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"Shark Tank" - Dive Right In

In a recent issue of *Variety*, [Jordan Yospe](#), Manatt attorney and former counsel and head of business and legal affairs at Mark Burnett Productions, comments on Burnett's upcoming reality TV show on ABC, Shark Tank. For more information, click [here](#)

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California and Hawaii Drop Bids to Tax Online Retailers

In the face of threats from Amazon.com and Overstock.com to drop state-based marketing affiliates, the governors of California and Hawaii have said they would block legislative bids to require online retailers to collect sales tax if they have marketing affiliates in the state.

The assurances from the two states convinced Overstock to reverse its decision to drop its California- and Hawaii-based marketing affiliates or entities who get sales commissions for featuring links to the retailers on their Web sites or blogs.

Lawmakers in several states are looking to follow the lead of New York, which passed a law last year taxing online sales by retailers with New York-



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based marketing affiliates. Overstock and Amazon are appealing a lower court decision that upheld the New York law. In the meantime, Overstock has dropped its affiliates in the state and Amazon has begun collecting a sales tax in New York.

Overstock had cut its ties with affiliates in California, Hawaii, North Carolina, and Rhode Island before backtracking on California and Hawaii. Amazon has cancelled relationships with affiliates in the three smaller states and threatened to do so in California.

California Governor Arnold Schwarzenegger said that following the state's recent tax hike, it made "absolutely no sense" to hit up the taxpayers yet again, and California should be doing everything it can to keep and create jobs in the state.

Hawaii Governor Linda Lingle also vetoed her state's Internet tax bill, saying the legislation has immediate and adverse consequences for residents and businesses in Hawaii and places them at a competitive disadvantage. An Overstock executive said that the company will soon announce its intention to resume affiliate ties in Hawaii. Amazon has previously stated its intention to reinstate affiliate relationships in Hawaii if the legislation was blocked.

Why it matters: The dispute underscores the increasing friction between Internet retailers and cash-hungry states looking to raise tax dollars. Requiring online sellers to collect sales tax upfront removes a key advantage over brick-and-mortar businesses, and also creates administrative burdens for online retailers. But online sellers are striking back by threatening to sever ties with state-based affiliates and, at least in Hawaii and California, those threats have had the desired effect.

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La Russa Drops Suit Against Twitter Over Fake Account

St. Louis Cardinals manager Tony La Russa has ended his bid to hold Twitter accountable for a fake account in his name that featured his photo and made fun of a DUI charge against him.

La Russa sued the online social network in May for trademark infringement and misappropriation of his name and likeness. The complaint claimed that the unauthorized page, which used his name but also stated that it was fake, caused the Major League Baseball team manager emotional distress.

After initially reporting that Twitter was going to settle the claim and donate money to a charity, La Russa filed a statement with the court on June 26 stating that he had dropped the suit and that Twitter made no payment to

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him.

Twitter took down the fake account when it received notice of the lawsuit. It has also launched a program to verify the ownership of accounts.

Why it matters: Most courts have found that under the Federal Communications Decency Act of 1996, Web sites are not liable for potentially unlawful content posted by a user (with the general exception of copyrighted material). La Russa had argued that the misuse of Twitter is different, because it involves a person's name embedded in the Web address of the site. However, because La Russa has withdrawn his complaint, that theory will have to be tested, if at all, in another case.

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Mary Kay Sues Yahoo Over Email Ads

Cosmetics company Mary Kay has sued Yahoo for allegedly inserting links to unauthorized retailers in emailed ads sent by Mary Kay sellers to consumers.

"Emails that advertise Mary Kay products are hijacked and manipulated by Yahoo and provide an unfair advantage for the unauthorized re-sellers and other competitors," the company alleged in a complaint filed in federal district court in Dallas.

The company has charged Yahoo with trademark infringement and is asking the court for injunctive relief and money damages. At issue is an ad format that sends pop-ups to recipients when they scroll over emailed text. These pop-ups allegedly include links to Web sites operated by unauthorized sellers of Mary Kay cosmetics. A company spokesperson said Mary Kay became aware of the ad format earlier this year.

Mary Kay contends that many email recipients might "mistakenly believe that the hyperlinks and pop-ups which include ads associated with the Mary Kay marks were affirmatively included or authorized by either Mary Kay or the Independent Beauty Consultant sending the email."

The lawsuit joins a number of other court disputes over the use of brand names to trigger online ads. However, Mary Kay's lawsuit appears to be the first time a brand owner has complained about links in personal emails. Most of the prior lawsuits in this area have been over ads that appear in search results or pop-up ads served by adware companies.

Another issue is whether Mary Kay can prove the resellers were, in fact, "unauthorized." Typically, sellers are allowed to sell lawfully purchased products without authorization.

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Why it matters: Mary Kay’s lawsuit comes with a twist: It complains about links in personal emails, rather than in pop-up ads or search result pages. This could affect whether Mary Kay can prove consumer confusion, one of the key factors in trademark infringement cases.

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Ad Industry Issues New Behavioral Targeting Standards

A coalition of ad industry trade groups has announced new voluntary guidelines for behavioral targeting, or tracking surf patterns of Internet users and serving ads based on sites visited. The new privacy principles announced July 2 differ in key respects from earlier standards and address types of behavioral targeting that had not been covered until now.

The new standards are the work of a task force of the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, the Interactive Advertising Bureau, and the Council of Better Business Bureaus. In total, the task force represents more than 5,000 companies.

Federal Trade Commission Chair Jon Leibowitz applauded the initiative, but also said the agency was still reviewing the guidelines. “Behavioral advertising raises a number of serious privacy concerns, and these guidelines are a direct response to the call by the FTC and consumer groups for improved practices, including increased transparency and consumer control over the collection and use of data,” he said in a statement. “The Commission’s goal is to promote meaningful consumer protection and choice in this area as well as to ensure that consumer protections are accessible and understandable to all consumers.”

Key aspects of the most recent set of self-regulatory standards vary from prior guidelines. The new guidelines bar Internet service providers and entities that track people via toolbars or other downloaded applications from collecting data or serving targeted ads unless users have taken an “action in response to a clear, meaningful and prominent notice.”

They also provide that cookie-based behavioral targeting—tracking users via cookies at publishers’ Web sites and then serving them ads—requires clear and prominent notice in at least two places: the publishers’ sites and within or around the targeted ads or another place on the page where the data is collected.

The guidelines also require companies to obtain users’ consent before collecting sensitive data, defined as financial account numbers, social security numbers, pharmaceutical prescriptions, or medical records about a

Chicago, IL

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Newsletter Editors

[Jeffrey S. Edelstein](#)
Partner
jedelstein@manatt.com
212.790.4533

[Linda A. Goldstein](#)
Partner
lgoldstein@manatt.com
212.790.4544

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specific individual. Also, for the first time, the guidelines would be enforced via the Council of Better Business Bureaus.

Why it matters: The new guidelines come at a time of heightened concern about the privacy implications of behavioral targeting in Congress and at the FTC. Online advertisers who use behavioral targeting are advised to study the new self-regulatory standards and ensure that their practices comply.

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J&J Acts Fast in Response to Tylenol Safety Concerns

With consumer perception regarding the safety of its long-standing best-selling painkiller Tylenol at stake, Johnson & Johnson has wasted no time responding to potentially harmful news on that front.

On July 3, just three days after a Food and Drug Administration advisory panel recommended wide-reaching limits on acetaminophen—the generic name for Tylenol—the drug company placed full-page ads in major newspapers across the country. The ads described Tylenol as “the safest brand of pain reliever you can choose” when taken in the proper dosage.

The panel expressed concerns about the risk of liver damage from overdosing on acetaminophen. Its June 30 recommendations included lowering the maximum daily dose of the drug and limiting the amount in a single over-the-counter pill.

J&J’s ads, which ran for a total of three days, took care to convey the notion that neither Tylenol itself nor its marketing were to blame for any overdosing problems. They underscored that consumers themselves needed to take care to monitor their dosage. If “you take more than the recommended dose,” then “you can cause serious liver injury,” the ads said.

The company stated that it ran the ads to address consumer confusion generated by news coverage of the panel’s advice.

The ads mark the first step in what is likely to be a concerted marketing effort by J&J to protect its best-selling Tylenol brand. Other marketing efforts may include changes to packaging or requests that retailers install signs on shelves where Tylenol is sold.

The FDA, which will consider the advisory panel recommendations as it decides on its acetaminophen policy, says it hopes to make a decision within the next three to six months. In the meantime, J&J will have to walk a fine line in advertising Tylenol’s safety while addressing the panel’s concerns.

Why it matters: Johnson & Johnson faces the delicate task of reassuring

consumers about the safety of Tylenol without overstating its case, which could generate a backlash or continue to keep safety concerns in the public eye. Moreover, J&J must be careful to avoid any charges that it is misleading reasonable consumers about the risks and safety of its drug.

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Rite Aid Settles “Germ Defense” Charges

Rite Aid Corporation has agreed to pay \$500,000 in consumer refunds to settle Federal Trade Commission charges that the drugstore chain falsely advertised its “Germ Defense” tablets and lozenges as effective in preventing colds or reducing the severity and duration of symptoms.

The FTC said Rite Aid touted the effectiveness of its line of cold and flu products as similar to that of “Airborne,” a popular line of natural health supplements that also claimed to protect against colds and germs. The agency alleged that Rite Aid did not have evidence to support its claims about the Germ Defense products.

Last year, the makers of Airborne agreed to pay up to \$30 million in consumer refunds and attorneys’ fees to settle FTC charges of false and deceptive advertising. The Federal Trade Commission similarly alleged that the company making Airborne had no proof that its products, which are comprised of various vitamins, minerals, and herbs, “provide any tangible benefit for people who are exposed to germs in crowded places.” The FTC action adds \$6.5 million to a previous class action settlement in which Airborne agreed to pay \$23.5 million in customer refunds and attorney fees.

Under the settlement agreement, Rite Aid is required to post refund notices on the cold and flu aisles of its stores. Consumers who bought the Germ Defense products have until the end of this year to request refunds.

Why it matters: After pursuing an investigation against and reaching a settlement with Airborne, it is not surprising that the FTC then turned its attention to Rite Aid’s Germ Defense, since it was marketed as a store brand product to compete with Airborne.

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