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Tesla Sues BBC Over TV Show Depiction

Electric carmaker Tesla Motors has filed suit against the BBC over a *Top Gear* television show episode that portrayed a Tesla Roadster that purportedly ran out of electricity and stopped on the show's test circuit while racing a gas powered Lotus Elise.

The show aired in December 2008, but continues to appear on the Internet, a *Top Gear* DVD, and on repeats of the show.

Tesla is alleging libel and malicious falsehood, and is seeking to enjoin the BBC from any further broadcasting or publication of the episode.

While some of the host's commentary was positive – "This car is electric, literally," the episode showed the Roadster stopped on the track after it had allegedly lost its charge. A second Roadster was shown sitting on the track while the voiceover announcer explained that it suffered an overheated motor. He concluded by saying, "I did think the Teslas would bring a bit of peace and quiet to our track with their electric motors, but I didn't think it would be this much peace and quiet, though. The sound of silence. The first electric car that you might actually want to buy, it's just a shame that in the real world, it doesn't seem to work."

In its suit, Tesla claims that several aspects of the show were defamatory, including the comment that "although Tesla says it will do 200 miles, we worked out that on our track it would run out after just 55 miles," and the depiction of one Roadster that ran out of charge and a second that was immobile as a result of an overheated motor.

Tesla also claims that BBC exhibited evidence of their false portrayal in an inconsistent interview and press release after the episode aired.

To read the complaint in *Tesla v. BBC*, click here.

Why it matters: In a press release, Tesla emphasized that it filed the suit not for monetary damages, but to stop the episode from continuing to air, and that it made repeated attempts to contact the BBC asking it to correct the record and stop rebroadcasting the episode. In a statement, the BBC said it "stands by the program and will be vigorously defending this claim."

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CAN-SPAM Applies to Facebook Messages, Court Rules

Applying the federal CAN-SPAM Act beyond a traditional e-mail message, a U.S. District Court ruled that the Act applies to messages sent by commercial Facebook pages.

Facebook sued MaxBounty, a company that operates a network for affiliate marketers, in which it alleged that MaxBounty created fake Facebook pages intended to redirect Facebook users away from the site to third-party commercial sites displaying a message that users can take advantage of a “limited-time offer” that includes an iPad product tester or gift cards.

The registration process required the registrants to become “fans” of the page and urged them to invite all of their Facebook friends to “like” the page. According to Facebook, the third-party pages to which users were redirected asked them to make purchases or subscribe to magazines.

MaxBounty argued that its communications on Facebook were not e-mail messages and therefore could not create a cause of action under CAN-SPAM.

U.S. District Court Judge Jeremy Fogel disagreed.

An “electronic mail message” is defined in the Act as “a message that is sent to a unique electronic address,” the court noted. Interpreting CAN-SPAM “expansively and in accordance with its broad legislative purpose,” the court said that because the transmissions required at least some routing activity on the part of Facebook, the communications constituted e-mail under the Act.

“While the routing employed by [Facebook] may be less complex and elongated than those employed by ISPs, *any* routing necessarily implicates issues regarding volume and traffic utilization of infrastructure issues which CAN-SPAM seeks to address,” the court said, ”because the pages were transmitted to destinations including users’ walls, news feeds, Facebook message inboxes, and even to users’ external e-mail addresses.”

“A determination that the communications at issue here are ‘electronic messages’ thus is consistent with the intent of Congress to mitigate the number of misleading commercial communications that overburden infrastructure of the Internet,” Judge Fogel wrote. He also declined to dismiss Facebook’s other claims that MaxBounty engaged in fraud, committed a breach of contract and violated the federal Computer Fraud and Abuse Act.

To read the court’s order in *Facebook v. MaxBounty*, click here.

Why it matters: If Facebook transmissions like wall postings, messages, and news feed updates are all covered by CAN-SPAM, advertisers must identify the communication as

an advertisement and include an opt out of future messages. While it does not address the merits of the suit, the decision is a reminder to companies that in the Web 2.0 world, courts can interpret CAN-SPAM broadly to include a variety of transmissions beyond the traditional e-mail message.

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FDA Proposes Rules for Calorie Disclosure

The Food and Drug Administration is seeking public comment on a proposed rule that would require chain restaurants and other food retailers with 20 or more locations to make calorie and other nutritional disclosures on menus and menu boards.

A second proposed rule, applying to vending machine operators, would impose similar caloric disclosure requirements.

The agency was required to promulgate the rules under the Patient Protection and Affordable Care Act, which established the disclosure requirements. Read more

Entities whose primary purpose is not to sell food (like movie theaters and airplanes, for example) would not be subject to the proposed rule, but chain restaurants and retail food establishments – including fast-food establishments, bakeries, coffee shops, and some grocery and convenience stores – would be included if they are part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items.

Under the proposed rule, food retailers must disclose the number of calories each standard menu item provides as it is typically prepared and must present that information in terms of suggested caloric intake in the context of an overall diet. The information must also include nutrition information currently required on packaged food labels, such as the number of calories, total fat, saturated fat, sugars, cholesterol, fiber, and protein, on a per-serving basis.

In addition to caloric disclosures, menus and menu boards would also be required to clearly and prominently display the following statement: “A 2,000 calorie diet is used as

the basis for general nutrition advice; however, individual calorie needs may vary." The statement is intended to "help consumers understand the significance of the calorie information in the context of a total daily diet," according to the FDA.

A second proposed regulation would require similar postings for operators who own or operate 20 or more vending machines, unless certain nutrition information is already visible on individual packages of food inside the machine.

The FDA is accepting comments on the menu labeling rules until June 6 and the vending machine rule until July 5. It is specifically seeking comment on how to define "restaurants or similar retail food establishments" and what types of retailers should be covered by the rules, as well as whether the labeling requirements should apply to alcoholic beverages (the agency "tentatively conclude[d]" that the requirements should not apply).

The agency said it plans to issue final rules before the end of 2011.

To read the proposed rules, click here.

Why it matters: If finalized, the rules will create some consistency for companies with a national or multistate presence, as they would preempt any state or local government nutritional labeling requirements. Currently more than a dozen states and local governments have passed menu labeling laws, including California and New York City.

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Will California Enact Its Own Privacy Law?

A California lawmaker introduced a privacy bill in the state legislature that would require Internet companies to notify state residents about their data collection practices and to provide an opt out option. Companies would be prohibited from collecting or using covered information if a consumer exercises his right to opt out.

State Senator Alan Lowenthal (D – Long Beach) introduced SB 761, that would require the California Office of Privacy Protection and the attorney general to adopt regulations

to establish a means under which consumers can opt out of online collection. The bill's definition of personal information includes an individual's online activity as well as his/her name, address, telephone number, e-mail address, and IP address.

"We think this is a reasonable and thoughtful way to provide consumers greater control over their own data," Lowenthal said at a press conference to announce his legislation. SB 761 applies to all "connected devices," including personal computers, tablets, smartphones, and Internet TVs, and would require covered entities to disclose to consumers their practices on collecting, using, and storing information.

Federal, state, and local governments are exempt under the bill, as are entities that can demonstrate they store covered information from fewer than 15,000 individuals or collect information from fewer than 10,000 individuals during a 12-month period.

The law includes a private right of action, specifies damages of up to $1,000 per violation, and permits the possibility of punitive damages.

To read SB 761, click here.

Why it matters: While Congress considers two proposed pieces of privacy legislation, could California pass its own law? The state has led the legislative way in the past and was the first state to adopt a data breach notification law and a do-not-call list. Several consumer groups have indicated support for the bill, including Consumer Watchdog, Privacy Rights Clearing House, Common Sense Media, and the California Consumer Federation. But a state-specific privacy law could wreak havoc on companies with an Internet presence, noted Mike Zaneis, the general counsel of the Interactive Advertising Bureau. "Any company doing business with a California resident would have the burden of both identifying them to be a computer user based in California, and then complying with any requirement of quote-unquote 'collecting information,'" he told *MediaPost*. Zaneis also told the *San Francisco Chronicle* that the bill was "inherently unconstitutional," as the Constitution gives Congress the power to regulate interstate commerce, not states, and that the Internet, by its very definition, is interstate.

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FTC Settles with Oreck Over Vacuum, Air Cleaner Claims

The Federal Trade Commission recently reached a proposed settlement over what the agency alleged were false and unproven claims about Oreck's Halo vacuum and ProShield Plus air purifier. The air purifier filters air particles using an electrostatic precipitator, while the vacuum features a HEPA filter.

According to the complaint, Oreck used infomercials, print ads, in-store displays, online advertisements and traditional television ads to make unsubstantiated claims like "The Halo and the ProShield Plus prevent or substantially reduce the risk of flu," and "The Halo and the ProShield Plus prevents or substantially reduces the risk of other illnesses or ailments caused by bacteria, viruses, molds, and allergens – such as the common cold – asthma, and allergy symptoms." In addition, the FTC alleged that Oreck provided advertisements to its franchised stores for use in their marketing and sale of the products, which provided the "means and instrumentalities" to deceive consumers.

One online ad displayed the two products side by side under the headline, "Introducing the Oreck Flu Fighters, Help Reduce the Flu on Virtually any Surface and in the Air in Your Home," while an infomercial claimed that "The Oreck Halo has killed up to 99.9 percent of bacteria exposed to its light in one second or less."

Under the terms of the settlement, Oreck will pay the FTC $750,000.

The company also agreed to refrain from making claims about a product's health benefits without competent and reliable scientific evidence for support, and to send a letter to all of its franchisees instructing them to stop using all advertising and marketing materials provided by Oreck.

To read the complaint against Oreck, click here.

To read the consent agreement, click here.

Why it matters: The agency noted that the settlement was part of its "ongoing efforts to protect consumers from bogus health claims," a reminder to companies that regardless of the type of product, they should be careful about making health-related claims for their products, and they should have substantiation for all claims.

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