



September 14, 2009



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Anthony DiResta Joins Manatt

Mr. DiResta has just joined Manatt as a partner in the firm's Advertising, Marketing & Media Division and as chair of its Consumer Protection practice group. His practice focuses on governmental investigations, commercial litigation, and business counseling on a wide range of issues, including privacy, advertising and marketing, financial practices, trade regulations, and unfair competition. Mr. DiResta is a leading authority on social media issues and serves as General Counsel to the Word of Mouth Marketing Association, a leading industry trade organization.

As a former Director of the FTC's Southeast Regional Office, Mr. DiResta supervised many of the enforcement, investigative, litigation, and outreach activities of the Competition and Consumer Protection Bureaus. Among his accomplishments was his initiation and coordination of a consumer protection law enforcement sweep—including the Department of Justice, the Securities and Exchange Commission, and 15 state attorneys general, as well as the FTC—that resulted in over 25 lawsuits and proceedings throughout the country.

Mr. DiResta is widely published in the areas of commercial litigation, FTC practice, governmental investigations, consumer protection, and antitrust—



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Marketing and Media



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Nationally for Marketing and
Advertising



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with many of his articles being cited by the courts and law reviews. In fact, one of his articles was cited with approval by the United States Supreme Court in a leading antitrust decision. He was elected to the membership of the American Law Institute in 1994, has been involved in the leadership of the ABA since 1992, and frequently serves on the faculty of legal and regulatory seminars and conferences.

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Oprah Sues Over Fake Endorsements

Oprah Winfrey – through her corporate vehicle Harpo Inc. – is charging 40 dietary supplement marketers with making unauthorized claims that she endorses their products.

Harpo also provided assistance in a probe by Illinois Attorney General Lisa Madigan, who has since filed three separate complaints targeting marketers of dietary supplements made from acai berries.

Oprah's show includes regular segments on foods or products that can improve health, and they often feature appearances by Columbia University heart surgeon Dr. Mehmet Oz. Last year Oz lauded the anti-aging properties of the acai berry, which is very high in antioxidants.

Shortly after, online marketers of acai berry supplements began implying that their products had been endorsed by Oprah or Oz, according to the complaint filed in federal district court in New York. "Defendants are fabricating quotes or falsely purporting to speak in Dr. Oz's and/or Ms. Winfrey's voice about specific brands and products that neither of them has endorsed," the complaint reads. In fact, neither person has ever sponsored or endorsed an acai berry supplement, the complaint states. Among other claims, the complaint charges the defendants with false endorsement under the Lanham Act.

Oprah's Web site has been inundated with more than 2,000 complaints related to acai berry-related products, according to the complaint. Some are from viewers who mistakenly believed that a product was actually endorsed by Oz or Oprah; others are from consumers who felt they had been scammed. Harpo turned over many of the consumer fraud complaints to the Illinois attorney general.

Why it matters: The Federal Trade Commission is considering changes to its rules governing the use of celebrity endorsements in advertising. However, in this case, Oprah will need to satisfy the requirements of Section 43(a) of the Lanham Act, which governs commercial endorsements. To prevail on a false endorsement claim, a plaintiff must prove that (1) its mark is legally protectable, (2) it owns the mark, and (3) the defendant's use of the

UPCOMING EVENTS

September 14, 2009
WESTDOC- The West Coast
Documentary and Reality
Conference

Session: Branding and
Integration: The New Reality

Panelists: [Jordan Yospe](#) of
Manatt, Phelps & Phillips,
Chris Coelen of RDF Media
Group and Mark Koops of
Reveille.

Doubletree Guest Suites
Santa Monica
Santa Monica, CA

[for more information](#)

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September 15, 2009
ERA D2C Convention

Speaker: [Linda Goldstein](#)

Paris Hotel
Las Vegas, NV

[for more information](#)

...

September 24, 2009

mark to identify its goods or services is likely to create confusion concerning the plaintiff's sponsorship or approval to those goods or services.

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Trade Group Issues Mobile Ad Guidelines

The Mobile Marketing Association (MMA), a nonprofit industry trade group that represents companies in the mobile marketing space, will shortly issue a new version of its Global Mobile Advertising Guidelines.

The intention of the MMA Guidelines is to provide an industry-standard framework that encourages the worldwide growth of mobile advertising while protecting consumers. The new Version 4.0 guidelines will be published sometime this month.

The edits are intended to globalize the guidelines, which currently apply only to North America. Mike Wehrs, President/CEO of the MMA in New York, said the focus was on "finding commonalities wherever possible, but . . . also addressing localities to formulate a single set of guidelines so brands don't have to reference many standards for the content they're producing."

"Web standards do change and new capabilities are brought to the market all the time, so we want our standards to remain current and state-of-the-art to help people develop compelling content based on the current standards," Wehrs said.

For a draft of Version 4.0 of the Global Mobile Advertising Guidelines click [here](#). The new guidelines include several major updates and additions:

- A new Universal Mobile Advertising Package that provides industry-standard ad units.
- An expanded Mobile Application section from North America only to worldwide.
- An expanded MMS section, including new ad units and guidelines, an expanded Mobile Video & TV section with new ad units and guidelines, and an expanded Mobile Applications section with new ad units and guidelines.

The MMA, which represents more than 700 companies in the mobile media space, focuses on clearing obstacles to market development, establishing mobile media guidelines and best practices for sustainable growth, and promoting the use of the mobile channel.

Why it matters: The MMA's recent efforts have focused on getting more public input from the outset, rather than issuing guidelines and waiting for

From The Source: AAF's Web Seminar Series

Topic: "Budget Busters: Bongs, Blogs and Brand Wars"

Speaker: [Jeff Edelstein](#)

[for more information](#)

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September 24, 2009
Natural Products Expo East

Topic: "The Claim is Right: Are You Smarter Than a Regulator?"

Speaker: [Ivan Wasserman](#)

[for more information](#)

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September 28, 2009
Thompson Interactive Webinar

Topic: "Food Claims Enforcement and Litigation on the Rise: How to Reduce Your Risk"

Speaker: [Chris Cole](#) and [Ivan Wasserman](#)

complaints. With these new guidelines, which were subject to a public review and comment period, the MMA hopes to try to standardize mobile marketing practices worldwide.

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Phishing Scams Decline Sharply

A recent report by IBM reveals a significant decline in the number "phishing" e-mails, in which scammers send what appears to be a legitimate e-mail from a bank or some other company. If the recipient of a phishing e-mail clicks on a link in it, he or she is taken to a fake Web site that captures passwords, account numbers, or any other information the user might enter.

IBM found that phishing accounted for just 0.1% of all spam in the first six months of this year. In the same period in 2008, phishing made up 0.2% to 0.8% of all spam. Overall, spam volume remained stable.

Observers are divided on what, if anything, the drop signifies. Kris Lamb, director of the X-Force research team in IBM's Internet Security Systems division, which produced the report, said that, in fact, the findings represented "a huge, precipitous decline in the amount of phishing." He said computer users may be getting more adept at identifying fake Web sites. Security software is also getting better at filtering out phishing sites before users ever see them. Another possibility is that online criminals are switching from phishing to another kind of attack, involving malicious software. IBM said it is seeing more instances of "Trojan horse" programs, which are used to spy on victims.

The IBM report found that criminals are also shifting the types of businesses they attack with phishing. The report found that 66% of phishing targets were banks, down from 90% last year. Meanwhile, PayPal and other companies that handle online payments are being targeted more frequently in phishing messages.

Why it matters: Many reports of phishing and other online scams must be taken with a grain of salt, since they are often issued by security firms that have an interest in drumming up consumer concern so they can sell their services and software. For this reason, IBM's midyear security report is noteworthy because it comes from a disinterested party. Of course, this doesn't mean that online criminals have retired en masse. They may simply be moving on to the next big scam tactic.

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October 5-6, 2009

NAD Annual Conference 2009

Moderator: [Jeff Edelstein](#)

W Hotel

New York, NY

[for more information](#)

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October 7-9, 2009

Digital Music Forum West

Topic: "Digital Music

Innovation: What's Next?"

Speaker: [Aydin Cajinalp](#)

The Roosevelt Hotel

Los Angeles, CA

[for more information](#)

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October 27, 2009

American Conference

Institute's 3rd Annual Forum

on Sweepstakes Contests and

Promotions

Speaker: [Linda Goldstein](#)

Ad Firm Says Agency Stole Bing Ad Concept

A small Delaware-based advertising shop has sued ad agency giant JWT and its parent company WPP, charging JWT with stealing its patented product-placement concept for use in an ad campaign for Bing, Microsoft's new search engine.

The ad shop, which is called Denizen, is claiming that JWT stole its patented method of using the content and characters of a television show – in this case, NBC's *The Philanthropist* – in ads for Bing that appeared during the show's airing.

Denizen, which describes itself as an "innovator in advertising" for its technique of "program-integrated advertisement," states in its complaint that it was in contact with London-based WPP and executives at the holding company since 2002, to explore possible business ventures, including partnerships with WPP's media agencies.

Although those talks fell through in late 2006, Denizen alleges that it had entered into a confidentiality agreement with WPP. In its complaint, Denizen accuses WPP of breaching the confidentiality agreement and JWT of stealing Denizen's integrated ad technique.

Commercials for Bing were filmed on location with actors from the show, which debuted this summer and stars James Purefoy and Neve Campbell. The Bing-themed ads appeared between the TV programming and regular commercial breaks.

"WPP intends to solicit customers by continuing to use Denizen's proprietary, trade secret information to solicit customers for WPP and its affiliates," the complaint states. Denizen claims the defendants not only stole its trade secrets for creating integrated ads – which include strategies for obtaining Screen Actors Guild contracts, methods for gaining access or rights to TV program content, and ways to shoot the ads – but also made them publicly known due to the number of parties involved in the Bing campaign.

Why it matters: Denizen may have a tough time proving its case. Integrated ads have been around since the early days of television. For instance, Ed McMahon pitched Alpo on *The Tonight Show* for years.

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ValueClick Settles Class Action Over Fake Sweepstakes

ValueClick, the behavioral-ad tracking firm, has agreed to pay \$10 million to settle a shareholder class-action suit charging the company

The Carlton Hotel
New York, NY

[for more information](#)

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November 5-6, 2009
31st Annual Promotion
Marketing Law Conference

Topic: "The Battle of the
Brands"

Moderator: [Chris Cole](#)

Fairmont Hotel
Chicago, IL

[for more information](#)

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November 5-6, 2009
31st Annual Promotion
Marketing Law Conference

Topic: "Sweepstakes &
Contests: Lend Me Your Ear
and I'll Sing You a Song..."

Speaker: [Linda Goldstein](#)

Fairmont Hotel
Chicago, IL

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November 18-20, 2009

with hurting its own stock price by using deceptive online strategies to collect user information and then failing to safeguard user privacy.

According to the complaint, ValueClick previously paid \$2.9 million to settle allegations by the Federal Trade Commission over its allegedly illegal tactics. Among other complained-of tactics, ValueClick advertised “free” gifts to consumers, which in fact required a purchase to receive the gifts. ValueClick also operated a phony sweepstakes, with prizes that included a Ford F-150 pickup truck, a Hummer, and a college scholarship. The sweepstakes, however, were shams, the complaint alleges. No drawings were held and no winners were selected, and, in fact, the campaigns were nothing more than a gimmick aimed at collecting entrants’ personal information for resale to ValueClick’s advertising customers.

Why it matters: This is an interesting shareholder suit. Securities fraud cases are often predicated on the bad acts of executives that, when they come to light, cause stock prices to fall. It’s rare to see this particular twist, in which a shareholder suit is based on a scheme to collect the personal information of unwitting consumers for resale to marketers. It suggests that, for public companies, the costs of getting accused of violating consumer privacy can be significant, even though it’s still unclear how to measure the actual monetary damage done to a consumer whose information is secretly gathered and sold for targeted advertising purposes.

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Infomercialist Will Appeal \$48 Million Fine

Donald Barrett, a prolific infomercialist who owns ITV Ventures and Direct Marketing Concepts, announced that he is appealing a \$48 million Federal Trade Commission fine for airing deceptive and misleading infomercials.

"I have every reason to believe that we will prevail," Barrett wrote on his blog, "I have every reason to believe that the outrageous amount of the judgment will not stand."

The FTC sued Barrett’s companies in 2004 over infomercials for two products – Coral Calcium and Supreme Greens with MSM – that included claims the products cured cancer, heart disease, diabetes, and Parkinson’s disease, and helped people lose weight.

FTC public affairs specialist Betsy Lordan said the federal ruling was fair. "It’s his right to appeal, but the bottom line is we’re happy," she said.

In addition to the hefty fine, the court ruling also bans Barrett from making any claim about the health benefits, performance, or efficacy of any product

4th Annual Word of Mouth
Marketing Association Summit

Topic: "FTC Developments"

Speaker: [Anthony DiResta](#)

Paris Hotel
Las Vegas, NV

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without scientific evidence, and bans him from misrepresenting any scientific study.

Barrett says he will keep pumping out the infomercials. "I currently have over 20 infomercials on the air and I will continue to produce more and more in the future," he wrote. "These infomercials are undisputed by the FTC and unaffected by the court's decision."

Why it matters: Although Barrett, like any advertiser, is free to exercise his free-speech right to promote his products, he must do so in a way that is not misleading or fraudulent. He crossed the line, according to the court and the FTC. Yet the considerable fine speaks to how profitable Barrett's infomercials are, despite how dubious the claims may seem on their face – and in fact are.

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