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February 10, 2009

ADVERTISING LAW @MANATT

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

IN THIS ISSUE

Manatt and BNA Launch Audioconference Series on Consumer Product Safety Improvement Act — Part of BNA's "Legal and Business EDge" Coverage of Current Topics

Kerrie Campbell, Chair of Manatt's Consumer Product Safety Group, has joined forces with BNA to develop a four-part audioconference series focusing on complying with the Consumer Product Safety Improvement Act (CPSIA).

The first installment of the audioconference series, to be held on February 17, starts with the regulators and asks a question many are asking: "*What has the Commission done so far and what does it mean?*" In a conveniently organized 90-minute question-and-answer format moderated by Ms. Campbell, attendees who tune in will find out.

Panelists Cheryl Falvey, CPSC General Counsel, and Joseph Martyak, Chief of Staff to CPSC Acting Chairman Nancy Nord and Acting Director of Public Affairs, will respond to questions concerning the interpretation and implementation of the

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UPCOMING EVENTS

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Promotion Marketing Association: Basics Seminar

Topic:
"Basics of Promotion and Integrated Marketing"

Speaker: Michael Barkow

USA Weekend Magazine
535 Madison Avenue
New York, NY
for more information

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March 5-6, 2009
PLI's Information Technology Law

CPSIA up to February 10, 2009, the effective date for new lead limits, the phthalates ban, and the mandatory toy safety standard (ASTM-F963).

Ms. Campbell will pose these and other questions:

- What do the recent Commission actions and rulemakings mean?
- Is general certification or third-party certification required, who has to certify, and do retailers need certificates?
- What does the February 10 effective date mean?
- What authority does the CPSIA provide the Commission to address apparently unintended consequences?

Attendees will have the opportunity to ask questions.

For additional program and registration information, please visit BNA's Legal and Business EDge, available at http://legaledge.bna.com/Pagemanager.aspx?pageId=8154.

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Supreme Court Brings End to COPA Controversy

On January 22 the U.S. Supreme Court declined to hear the federal government's final appeal over the Child Online Protection Act. By letting stand a lower court ruling striking down the law, the Justices appear to have finally brought to an end a decade-long battle between the government and civil liberties advocates who challenged the law.

Congress passed COPA in 1998, with the intention of protecting children from sexually explicit content by making it illegal to offer commercial content online considered "harmful to minors" unless providers implemented an age-verification system. The law was immediately challenged by civil libertarians and never enforced.

In a lawsuit brought by the ACLU, the Electronic Frontier Foundation, and others, the Third Circuit Court of Appeals issued a temporary injunction against COPA in 2003, which the Supreme Court upheld in 2004.

In 2007 a federal district court issued a permanent injunction against COPA on the grounds that it was unconstitutional for being "impermissibly vague" and "overbroad." The Third Circuit upheld the lower court's decision last year, and last

Institute 2009

Topic:
"Mobile Advertising and Web 2.0"

Speaker: Linda Goldstein

PLI New York Center
New York, NY
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March 11-13, 2009
The IAPP Privacy Summit 2009

Topic:
"Sunday in the Park With FACTA: Navigating the Post-FACTA FCRA Regulatory Landscape"

Speaker: Helen Foster

Washington Marriott Wardman Park
Washington, DC
for more information

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March 16-18, 2009
PLI Practising Law Institute

Topic:
"Television, Video & User-Generated Content"

Co-Chair & Moderator: Kenneth M. Kaufman

New York, NY
for more information

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April 2-3, 2009
PLI's Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems

week the Supreme Court declined to hear the federal government's latest appeal.

The ACLU argued that parents, not the government, should be responsible for protecting their children from inappropriate content by monitoring online activity and using filtering software.

New platforms and technologies – including peer-to-peer networks, YouTube, blogs, and social networking sites – have rendered the battle over COPA somewhat irrelevant, since Internet content now passes largely from user to user, rather than from traditional publishers to a passive audience.

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Payment Processor Sued Over Massive Data Breach

Credit card payment processor Heartland Payment Systems has been sued over a data breach disclosed by the company on January 20.

The complaint comes as no surprise, since such lawsuits almost invariably follow in the wake of a disclosure of a big data breach. The complaint filed on January 27 in federal court in New Jersey charges Heartland with failing to protect consumer data adequately or provide timely notice to consumers about the breach.

Heartland said in a statement that although the breach occurred last year, it had only discovered it in the week prior to the announcement, and had immediately notified law enforcement and credit card companies. Heartland CFO Robert Baldwin Jr. said that in late October, after being alerted to suspicious activity surrounding processed credit card transactions, Heartland hired forensic auditors who discovered malicious software hacking into the company's network.

The company has declined to pinpoint how many consumers or accounts were affected, although it handles 100 million transactions per month for more than 250,000 merchants, creating the potential for one of the biggest data security breaches ever disclosed.

The lawsuit seeks damages and injunctive relief for the "inexplicable delay, questionable timing, and inaccuracies concerning the disclosures" of the breach. The suit, which seeks class-action status, also charges Heartland with

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negligence for taking more than two months to ascertain the existence and scope of the breach and failing to name the affected merchants.

In its statement, Heartland said it was launching an end-to-end encryption system to protect data stored in databases and transferred around its network.

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New York Times Co. Settles Case Over "Scraped" News Content

The New York Times Co. has settled a widely watched lawsuit filed by GateHouse Media Inc., a community newspaper company that operates a number of local news Web sites, over the practice by *The Boston Globe's* Web site, Boston.com, of posting headlines and short excerpts of GateHouse articles with links to the full articles. The New York Times Co. also agreed to pull headlines and lead sentences from GateHouse articles previously posted on Boston.com.

Under the settlement announced last week, GateHouse will block Boston.com from automated "scraping" of GateHouse content, and Boston.com has agreed to abide by the prohibition.

GateHouse runs 125 local Massachusetts newspapers. In a complaint filed on December 22, it charged the New York Times Co., which owns the *Globe* and Boston.com, with copyright infringement. GateHouse complained that it was losing ad revenue because the links on Boston.com took readers to the article itself, instead of the front page of the GateHouse site. Although ads appeared on the pages with the linked articles, readers who clicked on the links missed the ads on the front page.

The settlement reflects the fact that GateHouse has figured out how to block Boston.com's software from retrieving stories for conversion to links from GateHouse's sites, something it had not been able to do previously.

A Boston.com spokesman said it would continue to use headlines and excerpts from non-GateHouse stories it links to, and the settlement leaves unresolved the issue of whether news Web sites can legally post headlines and lead sentences for articles linked to other sites.

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Chihuahua Costs Taco Bell $42 Million in Damages

The Ninth Circuit Court of Appeals has ruled that Taco Bell is liable for $42 million in breach-of-contract damages to two Michigan admen who created the Chihuahua idea that served as the foundation for the fast-food chain's hit $500 million ad campaign in the 1990s.

The television spots starring the talking dog as a beret-wearing revolutionary or sombrero-sporting bandit were a huge success. "Yo quiero Taco Bell" became part of the pop-culture lexicon, along with "Drop the chalupa!" and "¡Viva Gorditas!"

In 1998, Joseph Shields and Thomas Rinks, owners of the Wrench ad agency, sued Taco Bell for breach of contract. They claimed they had been in talks with Taco Bell ad agents to rework their "psycho Chihuahua" cartoon for TV spots when Taco Bell took the idea to ad shop TBWA\Chiat\Day.

Five years later a federal court in Michigan ordered Taco Bell to pay Shields and Rinks $30 million in damages, plus close to $12 million in interest. Taco Bell then sued TBWA in California, claiming that the ad agency was liable for the disputed content. The Ninth Circuit ruled that TBWA is not liable.

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China Promises Better IP Protection After WTO Rebuke

China has vowed to work with other nations to reinforce its protection of intellectual property rights, a day after the World Trade Organization found "a number of deficiencies" in China's enforcement of copyright and trademarks.

On January 26 Washington proclaimed victory in the groundbreaking case. U.S. entertainment and software groups claim piracy in China costs them over $3.7 billion a year in lost revenue.

In a statement the next day, Chinese Ministry of Commerce spokesman Yao Jian expressed regret that the WTO panel had not found in China's favor in areas such as copyright law. He maintained that China had made great progress in fighting piracy, and singled out one finding in China's favor: a rejection of the U.S.'s claim that copyright pirates had no fear of criminal prosecution because the Chinese government's

threshold for bringing a case was too high.

Yao also promised that China would work with the international community to resolve the issue. "As we strengthen our work on domestic intellectual property rights, we will continue to promote international exchanges and cooperation, in order to encourage the healthy development of trade relations," he said.

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Time-Share Firm Fined $900,000 for Telemarketing Calls

Westgate Resorts, one of the country's biggest time-share companies, will pay $900,000 to settle charges that it placed thousands of telemarketing calls to phone numbers listed on the national "Do Not Call" registry, the Federal Trade Commission announced last week.

The agency also announced that another time-share company, Accumen Management Services Inc., and its subsidiary, All in One Vacation Club, LLC, will pay $275,000 to settle similar charges. According to the FTC, Accumen placed telemarketing calls to consumers who had filled out entry forms for a sweepstakes to win vacation packages, many of whom were on the Do Not Call registry and did not agree to receive the pitches.

The Commission said Westgate purchased phone lists from an online lead generator that gathered contact information through offers on its Brandarama.com Web site. The two other companies named in the Westgate complaint are Central Florida Investments Inc. and CFI Sales and Marketing, LLC, which both did telemarketing for Westgate. The agency said it received several thousand complaints from consumers.

To date, the FTC has filed 40 Do Not Call cases against companies since the registry was introduced in June 2003. There are currently more than 167 million phone numbers on the Do Not Call list.

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