

Advertising Law

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Marketers of Grants Banned by FTC from Future Sales

Defendants who used patriotic images to promote their "Grant Connect" products and services as affiliated with the U.S. Government have settled with the Federal Trade Commission by agreeing to a permanent ban from marketing and selling similar products.

The FTC alleged that the defendants used images of American flags and pictures of President Barack Obama and Vice President Joe Biden to deceive consumers into purchasing various products and services, including credit- and grant-related products, work-at-home business opportunities, and weight-loss dietary supplements.

As an example, the agency cited an advertising claim that consumers were likely to obtain government grants: "\$15 Billion in Grant Money Available. EASY TO USE PROGRAM: Instantly find the Grant that's right for you! Receive your government funds!"

"Despite the numerous representations on the site regarding the ease of receiving a grant, in truth and in fact, consumers using Grant Connect are not likely to obtain a grant," according to the FTC complaint, and the site provided little more than outdated, useless information.

In addition, the Commission maintained that the defendants, without providing adequate disclosures, enrolled consumers in membership programs by debiting their accounts \$39.95 on a monthly basis and charged consumers for additional products and services like an identity theft protection program and a health benefits program.

In one settlement, defendant Johnnie Smith marketed and sold products and services using continuity programs or "negative option" sales, the agency alleged. Smith agreed to the ban from marketing or selling products and services using such billing methods, as well as from using testimonials. He will also pay \$45,000.

Under the terms of the second settlement, defendant Juliette Kimoto and four companies she owned reached an agreement similar to the Smith settlement, although it also covers the marketing of dietary supplements. The defendants agreed to cease making claims that their products assist in weight loss and related health benefits. Kimoto must also turn over cash and assets totaling \$220,000.

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Upcoming Events

November 14-16, 2011

PMA Marketing Law Conference

Topic: "What's New in the Game Today - New Twists on Traditional Sweeps, Contests and Promotions," [Linda Goldstein](#); "The Perils of Partners - Affiliate/Advanced Consent Marketing," [Marc Roth](#); "Courting Disaster - Mock Trial of Promotional Mishaps," [Chris Cole](#)

Chicago, IL
[For more information](#)

November 15, 2011

ABA Private Advertising Litigation and Consumer Protection Teleseminar

Topic: "The Television Network Advertising Clearance Process: Soup to Nuts"
Speaker: [Jeff Edelstein](#), [Lauren Teitelbaum](#)

[For more information](#)

December 5-6, 2011

Digital Gaming and Lottery Policy Summit

Topic: "Lottery 2.0 - Welcome to the Social Networks"

Speaker: [Linda Goldstein](#)
Washington, D.C.

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Awards



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The agency said that litigation continues against 7 individual defendants and 18 corporations.

To read the complaint in *FTC v. Grant Connect*, click [here](#).

To read the settlement with Smith, click [here](#).

To read the settlement with Kimoto, click [here](#).

Why it matters: The settlement serves as a reminder to marketers that the FTC continues its crackdown on continuity programs and negative option sales and that sellers must adequately disclose all terms and conditions when making offers.

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Kashi Faces Suit Over “Nothing Artificial” Claim

In the latest suit over the use of “natural” advertising claims, a California resident filed a class action suit against Kashi in which it alleged that the company falsely advertised its food products as having “Nothing Artificial,” despite the inclusion of unnatural and synthetic ingredients.

The plaintiff purchased Kashi’s Heart to Heart Apple Cinnamon instant oatmeal because it purported to be natural, she claims.

But after learning that it contained artificial ingredients like ascorbic acid and xanthan gum, she filed suit in California federal court.

Kashi has “built its image around being all natural and wholesome,” according to the complaint, but such claims are misleading because of the company’s use of artificial ingredients and synthetic substances.

“A reasonable consumer would understand the terms ‘nothing artificial’ and/or ‘natural’ to mean that the ingredients in the product are all natural and there is nothing synthetic or artificial that make up that product,” the suit contends.

The complaint alleges violations of California’s false advertising and unfair competition laws and seeks statutory and general damages.

To read the complaint in *Espinola v. Kashi Co.*, click [here](#).

Why it matters: The suit is the second filed against Kashi in recent months over [similar claims](#) and joins a slew of recent consumer class actions over companies making “all natural” health and nutrition claims.

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MMA Releases Proposed Privacy Guidelines

The Mobile Marketing Association has released a set of proposed guidelines that establish best practices for creating and maintaining privacy policies.

With hundreds of thousands of apps available to consumers, the need for privacy guidelines is greater than ever, the organization said.

The proposed guidelines address three main issues:



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- **Guidance on privacy principles and consumer-friendly language.** The guides recommend that app developers clearly inform consumers about whether their information will be shared with third parties and for what purpose. One example: If the developer sells an app and the information collected about users is transferred as part of the sale, developers should identify the consumer's mobile advertising network to determine if the network offers an opt-out for users. The app should inform users about their opt-out options, if any, including how an app can be uninstalled.
- **Ways to inform users on how data is obtained and used.** Consumers typically provide data (credit card information and e-mail address, as examples), and other data is automatically collected, like the mobile device's IP address, in the course of the downloading process. The guidelines caution app developers that if they collect information from social networking platforms – e.g., friend lists or photos – the app should ensure that prior consent of the user is obtained. Whether the app uses geolocation information should also be disclosed, and if so, how the information is used and whether it is shared. Developers should also inform users about how long data is retained.
- **Guidance on security and confidentiality of information.** Developers should ensure that the app's privacy practices are in compliance with the Children's Online Privacy Protection Act, especially apps that contain images or features that may appeal to children or cause the app to be perceived as being directed toward children – cartoon characters, for example. For all apps, the guidelines suggest that developers use reasonable security procedures and provide an overview to users.

The guidelines emphasize that privacy policies are not a "one-size-fits-all document" and should be customized by app developers to fit the needs of each company and jurisdiction.

"We strongly encourage those using this model policy to consult an attorney and/or privacy professional when crafting your own policy," the guidelines stress. The proposed guidelines are open for comment until Nov. 18.

To read the guidelines, click [here](#).

Why it matters: As the number and use of mobile apps continue to increase, regulatory interest has been piqued, as evidenced by the Federal Trade Commission's recent settlement in its [first suit over mobile apps](#). "These new privacy policy guidelines fill an urgent need for all companies doing business in the mobile marketing industry. The guidelines are intended to provide ways to give the mobile application developer with clear and transparent policy language that can be quickly and completely understood by the consumer," MMA Global CEO Greg Stuart said in a statement. "Today's release is the first in a series of privacy policy guidelines that the MMA will create with the input of industry leaders across the mobile ecosystem."

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Age Is More Than a Number for One Actress

In an anonymous complaint, an actress has filed suit against

Amazon after it posted her real date of birth on her public Internet Movie Database listing.

The actress alleges that the publication of her age has harmed her career by resulting in a loss of employment opportunities and earnings.

She claims that when she created her professional profile on imdb.com eight years earlier, she used a stage name and listed her age as a few years younger. IMDb is a “very handy resume tool” for the film and television industry, the plaintiff contends, that provided her with exposure. That exposure “directly influenced most, if not all, of her employment opportunities, credits and earnings,” she claims.

In 2008, when she upgraded to a premium IMDb account, she used a credit card with her legal name to pay for her subscription. The site then updated her profile with her true age, “revealing to the public that plaintiff is many years older than she looks,” according to the complaint.

“In the entertainment industry, youth is king,” the complaint claims. “If one is perceived to be ‘over-the-hill,’ i.e., approaching 40, it is nearly impossible for an up-and-coming actress, such as the plaintiff, to get work.”

As a result of the disclosure of her true age, the plaintiff has “experienced rejection in the industry” because 40-year-old actresses are not in demand in the entertainment business, she alleges. In addition, because she does not look her true age, the plaintiff claims she cannot physically portray roles of women her age.

Amazon violated her privacy rights, the suit claims, by using the data from her credit card to research public records about her.

The complaint seeks compensatory damages of at least \$75,000 and punitive damages in excess of \$1 million, as well as an order to remove the plaintiff’s legal date of birth from the Web site.

To read the complaint in *Doe v. Amazon.com*, click [here](#).

Why it matters: The suit could turn on the immunity available to online publishers under §230 of the Communications Decency Act. If imdb.com is publishing allegedly defamatory information – in this case, the plaintiff’s true age – based on its own research into public records, then it would not be immune from suit. But the question remains: Is publication of an actress’s actual age defamatory?

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Consumer Groups Filed FTC Complaint Against Pepsi

The Center for Digital Democracy, Consumer Action, Consumer Watchdog, and The Praxis Project joined in a complaint with the Federal Trade Commission about Pepsi’s online game sites, which the groups allege are deceptive and violate teen users’ right of privacy.

Pepsi and its subsidiary Frito-Lay, which owns Doritos snack foods, have mounted several digital marketing campaigns that the complainants find problematic.

“Frito-Lay has infiltrated the lives of teens by developing covert advertising campaigns centered on things teens love – video games, music, horror, sports, contests, and social networking,” according to the complaint.

The groups argue that the games and other campaigns are intended to “disguise advertising as entertainment” and are deceptive when evaluated from the perspective of teenagers, who are the target audience.

In one example, Doritos launched online games, including Asylum626.com, where players try to escape from an insane asylum. The Web site encourages players to “make the scare personal” by enabling their webcams to take their pictures and project them into the game. Doritos also utilized players’ Twitter and Facebook accounts by sending tweets and status updates from the game to players’ followers and friends. While the game itself is devoid of advertising, players cannot finish the game without purchasing a bag of Doritos and using the infrared marker on the bag to unlock the ending, according to the complaint.

Other digital marketing campaigns launched by the company’s “Snack Strong Productions” include a make-your-own Super Bowl TV ad, a partnership with video games like Call of Duty and Madden NFL, and concerts with musicians like blink-182 and Rihanna.

“Frito-Lay uses legitimate media or creates its own fake media to promote its advertising campaigns. This technique contributes to the perception that these campaigns are legitimate entertainment, enabling Frito-Lay to capture the interest of adolescents who want nothing to do with advertising,” the groups contend.

In addition, the games request contact information without adequately disclosing that it will be used for marketing purposes, according to the complaint. Personal information provided during registration for the online games may be shared with other Pepsi companies, and when teens enable their webcams during games, they are consenting to the company’s use of their name, images, and other information in their social networks.

The groups also maintain that by posting messages on a player’s Twitter feed or Facebook wall without user knowledge, Pepsi violated the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising.

Messages are generated by Frito-Lay without the players knowing they are transmitted from their accounts. “Postings made without the explicit knowledge or consent of ‘sender’ by definition do not honestly reflect the views of the game player,” which violates the Guides, the groups argue.

“Teens are particularly susceptible to these kinds of campaigns because of certain physiological and psychological traits associated with adolescence that make them likely to take risks, act impulsively, and be unduly influenced by peers. Frito-Lay takes advantage of teens’ vulnerabilities by disguising its marketing campaigns as entertaining videogames, concerts, and other immersive forms of entertainment,” according to the complaint.

The groups requested that the FTC investigate Frito-Lay's marketing to teens and "take action to stop these practices."

To read the complaint, click [here](#).

Why it matters: In a statement to *AdAge*, a spokesperson for the FTC said that it will "review [the complaint] carefully" and that it was the first filed with the agency about digital marketing to teens. The marketing of food to children and teens has been in the headlines recently. Currently under debate are proposed guidelines that would require food and beverage companies to modify the content of their products to meet nutrition standards or eliminate the marketing of such products to children under age 18. While the FTC recently backed off the proposal, saying that [marketing directed to teens aged 12 to 17 would be allowed](#), food and beverage companies should be aware of the controversy.

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