

## ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

### IN THIS ISSUE

- **Ad Industry Faces More Scrutiny From Washington**
- **Ad Shops Face Possible Discrimination Lawsuit**
- **NAD Disputes Rise 40 Percent**
- **Data Breaches Rise by Almost Half in 2008**
- **Veoh Granted Safe Harbor in Infringement Case**
- **Court Blocks Kentucky's Bid to Seize Gambling Domain Names**

### Ad Industry Faces More Scrutiny From Washington

The advertising industry is bracing for the possibility of more regulation and enhanced scrutiny under the Obama Administration and new leadership in Congress.

When the 111th Congress first convened in January, Rep. Henry Waxman, D-Calif., a vocal critic of advertising, took the helm of the influential House Energy and Commerce Committee, replacing longtime chairman John Dingell, D-Mich. Waxman has pushed for more stringent regulation of direct-to-consumer (DTC) drug advertising, tobacco advertising, and product placement. In the Senate, Senator Jay Rockefeller, D-W. Va., has been named chairman of the Senate Commerce Committee, replacing Senator Daniel Inouye, D-Hawaii. Rep. Rick Boucher, D-Va., will replace Rep. Ed Markey, D-Mass., as the head of the Telecommunications Subcommittee of the House Energy and Commerce Committee, and Rep. Bobby Rush, D-Ill., will continue to head the Consumer Protection Subcommittee of the House Energy and Commerce Committee.

- DTC Drug Ads DTC pharmaceutical advertising continues to draw criticism even with the enactment of the 2007 Food and Drug Administration Amendments Act, authorizing the FDA to fine companies for false or



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### UPCOMING EVENTS

**February 10-11, 2009**

**Promotion Marketing Association: Basics Seminar**

**Topic:**

"Basics of Promotion and Integrated Marketing"

**Speaker:** [Michael Barkow](#)

USA Weekend Magazine

535 Madison Avenue

New York, NY

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**March 5-6, 2009**

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misleading DTC drug ads. Despite the new law and stepped-up self-regulatory efforts by the drug industry, Rep. Henry Waxman, D-Calif., stated in December that he would back congressional efforts to authorize the FDA to impose a moratorium on new DTC drug ads. Last year Reps. John Dingell, D-Mich., and Bart Stupak, D-Mich., sent letters to the major drug companies urging them to adopt "guidelines," including a two-year moratorium on DTC ads for new prescription drugs.

- **Kid Food Marketing** In a study released last year, the Federal Trade Commission found that the kid food industry has made significant progress via self-regulation over the past three years. The agency reported that 44 major food and beverage companies are spending \$1.6 billion a year to promote kid food and drink products, down from previous estimates of \$10 billion a year. At a recent congressional hearing, Senator Tom Harkin, D-Iowa, a longtime advocate of childhood nutrition, stated that "self-regulation [of kid food ads] is the better route to go." However, some advocates continue to push for more governmental regulation.
- **Product Placement** The Federal Communications Commission is currently conducting a Notice of Inquiry and Proposed Rule Making on whether its current sponsorship identification rules sufficiently address the escalating use of embedded advertising and product placement. Last year the agency solicited comments on whether TV broadcasters should include an on-screen "crawl" whenever product placement occurs.
- **Behavioral Targeting** Late last year lawmakers raised renewed consumer privacy concerns over behavioral targeting, with some calls for a "Do Not Track" registry akin to the "Do Not Call" telemarketing registry. The FTC is also in the midst of revising a proposal for self-regulation of behavioral advertising. Reps. Ed Markey, D-Mass., and Byron Dorgan, D-N. Dak., have indicated that consumer privacy will be a priority in the 111th Congress.
- **Tobacco Ads** Last year the House of Representatives passed a bill that would have shifted oversight of tobacco ads from the Federal Trade Commission to the Food and Drug Administration. The bill would also have provided for interim ad restrictions that included a ban on outdoor tobacco ads within 1,000 feet of any grade school or playground and a requirement that most tobacco ads be restricted to black text on a white background. Although the bill did not reach the Senate, it is expected that tobacco ads will continue to be a key issue in the 111th Congress.

**Institute 2009**

**Topic:**

"Mobile Advertising and Web 2.0"

**Speaker:** [Linda Goldstein](#)

PLI New York Center

New York, NY

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**March 11-13, 2009**

**The IAPP Privacy Summit 2009**

**Topic:**

"Sunday in the Park With FACTA:  
Navigating the Post-FACTA FCRA  
Regulatory Landscape"

**Speaker:** [Helen Foster](#)

Washington Marriott Wardman Park

Washington, DC

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**March 16-18, 2009**

**PLI Practising Law Institute**

**Topic:**

"Television, Video & User-Generated  
Content"

**Co-Chair & Moderator:** [Kenneth M. Kaufman](#)

New York, NY

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**April 2-3, 2009**

**PLI's Information Technology Law  
Institute 2009: Web 2.0 and the Future  
of Mobile Computing: Privacy, Blogs,  
Data Breaches, Advertising, and  
Portable Information Systems**

[back to top](#)

## Ad Shops Face Possible Discrimination Lawsuit

Stating that current efforts to diversify the ad industry boil down to "blaming the victims," civil rights lawyer Cyrus Mehri announced that he is working with the NAACP Legal Defense Fund to bring a possible employment discrimination class-action suit against Madison Avenue.

"The NAACP and my firm are joining forces to take on the advertising industry to end the long era of purposeful discrimination," Mehri said recently in New York, where he, NAACP Interim General Counsel Angela Ciccolo, activist Sanford Moore, and economists Marc Bendick and Mary Lou Egan held a press conference. According to Mehri, the advertising industry is guilty of "pervasive racial discrimination."

In the past, Mehri's firm, Mehri & Skalet, has brought discrimination class actions against Ford Motor Co. and Texaco. Mehri said he would provide a more definitive timeline for the "Madison Avenue Project" shortly.

At the press junket, the results of a study by Bendick and Egan were announced, revealing a number of possibly damning alleged findings:

- African American college graduates in advertising earn 80 cents for every dollar earned by their white counterparts.
- The percentage of African Americans among advertising professionals and managers is less than half of what it should be.
- African Americans in advertising are only 10 percent as likely as their white counterparts to earn \$100,000 or more per year.
- Compared with the overall U.S. labor market, the advertising industry rates significantly worse on eight measures of employment for African American managers and professionals—by an average of 36.7 percent.

In 2004 the New York City Commission on Human Rights opened an investigation that resulted in 16 major ad shops agreeing to take specified measures to combat racial discrimination over a three-year period. But the actual result, said Moore, has been a "minimalist" response from the industry.

### Topic:

"Mobile Advertising and Web 2.0"

Speaker: [Linda Goldstein](#)

PLI California Center  
San Francisco, CA  
[for more information](#)

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### NEWSLETTER EDITORS

[Jeffrey S. Edelstein](#)

Partner

[jedelstein@manatt.com](mailto:jedelstein@manatt.com)

212.790.4533

[Linda A. Goldstein](#)

Partner

[lgoldstein@manatt.com](mailto:lgoldstein@manatt.com)

212.790.4544

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[back to top](#)

## **NAD Disputes Rise 40 Percent**

Disputed claims filed with the National Advertising Division of the Better Business Bureau, the industry's self-policing arm, rose 40 percent in 2008.

"The statistics show a more competitive atmosphere," Lee Peeler, president/CEO of the National Advertising Review Council, the agency that sets policies for NAD, told *Brandweek*. "Our speculation is when the economy's not growing . . . market share is more important than it ever was. Advertisers are being more adventurous and more sensitive to advertising claims."

NAD resolves about 95 percent of such complaints. It directs a few cases each year to the Federal Trade Commission, which has the discretion whether to conduct an investigation.

The jump came at a time when comparative ads—in particular, taste tests—appear to have risen in number as well, such as ads pitting Dunkin' Donuts against Starbucks and Domino's against Subway.

Of course, like anything, comparative ads have their limitations. For a variety of reasons, analysts say the approach can fall short of expectations. One reason is consumer skepticism, since viewers are inclined to assume that tests are rigged. Another is consumer confusion over who is making the initial claim, which can result in their tuning out the entire category.

[back to top](#)

## **Data Breaches Rise by Almost Half in 2008**

656 data breaches were reported in 2008, representing an increase of nearly 50 percent over the 446 breaches reported in the previous year, according to a study by the Identity Theft Resource Center, a nonprofit group that works to help individuals recover from identity theft and raise awareness of the issue.

Earlier this month, the ITRC said that an estimated 35.7 million records were possibly breached based on information reported by businesses, governments, and schools last year. Of the total 656 breaches, about 37 percent of the breaches occurred at businesses, and another 20 percent at schools.

The percentage of breaches resulting from data theft by employees more than doubled to 16 percent in 2008, up from 7 percent in the prior year, according to the ITRC.

In a statement, ITRC co-Founder Linda Foley said the increase "may be reflective of the economy, or the fact that there are more organized crime rings going after company information using insiders." She also noted that "as companies become more stringent with protecting against hackers, insider theft is becoming more prevalent."

The ITRC found human error to be one of the main causes of data breaches. Incidents such as lost or stolen laptops or inadvertent online posting of personal data caused more than 35 percent of reported incidents. Hackers and data-stealing software were blamed in about 14 percent of breaches.

Foley said the statistics probably understated the problem, since many organizations do not report data breaches. Although 40 states require that consumers be notified of any loss or theft of private data, many exceptions to these notice rules exist. Moreover, in close to 42 percent of data breaches reported last year, the organizations involved did not disclose the number of people involved.

[back to top](#)

## **Veoh Granted Safe Harbor in Infringement Case**

Recently, Veoh received a favorable ruling in the case filed against it by Universal Music Group alleging that Veoh's Internet service infringed copyrights owned by UMG.

UMG sued Veoh in 2007 for infringement under the Digital Millennium Copyright Act. Central to the dispute was whether Veoh, which hosts user-generated content and streams television shows and other fare from content provider partners, fell under the "safe harbor" exception of the DMCA. Veoh claimed that it was eligible for safe harbor, which generally provides that video-sharing Web sites are not required to request that users submit a copyright or proof of ownership. UMG countered that because Veoh's software creates copies and delivers videos to users, Veoh was ineligible for protection.

In denying UMG's motion for partial summary judgment that Veoh was not entitled to assert the affirmative defense under

the DMCA, the court found that Veoh "had no ability to prescreen content, and there was no evidence that Veoh fostered infringement for profit."

In court papers, Veoh said it "goes beyond the standard measures" of copyright protection by using digital fingerprinting to help safeguard material. "Once Veoh receives a notice that a video contains allegedly infringing material, Veoh removes the individual video and prevents the future uploading of any other video having the same hash. Veoh then terminates user access to any existing files containing the subject hash."

[back to top](#)

## **Court Blocks Kentucky's Bid to Seize Gambling Domain Names**

Kentucky may not take over 141 domain names owned by online betting operations. The Kentucky Court of Appeals overturned a lower court's decision to allow the state to seize the domain names on the basis that they violated the state's law against "gambling devices."

In a 2-1 opinion issued in January, a panel of the court ruled that an Internet domain name is not a gambling device. "It stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a 'machine or any mechanical or other device . . . designed and manufactured primarily for use in connection with gambling'," Judge Michelle Keller wrote in the majority opinion. "We are thus convinced that the trial court clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture."

Kentucky, which is home to the Kentucky Derby, already allows gambling on horse racing and bingo, and has a state lottery. It sued the gambling Web sites on the grounds that they permitted state residents to engage in illegal betting. The state estimated that some 13,000 Kentuckians use the Internet gambling sites. It requested that the court either force the sites to block Kentucky users or allow the state to seize the domain names.

In its ruling reversing the lower court, the appellate panel found that it lacked jurisdiction to decide whether Kentucky may seize the domain names. Rather, the panel found that authority to place domain names under the definition of illegal gambling devices lies with the General Assembly.

A spokesperson for Kentucky Governor Steve Beshear said that officials have not decided what the state's next step would be.

[back to top](#)

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