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Manatt Partner Tony DiResta Interviews FTC on Endorsements, Privacy and COPPA

During the course of the Word of Mouth Marketing Association's Talkable Brand Exchange in New York on October 7, 2010, Manatt partner Tony DiResta had the occasion to speak with Heather Hippsley, Assistant Director of Advertising Practices at the FTC, regarding the agency's perspective on endorsements, marketing and privacy issues. Below are a few of the key issues on which the FTC is focusing now and in the coming months.

Guides Concerning Endorsements and Testimonials: The FTC sees a new paradigm in the world of marketing, with increased use of social media platforms. Yet, the same principles applied to traditional media apply to "new media."

With respect to training, while there is no "one size fits all" approach, companies that have certification programs for their employees and agencies tend to have good models. When the training and monitoring of sponsored speakers are delegated outside the company to third parties such as agencies, Ms. Hippsley instructed that it is important that the agency contracts "have teeth," expressly providing what the expectations are for training and monitoring of agents or bloggers.

Marketing to Children: The key focus of the agency is on Children's Online Privacy Protection Act (COPPA) issues which targets the ages below 13. Ms. Hippsley said that companies need to be sensitive to marketing programs that impact a diverse age group but where the company has reason to know that kids under 13 will participate or be

impacted, COPPA compliance issues can be triggered.

Privacy: Privacy issues are of keen interest to the FTC senior management team, and the privacy models used in the past are under review. Ms. Hippsley specifically instructed that companies cannot merely rely on platform sites or their privacy notices, and she advised that companies need to put themselves in the shoes of consumers who do not want to be mislead about the use of their personal information. Mobile marketing is of keen interest.

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Tech Companies Support Rush Privacy Bill; Other Bills in the Pipeline

Three major tech companies – eBay, Intel, and Microsoft – sent a letter to Rep. Bobby Rush (D-II.) in support of his proposed privacy bill, the Best Practices Act. The companies said they support the bill, which would require companies to receive permission before collecting consumers' sensitive information, because it "strikes the appropriate balance."

Rep. Rush, Chairman of the House Subcommittee on Commerce, Trade, and Consumer Protection, introduced H.R. 5777 in July as the "Building Effective Strategies To Promote Responsibility Accountability Choice Transparency Innovation Consumer Expectations and Safeguards Act" or Best Practices Act of 2010. In the letter, the three companies said they "support the bill's overall framework" and "appreciate that the [Act] is technology neutral and gives flexibility to the Federal Trade Commission to adapt to changes in technology." However, they criticized the provision allowing civil suits by consumers, claiming it "would create unnecessary litigation costs and uncertainty for businesses, but would not have a corresponding benefit to consumer privacy."

In other privacy legislation news, Rep. Rick Boucher (D-Va.) recently spoke at a forum sponsored by the Safe Internet Alliance, saying that he plans to introduce his privacy legislation early in the next congressional session. Reps. Boucher and Cliff Stearns (R-Fla.) released a draft of their proposed legislation in May, which included heightened disclosure requirements for privacy practices and new rules on targeted advertising. The bill would also establish a general rule of opt-out consent for companies that collect data about consumers, although opt-in consent would be required to collect "sensitive data," such as geographic location information, medical records, or sexual orientation. (For more details on the legislation, click here.)

Movement could also come in the Senate, with Commerce Consumer Protection Subcommittee Chairman Mark Pryor (D-Ark.) announcing that he is working on a bill to address online tracking. Sen. Pryor said the bill could include a "do-not-track" list similar to the federal Do Not Call

registry, where consumers could opt out of having their activities tracked online. Sen. Pryor said he plans to introduce the bill – which could be either a broader privacy bill or a standalone measure – in the next congressional session.

To read the letter from eBay, Intel, and Microsoft, click here.

To read the Best Practices Act, click here.

To read the discussion draft of the Boucher-Stearns bill, click here.

Why it matters: Consumer privacy remains a hot topic in Washington and with several lawmakers addressing the issue, legislation could become a reality in the next congressional session.

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Oh, Brother! Hulk Hogan Settles

Hulk Hogan settled his lawsuit against Post Foods claiming that an ad for Cocoa Pebbles cereal misappropriated his likeness by featuring the cartoon character "Hulk Boulder." Under the terms of the settlement, the commercial will no longer be aired; other terms were not disclosed.

Professional wrestler and self-described actor Terry Bollea, better known as Hulk Hogan, filed suit in May. He claimed that Post Foods, the maker of Cocoa Pebbles, misappropriated his image and engaged in false endorsement, and he sought both punitive and compensatory damages.

In the commercial, Flintstones characters Fred and Barney wrestle with a cartoon character called "Hulk Boulder." After Hulk Boulder handily defeats Fred and Barney and begins to celebrate by eating a bowl of Cocoa Pebbles, the wrestler – who sports long blond hair and a Fu Manchu mustache, features that Hogan claimed are his "signatures" – is then bested by Bam-Bam. The commercial ends with Hulk Boulder "shown humiliated and cracked into pieces with broken teeth," according to Hogan's complaint.

Hogan argued that before his rise to fame as a professional wrestler in the 1980s, he originally wrestled as part of a tag team known as Terry and Ed Boulder before he made it big. Hogan filed a notice of dismissal with prejudice, dismissing the case on September 27. "Terry is happy to have it favorably resolved," said Hogan's lawyer, Joseph W. Bain.

To read the complaint in Bollea v. Post Foods, click here.

Why it matters: While the terms of the settlement are mainly undisclosed, the suit, and Post's agreement to no longer air the commercial, serve as a cautionary tale to advertisers considering using a celebrity likeness. Celebrities are increasingly seeking to enforce all aspects of their publicity rights – even cartoon versions.

Meet DAA, the New Trade Organization

A coalition of advertising groups has launched a new trade organization, the Digital Advertising Alliance, which has issued a new icon to inform consumers about behavioral advertising.

The Interactive Advertising Bureau, the Direct Marketing Association, the Network Advertising Initiative, the American Advertising Federation, the Association of National Advertisers, the American Association of Advertising Agencies, and the Council of Better Business Bureaus together launched the DAA in late September. The new trade organization has already established a Web site, www.AboutAds.info, which offers information about the industry's self-regulatory efforts.

In addition, the DAA released a new icon for companies to use to notify consumers of behavioral advertising in lieu of the previous icon created earlier this year. The new icon, called the "Advertising Option Icon," still uses a lowercase "i" but is now inside a triangle pointing to the right. When a consumer clicks on the icon, an explanation appears about why he or she is seeing a particular ad, along with an opt-out mechanism.

MediaPost reported that the change in icons was a result of speculation that the new icon would be an easier trademark to enforce. The icon is the latest step by the industry to self-regulate, following the 2009 Self-Regulatory Principles for Online Behavioral Advertising. Companies that follow the principles can license the icon to use in their ads for \$5,000, renewable annually (although Web publishers with annual revenues of less than \$2 million from online behavioral advertising pay no fee). Beginning in 2011, the CBBB and the DMA will monitor and enforce compliance.

For more information about the icon, click here.

Why it matters: Participation is mandatory for members of the DMA, although Dan Jaffe, Executive Vice President of Government Relations for the ANA, said he expects widespread participation among other member advertising companies, as well as nonmember companies. "The hope is that if Congress sees that there is widespread adoption of a solution that works for consumers, we will avoid imposition of a more restrictive system that could severely undermine the value of the Net for advertising purposes," Jaffe told MediaPost. The industry hopes that the principles and the icon will deter the Federal Trade Commission and Congress from passing legislation or creating regulations, although some critics have complained that government enforcement is necessary. "It's the fox watching the corporate-run hen house," said Executive Director of the Center for Digital Democracy Jeff Chester, referencing the self-regulatory principles and the new icon.

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Governor Schwarzenegger Terminates Labeling Bill; Brings California In Line With Green Guides

Vetoing a bill that would have prohibited labeling any plastic product sold in California as "biodegradable," "degradable," or "decomposable," Governor Arnold Schwarzenegger instead signed a bill bringing the state in line with the Federal Trade Commission's Environmental Marketing Guides ("Green Guides").

The California Legislature passed a bill that would have prohibited labeling any plastic product sold in California as "biodegradable," "degradable," or "decomposable," absent standard specification for such terms. Previously, California law banned such terms on food packaging or plastic bags, but Senate Bill 1454 expanded the scope of covered items to include all products that contain plastic components.

The American Society for Testing and Materials (ASTM) presently has no standard specification for the term "biodegradable" or "degradable" as it applies to plastic. According to the bill, the use of such terms on plastic items is inherently misleading to consumers, who will be more likely to litter an item labeled "biodegradable," resulting in harm to the state and environment.

Ultimately, Gov. Schwarzenegger vetoed the bill. Instead, he signed a different piece of legislation that requires manufacturers to comply with the FTC's Green Guides without establishing a higher standard of compliance in California. In his veto statement, Gov. Schwarzenegger said SB 1454 would have "greatly" expanded existing labeling requirements and expressed concern "about the much more expansive universe of plastic products that this bill would regulate and the unforeseen consequences that could result from such a vast expansion."

He opted to sign an alternative bill, SB 228, which requires manufacturers of compostable plastic bags to meet ASTM standards to ensure that the bag is "readily and easily identifiable" from other plastic bags. "I think that bill represents a reasonable next step in providing information to the consumer and recyclers about the differences in biodegradable products," Gov. Schwarzenegger said. The new law, which goes into effect July 11, 2011, prohibits compostable plastic bags from displaying any type of recycling symbol. However, the new law is superseded by the FTC's Green Guides in certain instances, as a "manufacturer [is] required to comply with these requirements only to the extent that those labeling requirements do not conflict with" the federal guidance.

To read California's new law, SB 228, click here.

To read Gov. Schwarzenegger's veto statement, click here.

Why it matters: In lieu of creating a heightened standard for

biodegradable claims in the state, Gov. Schwarzenegger's decision to sign SB 228 keeps California in line with the rest of the country. The FTC recently released proposed updates to its Green Guides, which would significantly tighten the standards for a range of environmental claims. For more information on the draft of the revised Guides, click here.

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CARU: Field Trip Sweepstakes Needs Clarification

Kraft Foods should modify its sweepstakes advertising to better disclose a free means of entry and the chances of winning, the Children's Advertising Review Unit recently recommended.

Kraft launched an "Ultimate Field Trip" sweepstakes for its Lunchables product, where winners could design their own "awesome field trip." The online ad featured a red bus with the sign "ULTIMATE FIELD TRIP" and was linked to Kraft's site. A voiceover told listeners that the "bus is your ticket to the ultimate field trip! Ultimate means your chance to go to the Kennedy Space Center, San Diego Zoo, or the Georgia Aquarium...or you could win the first prize, \$150 for your own awesome field trip."

Listeners were then told to "just find a code inside specially marked packages of Lunchables, go to www.lunchables.com and follow the directions to see where the bus takes you!" On the bottom of the screen a written disclosure stated "No purchase necessary." Listeners who clicked on the ad were taken to Kraft's Web site, where they could click on an "Enter Now" icon.

CARU said that those who heard the voiceover for the ad might conclude that they had to purchase the product in order to enter the sweepstakes. Neither the written disclosure nor the "Enter Now" icon on the advertiser's Web site provided adequate information about the free means of entry, CARU said. Kraft agreed to revise the advertisement. In its advertiser's statement, Kraft said that CARU's recommendations "will provide guidance going forward with respect to future executions."

Why it matters: When running a sweepstakes, companies should remember to clearly and conspicuously disclose both the chances of winning and a free means of entry, among other requirements.

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