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ADVERTISING LAW @MANATT
NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

IN THIS ISSUE

Manatt Lawyers Receive Top Ratings In Chambers USA 2008 Advertising, Entertainment, and Healthcare Practices Noted for Excellence

Thirteen Manatt lawyers have been ranked by peers and clients as leaders in their fields in the newly published sixth annual *Chambers USA: America's Leading Lawyers* for Business. Included in the prestigious rankings from Manatt's Los Angeles office are Gene R. Elerding, Terri D. Keville, Barry S. Landsberg, L. Lee Phillips, Gregory N. Pimstone, and James R. Schwartz. In New York, Manatt lawyers Robert D. Belfort, William S. Bernstein, Jeffrey S. Edelstein, Linda A. Goldstein, George Kalkines, and Benjamin "Ted" Wolff were recognized, as was Martin J. Thompson from the firm's Orange County office.

Ms. Goldstein (Advertising), Mr. Phillips (Media & Entertainment), and Mr. Schwartz (Healthcare) were each ranked "1," the publication's highest designation.

Beyond the individual rankings, three of Manatt's core practice groups garnered distinction in this year's edition, including the Advertising, Marketing & Media; Entertainment; and Healthcare Industry practice groups.

UPCOMING EVENTS

October 21, 2008
ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

For more information

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October 22, 2008
D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

For more information

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November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

The U.K.-based international publisher Chambers and Partners based its rankings on in-depth interviews with more than 14,000 leading private practice lawyers and key in-house counsel. A team of over 40 full-time researchers conducted the survey over a six-month period, with law firms and lawyers chosen on merit only.

The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client.

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FCC Eyes Product Placement Practices

The Federal Communications Commission is ready to start the process of drafting new rules to regulate product placement in television shows, a practice in which marketers pay to have their brands shown or mentioned in programs.

The practice has become increasingly prevalent as marketers look for ways to reach an audience who uses their digital recording devices to skip over commercials.

The FCC said it has no intention of banning the practice of product placements or other in-show advertising. Rather, it is looking to enhance disclosure. Right now, the FCC mandates disclosure but permits it to appear in relatively small type at the end of a program.

"You shouldn't need a magnifying glass to know who's pitching you," said FCC Commissioner Jonathan Adelstein, a Democrat who has championed the push to regulate product placement. "A crawl at the end of the show shrunk down so small the human eye can't read it isn't really in the spirit of the law."

The FCC will study whether product placement violates the rule that requires a break between a show and a TV spot in children's programming. It will further examine whether adult TV shows should be required to include notices similar to those required of political candidates in campaign ads. The agency will also scrutinize whether any new rules should extend to cable programs, which are currently exempt.

Research by Nielsen Co. found that product placements on broadcast TV went up close to 40% in the first quarter of 2008, compared with the same period in 2007. Reality shows

Sweepstakes, Games & Contests"

Linda Goldstein

Topic:
"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Kerrie L. Campbell

Marriott Downtown Magnificent Mile
Chicago, IL

For more information

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December 4-5, 2008
Film & Television Law

Topic:
"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Linda Goldstein

Topic:
"The Value of Fame: Understanding the Right of Publicity"

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

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OUR PRACTICE

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... more
. Practice Group Overview

such as *The Biggest Loser* led the pack in number of product placements. In 2007, spending for product placement on U.S. shows jumped 33.7% to $2.90 billion, compared with the previous year, according to PQ Media.

The FCC was originally expected to launch the rulemaking process in December, but put it off after getting complaints from the ad industry and networks. They asked the Commission instead to open a formal inquiry, which may or may not produce new rules.

The FCC compromised, subjecting the most radical proposals, such as a simultaneous notice when a product is shown, to a separate inquiry that would not result in new rules. It will conduct a rulemaking vote about the type of disclosures that might be appropriate.

Nearly five years ago consumer advocate Commercial Alert requested that the Commission look at product placement practices and require product placements to be identified when they occur.

Earlier this month 23 consumer groups asked the FCC to put a stop to "Trojan horse" advertising, or television programs carrying ads "that would otherwise be criticized by the public or even deemed illegal." Writers have also voiced their concerns over being asked to incorporate product pitches into scripts.

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Executives Are Employees For Deduction Purposes

On June 11, 2008, the New York Court of Appeals resolved two important issues under the state's Labor Law, ruling that executives are "employees" for purposes of permitted deductions from their pay and clarifying what represents a commission payment to an employee.

The ruling came in response to two certified questions from the Second U.S. Circuit Court of Appeals in *Pachter v. Bernard Hodes Group*.

Elaine Pachter, a media buyer for Bernard Hodes Group, a recruitment communications firm owned by Omnicom Group, sued her employer for improperly deducting finance charges, late fees, uncollectible advances, and other charges from commissions earned from client media buys through Hodes.

. Practice Group Members

Pachter earned between $100,000 and $200,000 a year as a Hodes vice president paid via commissions, versus $40,000 to $75,000 a year paid to salaried employees doing the same work.

Under Labor Law Article 6, §193, employers may not make deductions from "employee" wages except for insurance, pensions, union dues, and a few other purposes. The Second Circuit asked the state's highest court whether Pachter was an executive who was therefore exempt from the deduction protections, exactly what constituted commissions, and whether the "commissions" counted as wages for deduction purposes.

In answer to the first question, the Court of Appeals ruled that executives are employees for purposes of Article 6. It would be illogical to include executives in some provisions of Article 6 and exclude executives from other provisions if they were not "within the ambit of the general definition of 'employee,'" the court reasoned.

As to the question concerning when Pachter "earned" her commissions and they became "wages," the court ruled that in cases where no express or implied contract exists, or absent any other agreement, the earning of a commission will be timed to when an employee produces a "ready, willing and able purchaser of the services."

Importantly, however, the court held that nothing in state Labor Law prevents employees and employers from reaching other agreements. In particular, the court found that employees and employers could agree to a formula that includes both the sales an employee produces and the costs involved in making those sales. It also held that an oral agreement or one implied by the course of conduct could suffice.

In Pachter's case the court found "ample support for the conclusion" that Pachter and Hodes had an implied agreement under which the final computation of her commissions took into account any deductions of work-related expenses. "This is not surprising: Pachter reaped substantial benefit from the formula, earning a higher annual income than employees on fixed salaries performing similar duties," the court wrote.

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Charter Communications Ends Targeted Ad Program

Charter Communications has announced that it will shelve a project that would have provided marketers with data to help them target their online pitches to people based on their search patterns.

"As we do with all new service launches or initiatives, we conducted focus groups well in advance, which told us that most broadband consumers would look upon this service favorably," Charter said in a statement earlier this month. "However, some of our customers have presented questions about this service as well as suggested improvements. We will continue to take a thoughtful, deliberate approach with the goal to ultimately structure an advertising service that enhances the Internet experience for our customers and addresses [their] questions and concerns."

U.S. lawmakers criticized the project, including Rep. Ed Markey (D-Mass.), who chairs the House of Representatives' subcommittee on telecommunications and the Internet.

"Given the serious privacy concerns raised by the sophisticated ad-serving technology Charter Communications planned to test market, I am pleased to hear that the company has decided to delay implementation of this program," Markey said in a statement.

The decision to suspend the project will make it harder for cable companies in their efforts to earn more money from advertising. Cable companies are privy to a plethora of information on their customers' Internet activities.

Advertisers have been interested in tapping this data to better target their pitches, but privacy advocates and others have expressed concerns over attempts by search engines to amass information and share their customers' online search habits.

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Models Kickin' Mad Over "PedEgg" TV Ad

Two professional foot models are suing the company that sells the "PedEgg" for showing their faces in an infomercial, which they allege was then widely distributed.

Kelly Parks-Corso and Jonathan Corso, a married couple who live in Miami Beach, sued International Edge (manufacturer of the PedEgg), PB and J Partners (filmmakers of the shot), Peter Aranow (president of PB&J), and Karen Bussell (a PB&J talent

scout who recruited them) for violating their contract and damaging their reputation.

The PedEgg is used to buff or scrape corns, dead skin, and other rough spots on the feet. The Corsos claim they were informed that only their hands and feet would be shown in the ad, which would run only as an online infomercial.

Instead, Kelly Parks-Corso, who has long, curly red hair, is seen at the beginning of the spot putting on panty hose, and then later wearing a green skirt. Her husband is seen sitting on a couch.

In the June 23, 2008 complaint, plaintiffs claim that at the shoot's location, they were told that their "feet would be doctored with 'horror' makeup - artificial bumps and discoloration - in order to make a 'before' shot for comparison in a 'before-and-after' scheme."

The Corsos claim that when their agent complained, Aranow said "that the commercial was undergoing a test run in a limited geographic area for 3 weeks." In fact, the commercial has been broadcast "all over the world" without their permission.

Plaintiffs then heard from friends worldwide saying things such as: "I can't believe that you took that job!"

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The Romance Is Gone: Hearts On Fire Sues Blue Nile

Hearts on Fire, which advertises itself as "the world's most perfectly cut diamond," is suing online jewelry retailer Blue Nile, claiming its use of the "Hearts on Fire" trademark in keyword searches is diverting potential customers to Blue Nile, in violation of trademark and unfair competition laws.

Hearts On Fire is requesting injunctive relief banning Blue Nile from using the Hearts On Fire trademark and "any confusingly similar designations" in keyword searches, as well as treble damages and attorney fees.

In the complaint filed on June 20 in federal court in Boston, Hearts On Fire claims that Blue Nile bought the search term "Hearts On Fire" from Webcrawler.com, a search engine that searches other search engines. As a result, when Webcrawler.com searchers type "Hearts On Fire," the top

search result is a link to Bluenile.com.

The link states, "Ideal Cut Diamonds at Blue Nile. Find Hearts On Fire diamonds at Forbes Favorite Online Jeweler. Sponsored by www.bluenile.com," according to the lawsuit.

When users arrive at Blue Nile's Web site and type "Hearts On Fire" into the site's search engine, they are directed to Web pages selling "diamonds and jewelry containing diamonds, none of which are HOF diamonds or jewelry," as Blue Nile is not an authorized retailer of Hearts On Fire diamonds or jewelry, the lawsuit states.

All of this, the lawsuit states, could cause "confusion, mistake, and deception among the general public as to the origin of Blue Nile's goods and/or as to sponsorship by, affiliation with, and/or connection to HOF."

Since the lawsuit was filed, Blue Nile appears to have made some changes to the link text and its Web site. The Blue Nile link no longer refers to "Hearts on Fire" by name, although it still comes up as the first link. In addition, when a user searches for "Hearts on Fire" on the Blue Nile Web site, a message comes up reading, "No results were found for your search of 'hearts on fire.'"

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