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NARB: Staples Should Discontinue, Modify Use of "Like FREE" Claim

Agreeing with a decision from the National Advertising Division, a National Advertising Review Board (NARB) panel recommended that Staples discontinue or modify the claim "[I]t's like getting supplies for FREE."

In print and Internet materials, Staples made the claims "Buy ANY of these select office supplies, get 100% back in Staples Rewards . . . .It's like getting supplies for FREE!" and "Buy ANY backpack, get 100% back in Staples Rewards. It's like getting a FREE backpack!" Customers who registered for the Staples loyalty program received a portion of the cost of their initial purchase in Staples Rewards, which could be used for future purchases. Competitor Office Depot challenged the claims.

The NARB panel determined that given the text, graphical presentation and the emphasis on the word "free," one of the ads reasonably conveyed the message that consumers who purchased the advertised items would receive another item for free (a backpack, for example). The term "free" was a predominant feature of the ads, the panel noted, and it was presented in capital letters with much larger type size, and usually in a different color from the surrounding type.

"It is clear that Staples is not offering 'free' merchandise as suggested by the challenged advertisements," the panel said. Customers had to buy a product, register or enroll in the loyalty program, wait a month to receive their Rewards points, and then use the points within a limited amount of time. The panel disagreed with Staples' argument that the word "like" adequately qualified the word "free," primarily because of the significant emphasis placed on the word "free" in the ads. In addition, the company failed to clearly and conspicuously disclose all of the material conditions related to obtaining Rewards points, particularly the limited time period in which to use the points before expiration. The panel also noted that advertisements can tout the benefits of a loyalty program, but said that Staples' ads should be modified or discontinued because they created "the strong implication that consumers will receive the referenced merchandise for free or obtain a similarly immediate benefit with their original purchase and do not adequately convey material terms and conditions to counter that message." In its advertiser's statement, Staples said it disagreed with the NARB panel's conclusions but said it would take the recommendations into account in future advertising. To read a press release about the NARB's decision, click here.

Why it matters: This decision gives companies guidance regarding the NARB's position on the use of the term "free" in advertising claims. "The term 'free' is a powerful advertising term," the panel emphasized. "Any offer of free merchandise must be made with extreme care. All of the terms, conditions, and obligations necessary for receipt of free merchandise should be set forth clearly and conspicuously at the outset of the offer."

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Privacy Legislation Hits Congress, Including Do-Not-Track Bill

Two pieces of federal privacy legislation were recently introduced in the U.S. House of Representatives: Rep. Bobby Rush's Best Practices Act, which is similar to the bill he introduced last year, and Rep. Jackie Speier's Do Not Track Me Online Act, which would allow consumers to opt-out from having their personal information tracked by online advertisers.

Rep. Rush (D-Ill.) introduced H.R. 611, which permits companies to collect and use some consumer information as long as consumers have the option to opt-out. Consumers would also have to give prior consent before their information could be shared with third parties. The bill would additionally require companies to disclose information regarding their collection, use, disclosure, merging, and retention of personal information practices, and notify consumers regarding their options. Companies could qualify for a safe harbor from some of the legislation's requirements by following a self-regulatory program established by the Federal Trade Commission.

Shortly thereafter, Rep. Jackie Speier (D-Ca.) introduced her legislation that is designed to "send a clear message – privacy over profit." The Do Not Track Me Online Act would empower the FTC to create opt-out regulations, under which consumers could preclude a company from collecting personal information, such as Web activity, geolocation, name, IP address, physical address, e-mail address, driver's license or Social Security number, and financial account numbers.

The bill also contains disclosure requirements. The legislation would apply to companies engaged in interstate commerce, but exempts sites that collect information from fewer than 10,000 visitors a year. Collection of information

for "commonly accepted commercial practices" like fraud prevention are also exempted. The bill would give both the FTC and state attorneys general enforcement authority, with civil penalties up to $11,000 per day.

To read the Best Practices Act, H.R. 611, click here.
To read the Do Not Track Me Online Act, H.R. 654, click here.

Why it matters: Consumer privacy continues to garner attention in Washington, with two pieces of legislation already introduced and more on the way. Rep. Cliff Stearns (R-Fla.) has stated that he plans to introduce legislation similar to that which he co-sponsored last session, while Senator John F. Kerry (D-Mass.) has also said he plans to introduce a bill. The inclusion of a do-not-track mechanism, recommended by the FTC in its privacy report, has become a hot topic for future legislation. While Rep. Rush's bill does not include a do-not-track mechanism, he said in a statement that he does not oppose the concept.

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Zip Code Is "Personal Information" Under California Law

In a closely watched decision, the California Supreme Court ruled that retailers may not collect zip codes from consumers who use their credit cards, as they are considered "personal identification information" under the state's Song-Beverly Credit Card Act.

The plaintiff used her credit card to make a purchase at a Williams-Sonoma store and provided her zip code when asked by the cashier, thinking it was required to complete the purchase. She filed a class action suit, claiming that the company had used her name in combination with her zip code to find her home address and add her to a marketing database.

Under the Song-Beverly Act, companies may not request and record "personal identification information," which is defined as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number." Reversing both the trial court and appellate court, the state Supreme Court said that a cardholder's zip code is "certainly information that pertains to or regards the cardholder" and is protected by the statute. Although a zip code pertains to a group of individuals who all share the same five-digit number, the court said, it is part of an individual's address and the legislature intended to protect all components of an address.

This interpretation most accurately reflects the "protective purpose" of the statute, the court said, and an opposite result would "vitiate" the effectiveness of the law. The court said its decision – despite prior contrary authority – did not violate the due process of Williams-Sonoma and that its interpretation should not be limited to prospective application. It remanded the case to the trial court for a determination of damages, noting that while the statute lays out a maximum penalty – $250 for the first violation and $1,000 for each subsequent violation – "the amount of the penalties awarded rests within the discretion of the trial court."

To read the decision in *Pineda v. Williams-Sonoma Stores, Inc.*, click here.

Why it matters: The decision will have a large impact on companies operating in California that have a practice of collecting consumers' zip codes or other personal information. Those companies should be aware that the Court's ruling that the statute may be applied retroactively may prompt additional litigation.

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Partridge Show Actress Sues Photo Agency Over Publicity Rights

Former *Partridge Family* actress Shirley Jones filed a putative class action suit against photo agency Corbis, alleging that the company's inclusion of her name and image on its database violates her publicity rights under California law.

Jones, an actress and singer who won an Academy Award for Best Supporting Actress in 1960, is best known for her work as the mother on the 1970s television show *The Partridge Family*. Her suit claims that Corbis operates multiple Web sites providing images that can be licensed for use in commercial products and advertisements. Users search for a celebrity and choose to license the images in the search results. Rates vary depending on the end use of the image (lower prices for newspaper articles and higher prices for ads or other commercial purposes), the duration of the time period the image will be used, and the size of the image used, according to the suit.

Users can license the images for advertising, retail, editorial use, book publishing, and television or video, Jones alleges, all purely for Corbis' commercial purposes. She claims that Corbis' operations violate her publicity rights and her ability to control the use of her name, image, and likeness in violation of California law. As supporting documentation, Jones included 10 images of herself that the Corbis site had uploaded during 2010. Jones estimates that the class will likely exceed 100 members, with aggregate claims totaling over $5 million.

To read the complaint in *Jones v. Corbis Corporation*, click here.

Why it matters: Corbis has been sued over similar charges twice before, including a 2009 suit by actress Anna Maria Alberghetti and Bonnie Pointer of the Pointer Sisters; however, the suits were dismissed for technical reasons.

Although Corbis deems the Jones suit frivolous, if she prevails, it could make it much harder for photo agencies and photographers to market celebrity images online.