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August 29, 2008

ADVERTISING LAW

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

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Wendy's Gets OK to Say "Always Fresh, Never Frozen"

Fast-food chain Wendy's got a boost mid-month when the National Advertising Division of the Council of Better Business Bureaus gave the go-ahead to its "Always fresh, never frozen" ad campaign.

Burger King had complained to the ad industry watchdog that Wendy's did not have sufficient proof to support its claim that it uses fresh beef patties. Burger King also argued that its rival lacked adequate documentation to back up the use of the word "always," which implies that consumers are getting a fresh beef patty every time they go to Wendy's.

NAD rejected Burger King's contentions, finding that Wendy's had enough evidence to support its claim that its beef patties are fresh. It also ruled that the use of the word "always" was appropriate in the context of its advertising.

Wendy's launched the campaign in January 2007 in print ads and TV and Internet spots. The TV commercials focused on the quality of Wendy's fresh ground beef. One spot says: "If hamburgers were meant to be frozen, wouldn't cows come from Antarctica? Wendy's hamburgers are made with fresh, never frozen beef. Who else can say that? It's better than fast food. It's Wendy's."

UPCOMING EVENTS

October 21, 2008
ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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October 22, 2008
D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

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November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

According to Wendy's, ads airing in Alaska and Hawaii, where Wendy's restaurants use frozen beef patties, were taken off the air a month after they launched and prior to Burger King's initial filing. Wendy's said it also discovered three cases in which ads were "mistakenly overbroad" in using the "always fresh, never frozen" tagline, but contended that in each of these instances, the ads were created by local franchises, which are not covered by the NAD's national jurisdiction.

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Some Firms Admit to Tracking Web Surfing Without Consent

Several Internet and broadband companies admit that they use targeted-advertising technology to track Web-surfing behavior without explicitly informing users.

The disclosures were made in letters to the House Energy and Commerce Committee, which released them to the public on August 11. The letters came in response to a bipartisan Congressional inquiry into how online companies gather data to target customers.

Some lawmakers said the revelations highlight the need for an overarching Internet privacy law. "Increasingly, there are no limits technologically as to what a company can do in terms of collecting information . . . and then selling it as a commodity to other providers," said committee member Edward J. Markey (D-Massachusetts). "Our responsibility is to make sure that we create a law that, regardless of the technology, includes a set of legal guarantees that consumers have with respect to their information."

Markey said he plans to introduce an online privacy Bill of Rights next year that would prohibit companies from tracking the online behavior of users and collecting and sharing personal data without users' explicit consent. He added that any legislation should require explicitly notifying consumers of the type of information being gathered, any intent to use it for a purpose other than advertising, and a right to opt out of its collection or use.

In its letter to committee Chairman John Dingell (D-Michigan), Markey, Representative Cliff Stearns (R-Florida), and Representative Joe L. Barton (R-Texas), Google Inc. said it had launched a "DoubleClick ad-serving cookie," a computer code that allows Web-surf tracking. In the letter, Google said that users could opt out of a single cookie for both

Sweepstakes, Games & Contests"

[Linda Goldstein](#)

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

[Kerrie L. Campbell](#)

Marriott Downtown Magnificent Mile
Chicago, IL

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December 4-5, 2008 Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

[Linda Goldstein](#)

Topic:

"The Value of Fame: Understanding the Right of Publicity"

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

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DoubleClick and the Google content network. The company also said that it was not yet focusing on behavioral advertising, in which ads are targeted according to data gathered by tracking Web-surfing behavior.

So far, the committee had posted letters from over 30 companies on its Web site [here](#).

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EBay Wins Fake L'Oreal Cosmetics Suit

A Belgian court has thrown out a claim by French cosmetics company L'Oreal that eBay did not do enough to stop the sale of counterfeit cosmetics on its site.

Last year, L'Oreal sued eBay in five European countries over counterfeit sales on the site. The Belgian case is the first in which there has been a decision. L'Oreal said in a statement that it was "extremely surprised" by the ruling and plans to file an appeal. "The court wrongly minimized eBay's role in the commercialization of products," L'Oreal said.

The decision is the second to find in eBay's favor in a case over the sale of fakes by vendors using the Internet auction site. In July, a Manhattan federal judge ruled that eBay was not liable under U.S. trademark law for the sale of counterfeit Tiffany-branded jewelry. Tiffany announced recently that it will appeal the ruling to the Second Circuit Court of Appeals.

The Belgian and U.S. rulings contrast with two in June by French courts which both found that eBay had to do more to stop the sale of fakes. In one of the cases, eBay was ordered to pay 40 million euros (\$60 million) to LVMH Moet Hennessy Louis Vuitton, the world's largest luxury goods maker. The German Federal Supreme Court also recently ruled against eBay in an appeal from Montres Rolex SA, requiring the auction site to take preventative measures against the sale of counterfeits.

Under U.S. law, it is typically the trademark owner's burden to police its own mark. But the brand owners argue that once eBay had reason to believe that a specific brand is being widely counterfeited and sold on the Web site, eBay should be forced to investigate and take action to stop the illegal conduct. They argue that eBay has an incentive to continue to allow sellers to list fakes, since eBay earns fees from each listing and sale.

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EBay contends that it already has taken extensive measures to help curtail counterfeit listings, such as a search program that flags words in listings such as "replica" or "knock-off." It also has a program to enable trademark owners to report and remove infringing listings. Under U.S. law, the company is required to remove listings when brand owners alert it to fakes.

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Three Plead Guilty to Internet Gambling Charges

Three men who helped promote BetOnSports.com, the U.K.-based Internet betting operation, have pleaded guilty to gambling-related charges.

Miami resident William Hernan Lenis, his son, Will Lenis, and nephew Manny Lenis entered the pleas on August 7, 2008. Lawyers for the men said they were bit players who were swept up in a high-profile prosecution.

In July 2006, the U.S. attorney's office in St. Louis charged BetOnSports, its executives, and others of illegally taking sports bets online. The defendants were charged with conspiracy, racketeering, and fraud under the Federal Wire Act, which bans placing bets on sporting events over the phone. Federal agents arrested BetOnSports CEO David Carruthers and four other defendants. Ten months later, in March 2007, BetOnSports founder Gary Stephen Kaplan was captured and arrested in a hotel in the Dominican Republic.

In November 2006, the government settled civil charges against BetOnSports and permanently banned the company from accepting bets from U.S. gamblers. In May of last year, the company pleaded guilty to one count of racketeering and agreed to cooperate with the government in its prosecution of individual defendants.

William Lenis, 55, pleaded guilty to interstate transportation of gambling paraphernalia. Prosecutors said his company, Mobile Promotions, sent motor homes promoting BetOnSports to sporting events across the country. Will Lenis, 28, and Manny Lenis, 29, worked with the elder Lenis in his business, the government alleged. William Lenis also admitted that his company, Direct Mail Expertise, mailed ads for BetOnSports from 2000 through 2006.

Will Lenis pleaded guilty to transmission of wagering

information. Manny Lenis pleaded guilty to a misdemeanor of failing to pay a wagering tax. The government dropped all other charges against the men, as well as all charges against William Lenis's daughter, Monica Lenis.

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Facebook Sued Over Beacon Ad Product

Facebook, the popular social network, is facing a class action lawsuit over Beacon, its poorly received advertising service that shares information about third-party site activity by its members with others in their network.

Twenty plaintiffs, mostly Texas residents, are listed in the lawsuit, which was filed in the U.S. District Court for the Northern District of California.

Beacon faced an immediate outcry when it was unveiled last fall as part of Facebook. Privacy advocates complained that the program did not permit users to readily disable it. Facebook modified the program in response to the concerns, and the controversy has since blown over.

The class action plaintiffs claim that Facebook can still access a large amount of user data collected in the month between Beacon's launch and the modifications to the program. "If the user was not a member (of Facebook), Facebook still obtained the notification from the Facebook Beacon Activated Affiliate," the complaint alleges. "Information regarding user activities was sent in real time to a third party Web site—one which was not open or active in the user's browser, and one which, in many cases, the user may never even have visited or heard of."

The complaint alleges violations of the California Computer Crime Law, the Electronic Communications Privacy Act, and the Video Privacy Protection Act of 1988.

An earlier lawsuit targeted Blockbuster, the video rental company, for participating in Beacon. Facebook was not named as a defendant in that case.

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