



November 16, 2009



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Chamber of Commerce Sues Parody Site

The U.S. Chamber of Commerce has sued Yes Men, a group of so-called culture jamming activists who practice what they call "identity correction" by pretending to be powerful people and spokespersons for prominent organizations.

The lawsuit filed late last month follows on the heels of a fake press conference held by Yes Men announcing that the Chamber of Commerce had changed its stance on global warming legislation. The Yes Men also posted a phony press release on a parody site that closely resembles the media center page on the Chamber of Commerce's Web site.

The prank fooled Reuters and several other news outlets, which reported that the Chamber of Commerce had changed its position on climate change legislation. In fact, the Chamber opposed the cap-and-trade climate bill passed by the House of Representatives earlier in the year and has objected to plans by the Environmental Protection Agency to more closely regulate greenhouse gases. The Chamber's stance has led to some recent membership defections by major companies, including Nike, Exelon Corp., and PNM Resources.

The Chamber alleges in its lawsuit that the stunt was part of a publicity campaign for the film *The Yes Men Fix The World*, released nationwide last month.

The complaint, which was filed in federal district court for the District of Columbia, requests that the court order the Yes Men to shut down the copycat Web site and ban them



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from impersonating Chamber of Commerce representatives.

The Chamber contends that the fake site too closely imitates the real site, going so far as to contain links to the genuine site. "Rather than create a parody site that resembles the Chamber's site, the fraudulent pages copy embedded software elements from the Chamber's Web site," the business organization alleges. "This ensures that if a visitor 'clicks' any links on the fraudulent pages they are taken to the authentic Chamber Web site." Therefore, the Chamber alleges, members of the public "would have no idea that they were visiting a fraudulent site, rather than the Chamber's legitimate site."

The Chamber also added a banner to its own site that warns visitors from the parody site that they had come from a "hoax site."

The business group has also demanded that Hurricane Electric Internet Services delete the site, arguing that it infringed the Chamber's copyright. Hurricane Electric is one of several Internet access providers used by May First/People Link, a group that provides Internet services to around 400 members, including Yes Men.

Hurricane Electric acquiesced, taking down the Yes Men site. The site went back online the next day, after May First/People Link was able to arrange for another ISP to host it.

Why it matters: Although the prank apparently caused some confusion in the media, the Chamber faces several legal and factual hurdles in its lawsuit. Trademark infringement requires use in commerce, and it's not clear whether the Yes Men's use of the business group's logo for a parody is a use in commerce. In addition, the Chamber must show likelihood of consumer confusion, which in this case would appear to mean confusion by the Chamber's members, or potential members. Even if the Chamber of Commerce can establish likelihood of confusion, the court would still have to consider whether the Yes Men have a First Amendment right to parody the association.

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Agency Sues Over Brand Integration Idea

A small ad agency is charging a media agency owned by the WPP Group with violating trade secrets over a brand integration campaign.

In the complaint, Denizen contends that Mindshare stole from it a concept to integrate a brand of Vaseline into a Lifetime miniseries titled *Maneater*.

Denizen bases its claim on allegations that the two companies entered into an agreement in 2004 prohibiting Mindshare from publishing, disclosing, communicating, or divulging information shared on Denizen's proprietary method of product integration.

UPCOMING EVENTS

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](#)

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November 24, 2009
2:30 - 4:00 pm (EST)

Topic: "Damages in Lanham
Act False Advertising Cases:
Theory and Practice"

Moderator: [Chris Cole](#)

The ABA Section of Antitrust
Law Private Advertising
Litigation Committee and the
Economics Trial Practice
Committee Teleconference

[for more information](#)

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December 3, 2009
Fast Forward 2011: PMA's
Second Annual Digital Summit

Topic: "What the Recent FTC
Guidelines Mean for
Advertising and Marketing"

Speakers: [Linda Goldstein](#),
Manatt Phelps & Phillips and
Randall Rothenberg,
President, Interactive
Advertising Bureau

Google Headquarters
New York, NY

[for more information](#)

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December 7, 2009
ERA Spotlight Session

Topic: "Endorsements and
Testimonials"

Speakers: [Linda Goldstein](#) of
Manatt Phelps & Phillips, Rich
Cleland of the FTC and Julie
Coons of the Electronic

"During the meeting, Denizen disclosed to Mindshare certain techniques . . . that could be used to implement program integrated advertisements, such as, but without limitation, ways to shoot the advertisements, strategies for obtaining Screen Actors Guild contracts, methods to gain access or rights to television program content, and how and when an advertising agency could work with a production house or network," the complaint reads.

Denizen claims Mindshare misappropriated trade secrets, breached a contract, and committed misrepresentation when the defendant brokered an agreement between client Unilever and Lifetime Networks for the integration of Vaseline Aloe Fresh into *Maneater*.

In fact, Denizen claims, it "created the concept of 'program integrated advertisement' in order to entice viewers to pay attention to advertisements in various media, including, but not limited to, television, radio, and the Internet." As proof, the company points to a patent it registered in 2005.

Why it matters: At first glance, Denizen's claim to proprietary rights over a concept that has been around for decades seems far-fetched. However, the lawsuit may turn on as yet undisclosed details regarding how closely the complained-of brand integration campaign tracks the alleged strategies outlined by Denizen in its meeting with Mindshare. Issues of trade secrets and contract may also play a role in the outcome of this dispute.

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Internet Airing Helps Settle Monster Lawsuit

A small Vermont brewery that makes a beer called Vermonster and the maker of Monster energy drinks have settled a trademark dispute after some stores pulled beverages made by the larger company off the shelves.

Hansen Beverage Co., which makes Monster energy drinks, sent a cease-and-desist letter last month to Vermonster maker Rock Art, ordering the brewer to stop using the name.

After receiving the cease-and-desist letter, the husband-and-wife team who own the brewery went on the offensive, posting a video on YouTube, alerting bloggers, and putting up posts on Twitter describing the dispute as an example of a "billion dollar" corporation trying to crush a small business owner. Word of the dispute quickly spread across the Internet, and stores in Vermont, New York, Maine, and Connecticut took the energy drink off their shelves in protest. Even U.S. Senator Bernie Sanders, (I-Vt.), stepped in, urging Hansen to back off.

Shortly thereafter, the two sides settled the dispute in an agreement that permits Rock Art to continue to market the brew, an American barley wine, anywhere in the country. In return, Rock Art agreed not to sell energy drinks, which it claims it never planned to do anyway.

Retailing Association as moderator

Digital Sandbox Networking Event Center
New York, NY
[for more information](#)

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December 8, 2009
BNA Audioconference

Topic: "The FTC's New Endorsement and Testimonial Guides: As of December 1, It is No Longer Business as Usual for Brands and Bloggers"

Speakers: [Anthony DiResta](#) of Manatt, Phelps & Phillips, Jim Dudukovich, Coca-Cola North America, and Paul Rand, Zocalo Group

[For more information](#)

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December 14, 2009
ERA Spotlight Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt, Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator

Hilton Long Beach & Executive Meeting Center
Long Beach, CA
[for more information](#)

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December 17, 2009
ERA Spotlight Webinar Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing

A number of years ago, Monster energy drinks was itself the subject of a complaint by Monster Cable Products Inc., which is somewhat notorious for the dozens of lawsuits and trademark infringement claims it has filed against companies for using “monster” in names, products, or services.

Why it matters: Fighting over the name in court could have been an expensive proposition for Rock Art. The publicity they were able to generate for their David vs. Goliath story may have helped persuade Monster energy drinks to settle. The incident is an excellent example of the power of the social media network, even in what is ostensibly a legal dispute.

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Iconix Settles COPPA Complaint for \$250,000

Iconix Brand Group has agreed to pay \$250,000 to settle a Federal Trade Commission complaint that the company violated a federal law banning collection of data about children without their parents' consent.

In its complaint, the FTC alleged that since 2006, Iconix collected personal information from children on sites for youthful clothing and accessory brands like Candies, Mudd, and Bongo. Iconix gathered registration data, including birthdates, of at least 1,000 children aged 12 and under and then sent them newsletters and enrolled them in sweepstakes, the FTC alleged. The agency also claimed that Iconix permitted users under 13 to upload their photos and post personal information about themselves.

The Commission said these alleged practices violated the Children's Online Privacy Protection Act, or COPPA, which prohibits Web sites from collecting or disseminating personal data about children under 13 without their parents' permission.

In addition to the fine, Iconix agreed to destroy data collected in violation of federal law and to comply with COPPA in the future. It neither admitted nor denied wrongdoing as part of the settlement. In a statement, the company said that it "believes that any non-compliance was inadvertent and did not result in any harm to children or other users of its sites," but agreed to the settlement to avoid a protracted dispute.

The case is the 14th time the FTC has brought an action under COPPA. It has collected a total of \$3 million in fines in the nine years the law has been in effect.

Why it matters: A senior staff attorney with the Commission attributed the alleged violations more to inattentiveness than a deliberate attempt to market to children. The enforcement action underscores the importance of ensuring that functionalities actually comport with privacy policies, and testing those functionalities for compliance.

Association as moderator

[for more information](#)

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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

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

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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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](#)

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Ad Shop Goes After Fake Malware Ads

Starcom MediaVest Group is going after a group that impersonated its Spark Communications unit to buy a fake banner ad on Gawker.com.

Starcom alerted federal authorities, who are now conducting a criminal investigation of the fraudulent online media buy. The buy was for a banner ad for Starcom client Suzuki that actually launched a malware attack on visitors to Gawker.com. Malware is short for malicious software, or software designed to infiltrate or damage a computer without the owner's informed consent.

The attack is the latest in a series of online insertion orders being placed by online criminals on high-traffic Web sites. However, it is thought to be the first to successfully impersonate a major advertising agency. The attack also came a few weeks after Starcom and other units of Publicis Groupe sent letters to online publishers warning them to be on their guard for such attacks, and to confirm orders directly with an agency executive before placing any ads.

"The Gawker situation is currently under investigation. We will continue to work closely with our vendors to be diligent and absolute about insertion orders and ad placement," said a spokeswoman from VivaKi, the unit that oversees Publicis' digital and media buying operations.

Publicis executives said they do not know the identity of the perpetrator. However, the person apparently showed a sophisticated knowledge of the agency's media-buying process, and successfully navigated through several checks and balances undertaken by the Gawker sales team before they processed the order. The sophistication is apparent in an email exchange that the Gawker sales team sent to industry blogger Silicon Valley Insider to draw attention to the incident.

Among other things, the impersonator copied Spark Communications' email address, and acted much like an actual online media buyer. For instance, the person tried to negotiate the price of the buy with Gawker's sales team – something spammers don't do. The buyer also switched from an ad server the Gawker sales team was not familiar with to AdJuggler, a server the Gawker team routinely conducts business with.

Although Publicis executives said they had no prior knowledge that such a buy would actually occur, they said the recent acceleration of fake insertion orders placed with major publishers prompted them to put publishers on notice. They said Gawker failed to take the extra step of confirming the order with a known Publicis executive as suggested in the letter.

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Why it matters: The level of sophistication exhibited by the malware perpetrator in this incident shows how fast the problem of fraudulent online insertion orders is evolving. After *The New York Times'* Web site accepted a fake ad placed by a malware purveyor posing as broadband telecommunications provider Vonage, it changed its protocol to accept ads only from servers listed as recognized providers to the paper's Web site. Legitimate businesses must do what they can to avoid or diminish the damage such online criminals can cause, by constantly updating technology, policies, and practices, and by monitoring activity and alerting law enforcement.

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ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)

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