



Advertising Law

July 14, 2011

2011 Midyear Recap

As we enter the second half of 2011, we are pleased to bring you our inaugural Advertising Law recap issue. We've taken stock of the most significant stories and trends covered in our weekly newsletter and have prepared a top-line overview of the key issues that impact your work and your business.

We invite you to share **Advertising Law – 2011 Midyear Recap** with colleagues and friends who may be interested in keeping current on what's happening in this rapidly evolving space.

Emerging Media, Including Social Networks and Blogs

New media continues to challenge marketers, particularly as existing laws and rules are applied to new formats such as text messages and sites such as Facebook and Twitter.

- Facebook has been involved in a number of disputes, with a [New York day spa filing suit](#) against a competitor in California, alleging that it engaged in false advertising by sending Facebook friend requests to its existing fans. In a second suit involving the site, the father of a minor son [filed a federal lawsuit](#) claiming that because parental permission is not received, the use of minors' images when they "like" things on Facebook misappropriates their images in violation of New York law. And pharmaceutical companies struggled with a recent Facebook policy change that could create potential liability under Food and Drug Administration regulations. Previously, Facebook allowed pharmaceutical companies to set their product pages to disable the comments feature, which

prevented comments about non-approved or off-label use of the drug, triggering the FDA's scrutiny. But in June, [the site switched its policy](#), leaving pharmaceutical companies struggling with how to market themselves in a Web 2.0 world while fulfilling legal requirements.

- In a decision with import for all businesses on Facebook, a [U.S. District Court ruled in March](#) that the federal CAN-SPAM Act applies beyond a traditional e-mail message, including messages sent by commercial Facebook pages. The ruling could have broad implications for a variety of communications – including newsfeed updates, wall postings, or other communications via social networking – covered by CAN-SPAM, meaning advertisers would be required to identify the communication as an advertisement and include an opt-out of future messages.
- Legal issues aren't exclusive to Facebook, however. [Courtney Love was sued for defamation after tweeting](#) that a clothing designer was a “total scumbag, lying ripoff” among other comments. While the suit presented novel issues of whether a 140-character tweet could constitute defamation, the suit settled just prior to trial, with Love agreeing to pay \$430,000.

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Privacy

Without question, privacy has been the hottest legal issue, from consumer lawsuits to proposed legislation to regulatory action.

- Coming off reports issued last December by both the [Federal Trade Commission](#) and the [Department of Commerce](#), lawmakers introduced a number of pieces of federal legislation. In the House, Rep. Bobby Rush (D-Ill.) introduced his Best Practices Act, and Rep. Jackie Speier (D-Cal.) made headlines with her [Do Not Track Me Online Act](#), a bill that would allow consumers to opt out from having their personal information tracked by online advertisers. In the Senate, bills included [Sen. John Rockefeller's Do Not Track Online Act of 2011](#) and the [Consumer Privacy Bill of Rights Act of 2011](#), introduced by Sens. John Kerry (D-Mass.) and John McCain (R-Ariz.). Sens. Kerry and McCain's bill did not include

a do-not-track provision, but required companies to inform consumers about their online collection practices and allow them to opt out of behavioral targeting; it also required consumers to affirmatively opt in before companies can collect sensitive information or personally identifiable information.

- California lawmakers considered their own [state version of a privacy bill](#), which requires Internet companies to notify state residents about their data collection practices and to provide an opt-out option. Companies would also be prohibited from collecting or using covered information if a consumer exercises his right to opt out. The state also considered – but rejected – a bill that would have regulated the [privacy controls of social networking sites](#), mandating that consumers make privacy settings prior to joining sites.
- Other pieces of legislation also touched on privacy, such as a proposed [update to the 25-year-old Electronic Communications Privacy Act](#), and Sens. Al Franken (D-Minn.) and Richard Blumenthal’s (D-Ct.) [Location Privacy Protection Act](#), a bill which would require that companies obtain users’ consent before collecting or sharing geolocation data.
- Privacy has been at the forefront of multiple class actions, including [suits against LinkedIn](#) for its use of tracking cookies connected to identifiable users, and [MySpace](#), where plaintiffs allege that the company leaked users’ names to advertisers in violation of its privacy policy.
- The Federal Trade Commission also waded into privacy litigation, [settling with two companies](#) over charges that sensitive information – including Social Security numbers – of almost 65,000 consumers was compromised despite promises by the defendants to take reasonable measures to secure the data. And the agency marked a major milestone when it required that [Google implement a comprehensive privacy policy](#) as part of its settlement over the site’s Buzz social networking feature. ([Google also settled a consumer class action](#) over its alleged privacy violations, paying \$8.5 million to a number of organizations focused on Internet privacy policy or privacy education.)

With multiple pieces of legislation pending, a continuing stream of litigation, and [multiple Senate hearings](#) on [privacy issues](#), privacy promises to remain a major issue for the second half of 2011.

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Mobile Marketing

Text and SMS marketing have continued to trip up advertisers who forget that existing laws such as the Telephone Consumer Protection Act and the FTC Act apply to mobile devices.

- In March, the [Federal Trade Commission brought its first suit](#) against an alleged SMS spammer that the agency claims sent more than 5.5 million unsolicited messages to consumers' mobile phones. The agency claimed that the company's unsolicited text messages violated Section 5 of the FTC Act as an unfair and deceptive business practice, particularly because many consumers were charged by their mobile carriers after receiving the texts.
- Joining other federal courts, a [U.S. District Court judge ruled that the Telephone Consumer Protection Act](#) constitutionally requires companies to obtain a user's "prior express consent" before sending text ads. The defendants argued that it was unclear whether the TCPA's requirements applied to text messaging. Both the court's decision and the FTC's action make clear that marketers who send unsolicited text messages without prior express consent from consumers could face regulatory action or a class action lawsuit.

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Green Marketing

Environmental claims are increasingly appearing on a broad variety of products and are continuing to face challenges by consumers and regulators alike.

- Fiji Water faced multiple class action lawsuits this year, with a [new suit filed](#) alleging that the company made false and deceptive environmental claims when it advertised itself as “carbon neutral” in the manufacturing of its bottled water. The company scored a victory, however, when a [California appellate court recently held](#) that no reasonable consumer would believe that Fiji’s “green drop” seal declared the product environmentally sound by a third-party organization. Companies making environmental or green claims should be sure to familiarize themselves with the [draft revised Guides for the Use of Environmental Marketing Claims](#), commonly known as the FTC’s “Green Guides,” which propose to significantly tighten the standards for a range of environmental claims. While the Guides have not been finalized, courts and regulators are already looking to the draft for guidance; both the complaint against Fiji and the appellate court’s opinion referenced the Guides.

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Marketing Directed to Children

Regulators kept a close eye on advertising targeted toward children, and in 2011 we’ve seen the largest civil penalty under the Children’s Online Privacy Protection Act.

- Earlier this year, the Federal Trade Commission reached a [\\$3 million settlement](#) with Disney-owned Playdom, Inc., and a company executive over charges that they violated the COPPA approximately 1.2 million times by illegally collecting and disclosing the personal information of children under the age of 13.
- The agency also [finalized a consent order with a subsidiary of Nestle](#) over charges that the company made deceptive health benefit claims about its children’s drink BOOST Kid Essentials, a nutritionally complete drink intended for

children ages 1 to 13. The company agreed to modify its claims and must receive preapproval from the Food and Drug Administration for future claims that BOOST can reduce the risk of colds, flu, and other respiratory infections.

- In addition to regulatory actions, companies should be prepared for changes in the world of marketing to children, with the FTC in the [process of reviewing COPPA](#). In addition, Reps. Ed Markey (D-Mass.) and Joe Barton (R-Tex.) introduced the [Do Not Track Kids Act](#), a bill that would expand the protections of COPPA and prevent online behavioral advertising to persons under age 18.

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Marketing Health and Nutrition

2011 has already been a busy year for those marketing health and nutrition.

- Several suits have been filed against the makers of “toning shoes,” alleging false advertising over claims that the shoes can actually increase calorie burn and muscle activation, most recently against [New Balance](#). Consumers have also targeted products ranging from [Nutella](#) (“the next best thing to a candy bar,” according to the complaint) for falsely marketing its hazelnut spread as healthy for children to the makers of [arthritis pills](#).
- After reaching a \$45 million settlement with consumers over allegations that the company exaggerated the health benefits of its probiotic products, [Dannon reached a settlement](#) with the Federal Trade Commission and 39 state attorneys general for \$21 million. The agency alleged the company’s claims that Activia and DanActive helped relieve irregularity and helped consumers to avoid catching colds or the flu were false. As part of the settlement, the FTC required that Dannon receive approval from the FDA for any health claims about its probiotic products.
- Health supplements continue to be a focus for suits, with ten California counties settling charges of false advertising against the makers of [Hoodia dietary supplements](#) for \$2.65 million in February. And in a major action, the FTC

announced a law enforcement initiative against the affiliate marketers of [acai berry weight loss products](#), simultaneously filing ten lawsuits against marketers who operated fake news sites featuring investigative reports with headlines such as “Acai Berry Diet Exposed: Miracle Diet or Scam?” The agency said the litigation could be expanded as its discovery process continues.

- Food labeling has also received attention this year, with the Grocery Manufacturers Association and the Food Marketing Institute announcing in February a [voluntary industry program](#) that will allow participating companies to place certain nutritional information on the front of food packaging. In addition, the [FDA is seeking public comment on a proposed rule](#) that would require chain restaurants and other food retailers with 20 or more locations to make calorie and other nutritional disclosures on menus and menu boards. A second proposed rule, applying to vending machine operators, would impose similar caloric disclosure requirements.

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Marketing and Sales Practices

The first half of 2011 was a mixed bag for businesses: while their ability to collect personal information for marketing purposes was limited, the U.S. Supreme Court protected companies’ rights to limit class litigation.

- Beware of asking consumers for information: In a closely watched case decided in February, the [California Supreme Court ruled](#) that retailers may not collect zip codes from consumers who use their credit cards, as the information is considered “personal identification information” under state law. The impact of the decision is already being felt outside of the state – just months later, a [class action suit was filed in Massachusetts](#) against arts and crafts retailers Michaels Stores, alleging that the company violates the state’s consumer protection laws by collection and recording of consumers’ zip codes during credit card transactions.

- Businesses scored a [resounding victory from the U.S. Supreme Court](#), however, when the Justices ruled in a 5-4 decision that contracts may specify that disputes will be decided through arbitration – and on an individual basis. The decision in *AT&T v. Concepcion* effectively eliminates class arbitration, a boon for companies seeking to litigate on a case-by-case basis.

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Sweepstakes, Games and Contests

Already this year, sweepstakes have caught the attention of the Federal Trade Commission.

- The FTC sought to shut down a [national sweepstakes operation](#) that the FTC alleged was tricking consumers into paying a \$20 fee to collect a fake multimillion dollar sweepstakes prize. According to the agency, the companies sent personalized mailers (some with fictitious government agency names and official-looking seals) to hundreds of thousands of consumers, asking for a \$20 “processing fee.” Instead of a prize, consumers would then receive information about entering a sweepstakes. A federal court judge ordered the defendants to halt operations and froze their assets.
- In May, the agency settled with a company over charges that a [sweepstakes entry form did not establish a business relationship](#) for telemarketing. Electric Mobility Company and its owner agreed to pay \$100,000 after the agency claimed the defendants made more than 3 million calls to consumers on the Do Not Call Registry after collecting the numbers in a sweepstakes form.

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NAD and False Advertising Litigation

Two decisions stand out from the first half of the year as providing guidance in the world of false advertising litigation.

- “Simply stated: labels matter,” the California Supreme Court said in a February decision that broadened standing for consumers in false ad suits, creating the potential for greater liability for marketers. In [Kwikset Corp. v. Benson](#), the court held that a ballot initiative which limited standing in false advertising suits to plaintiffs who have “lost money or property” did not foreclose a suit by a consumer who sued a California-based company that made locksets labeled “Made in U.S.A.” even though many of the components were made in Taiwan and assembled in Mexico. The court said that because the product was mislabeled, the consumer had suffered an actual, economic harm – even though the locksets functioned properly, merely buying a product as a result of a false claim was enough to support a suit.
- In another notable decision, the [National Advertising Review Board agreed](#) with a decision from the National Advertising Division that Staples should discontinue and modify its use of a “Like FREE” claim. The decision offered guidance to companies regarding the NARB’s position on the use of the term “free” in advertising claims, which must “be made with extreme care.” Staples failed to inform its customers that to receive a free product, they had to buy a product, register or enroll in the loyalty program, wait a month to receive their Rewards points, and then use the points within a limited amount of time. “All of the terms, conditions, and obligations necessary for receipt of free merchandise should be set forth clearly and conspicuously at the outset of the offer,” the NARB emphasized.

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In Our Next Issue: We will cover the recent online privacy hearing conducted by the Senate Committee on Commerce, Science and Transportation at which FTC Commissioner Julie Brill testified, as well as summarize California’s new law requiring

out-of-state retailers to collect California sales tax from residents, among other stories.
Stay tuned...