Advertising Law @ manatt

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Are Spammers More Prepared For ISP Shutdowns?

In the beginning of June, the Federal Trade Commission announced that the U.S. District Court for the Northern District of California had granted its request for a temporary restraining order shutting down the Internet Service Provider (ISP) Pricewert LLC. A preliminary injunction hearing is scheduled for later in the month.

According to the FTC's complaint, Pricewert, which also operated under the name 3FN, recruited and colluded with criminals to distribute illegal electronic content, such as child pornography, spyware, viruses, Trojan horses, phishing, and pornography featuring violence, bestiality, and incest. The complaint also alleges that the ISP engaged in the deployment and operation of botnets, large networks of computers that have been compromised and can be used for a number of illicit purposes, including sending spam.

In May 2009, the Cutwail botnet operated by Pricewert accounted for up to 35 percent of all spam. In the week after the shutdown, data from TRACElabs showed that the overall spam volume index had been reduced by 15 percent, but the day-by-day amount slowly increased. These results were more modest than those reported after the takedown of ISP McColo last November, when the volume of spam fell by almost half and took months to rebound to the same level. This suggests that since the McColo shutdown, spammers have installed better backup systems to keep control of their botnets of zombie computers in the event of a takedown.

In a statement, the FTC said Pricewert "actively shielded its criminal clientele by either ignoring take-down requests issued by the on-line security community, or shifting its criminal elements to other Internet protocol addresses it controlled to evade detection."

Upcoming Events

June 17-19, 2009
Personal Care Products Council
Speaker: Linda Goldstein
Vancouver, British Columbia
for more information

Pricewert has said that it is not at fault for the alleged criminal activity on its network, which it blames on bad customers.

Why it matters: While many believe there will not be a prolonged decrease in the amount of spam after this latest ISP shutdown, there is hope that the FTC's continued action in this area will serve as a deterrent to ISPs that engage in similar illegal activities.

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Minnesota Abandons Efforts To Ban Online Betting

In April, letters from the director of Minnesota's Alcohol and Gambling Enforcement Division, a division of the state's Department of Public Safety, sent to Internet Service Providers with an order to block access to online gambling Web sites for state residents started a firestorm of activity on the part of gambling industry trade groups and even the state legislature. Now, in the wake of the filing of a lawsuit seeking to stop the ban on the grounds that it violated free speech rights, and with the introduction of legislation in the state to prevent the ban from being enforced, the Division has decided to drop it.

The April letters contained a list of approximately 200 online gambling Web sites. That list was later discovered to be incomplete and inaccurate, as it included sites which did not even accept U.S. customers. In its letters, the Division stated that the failure to block the listed Web sites would result in action from the Federal Communications Commission based on a 1961 federal law.

The legislation, introduced when the Interactive Media Entertainment & Gaming Association filed suit, would have prevented its enforcement and required legislative approval of any similar actions in the future. After the Division announced that it would not enforce the ban, the representative who introduced the bill said he would withdraw it. He also said he planned to sponsor a new bill that would establish a framework for regulating and licensing the online gambling industry.

Why it matters: Although free speech issues may have ultimately led to the dropping of the ban, efforts to regulate online gambling are not over. In addition to the potential new legislation that may be introduced in Minnesota, the director of Minnesota's Alcohol and Gambling Enforcement Division now says that he plans to work with governmental authorities to create policies for regulating online gambling.

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China To Require Blocking Software on All New PCs

Beginning July 1 all PCs sold in China must include software blocking access to certain Web sites.

In May, the Chinese government informed PC manufacturers that they must either

June 18-19
ABA Antitrust Section's Consumer Protection Conference
Topic:
Use, Misuse, and Disregard of Evidence of Actual Confusion in Federal and State Regulatory Proceedings
Speaker: Christopher Cole
Georgetown University Law Center
Washington, D.C.
for more information

June 25, 2009
Nutrition Business Journal Webinar
Speaker: Ivan Wasserman
for more information

June 25-26, 2009
Food and Drug Law Institute
Introduction to Drug Law and Regulation:
A Program on Understanding How the Government Regulates the Drug Industry
Speaker: Ivan Wasserman
for more information

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pre-install the software or offer it on a CD-ROM. The software is known as "Green Dam Youth Escort." In Chinese the word "green" is used to describe Internet surfing free from pornography and other illicit content. Green Dam would link PCs to a regularly updated list of banned sites and block access to them. It also has the ability to collect private user information.

According to China's Ministry of Industry and Information Technology, the new requirement will "protect the healthy growth of young people, and promote the Internet's healthy and orderly development."

Jinhui Computer System Engineering Co., with input from Beijing Dazheng Human Language Technology Academy Co., designed the software. Jinhui founder Bryan Zhang says Green Dam is similar to software that allows parents to block their children's access to inappropriate content, and that the list of banned sites is limited to pornography. He also says the software can be uninstalled or users can choose to unblock Web sites (although users will not be able to learn what sites have actually been blocked).

PC manufacturers and Green Dam providers must periodically report the number of PCs sold and software packages installed to the Ministry. China is second only to the United States in the number of PCs sold – approximately 40 million units were sold in China last year. Many PC companies based outside of China also have investments in factories and research facilities in the country.

The new requirement raises a host of questions and potential problems. China already has a wide-ranging Internet filtering system known as the Great Firewall, which blocks user access to pornography, politically sensitive sites, and foreign media sites that the government finds objectionable. That system, however, blocks content at the network level, and many users are able to get around it. The new requirement could potentially enable the government to tighten its control over how its citizens use the Internet.

Other concerns focus on the technology involved in Green Dam. Industry experts point out that having a single universal application opening a link into every computer could make them more susceptible to viruses and other attacks, although Mr. Zhang said the software is no riskier than other programs updated through the Internet. Like any software, Green Dam could also conflict with other applications, causing bugs or system crashes.

Why it matters: The new requirement and accompanying software could give Chinese censors unprecedented control over Internet access in the country. As a result, PC manufacturers could find themselves facing the difficult choice of losing a major market for their products or exposing themselves to allegations of aiding censorship. One major manufacturer has already said it will consider including the new software with its PCs only if the purpose is to block pornography and only if it can be disabled.

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Nescafé Targets Starbucks' Instant Coffee in Ads

Even before Starbucks' nationwide launch of Via instant coffee, the new product has already become the target of a comparative ad campaign by Nescafé, the maker of Taster's Choice instant coffee.

Starbucks is testing its new instant coffee in Chicago and Seattle. In both of those cities Nescafé is running an outdoor ad campaign that points out the price difference between its brand and Via. One such ad on Chicago subway cars reads: "Starbucks makes great instant. We make great instant. So why does theirs cost 400% more?" The ad refers to Nescafé's Taster's Choice as "the smart choice." In style, copy, and typeface, the Nescafé ads resemble the ads Starbucks is running for Via.

Nescafé has also taken its price-based comparative ad campaign to the Internet. Its Web site for TastersChoice.com features a budget calculator and calls for consumers to stage a "coffee intervention."

A Starbucks spokeswoman said that the company does not plan to respond to the Nescafé ad campaign. The company also ignored McDonald's "UnSnobby Coffee" ad campaign. Recent newspaper ads, however, make a case for Starbucks' higher prices, saying they help pay for health care for its workers, environmental initiatives, and fair trade. Cheaper coffee, the Starbucks' ads say, "comes with a price."

Why it matters: In hard economic times it is not uncommon for more marketers to use comparative ads to improve or retain market share. Comparative advertising can be a powerful tool for marketers to help differentiate their products from those of their competitors. Yet marketers considering a comparative ad campaign must tread carefully, since such tactics are more likely to draw the attention of and a response from their rivals. Recent months have seen a flurry of false advertising lawsuits, including Pepsi vs. Coca-Cola and Sara Lee vs. Kraft.

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Cardinals Manager Sues Twitter Over Fake Page

St. Louis Cardinals manager Tony LaRussa apparently does not consider imitation to be the sincerest form of flattery. He has filed a lawsuit against the social networking site Twitter over a fake account. Although the fake "Tony LaRussa" had only four followers, LaRussa was upset about the tweets that were being sent using his name. The offensive tweets included comments about the deaths of two Cardinals pitchers and drunk driving.

In his complaint, LaRussa asserted claims for trademark infringement/false designation of origin, cybersquatting, and emotional/privacy torts. LaRussa alleges that the page, Twitter.com/TonyLaRussa, which has since been taken offline, has caused him

"significant emotional distress and damage to his reputation." In his lawsuit, filed in California state court in San Francisco (and later moved by Twitter to federal court), LaRussa argues that Twitter is liable because it owns the page and has profited from the use of his name and image. "The site states in large lettering: 'Tony LaRussa is using Twitter,' and encourages users to 'Join today to start receiving Tony LaRussa's updates,'" the complaint states.

Legal experts see several issues with LaRussa's claims. First, there is the argument that the fake account was clearly a parody. Second, the fact that the fake LaRussa only had four followers will likely hurt the real LaRussa's damages claims. Another potential stumbling block for LaRussa is the fact that the Communications Decency Act creates a safe harbor from civil liability, including for defamation claims, for providers and users of "interactive computer services."

Early reports indicated that Twitter had agreed to settle the case; however, Twitter's co-founder posted a statement that the company would not settle.

Why it matters: Although Twitter has fielded complaints about impersonation on its site before, this marks the first time that someone has taken the company to court over it. As the number of people using social networking sites continues to grow, policing how these users interact with the sites becomes more difficult. Already there are signs that sites are taking impersonation complaints more seriously. Shortly after the LaRussa complaint, Twitter announced that it will start testing a "verified accounts" service to authenticate the identity of certain site users, such as public officials and famous artists and athletes. Facebook already has policies in place for verifying accounts when it is informed about a potential impersonator.

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Court Rules "Crunchberries" Are Fake

A judge on the U.S. District Court for the Eastern District of California dismissed a complaint filed by a woman who alleged that she bought Kellogg's "Cap'n Crunch with Crunchberries" because she believed it contained real fruit. The plaintiff, Janine Sugawara, alleged that she had only recently found out that "Crunchberries" were actually just brightly colored cereal balls. She filed the class action complaint on behalf of all similarly "duped" cereal and fruit lovers, some of whom thought, as she did, that crunchberries grow on bushes, not in factories.

According to Sugawara's complaint, Kellogg's misled consumers by using "berries" in the name of the cereal and featuring Cap'n Crunch, aggressively "thrusting a spoonful of 'Crunchberries' at the prospective buyer" on the front of the box. Sugawara argued that the portrayal of "Crunchberries" as fruit was reinforced by other marketing representing the product as a "combination of Crunch biscuits and colorful red, purple, teal and green berries," even though the product contained "no berries of any kind." In her complaint, Sugawara asserts claims for fraud, breach of warranty, and violations of California's Unfair Competition law and the Consumer Legal Remedies Act.

The court gave short shrift to Sugawara's claims. "In this case . . .while the challenged packaging contains the word 'berries' it does so only in conjunction with the descriptive term "crunch,'" the court wrote. "This Court is not aware of, nor has Plaintiff alleged the existence of, any actual fruit referred to as a 'crunchberry.' Furthermore, the 'Crunchberries' depicted on the [box] are round, crunchy, brightly-colored cereal balls, and the [box] clearly states both that the Product contains 'sweetened corn & oat cereal' and that the cereal is 'enlarged to show texture.' Thus, a reasonable consumer would not be deceived into believing that the Product in the instant case contained a fruit that does not exist. . . So far as this Court has been made aware, there is no such fruit growing in the wild or occurring naturally in any part of the world."

The court also noted that Plaintiff admitted in her opposition to the motion to dismiss that "[c]lose inspection [of the box] reveals that Crunchberries . . .are not really berries," and that another federal court had "previously rejected substantially similar claims directed against the packaging of Fruit [sic] Loops cereal, and brought by these same Plaintiff attorneys."

Why it matters: While this particular complaint may seem a bit silly, food and drink products aimed at children are facing intense scrutiny from lawmakers and advocates alike. Food and drink marketers need to be very careful when introducing new products to ensure that their descriptions are accurate and do not mislead the reasonable consumer (or if the product is directed to children, a reasonable child) either directly or by implication.

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