Advertising Law

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Facebook to Pay $20M for Settlement to Charities, Attorneys – Not Plaintiffs

In the social networking site's latest legal news, Facebook has agreed to pay more than $20 million to settle a class action lawsuit over its "Sponsored Stories" ad feature.

The suit, filed last year, alleged that using a plaintiff's name and image to share their "likes" with friends was a violation of their publicity rights under California law because the site failed to provide users with compensation or the ability to opt out. After U.S. District Court Judge Lucy Koh declined to dismiss the suit, the parties reached a settlement totaling over $20 million.

Other than the class representatives, however, the plaintiffs will not receive a payout. The bulk of the settlement will fund a cy pres award for "groups whose charters set out actions and programs relevant to advocacy related to the purposes for which the case was brought." Proposed recipients include the Electronic Frontier Foundation ($1 million), Consumers Union ($500,000), and $600,000 to the Consumer Privacy Rights Fund. An additional $10 million is slated for the plaintiffs' attorneys as well as $300,000 for costs and payments to the named plaintiffs.

Facebook also agreed to make changes to the site. Additional notice and engineering controls will be developed, including "a mechanism that will allow users to see and control which actions they have taken that have led to their being featured in sponsored stories ads," according to the settlement motion. The site will also "make clear" to users that their name and image may be used in sponsored stories, providing the notice that the class claimed was previously lacking. Provisions for those under 18 to represent they have received parental consent to be featured in sponsored stories will also be added.

A preliminary approval hearing before Judge Koh will be held in July.

To read the motion for a proposed settlement in *Fraley v. Facebook*, click here.

Why it matters: Settling the suit would eliminate one of Facebook's current legal worries, but approval of its terms may prove a challenge with the settlement fund devoted almost entirely to the attorneys and various charities. The parties contend that the award coupled with the

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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

September 19-20, 2012
2012 PMA Digital Shopper Marketing Summit
Topic: "Ten Social & Mobile Marketing Techniques That Will Get Your Company The Attention of Law Enforcement"
Speaker: Linda Goldstein
Stamford, CT
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injunctive relief is the best result for the class. “The facts of this case do not lend themselves to the distribution of an award of meaningful monetary relief to the individual class members,” according to the motion. Given the size of the class – 153 million Facebook users in the United States – a settlement fund would need to be in the billions to provide meaningful relief. “Thus, the only real way to provide consideration with meaning for the class is to have [Facebook] provide funds, through cy pres funding of $10 million and distributions to groups whose charters set out actions and programs relevant to advocacy as to the purposes for which the case was brought, and thus to ensure that the concerns raised in the suit are thereby continued to be monitored, advanced, and protected for years to come.”

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Federal Judge Rejects FTC Settlement – Again

For the second time in four months, a U.S. District Court Judge in New Jersey has declined to accept a settlement between the Federal Trade Commission and the marketer of an acai berry weight-loss product.

In February, Judge Renee Marie Bumb refused to sign off on the deal, which imposed a permanent injunction on marketer Circa Direct as well as a suspended $11.5 million monetary payment. Judge Bumb made headlines when she wrote that because the defendant did not admit fault in the settlement, she could not determine whether the monetary award or other terms were appropriate without “established facts as to the extent of the alleged wrongdoing at issue.” She ordered further briefing from the parties regarding her concerns.

But after those briefings, Judge Bumb again declined to approve the terms of the settlement and requested yet another round of briefing. The judge stated that although the parties alleviated some of her concerns about the terms of the settlement, it remained unclear if the settlement was in the interests of the public.

In her order, Judge Bumb noted a letter she received from FTC Commissioner J. Thomas Rosch, cautioning her not to “simply ‘rubber-stamp’ an agency decision.”

Judge Bumb also referenced a similar order from a New York federal court, where a judge rejected a settlement with the Securities and Exchange Commission in which the defendant did not admit fault. After her first order in the *Circa Direct* case, the 2nd Circuit issued an unsigned opinion indicating that the New York decision was likely to be reversed on appeal, as “Requiring such an admission would in most cases undermine any chance for compromise.”

Judge Bumb acknowledged that an admission of fault may not be necessary to assess the fairness, adequacy, and reasonableness of a proposed settlement if the parties have provided sufficient context for the settlement terms. But the FTC and Circa Direct have “not

demonstrated that the settlement is in the public interest notwithstanding defendants' failure to admit to liability," she wrote.

And while the court acknowledged that she must afford substantial deference to the FTC's views, "This deference does not mean, however, that this court must accept compulsory arguments regarding the public interest. It is instead entitled to the FTC's reasoning and the fact supporting that reasoning.

"The court is also cognizant that it may not dictate the FTC's policy choices. But neither can this court abdicate its own responsibility to conduct meaningful judicial review. Some tension between these directives is unavoidable," Judge Bumb wrote.

Therefore, she requested that the agency – and not the defendants – provide additional briefing on whether the court "may consider the FTC's failure to obtain an admission of liability in its public interest analysis and, if so, why the [settlement] is in the public interest."

To read the court's order in *FTC v. Circa Direct*, click here.

Why it matters: The practice of neither admitting nor declining fault in such settlements is commonplace, particularly with entities that could face civil suits as a result of making a deal with the government. Judge Bumb's challenge to the practice – and Commissioner Rosch's caution not to "rubber stamp" the agency's deals – should be closely watched by advertisers and marketers.

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What's in a (Domain) Name? 1,930 Applicants Believe A Lot

The Internet Corporation for Assigned Names and Numbers (ICANN) released the list of the applications for the newly created top-level domain names, which totals 1,930 requests for sites like ".google" and ".home."

Eliminating some fears of brand holders, new domains featuring a trademark – like ".apple" – were all registered by the brand owner. Other applications may pose concerns to marketers, however, as they seek approval of generic terms like ".vodka" and ".inc."

"We are standing at the cusp of a new era of online innovation," ICANN president and chief executive officer Rod Beckstrom said in a press release about the applications. "That means new businesses, new marketing tools, new jobs, and new ways to link communities and share information."

The most contested new domains include ".home" and ".inc" with 11 applicants each and ".app" which received 13 applications for ownership. Other popular choices include ".music" – requested by Google, Amazon, and six others – as well as ".art," ".book," ".news," and ".shop." Google applied for a total of 101 domain names, followed by Amazon with 76. Other Internet giants like Facebook and Twitter declined to file any applications.

All 1,930 applications will not result in new domains. In addition to contested names, not all applicants will make it through the approval process. ICANN received more applications than expected and said it

plans to break up the approval process into four groups of roughly 500 applicants each. A comment period is now open until August 12 and the formal objection period will last roughly seven months, until January 2013. The first set of approved domain names could go live as early as after March 2013.

To read a list of all the names applied for in the new program, click here.

Why it matters: The creation of new domain names has been controversial with trademark holders expressing concern about cybersquatting and misuse of terms at the general level, as well as the cost of the process – an application cost of $185,000, with annual renewal rates of $25,000. But given the impact on advertising and search engine marketing, brand owners will need to decide whether they want to take part in the domain name regime.

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Agencies Focus on Privacy of Mobile Apps

Multiple federal agencies are currently addressing the issue of mobile application privacy, including the Federal Trade Commission, the Federal Communications Commission, and the Commerce Department.

The Commerce Department's National Telecommunications and Information Administration (NTIA) set the date for its first meeting in the process to set privacy guidelines for mobile applications. The NTIA was charged with developing a code of conduct as part of the White House's privacy framework released earlier this year. "The goal . . . is to develop a code of conduct to provide transparency in how companies providing applications and interactive services for mobile devices handle personal data," the agency said in its press release about the meeting.

"Mobile applications are socially and economically important, but mobile devices pose distinct consumer privacy challenges, such as disclosing relevant information on a small display," the NTIA said. "The . . . process will encourage stakeholders to develop a code of conduct that promotes transparent disclosures to consumers concerning mobile apps' treatment of personal data."

The meeting, scheduled for July 12, is open to all interested stakeholders and will be webcast.

The NTIA is not alone in addressing issues relating to mobile app privacy – the FTC recently held a workshop on the topic of advertising and privacy disclosures in mobile environments. Linda Goldstein, chair of Manatt's Advertising, Marketing & Media Division and head of the Promotion Marketing Association's Legal & Government Affairs Committee, served as a panelist. During the meeting, the FTC said it plans to incorporate mobile app privacy issues in the updated "Dot Com disclosures" currently under review. Topics covered at the workshop included how short, effective, and accessible privacy disclosures can be made on mobile devices and the opportunities and limitations of disclosures via hyperlinks, jump links, hashtags, click-throughs, icons, and other options.

The FCC also announced its plans to address mobile privacy, issuing a

public notice that it is seeking guidance on how wireless service providers store customer information on their devices. Specifically, the agency asked for comments on the manner in which the collected information is used and whether the information pertains to voice service, data service, or both, as well as the degree of control that the service provider exercises over the design, integration, installation, and use of the software that collects and stores users' data.

The FCC is accepting comments through July 13.

To read the NTIA's press release about the meeting, click here.

To read the FCC's request for comment, click here.

Why it matters: The NTIA touted the benefits of a code of conduct, which "would give mobile app-related businesses greater certainty about how the [White House's privacy] transparency principle applies to them. A code of conduct might address how best to convey data practices to consumers who download mobile apps and use interactive mobile services."

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Consumer Group: Nestlé's Girl Scouts Deal Violates Pledge

Nestlé is facing controversy after consumer groups allege the company broke its promise as a member of the Children's Food and Beverage Advertising Initiative (CFBAI) by co-branding a limited edition series of "Nestlé Crunch Girl Scout" candy bars.

Under the terms of the CFBAI's self-regulatory agreement, Nestlé committed not to advertise to children under age 12. But according to the Center for Science in the Public Interest (CSPI) and the Berkeley Media Studies Group, the company is violating that pledge by featuring its logo on the boxes of three flavors of Girl Scout Cookies – Thin Mints, Caramel & Coconut, and Peanut Butter Crème – for a limited run this summer.

Given Nestlé's membership in the CFBAI, the groups said they were "disappointed" with the company's decision to partner with the Girl Scouts, a group made up of children.

"Even if the candy bar advertising is targeted towards adults, the Girl Scout's theme is inherently appealing to children and so constitutes marketing to children," according to the letter. "We ask that Nestlé stop marketing unhealthy foods featuring the Girl Scout's name and logo, given that it violates your pledge not to target children with marketing for candy, and refrain from similar marketing approaches in the future. Marketing thematically geared towards children is marketing to children."

Nestlé has yet to comment on the controversy, but the director of the CFBAI, Elaine Kolish, defended the company. "Nestlé's arrangement with the Girl Scouts does not violate its commitment under the CFBAI pledge because it is not engaging in child-directed advertising for products with a Girl Scouts logo," Kolish said in a statement. "Our program does not apply to packaging at point of sale because grocery stores are primarily adult-oriented venues."

To read the CSPI's letter to Nestlé, click here.

Why it matters: The controversy hasn't hurt sales of the limited edition cookies, which are available from June to September, with Nestlé reporting that an early Facebook promotion sold out more than 800,000 candy bars in less than 24 hours. But it does serve as a reminder to marketers that their participation in self-regulatory programs is monitored by consumer groups.

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