

October 8, 2010

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Chris Cole to Lead Webinar Discussion on FTC's Newly Released Green Guides

Marketers of environmentally friendly products will face tighter rules on how they advertise to consumers under proposed updates to the FTC's so-called Green Guides, released on October 6.

To help marketers interpret these revised rules, Manatt partner Chris Cole will lead a Promotion Marketing Association webinar discussion, "What will it mean to be green?" on October 12 from 2:00 pm – 3:00 pm Eastern.

Chris's presentation will provide an overview of the most significant changes to the Guides, as well as focus on the actions marketers need to consider for complying with them. To register for this event, click [here](#).

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FTC Unlocks Charges Against Online Data Broker

The Federal Trade Commission settled charges with the online data broker U.S. Search, Inc. over its "PrivacyLock" service, in which the company charged a \$10 fee to "lock their records" of consumers so that they could not be viewed or purchased by others on the site.

The company advertises itself as the top people search Web site in the United States. It compiles public records and then sells consumer data to the public – including names, addresses, tax liens, phone numbers, aliases, marriage and divorce records, home values, civil judgments and

lawsuits, bankruptcies, and criminal records.

Customers can find information about others by using a number of search services on the site, like "people search," "background check," and a "reverse lookup" that will return the information associated with a particular phone number or property address. At the same time, U.S. Search also offered the "PrivacyLock" service for a \$10 fee, which the company advertised would prevent such information from appearing on its Web site or search results for a period of one year. Accordingly, persons could pay to obtain information about others who had paid to block the disclosure of information at the site.

The FTC alleged that since June 2009, the company made deceptive claims about the service. Specifically, the company did not block consumers' names from showing up as an associate of someone else, nor did it block the consumers' information from appearing in the "reverse search" of phone numbers or addresses. The service also did not work if a consumer had multiple records or changed addresses.

Under the terms of the settlement, U.S. Search agreed to refund fees to approximately 5,000 consumers and is barred from making misrepresentations about the effectiveness of its services.

To read the complaint in *In the Matter of US Search Inc.*, click [here](#).

To read the consent agreement, click [here](#).

Why it matters: The agency said that the settlement was "the latest in a series" of FTC cases challenging companies' failure to honor their privacy pledges, including the agency's recent involvement in a bankruptcy proceeding by the owner of a magazine aimed at gay teens. Other online data brokers, like Spokeo, have faced both regulatory scrutiny as well as a class action lawsuit alleging the company violates the Fair Credit Reporting Act by offering inaccurate data about consumers without effectively allowing them to remove incorrect reports.

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NY Settles Over Software to Monitor Children on the Web

New York Attorney General Andrew Cuomo recently settled with Echometrix, the maker of software that allowed parents to monitor their children's activity on the Web.

In 2009, Echometrix launched "Pulse," a parental Internet monitoring software that allowed adults to keep track of their children's activity on the Internet. In addition, the monitoring software secretly collected and analyzed portions of children's private online activities, like posting blogs, sending instant messages, and viewing on social networking sites,

the AG's office said.

Pulse was marketed as a way for third party companies to gain insight into what children privately said about products and services, the AG's office said, and the company failed to disclose to the parents and guardians who purchased its service that it was collecting and analyzing their children's online activities for marketing purposes.

The Electronic Privacy Information Center filed a complaint with the Federal Trade Commission last year, making similar allegations. EPIC claimed that New York-based Echometrix's actions violated the Children's Online Privacy Protection Act and that the company engaged in unfair and deceptive trade practices regarding the marketing of Pulse services.

The New York settlement requires Echometrix to pay \$100,000 and refrain from analyzing or sharing any of the data it has access to. The company no longer offers the Pulse service, which it discontinued when the New York investigation began.

To read the press release on the New York settlement, click [here](#).

Why it matters: The settlement comes during the Federal Trade Commission's review of COPPA, the law which prohibits Web sites from collecting or disseminating personal information about children under 13 without their parents' permission. Children's advocacy groups and parental organizations are seeking expansion of the law and a broader definition of "personal information," but are butting heads with industry and privacy advocates, who argue that limited Internet access or increased age verification impacts privacy rights and raises First Amendment concerns.

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Lohan Settles With E-Trade Over 'Milkaholic' Suit

On the same day a judge issued a bench warrant for her arrest, Lindsay Lohan settled her \$100 million lawsuit against E-Trade, after it featured a "milkaholic" baby named Lindsay in a Super Bowl ad.

The commercial featured the group of talking babies who play the stock market using E-Trade services. The "Girlfriend" ad ran during the 2010 Super Bowl and featured a male baby apologizing to a female baby for not calling her the night before.

Suspicious, the female baby asked if that "milkaholic Lindsay" was over. Another female baby's head popped onto the screen and asked, "milk-a-whaaat?"

Lohan filed suit in New York state court, claiming that E-Trade violated

her publicity rights, and sought \$50 million in compensatory and \$50 million in exemplary damages, as well as an injunction. Her lawyer said that Lindsay had single-name recognition, like Oprah or Madonna, and that E-Trade used her celebrity status for its own profit.

A spokesperson for the company that produced the ad said it “just used a popular baby name that happened to be the name of someone on the account team.” E-Trade said in a statement that the suit had no merit, and filed a motion to dismiss the suit in May.

In late September the parties settled the case, with Lohan withdrawing the suit with prejudice. The terms of the settlement are undisclosed.

In a statement, the company said that “E-Trade has always maintained that the claims were without merit, which is why we moved to dismiss the case. With the case now withdrawn, we are pleased to have the matter behind us.” When asked if the settlement included a cash payment, a spokesperson said, “It was a simple business decision. We always have to consider the cost and time involved in litigation, and we are pleased to have the matter behind us.”

Lohan’s lawyer had no comment other than to confirm the settlement, but her mother, Dina, told reporters that the family was “pleased.”

Why it matters: Settling the case allows Lohan to focus on her other legal problems, including a current probation violation for failing multiple drug tests. And had the E-Trade suit gone forward, Lohan faced a tricky legal argument: that the single-name recognition E-Trade allegedly traded on was that of a party girl whom the public knows and understands as someone who imbibes too much “milk.” But the case also demonstrates the expanding notion of publicity rights, where celebrities consider more than just their likeness protectable. Advertisers should be aware that the use of qualities associated with celebrities – positive or negative – could trigger a potential lawsuit.

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CARU: Kids Magazine Should Include Ad Disclaimer

The Children’s Advertising Review Unit recently determined that National Geographic Kids should clearly label advertising in its children’s magazine to avoid blurring editorial and advertising content.

The magazine ran an advertisement for “The Ranger’s Apprentice” book series, which appeared on the upper half of a right-side page. Editorial content ran on the left-side page and jumped to the lower half of the right side. The advertisement, which had a dark background with gold and white text and blue highlighting, did not include a disclaimer that it was an ad.

The editorial feature, "Bet You Didn't Know: 10 Earthshaking Facts About Our World," contained random facts on various topics, including science, geography, and history, on a dark background with blue, white, and gold lettering.

CARU expressed concern that children, due to their level of experience and lack of maturity, would have difficulty distinguishing between the magazine's editorial feature and the book series advertisement. Looking at the net impression of the advertisement as a whole and in relation to the adjoining editorial feature, CARU determined that "one reasonable take away message was that the advertisement for the book series was part of the editorial feature." "[T]he background of the advertisement was the same color and tone as that of the editorial feature making it difficult for a viewer to distinguish where one started and the other ended. Adding to this impression of continuity was the fact that both had gold and white text with blue highlights throughout." In addition, CARU concluded that some children may have thought the "random facts" in the editorial feature were related to the content in the books, and "that it was all a part of the same article."

Therefore, "a prominent disclosure delineating the advertisement from the editorial feature is necessary, particularly for children who do not possess the requisite cognitive ability to understand that some types of magazine content (especially those that appear similar to editorial content) are in fact advertisements," CARU said.

In its statement, National Geographic for Kids said it had instituted a policy of including the slug line "Advertising" at the top of any fractional advertising in the magazine, regardless of the content or color.

Why it matters: "Advertising should not be presented in a manner that blurs the distinction between advertising and editorial content," CARU cautioned in the opinion. Especially when advertising to children, marketers should be careful to distinguish their ads from non-advertisements.

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Another Post-Transaction Company Settles, This Time For \$5.2 Million

In a second major settlement with a post-transaction company, Webloyalty agreed to pay \$5.2 million to the state of New York over charges that it enrolled consumers in discount programs after receiving their credit card information from online retailers. Five online retailers will also pay a total of more than \$3 million.

New York Attorney General Andrew Cuomo recently settled with a Webloyalty rival, Affinion, for \$8 million over claims that the company tricked consumers into signing up for discount clubs.

The settlements are a result of Cuomo’s “data pass” marketing investigation, where an online retailer transfers a customer’s credit card information to a third party like Webloyalty. After completing a transaction with an online retailer, consumers would be presented with a cash-back or discount offer from a marketing company. The AG’s office alleged that information about the offer and the fact that a consumer’s credit or debit card information would be transferred to a third party was buried in the fine print, and that consumers often accepted the offer without knowing they were joining a fee-based program. Webloyalty charged consumers between \$9 and \$20 each month, the AG’s office said.

Webloyalty will pay a total of \$5.2 million under the settlement, which will refund consumer purchases and cover penalties, costs, and fees. In addition, the company agreed to permanently end its practice of obtaining consumers’ billing information from online partner retailers and reform its marketing practices to ensure that consumers understand the kind of program in which they enroll.

Webloyalty’s online retailer partners will pay a total of \$3.3 million and also agreed to reform their marketing practices and refrain from providing their customers’ billing information to companies that market discount clubs online.

Along with the other major post-transaction companies Affinion and Vertrue, Webloyalty changed its practices earlier this year to require consumers to re-enter their credit card information to enroll in their discount clubs.

To read more details from the AG’s press release, click [here](#).

Why it matters: In addition to the ongoing investigation in New York, data pass marketers are facing federal scrutiny as well. In May, Senator Jay Rockefeller (D-W.Va.), Chairman of the Commerce Committee, introduced the Restore Online Shoppers’ Confidence Act, legislation that would establish prohibitions and restrictions for all online post-transaction offers, and limit the use of “negative option” sales. The proposed legislation would impose a complete ban on the passage of data from one merchant to another in a post-transaction marketing sale. The post-transaction companies would be required to collect a consumer’s full information, rather than receiving it from the underlying seller. If enacted as drafted, the Restore Online Shoppers’ Confidence Act would have a profound effect on online marketers that currently pass or receive consumer data for post-transaction sales, and would have implications for all online services that periodically bill for their products or services. For more information on the Act, click [here](#).

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