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## Manatt Partner Tony DiResta to Explore the FTC's Top Privacy Initiatives in WOMMA Webinar

**On December 15, 2010, Manatt partner and WOMMA General Counsel [Tony DiResta](#) will join Manas Mohapatra, an attorney with the FTC Division of Privacy and Identity Protection, in a special one-hour WOMMA webinar, titled "Exploring Privacy: What the FTC Wants You to Know When Building Your Social Platforms."**

The webinar will focus on the recent privacy report released by the FTC as well as discuss the agency's past privacy-related enforcement actions. Tony will serve as moderator in this webinar, the first FTC outreach presentation concerning social media and privacy.

The webinar will be held from 12:00 pm - 1:00 pm EST. For more information or to register for this free event, please click [here](#).

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## **Antipiracy, Counterfeit Bill Heads to Full Senate**

**The Senate Judiciary Committee recently passed the Combating Online Infringement and Counterfeits Act by a unanimous vote, moving the legislation to the full Senate.**

The bill, which would give the Department of Justice greater power to shut down Web sites featuring allegedly infringing or pirated material, has received sharp criticism from digital rights groups. These groups argue that the Act gives the government too much power because it allows a court to issue an injunction against a domain registrar without giving them a chance to respond.

The bill (S. 3804) was sponsored by Sen. Patrick Leahy (D-Vt.) and was introduced in September. "The Internet needs to be free – not lawless," Sen. Leahy, the Senate Judiciary Chairman, said in a statement. The bill "will give the Department of Justice a new and more efficient process for cracking down on rogue websites, regardless of where overseas the criminals are hiding."

The legislation would allow the Attorney General to petition to shut down a site "dedicated to infringing activities" for sites both in the United States and abroad. The bill defines sites "dedicated to infringing activities" as designed primarily to offer goods or services in violation of federal copyright law or selling counterfeit goods.

Under the legislation, the injunction would apply not just to an individual Web site but to a domain name, which critics have argued could result in overbroad governmental action because more than one individual site can operate under a single domain name.

According to a group of 40 law school professors who sent a letter to the Senate Committee, the bill would “fundamentally alter U.S. policy towards Internet speech, and would set a dangerous precedent with potentially serious consequences for free expression and global Internet freedom.” The law school professors argue that because the legislation would allow the court to order an injunction without hearing a counterargument that applies to an entire domain name – which could include noninfringing or noncounterfeit material – it grants the DOJ unconstitutionally broad powers that could infringe free speech.

A number of groups have thrown their support behind the bill, including the Motion Picture Association of America, the Recording Industry Association of America, the U.S. Chamber of Commerce, and the Newspaper Association of America.

To read the text of S. 3804, click [here](#).

**Why it matters:** Because of the lame-duck congressional session, the bill faces an uphill battle getting passed. In addition, despite the support of several major publishing-related groups, criticism of the legislation – from groups including the Electronic Frontier Foundation and the Center for Democracy and Technology – has been vocal.

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## Preview: A Draft of the Commerce Department’s Privacy Report

**A draft copy of the Department of Commerce’s privacy report was informally released, providing insights into the agency’s recommendations before its official release in the coming weeks.**

The 54-page report, “Privacy and Information Innovation: A Dynamic Privacy Framework for the Internet Age,” includes 10 policy recommendations as

currently drafted, including the passage of federal privacy legislation, according to *The Washington Post*.

Legislation should be “built on an expanded set of Fair Information Practice Principles,” which generally require notification about data collection with the option to consent, but include limits on the collection and usage of data. The legislation should also cover data breach issues that address “notification provisions, encourages companies to implement strict data security protocols, and allows states to build upon the law in limited ways.”

The report also recommends that Internet advertisers adopt a voluntary code of conduct, which would operate as a safe harbor. While it recommends that the Federal Trade Commission should remain the primary enforcement agency for consumer privacy, the report seeks comment on whether the agency should be given additional rulemaking authority if a voluntary, enforceable code is not established by the industry.

Another recommendation from the report includes the appointment of a federal privacy officer, albeit without enforcement authority; the office would work with the FTC “in leading efforts to develop voluntary but enforceable codes of conduct.”

Once released, the report will be published in the Federal Register to seek comment on questions about various proposals, including the expansion of FTC rulemaking, whether the Electronic Communications Privacy Act should be updated, and if state Attorneys General should be given the authority to enforce national privacy legislation.

**Why it matters:** The push for action on privacy continues, with the release of the Commerce Department’s report expected before the end of the year. The report will come on the heels of the FTC privacy report that was issued just over a week ago, in which it called for, among other things, the establishment of a do-not-track mechanism. In addition, the White House established its own committee on Internet privacy in October. And the House Commerce, Trade and Consumer Protection Subcommittee held a hearing earlier this month to discuss Internet privacy.

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# Feds Crack Down on “Alcopop” Drinks

**Launching a multi-pronged attack on caffeine-infused alcohol drinks, both the Federal Trade Commission and the Food and Drug Administration sent warning letters to four companies that market the drinks suggesting that the beverages “present unusual risks to health and safety” and that the caffeine used in the products is an “unsafe food additive.”**

The companies – Charge Beverages Corp., New Century Brewing Co., Phusion Projects, and United Brands Co. – are marketing their products in violation of the Food, Drug, and Cosmetic Act because the caffeine is an unsafe food additive that “may result in adverse behavioral outcomes because the caffeine is likely to counteract some, but not all, of the adverse effects of alcohol,” according to the FDA letters.

The FDA performed a scientific review, which did not find support for the companies’ claims that the addition of caffeine to alcoholic beverages meets the legal standard of “generally recognized as safe,” the agency said.

In a statement, Dr. Joshua M. Sharfstein, the FDA’s Principal Deputy Commissioner, said, “To the contrary, there is evidence that the combinations of caffeine and alcohol in these products pose a public health concern.”

The FTC noted that some of the beverages contain as much alcohol as four regular or five light beers in addition to an amount of caffeine equivalent to three cups of coffee. The caffeine negates warning signs of intoxication, the FTC said, and referenced several recent incidents of consumers hospitalized after consuming caffeinated alcohol. According to the FTC letters, “These incidents suggest that consumers, particularly young adults, may not fully appreciate the potential effects of consuming caffeinated alcohol beverages.”

The agency urged the companies to “take swift and appropriate steps to protect consumers. Even in the absence of express safety claims, the very

act of offering goods for sale creates an implied representation that the goods are reasonably fit for their intended uses and free of gross safety hazards. In addition, the non-disclosure of rare but serious safety risks may constitute an unfair practice.”

To read one of the FDA’s warning letters, click [here](#).

To read one of the FTC’s warning letters, click [here](#).

To read Sen. Schumer’s press release, click [here](#).

**Why it matters:** The letters could be the beginning of the end for the caffeine-infused alcohol beverage industry. Several states – including Michigan, Oklahoma, Utah, and Washington – have already banned the drinks, and Sen. Charles Schumer (D-N.Y.) released a statement saying that the FDA plans to ban the drinks entirely. “Compounded with its health risks, beverages like Four Loko pose a unique danger because they target young people,” Sen. Schumer said, noting the “vibrantly colored” cans with “funky designs” are stocked next to energy drinks in most stores. The drinks “appeal to younger consumers, increasing the likelihood that the beverages will be consumed by young adults and creating a problem for parents and business owners who might be misled by the branding,” he said. Some of the companies have already begun selling non-caffeinated versions of their drinks; Phusion Products, the maker of market leader Four Loko, agreed to remove caffeine from its alcoholic beverages, although the company defended its product in a statement. “We have repeatedly contended – as do many people throughout the country – that the combination of alcohol and caffeine is safe. If it were unsafe, popular drinks like rum and colas or Irish coffees that have been consumed safely and responsibly for years would face the same scrutiny that our products have recently faced,” said co-presidents Chris Hunter, Jeff Wright, and Jaisen Freeman in a written statement.

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# Studies Find Privacy Icons Effective

**Providing support for the self-regulation regime, two recent studies found that privacy icons are effective, with low percentages of respondents choosing to opt out of targeted ads when given the choice and responding favorably to brands that offer more control.**

A study conducted by Better Advertising and Dynamic Logic analyzed reactions to the Digital Advertising Alliance's icon and found that 67 percent of respondents preferred brands that gave them more control.

Of the 1,600 people who were tested, 57 percent felt more positive towards the brands that informed them how they were being targeted, and 67 percent indicated they felt better about brands when given more "control"(like the ability to opt out). One in twenty who clicked on the icon chose the opt-out option, and the study also found that exposure to the ad notice reduced serious privacy concerns by 30 percent.

In a second study by TRUSTe and Publishers Clearing House, just 1.1 percent of respondents chose to opt out of all advertising networks when given the choice. TRUSTe placed icons near ads on Publishers Clearing House's Web site, PCHlotto.com, over a six-month period.

When users clicked the icon, they saw a pop-up window that provided information about Interest-based ads and advertising networks. The window also allowed users to set their preferences to opt out of Interest-based ads, and to provide feedback to TRUSTe about the process.

Of the approximately 20 million consumers (with 7 million unique visitors), 56,000 users (and 44,000 unique viewers) clicked on the icon. The survey found that just 1.1 percent decided to opt out of all advertising networks, while more than half said they found the notice helpful. And twice as many clicked through the icon for more information than clicking on the privacy policy itself.

To read the results of the DAA icon study, click [here](#).

To read the results of the TRUSTe study, click [here](#).

**Why it matters:** These studies provide valuable support for the advertising industry's ability to self-regulate using the new privacy icons to inform consumers about their data-collection practices and privacy policies.

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## **DAs Sue Overstock.com for Discount Misrepresentations**

**Seven district attorneys in California have filed a joint lawsuit against online retailer Overstock.com, claiming that the company overstated its discounts.**

The DAs allege that the company listed comparative prices at other sites that were inflated, making its claimed discounts look larger. The lawsuit seeks \$15 million in fines and restitution, as well as an injunction against the retailer's use of price comparisons.

The complaint, filed in California state court, cited an incident where Overstock.com allegedly advertised a patio set for \$449.99 with a list price of \$999. A consumer claimed that when he received the set, it had a retailer sticker on it with a price of \$247.

That incident was typical, according to the complaint – Overstock.com didn't actually present the prevailing market price when it advertised the "list price" or "compare at price" for a product, but used either the highest price for which the product was selling in the marketplace or applied a preset formula incorporating a hefty profit margin over its wholesale cost without ascertaining whether or not the product had actually been offered at that price.

The DAs also alleged that the company would sometimes advertise "free shipping" at times when it had already factored shipping costs into its price for the product, inflating the price to include a hidden shipping charge.

Overstock.com also misrepresented to consumers that it was a liquidator and therefore able to undercut competitors' prices, but failed to disclose that the majority of its products were offered by Overstock's invitation and shipped from third-party vendors' warehouses, the complaint alleged.

In addition to injunctive relief, the suit seeks \$15 million in damages, noting that each use of the term "you save" when Overstock claimed to offer a lower price constituted violations of California state law.

Responding to the suit, Overstock.com President Jonathan Johnson said in a statement that the company follows standard industry practices and was singled out.

"Overstock.com stands by all our advertising practices, including providing comparison values which we thoroughly explain on our site. We have been singled out for standard industry practices, which we look forward to demonstrating in court," he said.

To read the complaint in *California v. Overstock.com*, click [here](#).

**Why it matters:** If proven, the allegations that Overstock.com "routinely and systematically" made untrue and misleading claims could result in large damages and significant changes to the way Overstock advertises. If Overstock's claims are true, it could also impact how others in the online liquidation industry advertise their prices. The DAs have been investigating the company for several years and tried to settle the allegations for \$7.5 million earlier this year.

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