



January 7, 2010



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Thomas C. Morrison, Prominent False Advertising, Lanham Act Litigator Joins Manatt in New York

Thomas C. Morrison has joined the firm as a litigation and trial partner. He is widely known as the one of the “deans” of false advertising litigation. Over his 30-year career, he has tried over 60 cases in state and federal court, and has argued some 35 appeals in federal circuit courts throughout the nation. Mr. Morrison has successfully represented major pharmaceutical and consumer products corporations in Lanham Act, false advertising, and trademark cases, resulting in significant jury verdicts and landmark appellate decisions.

Mr. Morrison closely follows the recent additions of prominent advertising lawyer Terri Seligman, also in Manatt’s New York office, and noted consumer protection lawyer, Anthony DiResta, in the firm’s Washington, D.C. office.

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Manatt Attorneys Take Center Stage at Leading Industry Events

January 7

Dietary Supplement Enforcement 2010: What Pharma and Supplement Makers Must Prepare For

Tune into this audio conference hosted by Thompson Interactive to hear Manatt Partner Ivan Wasserman discuss the rules that govern dietary supplements. Register [here](#) to attend.

January 20

New Advertising and Marketing Guidelines and Priorities: How to Stay Compliant with the FTC

In this upcoming webinar conducted through CLE provider Celesq, Manatt Partner Jeff Edelstein will explain the latest FTC regulations and present best practices on how to comply. For more information, visit [here](#).

January 21

Strategies for Challenging Your Competitor's False Advertising

At the invitation of The American Bar Association's Privacy Advertising Litigation and Corporate Counseling Committees, Manatt Partner Terri Seligman will outline steps an advertiser can take to challenge its competitor's false advertising. Registration information is available [here](#).

January 21-22

6th Annual Film, TV & New Media Law Conference

Los Angeles, CA

Manatt Partners Mark Lee and Jordan Yospe have joined the faculty of CLE International's 6th Annual two-day conference in Los Angeles covering the changing media landscape. Mr. Lee will discuss "Trademark Rights for the Entertainment Lawyer: Use of Trademarks in Creative Works." Mr. Yospe will outline the essentials involved in negotiating and structuring "Brand Integration Deals." For more information, click [here](#).

January 26-27

ACI's 23rd National Advanced Forum on Advertising Law

New York, NY

Linda Goldstein has joined the faculty of presenters participating in this one-of-a-kind industry leading program. Ms. Goldstein's session covers "Resolving Disputes Involving Competitors' Comparative Claims." Register to attend by completing the attached [brochure](#) and receive Manatt's friend-of-the-firm \$300 discount.

February 3

UPCOMING EVENTS

January 7, 2010
Thompson Interactive Audio Conference

Topic: "Dietary Supplement Enforcement 2010: What Pharma and Supplement Makers Must Prepare For"

Speaker: [Ivan Wasserman](#)

[for more information](#)

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January 20, 2010
Webinar

Topic: "New Advertising and Marketing Guidelines and Priorities: How to Stay Compliant with the FTC"

Speaker: [Jeff Edelstein](#)

[for more information](#)

...

January 21, 2010
American Bar Association Teleconference

Topic: "Strategies for Challenging Competitor's False Advertising"

Speaker: [Terri Seligman](#)

[for more information](#)

...

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

Topic: "Brand Integration Deals"

Speaker: [Jordan Yospe](#)

Millennium Biltmore Hotel
Los Angeles, CA
[for more information](#)

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

Word of Mouth Marketing Association's (WOMMA) 'Wine Wednesday'

Manatt Los Angeles Office

For its second Wine Wednesday of the new year, WOMMA brings its unique educational and networking event to the offices of Manatt in Los Angeles. This is a special wine tasting event you do not want to miss. Get to know WOMMA, its members, and meet Manatt Partner and WOMMA General Counsel, Tony DiResta. For more information click [here](#).

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ISP Wide Open West Charged With Installing Spyware

A privacy lawsuit seeking class action status has been refiled against the Internet service provider Wide Open West (WOW) over its work with NebuAd, a behavioral targeting company that has since shut down.

In a complaint filed in December in a federal district court in Illinois, plaintiff Dan Valentine charges WOW with violating a federal wiretapping law and various other statutes by permitting NebuAd to monitor the online activities of WOW customers in order to send them targeted ads.

The plaintiffs' firm that filed the suit had previously made the same allegations against WOW and five other ISPs in a complaint that a federal court in California dismissed in October for jurisdictional reasons.

The Illinois lawsuit charges WOW with letting NebuAd install "spyware devices" on its network, stating:

The devices funneled all users' Internet communications – inbound and outbound, in their entirety – to a third-party Internet advertisement-serving company, NebuAd. Offering its users little warning and less choice, WOW gave them only tardy and misleading notices and an ineffective opt-out opportunity.

The complaint states further that the companies then used the data to send users targeted ads:

NebuAd and WOW used the intercepted communications to monitor and profile individual users, inject advertisements into the Web pages users visited, transmit code that caused undeletable tracking cookies to be installed on users' computers, and forge the "return addresses" of user communications so their tampering would escape the detection of users' privacy and security controls.

NebuAd, which is also defending a class action lawsuit, shut down last year in the face of a congressional inquiry.

Topic: "Trademark Rights for the Entertainment Lawyer: Use of Trademarks in Creative Works"

Speaker: [Mark Lee](#)

Millennium Biltmore Hotel
Los Angeles, CA
[for more information](#)

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

Speaker: [Linda Goldstein](#)

New York Marriott Downtown
New York, NY
[for more information](#)

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February 3, 2010
WOMMA Wine Wednesday

Speaker: [Anthony DiResta](#)

Office of Manatt, Phelps &
Phillips
Los Angeles, CA

[for more information](#)

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February 12, 2010
New York City Bar

Topic: "Understanding and
Complying with Sweepstakes,
Promotions and Marketing
Law"

Speaker: [Terri Seligman](#)

New York, NY

[for more information](#)

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Consumer advocates claim that NebuAd's ISP-based program represented a bigger threat to user privacy than previous incarnations of behavioral targeting because ISPs can access the entire Web history of their subscribers, including searches and activity at noncommercial sites. Before NebuAd introduced its business model, behavioral targeting companies tracked users only at a limited number of sites.

The latest lawsuit alleges that WOW misled Congress last year by denying that NebuAd collected personally identifiable information, stating:

Regardless of whether NebuAd eventually discarded the personally identified content in users' "raw data," it identified individual users and maintained behavioral profiles on them. The unique and persistent identifiers NebuAd used to track users and link their online behavior to its profiles constituted personally identifying information, just as a telephone number constitutes personally identifying information used to contact an individual.

The new lawsuit also charges that, for at least one month, WOW deployed NebuAd's technology without providing users with any notice.

NebuAd maintains that it did not infringe on user privacy. The company says that all data it collected was anonymous because it did not know user names or phone numbers or retain copies of their IP addresses. NebuAd also contends that it did not collect sensitive data, and that users could opt out of the platform, although in the beta tests it conducted, many of the users allegedly were not informed that they were being tracked.

Why it matters: NebuAd's activities are viewed as threatening to user privacy by the plaintiffs' lawyers because of the extent of the alleged monitoring and the degree of access an ISP has to users' personal information. There is still a real question as to how NebuAd's and WOW's beta tests caused monetary damage to users, since all they did was send users targeted ads. However, the plaintiffs' lawyers clearly think that there is money to be made here, since cases that actually get certified as a class almost invariably settle.

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Food Industry Faulted for Self-Regulatory Failings

A new study commissioned by a consumer advocacy group charges the food industry with failing to implement and adhere to meaningful self-regulation of advertising and marketing campaigns aimed at children.

Children Now, a California-based children's advocacy group, commissioned the study conducted by Dale Kunkel, a professor of communications at the University of Arizona. The study can be accessed on the Children Now Web site.

The study – "The Impact of Industry Self-Regulation on the Nutritional Quality of Foods

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Advertised on Television to Children" – analyzes the impact of the 2007 Children's Food and Beverage Advertising Initiative. Children Now claims that the study is the first independent, comprehensive evaluation of industry self-regulation on the advertising of food to children. Kunkel also presented his findings at a Federal Trade Commission hearing on December 15.

The industry initiative at issue was launched three years ago by the Council of Better Business Bureaus as a voluntary, self-regulatory program designed to shift the mix of advertising messages targeting children. The goal is to significantly improve the nutritional quality of food and drink advertised to children. More than a dozen of the nation's largest food and beverage companies, representing about two-thirds of that industry's advertising budget, signed on.

Kunkel's study concludes that the industry has failed to meet the principal recommendations from a 2006 Institute of Medicine report to shift marketing away from foods low in nutritional quality and to emphasize advertising strategies promoting healthier food, beverage, and meal options.

The study's key finding is that, despite industry self-regulation, nearly three out of four (72.5 percent) of the foods advertised on television to children are for products in the poorest nutritional category. Advertising for truly healthy foods, such as vegetables and fruits, is virtually invisible, accounting for only 1 percent of all food ads marketed to children.

Kunkel said that in 2005, before the initiative began, 84 percent of ads were for products with the poorest nutrition, based on criteria from the Department of Health and Human Services Go-Slow-Whoa food rating system. "Four years later, under self-regulation, they have only moved the bar to 72.5 percent," Kunkel said. "We cannot win the battle against childhood obesity as long as we continue to allow the industry to bombard children with ads for foods that they really shouldn't eat very often."

The study also criticizes the use of licensed characters in kid food ads. Contrary to food industry claims that licensed characters are only used to promote healthy foods to children, the study found that nearly half (49 percent) of all food ads with licensed characters promote foods in the poorest nutritional category.

Why it matters: Kunkel's report argues that, because of the failure of industry self-regulation, Congress should pass legislation regulating foods ads directed to children, a measure also advocated by the Institute of Medicine. However, Kunkel glosses over the fact that there is little evidence that actually demonstrates a causal link between food ads directed to children and childhood obesity. At the end of the day, though, this lack of evidence may not matter, because the industry is an easy target for lawmakers looking to curry favor with constituents concerned about ever-increasing levels of obesity among our nation's youth.

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FTC: Violent Content Still Marketed to Children

A new report by the Federal Trade Commission found that the video game industry is more successfully shielding young children from violent and other inappropriate content than the music and movie businesses, although all three industries could improve self-regulation, especially when it comes to new technologies, such as mobile games and viral online marketing.

“Marketing Violent Entertainment to Children: A Sixth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries” analyzed information from sources, including marketing documents submitted by industry members, an undercover “mystery” shopper survey, consumer surveys conducted in shopping malls and by telephone, “surfs” of industry Web sites, and data acquired from proprietary ad-monitoring services. It is the FTC's seventh such report to Congress since 2000, and each found that the movie and game industries made progress in restricting the marketing to children of products intended for grown-ups. The music industry, however, “had not significantly changed its marketing practices since the Commission's initial report,” the FTC said.

Among its findings, the report found that movie studios intentionally market PG-13 movies to kids under 13. Unrated DVDs pose another challenge, because stores often sell such versions of R- or PG-13-rated films. Nearly six out of ten parents surveyed didn't know that unrated movies can contain additional adult or explicit content that wasn't in the original cut.

The report did find that fewer children are able to skirt age restrictions than was the case just a few years ago. To see if retailers and movie theaters are enforcing age limits, the Commission sent 13- to 16-year-old “mystery shoppers” to see movies and buy DVDs, video games, or music not intended for their age group. On average, 20 percent of them were able to buy M-rated video games when unaccompanied by a parent, down from 42 percent in 2006. In contrast, 72 percent of the kids were able to buy music CDs with explicit content warnings, compared with 76 percent in 2006. More than half of them were sold R-rated movie DVDs, down from 71 percent three years ago. Movie theaters are also checking IDs more: only 28 percent of the teens could buy tickets for R-rated movies, down from 39 percent in 2006.

The Commission made a number of recommendations for strengthening the entertainment industry's self-regulatory programs and better restricting the marketing of violent entertainment to children:

The movie and music industries should develop specific and objective criteria to restrict the marketing of violent movies and music to children. Specifically, marketing of PG-13 movies to young children directly and through tie-ins with foods, toys, and other licensed products should be restricted. All three industries should tighten

restrictions on online and viral marketing.

The movie industry should increase enforcement against online posting of “red tag” trailers without adequate age-based access restrictions, and should ensure that the content of “appropriate audience” trailers is consistent with the feature films they will precede.

All three industries should improve their display of rating information in advertising and packaging. The movie industry should place the rating and rating reasons on the front of DVD cases and disclose rating information prominently in all advertising venues. The music industry should display the Parental Advisory Label more prominently in advertising, particularly in television and online venues, and it should provide information about the specific type of explicit content. The electronic game industry should include content descriptors with the rating on the front panel of game packaging and continue to provide more detailed rating summaries for parents online.

The movie industry should better inform parents about additional adult content in unrated DVDs and give parents a way to evaluate unrated versions. The industry should consider re-rating DVD releases or, at a minimum, expanding new disclosure rules for unrated DVDs.

Gaps in enforcement of age-based sales restrictions for movies, music, and electronic games should be closed, and enforcement challenges created by the use of gift cards for online purchases should be addressed.

A link to the full report is available [here](#).

Why it matters: Although the FTC thinks there is still room for improvement, its findings demonstrate that the entertainment industry has made notable progress in keeping violent content out of the hands of young children and alerting parents to inappropriate content. In some ways it is also not surprising that the video game industry has made the most progress in this area, because it has been the primary target of children’s advocacy groups, state lawmakers, and other governmental entities concerned about this issue.

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Google Sues Over Work-at-Home Scams

Google has charged a company called Pacific WebWorks with illegally using its name to scam people into paying for supposed work-at-home kits advertised online and in e-mails.

The complaint filed in federal court in Salt Lake City alleges trademark infringement and

dilution, unfair competition, federal cyberpiracy, and violation of consumer sales practices. A Google spokesperson said that the action against Pacific WebWorks represents only the “tip of the iceberg.” The lawsuit can be amended to add the names of additional defendants as they are uncovered.

The complaint charges the defendants with deceiving the public “by misusing the famous Google brand and GOOGLE marks to sell to consumers work-at-home kits purporting to train and enable consumers to earn money using Google services.” People are targeted via either online ads, pop-up ads, or promotional e-mails that promise information on how to make money by working at home. The ads typically display the Google brand prominently and include a link to a site with what looks like legitimate news articles, blog postings, or social-networking posts and sites featuring testimonials from people claiming to have made thousands of dollars per month from the program.

The complaint states:

At the heart of the scheme is a false representation that consumers can participate in a Google-sponsored program that will allow them to make hundreds of dollars a day working at home performing a simple task that requires no particular experience or qualifications. Although the program is often advertised as “free,” in fact consumers must pay an “instant access” fee for online access to a members-only portal, or a “shipping and handling fee” for a DVD, that, they are told, will explain how to make money through the program. Consumers must pay the fee by submitting their credit or debit card information through a Web site.

After making this initial payment, many consumers receive nothing. Those who do get something often receive DVDs containing viruses, with no information of value, or they receive a DVD or access to an online portal containing information available free of charge elsewhere on the Internet, including from Google’s own free online help center. Consumers are not enrolled in any program that provides opportunities for generating income. Instead, they are subjected to continuing monthly fees that often exceed \$50 and range as high as \$79.90. After discovering that they have been duped, consumers typically find it difficult, if not impossible, to cancel the continuing charges, or get a refund of their money.

The defendants are part of a network that reuses Web sites and shares tools to perpetuate the scams with little effort, the lawsuit alleges. For instance, the same templates are used to generate fake testimonials, blogs, and news stories, often ones that are customized to the location of consumers, the lawsuit alleges.

Why it matters: The alleged scam is a classic Internet rip-off that centers around tricking people into revealing credit card information so the scammers can charge the card, often for months. It’s a real problem for Google, since the scam is potentially hurting its brand by luring people in with the name. The scam is also playing on some powerful methods of persuasion by creating fake news articles and blogs that purport to profile someone who has made a lot of money through the fake work-at-home business.

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