy on Anyone. From Anywhere," the company advertised the product as undetectable by antivirus software. It gave its customers special instructions on how to e-mail the program to an intended victim, disguising it as a harmless photo file. Features included a "configuration wizard, a user tutorial and step-by-step instructions, including screenshots and examples of how to disguise the appearance of the executable as an innocuous-looking file attachment," the FTC complaint read.

Once installed, RemoteSpy, which retailed for \$89.95, would record all keystrokes, including passwords, and take

snapshots of a person's screen every five minutes. It could also record instant message conversations, as well as Web sites a person visited. The information would be sent every 10 minutes to a CyberSpy server, the complaint read. Purchasers of RemoteSpy could then log in through a Web-based interface to retrieve the details.

According to CyberSpy, once installed, RemoteSpy would not display entries under "Add/Remove Programs" or the Start Menu, and would be invisible to the Task Manager. RemoteSpy would also hide its own install/data aggregation directories and would copy itself from location to location to prevent the end user from permanently deleting it.

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Microsoft Executive Said "Vista Capable" Label Misled Consumers

Microsoft's former co-president Jim Allchin described the company's decision to permit PC makers to label machines as Vista Capable even though they were incapable of running all of Windows Vista's features as "terrible" and "misleading," according to new e-mails revealed recently in a consumer fraud suit against the company.

"I believe we are going to be misleading customers with the Capable program," Allchin wrote in an April 2006 e-mail to a group of Microsoft product executives. PC manufacturers "will say a machine is Capable and customers will believe that it will run all the core Vista features. The fact that [one of Vista's features, its 3-D Aero interface,] won't be there EVER for many of these machines is misleading to customers," wrote Allchin, who retired from Microsoft when Vista was launched in January 2007. He added that he considered the Vista Capable campaign "wrong for customers."

The Vista Capable program was aimed at reassuring customers who bought PCs prior to Vista's debut that they would be able to upgrade to the new operating system once it became available. Other e-mails entered as evidence allegedly demonstrate that Microsoft had earlier lowered the specifications for a Vista Capable PC to satisfy Intel, whose 915 graphics chipset was not capable of running Vista's 3-D Aero interface.

A class action lawsuit charges Microsoft with deceptive marketing practices, alleging that Microsoft purposefully misled customers by marketing computers as Vista Capable

computers even though they lacked the power to fully support all of its features. Consumers Dianne Kelley and Kenneth Hansen first sued Microsoft last March in federal court in Washington state, claiming they were victimized by “bait and switch” sales tactics. Earlier this year, a court granted class action status to the case.

Microsoft has argued that it did not deceive consumers because the Vista Capable campaign distinguished between PCs that could run the basic version of the operating system and those able to run the premium version.

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Chicago Transit Authority Bans Ads for Violent Video Games

The Chicago Transit Authority has permanently banned advertisements for violent video games following the conclusion of a lawsuit over ads for the video game Grand Theft Auto 4.

Before the debut of Grand Theft Auto 4 in April 2008, its developer, Take-Two Interactive Software Inc., and the CTA agreed to an ad campaign for the game to appear throughout the city’s buses and subway system. After the ads were up for a short time, public criticism linking such games to real-world violence persuaded the CTA to take down the ads.

Take-Two then sued the CTA for breaching the parties’ \$300,000 advertising contract. In a settlement, the CTA has agreed to run the ads for six weeks, or through the holiday season.

“The CTA made the earlier decision to remove the ads from the system following some violence in the city,” said CTA spokesperson Noelle Gaffney. “The CTA felt that, based on the circumstances, it was in the best interest of our customers to remove the ads and further review the circumstances.”

However, following the CTA’s concession, its board has now voted to ban outright any advertising for violent games. The board cited a “`demonstrable correlation’ between intensely violent video games and violent or aggressive behavior.”

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