



September 25, 2009



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**SPECIAL FOCUS:**

**"L.A. Scale": An Interview with Partner Alan Brunswick**

Since the recent successful completion of negotiations between the Screen Actors Guild (SAG) and the American Federation of Television & Radio Artists (AFTRA) on the one hand, and the Joint Policy Committee (JPC) of the ANA (Association of National Advertisers) and AAAA (American Association of Advertising Agencies) on the other, for new contracts covering actors and athletes who perform in television and radio commercials, some talent agents have been demanding that their clients be paid "L.A. Scale" for voice-over work in radio commercials recorded on the West Coast. This week our newsletter editors asked Alan Brunswick, Chair of Manatt's Entertainment & Media Division, resident labor relations and employment law expert, and former vice president and in-house counsel for the Association of Motion Picture & Television Producers, to explain what it means to advertisers and advertising agencies.

**Editors:** What is "L.A. Scale"?

**Brunswick:** These are fictional rates created by one or more talent agents for Los Angeles voice-over work on commercials.



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**Editors:** What do you mean by "fictional"?

**Brunswick:** The L.A. Scale rates were simply made up by some agents; they were not negotiated by SAG/AFTRA and the JPC, the official bargaining parties to the SAG/AFTRA Commercials Contracts.

**Editors:** What's wrong with that?

**Brunswick:** Agents can always ask for overscale compensation for their clients. However, some agents have indicated that these rates are required by SAG and AFTRA. That's simply not correct. And if agents from different companies are working in concert with each other to artificially set prices, that might actually be a violation of law, since the guilds were not involved in the creation of the L.A. Scale.

**Editors:** What should advertisers and agencies do when an agent demands L.A. Scale for his/her clients?

**Brunswick:** Ask for the source of those rates; if they claim that they're from SAG or AFTRA, ask for some written confirmation and, if they provide it, forward it to your counsel to deal with. Most important, understand that whether or not to accede to such a demand is a matter of negotiation and how much leverage you have in the circumstances; it is not a requirement of any guild contract. Do you or your client want or need that particular actor or athlete in your commercial? Are you or your client willing to pay the extra money to cast that particular actor or athlete in your commercial, or will some other actor or athlete who is willing to work for less (e.g., actual SAG/AFTRA scale) do for your purposes? These are just a few of the questions our clients are grappling with, but I've been doing this a long time. Nothing's insurmountable.

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## FTC Plans Wide-Ranging Look at Privacy Issues

**The Federal Trade Commission is planning a series of public roundtable discussions to explore the privacy challenges posed by current technology and business practices that collect and use consumer data. Such practices, according to the FTC, include social networking, cloud computing, online behavioral advertising, mobile marketing, and the collection and use of information by retailers, data brokers, and other diverse businesses. The goal of the roundtables is to determine how best to protect consumer privacy while supporting beneficial uses of the information and technological innovation.**

The series will consider the risks and benefits of information collection and use in online and offline contexts, consumer expectations surrounding

## UPCOMING EVENTS

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](#)  
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September 30, 2009  
Promotion Marketing Association Webinar  
Topic: "ABC's of UGC: User Generated Content Contests"

Speaker: [Linda Goldstein](#)  
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October 5-6, 2009  
NAD Annual Conference 2009  
Moderator: [Jeff Edelman](#)

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New York, NY  
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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  
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October 27, 2009  
American Conference Institute's 3rd Annual Forum on Sweepstakes Contests and Promotions

Speaker: [Linda Goldstein](#)  
The Carlton Hotel  
New York, NY  
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November 5-6, 2009  
31st Annual Promotion Marketing Law Conference  
Topic: "The Battle of the Brands"

Moderator: [Chris Cole](#)  
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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](#)

various information management practices, and the adequacy of existing legal and self-regulatory regimes to address privacy interests. The first roundtable will be held on December 7, 2009, in Washington, D.C.

Anyone may submit a request to participate as a panelist and recommend topics for the agenda. Submissions should be made to [privacyroundtable@ftc.gov](mailto:privacyroundtable@ftc.gov) by October 30, 2009.

The Commission also invited interested parties to submit written comments or original research. A list of specific questions to inform the first roundtable discussions is available at the Commission's Web site at [www.ftc.gov/bcp/workshops/privacyroundtables/](http://www.ftc.gov/bcp/workshops/privacyroundtables/).

Depending on the results of the roundtables, the Commission may issue a new set of privacy principles by next year.

Currently, no single federal law governs the protection of consumer data. Instead, consumer privacy is governed by a hodgepodge of state and federal laws and regulations.

In February, the FTC released a report urging the industry to bolster its self-regulatory efforts. FTC Chairman Jon Leibowitz has threatened to issue privacy regulations if adequate improvements are not made.

Meanwhile, federal lawmakers are also teeing up privacy bills for consideration by Congress. Representative Rick Boucher (D-Va.), who chairs the Subcommittee on Communications, Technology, and the Internet, is expected to introduce a general privacy bill this fall.

**Why it matters:** Online privacy is clearly on the agenda at the FTC and Congress, and may well produce a statute and/or regulations that govern how companies collect, handle, and use consumer data. Companies and individuals with an interest in these issues would be well advised to monitor the developments at the FTC and Congress and consider weighing in with comments and/or requesting to participate in the roundtables.

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## Third Circuit Upholds Online Betting Ban

**The Court of Appeals for the Third Circuit has upheld a federal law that criminalizes bank or credit card transactions linked to Internet gambling.**

In upholding the Unlawful Internet Gambling Enforcement Act of 2006, the court rejected a challenge from a trade group representing offshore betting operations that argued that the statute was unconstitutionally vague and

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Marketing Association Summit  
Topic: "FTC Developments"  
Speaker: [Anthony DiResta](#)  
Paris Hotel  
Las Vegas, NV  
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violated privacy rights.

The Interactive Media Entertainment & Gaming Association had sued the government in New Jersey federal court in the hopes of legalizing online gambling in that state.

The challenged law does not target the bet itself, but instead criminalizes the exchange of money associated with the bet within a particular state. The association questioned how the location of an online bet would be determined if the gambler is in Delaware, for instance, and the operation is in Costa Rica.

The court rejected that argument, finding that the location of the bettor was enough to establish the application of the law. It also rejected arguments that the law invades a gambler's right to privacy in the home.

Chairman Joe Brennan, Jr., said the association was considering an appeal. But he also said he saw a potential window in the ruling, because it found that state law is the determinant. Accordingly, if online betting is not illegal in a particular state, it may not be a violation of the federal law to process a transaction from a gambler in that state.

**Why it matters:** The federal government's campaign to ban Internet gambling got a major boost from the Third Circuit. However, this is certainly not the last we will hear of the ongoing battle between government regulators and lawmakers and the online betting industry. The United States was, at one point, the biggest market for online gambling, and industry players, no doubt, will continue to seek ways to do business stateside.

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## Feds Raise Eyebrows at Food Label Campaign

**A new food-labeling campaign called Smart Choices that is being used by a number of big food manufacturers has two federal agencies on red alert.**

The program, which uses a green checkmark label on products that meet certain nutritional standards, is "designed to help shoppers easily identify smarter food and beverage choices." The label that is debuting now on store shelves will eventually appear on hundreds of packages.

But with Smart Choices products that include sugar-laden cereals like Kellogg's Cocoa Krispies and Froot Loops, the program has raised eyebrows among nutritionists, consumer advocates, and the federal government.

The Food and Drug Administration and the Department of Agriculture sent

program officials a letter on August 19 saying that they planned to monitor the effect of the Smart Choices label on consumer choice. The letter said the agencies would be concerned if the Smart Choices label “had the effect of encouraging consumers to choose highly processed foods and refined grains instead of fruits, vegetables and whole grains.”

Eileen Kennedy, president of the Smart Choices board and the dean of the Friedman School of Nutrition Science and Policy at Tufts University, told *The New York Times* that the program’s criteria were based on government dietary guidelines and widely accepted nutritional standards. Dr. Kennedy, whose position is unpaid, defended the products endorsed by the program, including sweetened cereals such as Froot Loops. She said Froot Loops was better than other things parents could choose for their children, like a doughnut.

Froot Loops qualifies because it meets standards for fiber and Vitamins A and C, and because it does not exceed limits on fat, sodium, and sugar. It contains the maximum amount of sugar allowed under the program for cereals, 12 grams per serving, which amounts to 41 percent of the product, measured by weight.

Senior FDA advisor Michael Taylor said the agency was concerned that the label would give the impression that sugar-laden cereals and high-fat foods were nutritionally superior. “What we don’t want to do is have front-of-package information that in any way is based on cherry-picking the good and not disclosing adequately the components of a product that may be less good,” Mr. Taylor said. “We’re taking a hard look at these programs and we want to independently look at what would be the sound criteria and the best way to present this information.”

Ten companies have signed up for the Smart Choices program so far, paying a fee of up to \$100,000 a year, based on total sales of Smart Choices-labeled products. It is meant to replace similar nutritional labels used by individual manufacturers, like PepsiCo’s Smart Choices Made Easy and Sensible Solution from Kraft. Companies that join Smart Choices agree to stop using their own labeling systems.

Last September, Michael Jacobson, executive director of the advocacy group Center for Science in the Public Interest, quit the panel that helped devise the Smart Choices nutritional criteria, complaining that it was dominated by members of the food industry, which colored its decisions. Dr. Kennedy disagreed, saying industry members had not controlled the results.

**Why it matters:** It’s unfortunate for the proponents of the Smart Choices program that Froot Loops has become the inadvertent poster child for the new labeling system. With childhood obesity still a hot topic in Washington and elsewhere, we anticipate that the letter from the FDA and Department of

Agriculture won't be the last we hear from them on the Smart Choices program.

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## Obama Warns Teens of Facebook Dangers

**President Barack Obama recently warned U.S. teenagers of the perils of putting too much personal information on social networking Web sites, saying it could come back to bite them.**

Obama's advice, given in a Q&A with a group of 14- and 15-year-olds, came on the heels of recent studies that show U.S. employers are increasingly using sites such as Facebook and MySpace to conduct background checks on job applicants.

In response to a request for advice on becoming president, Obama said, "Well, let me give you some very practical tips. First of all, I want everybody here to be careful about what you post on Facebook, because in the YouTube age, whatever you do, it will be pulled up again later somewhere in your life."

"And when you're young, you make mistakes and you do some stupid stuff. And I've been hearing a lot about young people who—you know, they're posting stuff on Facebook, and then suddenly they go apply for a job and somebody has done a search."

A June survey by careerbuilder.com found that 45 percent of employers used social network sites—especially Facebook—to research job candidates. More than one in three of the employers surveyed said they had found content on the sites that had influenced them to reject a candidate. Examples included inappropriate photographs, information about the applicant's drinking or drug use, or bad-mouthing of previous employers, coworkers, or clients.

**Why it matters:** With the advent of the Internet, privacy has taken on an entirely new dimension. Social networking sites have taken privacy to yet another level. There's no such thing as doing things in the privacy of your own home if you are doing them online. Yet many consumers seem unaware that personal information they are putting on the Internet may be accessed by any number of people. Privacy, however, is top-of-mind for the Federal Trade Commission and some congressional members. We expect many legal developments in this area over the next few years.

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EU Finds Most Electronic Goods Web Sites Break the

## Law

**A recent analysis by the European Union of 369 Web sites selling electronic goods in 28 European countries found that 203—or 55 percent—were violating European consumer protection laws.**

The biggest problem involved the consumer's right to return a product bought online within seven days.

“We know from the level of complaints coming into European Consumer Centres that this is a real problem area for consumers,” said EU Consumer Commissioner Meglena Kuneva. “We discovered that more than half of the retailers selling online electronic goods are letting consumers down.”

EU authorities conducted the probe in May to determine if Web sites were following rules on providing clear information about the trader, the product, the price, and customers' rights. Some 369 Web sites across 26 EU member states, Norway, and Iceland, selling electronic goods, including digital cameras, mobile phones, personal music players, DVD players, computer equipment, and game consoles, were scrutinized. The 200 biggest such sites in the EU, along with another 100 that had been the subject of previous consumer complaints, were checked.

Of the 203 cases facing further investigation:

- Two-thirds failed to adequately explain that consumers had seven days to return a product for a full refund without giving a reason. Others failed to explain the right to have a faulty product repaired or replaced for at least two years after sale.
- 45 percent omitted or failed to prominently display details about extra delivery charges.
- One-third did not provide complete contact information in the event of a problem.

The EU said it would contact all the traders with identified problems and ask them to clarify the position or correct the problems. Any Web site that fails to make corrections could face warning letters and then enforcement action. If this is ignored, the operators could be prosecuted and face fines.

Every site checked in Cyprus and Hungary was found to have problems. Six of fourteen Web sites checked in the U.K. revealed irregularities. Iceland, Norway, and Latvia have published a list of the Web sites that will face further investigation.

**Why it matters:** Although these are European Web sites, U.S. and global

companies should check the list of Web sites to ensure that they do not have any affiliation with those sites, or if they do, to address the irregularities accordingly.

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## Maine AG Won't Enforce Predatory Marketing Law

**Maine Attorney General Janet Mills has agreed not to enforce a new law designed to protect minors' sensitive medical information from marketers.**

The agreement came days before the state's Predatory Marketing Law was to have taken effect on September 12. The law would have prevented marketers from collecting or sharing health or other personally identifiable information acquired from minors, defined as 18 years old and under. Its passage prompted a lawsuit by the Maine Independent Colleges Association, Maine Press Association, MetChoice, and Reed Elsevier that argued that the law was overbroad and violated the First Amendment and sought a permanent injunction of its enforcement. The lawsuit contended that the law impermissibly restricts commercial speech and restricts Internet commerce outside the state, whether or not it occurs "wholly outside of Maine."

The agreement with the Attorney General brings the lawsuit to a close. A stipulated court order states, "The Attorney General has acknowledged her concerns over the substantial overbreadth of the statute and the implications of Chapter 230 on the exercise of First Amendment rights and accordingly has committed not to enforce it. She has also represented that the Legislature will be reconsidering the statute when it reconvenes."

**Why it matters:** According to the complaint, the law would have forced many businesses to suspend operations in Maine because it was impossible to know if any information collected or used pertains to a minor in the state. The Attorney General said she would work with the plaintiff and the state legislature to develop a policy that will protect the privacy of children while also respecting the Constitution.

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