Advertising Law

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In This Issue

Q&A: Guide to a Healthy Social Media Diet—What Should You Really Tweet?

Companies in the health and nutrition industry are increasingly using social media platforms to engage consumers and promote brand loyalty. However, the best-laid strategic marketing plans may fail if they don't include the recommended dose of legal and regulatory compliance and business acumen. To influence your chances of staying healthy, Penton Media has assembled a panel of authorities to participate in a unique educational certification program called "Social Media for the Health and Nutrition Industry."

Manatt's own Ivan Wasserman, a partner in the Advertising, Marketing & Media practice who counsels national and international food, dietary supplement and cosmetics companies on the legal and regulatory aspects of marketing, serves as one of the instructors. Our editors checked in with him this week to learn more about the benefits of Penton's certification program.

Editors: Tell us about how the program works and what the certification means.

Wasserman: The program is an online education certification program for busy marketers who need to stay on the cutting edge of their field. To complete the program, you watch four core sessions and two electives, all taught by experts in the field and designed to teach health and nutrition companies how to successfully navigate the social media space. The four core sessions are "Building the Strategy," "Content," "ROI & Measurements," and "Time and Resource Management." My session is an elective entitled "What FDA and FTC Won't Let You Do on Social Media."

Each session concludes with an exam. This ensures your comprehension, and you'll develop your social media skills in less time than you imagine. You will receive your certificate after completing sessions and tests.

Editors: Who do you expect would most benefit from attending your

Newsletter Editors

Linda A. Goldstein
Partner
Email
212.790.4544

Jeffrey S. Edelstein
Partner
Email
212.790.4533

Marc Roth
Partner
Email
212.790.4542

Practice Area Links

Practice Overview
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Upcoming Events

June 19, 2012
***The National Law Journal's* 2012 Complex Litigation Breakfast Series**
Topic: "Developments & Considerations in False Advertising Claims"
Speaker: Chris Cole
New York, NY
For more information

June 19-20, 2012
ACI's 3rd Annual Conference on Litigating and Resolving Advertising Disputes
Topic/Speaker: "Buckle Up: We're Headed to Trial," Chris Cole
Topic/Speaker: "Defining Advertising Injury: Protecting Coverage Rights When the Company is Sued for False or Misleading Advertising," Steve Raptis
Topic/Speaker: "Developing a Strategy to Combat the Uptick in Litigation Challenging the Marketing and Labeling of Food Products," Linda Goldstein
New York, NY
For more information

July 11, 2012
The Beauty Company's Cosmetics Safety Act & Beauty Product Claims Development Webinar
Topic: "Beauty Product Claims, Testimonials and Before & After Images – Stand Out, But Stay Legal"
Speaker: Ed Glynn
For more information

July 24–27, 2012
15th Annual Nutrition Business Journal Summit
Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman
Dana Point, CA
For more information

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course “What FDA and FTC Won’t Let You Do on Social Media,” and can you give us an example of a “do” and a “don’t”?

Wasserman: Anyone can benefit! In particular, the program is designed for anyone in marketing, legal and regulatory, customer service, operations, and public relations. A “do” is to understand that even though social media is new and exciting, the FDA and FTC rules that were created for traditional advertising also apply to social media in ways that you may not expect. A “don’t” is don’t assume that because your company did not create or authorize claims made in social media by bloggers or others that you cannot get in trouble for those claims!

Editors: Is there a particular social media tool or strategy that health and nutrition marketers are using with increased frequency today that is presenting new challenges from a legal and regulatory standpoint?

Wasserman: Like marketers in other industries, everyone is using Facebook, Twitter and other social media platforms to connect with their customers. While these new platforms offer exciting and unprecedented opportunities to connect with and educate consumers about products and services, it is vitally important that companies understand the rules and have company policies in place to help ensure compliance.

Editors: Thank you for your time today, Ivan. For anyone who wishes to obtain more information or enroll in Penton’s **“Social Media for the Health and Nutrition Industry”** program, you may do so by clicking here. To receive a discounted rate, use promo code HEALTH when you register by June 19.

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#DoNotTrack: Twitter to Let Users Choose Not to be Followed

Twitter announced that the microblogging site is joining the ranks of companies that honor user do-not-track requests. Despite the switch, federal lawmakers are still questioning the site’s data collection and retention practices.

In a recent blog post, Twitter announced a new system in which it will suggest interesting accounts to its users based on their Internet activity and other information gleaned from sites that have integrated with Twitter using buttons or widgets.

But following in the footsteps of entities Yahoo and Apple, Twitter will also allow users to adjust their account settings to stop such recommendations. In addition, Twitter will also recognize the use of a do-not-track header.

“If you have [do-not-track] enabled in your browser settings, we will not collect the information that enables this feature, so you won’t see any tailored suggestions,” the company wrote in its blog post. “We hope that our support of [do-not-track] highlights its importance as a privacy tool for consumers and creates even more interest and wider adoption across the Web.”

The move generated praise from the White House, with Deputy Chief

Technology Officer for Internet Policy Danny Weitzner calling it “an important step [that] is part of a larger Obama Administration strategy to encourage more consumer privacy protections on the internet.”

Even while applauding Twitter’s support for do-not-track, however, two federal lawmakers requested that the company disclose information about its data collection and tracking practices as part of its recommendation system.

Reps. Cliff Stearns (R-Fla.) and Joe Barton (D-Texas) sent a letter to the site seeking answers about what kind of personally identifiable information is collected by Twitter, how it is collected, how it is stored, how long information is kept, and how the site will honor opt-out requests from mobile devices. The legislators requested a response by June 15.

To read Twitter’s blog post about the policy changes, click here.

To read the letter from the lawmakers, click here.

Why it matters: Twitter’s acceptance of do-not-track reflects mounting support for the movement. Over the last year, sites such as Yahoo and Apple have similarly indicated their support for user preferences, while Mozilla and Microsoft have developed do-not-track settings for their browsers. It remains to be seen, however, whether such efforts by industry will stave off legislation in this area.

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Dish’s “Hopper” Jumps into Court

A major battle is brewing between Dish Network and the broadcast television networks, with lawsuits filed on both coasts amid allegations that the satellite provider’s new on-demand service could destroy television programming as it currently exists.

In March, Dish introduced a new HD DVR called the “Hopper.” Its most prominent – and promoted – feature: PrimeTime Anytime capability, which allows viewers to record high-definition PrimeTime broadcasting on all four networks at once. Using the “Auto Hop” feature, subscribers to the service can then replay the programming and skip all commercials.

Threatened with lawsuits from the broadcast networks, Dish filed a preemptive federal suit in New York, seeking a declaratory judgment that the service does not directly or indirectly violate any copyright owned by the networks.

Consumers can fast-forward through commercials using a traditional DVR, the Colorado-based satellite provider argued, and the PrimeTime Anytime service does not erase or delete commercials, which remain on the recording and can be watched if the customer chooses. “The Dish Auto Hop feature does not alter or modify the broadcast signal,” the company said in its filing.

But three large networks disagreed and filed separate lawsuits in California against Dish, arguing that the Hopper violates its copyright. In one suit, a network distinguished the Hopper from a traditional DVR, which it said is controlled by the consumer. The Hopper, the network

argued, actively controls, causes and carries out the unauthorized copying of the networks' broadcasts, resulting in an adulterated version of the network's copyrighted broadcast.

In addition to a declaratory judgment that the Hopper violates their copyrights, the networks seek an injunction halting its sale and compensatory and statutory damages under the Copyright Act.

To read the complaint in *Dish Network v. ABC*, click here.

To read the complaint in *Fox v. Dish Network*, click here.

Why it matters: "Ultimately, this case is about freedom of consumer choice, individual families' choice to elect, if they want, to time-shift their television viewing and watch recorded television without commercials," Dish argued in its complaint. Not surprisingly, one network framed the issues differently in its filing, saying the outcome of the case could end broadcast television and its advertising model as we know it. "This lawsuit is not about Dish enhancing consumer choice," the network retorted. "By stealing [our] broadcast programming . . . Dish is undermining legitimate consumer choice by undercutting authorized on-demand services and by offering a service that, if not enjoined, will ultimately destroy the advertising-supported ecosystem that provides consumers with the choice to enjoy free over-the-air, varied, high-quality PrimeTime broadcast programming." Dish won the first round of the battle on May 31 when U.S. District Court Judge Laura Taylor Swain granted a temporary restraining order halting the California suits. Judge Swain set a hearing for July 2 to consider whether all of the cases should be consolidated.

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"Siri, How Do I Defend Against a Class Action?"

Apple is facing a number of consumer class actions claiming that Siri, the voice-activated assistant feature on Apple's iPhone 4S, is falsely advertised.

Unlike Siri's performance in television commercials, named plaintiff Frank Fazio charges that Siri could not provide directions to a given location or locate a nearby store and that it often claimed not to understand the request or took an inordinate amount of time to respond and still provided incorrect directions.

Although Siri is in fact in beta testing, "the bulk of Apple's massive marketing and advertising campaign, including its dominant and expansive television advertisements, fail to mention the word 'beta' and the fact that Siri is, at best, a work-in-progress," Fazio alleged.

According to Fazio and the other plaintiffs in the suits consolidated in the Northern District of California, Apple engaged in "fundamentally and designedly" false and misleading advertising that permitted the company to charge a significant price premium for the iPhone 4S.

The suits seek injunctive relief, compensatory and statutory damages, and restitution for violations of California's Consumer Protection Act.

Apple quickly responded with a motion to dismiss the suits, arguing that the plaintiffs failed to specify the particular representations on which they relied and only desribed their disappointment with Siri. The motion

notes that although the plaintiffs all claim they became dissatisfied with Siri's performance "soon after" purchasing the iPhone, none of the plaintiffs availed themselves of Apple's 30-day return policy.

Further, the company was upfront about Siri's beta status, Apple argued, and disclosed it was developing technology during the press conference announcing the product, in the accompanying press release, and on the Apple Web site.

A hearing on the motion to dismiss is scheduled for June 21.

To read the complaint in *Fazio v. Apple*, click here.

To read Apple's motion to dismiss the consolidated suits, click here.

Why it matters: Apple raises several arguments in defense of Siri and its advertising, although its strongest contention may be its own acknowledgement that Siri is still in beta. While calling the feature "cutting-edge technology," the company explicitly advised consumers that they "can't ask [Siri] everything, and it's not perfect" at the press event launching the iPhone 4S. In addition, Apple's Web site "prominently" discloses its beta status on several pages in the Siri features section, the company said.

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TCPA Requires Permission From Current Phone Owner, Court Rules

Consent given by the prior owner of a phone number terminates when the number is reassigned to a new owner, the 7th Circuit ruled in a Telephone Consumer Protection Act case.

It was the first time a federal appellate court had examined the issue.

Two plaintiffs alleged they received 18 and 29 automated or recorded calls from a bill collector that were intended for the prior user of the cell phone number they now owned.

Although the bill collector argued that it had received consent to call the number from the prior owner, the panel held that a "called party" under the TCPA refers to the current owner of the number, not the "intended recipient" of the call.

"Consent to call a given number must come from its current subscriber," the court said, noting that such automated calls result in not just annoyance to a subscriber but consumed minutes from cell phone plans and added expense for owners. Consent to call a given number "does not authorize perpetual calls to that number after it has been reassigned to someone else," the court added.

Recognizing that advertisers or bill collectors may be unwilling to part with predictive dialers, the court offered three suggestions for their continued use:

- Have a live person make the first call to the number and then revert to a predictive dialer after verifying that the cell phone number is still being used by the customer.
- Use a reverse lookup directory to ascertain the current cell phone number subscriber.
- Where the number was obtained from a third party (in the case of bill

collectors, the original creditor), verify whether the customer is still associated with the cell phone number and get an indemnity from the third party.

To read the decision in *Soppet v. Enhanced Recovery*, click here.

Why it matters: While the 7th Circuit's decision may present obstacles to companies utilizing predictive dialers, it also offers three possible solutions for their continued use. Companies that make automated or recorded calls to cell phones should consider their options in light of the court's opinion or face the potential of a TCPA suit and $500 per violation in damages.

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FDA Warns Marketers of "Workout Boosters"

The Food and Drug Administration recently sent warning letters to 10 marketers of diet supplements that tout themselves as "workout boosters."

The supplements, including Jack3d and OxyElite Pro, contain dimethylamylamine, or DMAA, which the manufacturers claim can increase energy, concentration and metabolism, often referring to it as a "natural" stimulant, the agency said.

But the FDA cautioned that the safety of DMAA has yet to be demonstrated, noting that it can narrow blood vessels and arteries, causing elevated blood pressures which in turn can result in cardiovascular events such as shortness of breath or heart attacks.

DMAA is not a "dietary ingredient" because it is synthetically produced, the letters noted, and therefore cannot be lawfully marketed as a dietary supplement.

"Before marketing products containing DMAA, manufacturers and distributors have a responsibility under the law to provide evidence of the safety of their products. They haven't done that and that makes the products adulterated," Daniel Fabricant, Ph.D., Director of the FDA's Dietary Supplement Program, said in a statement.

The letters warn the marketers and manufacturers to cease distribution immediately or face an enforcement action by the agency.

Recipients of the letters questioned the FDA's action. A lawyer for USP Labs, which markets Jack3d and OxyElite Pro, told *The New York Times* that DMAA is "lawfully marketed as a dietary ingredient under federal law and the company will present a full defense of the ingredient."

To read the FDA's warning letter to USP Labs, click here.

Why it matters: DMAA has caused controversy before. Canada's government health agency classified the ingredient as an "amphetamine-like" drug that cannot be used as an ingredient in dietary supplements in that country. Manufacturers of dietary supplements are well advised to exercise caution when developing and disseminating claims for their products.

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Noted and Quoted . . . *Ad Age* and *AdWeek* Turn to Manatt Attorneys for Insight on Industry

Developments

On June 12, 2012, *Advertising Age* and *AdWeek* sought guidance from Manatt partners Linda Goldstein, Jacqueline Wolff and Marc Roth on regulatory developments of significance for advertisers and marketers.

Ms. Goldstein and Ms. Wolff coauthored an article for *Advertising Age* titled, "What You Need to Know About the Foreign Corrupt Practices Act," highlighting activities ripe for regulatory scrutiny under the Foreign Corrupt Practices Act (FCPA) and outlining steps to mitigate risks. The article discusses who may be liable under the law, including individuals and principals; for example, an advertising agency that hires a consultant to obtain permits when shooting commercials overseas could be liable if the consultant bribes a foreign official and the agency did not take steps to prevent it.

To read the full article, click here.

Mr. Roth's commentary was featured in an *AdWeek* article regarding the Federal Trade Commission's settlement with Internet data broker Spokeo on charges that it violated the Fair Credit Reporting Act when it marketed consumer profiles to companies that used them for employee screening.

As the first FTC case addressing this issue, Mr. Roth noted that it could signal more to come. "[The Spokeo case] brings together a perfect storm of issues on the FTC's plate and puts teeth in their bite," he said. "The FTC needs to show Congress there are cases out there of consumer abuse."

To read the full article, click here.

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