Advertising Law manatt

January 24, 2011

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Companies Sued Over Online "History Sniffing"

Several major companies, including McDonald's, Mazda and Microsoft, were sued for "history sniffing" for acting in concert with Interclick, a behavioral advertising network. The putative class action suit, filed in New York federal court, claims that the practice violated the plaintiff's privacy by mining her Web surfing history for marketing purposes.

Plaintiff Sonal Bose filed suit alleging that Interclick and the four companies violated the Computer Fraud and Abuse Act, Electronic Communications Privacy Act, and New York state law by monitoring her Web browsing without her knowledge. She claimed that Interclick used Flash cookies to store tracking data on consumers' computers as a substitute and back-up for browser cookies when consumers set their browser controls to block third-party cookies. This "surreptitious" and "deceptive" method of history sniffing was unknown to the plaintiff, according to her complaint.

After first filing suit against Interclick, the plaintiff then sued the companies, which she claimed engaged Interclick for various advertising campaigns like McDonald's online, a World Cup-themed game with prize chances, and Microsoft's ad campaign to promote its new Windows Smartphone.

The defendants worked together in "planning, executing, and monitoring the success" of the ad campaigns, according to the complaint, and they "intentionally procured Interclick to engage in browser history sniffing, profiling, and deanonymization activities."

To read the complaint in *Bose v. Interclick, Inc.*, click here.

To read the complaint in *Bose v. McDonald's Corp.*, click here.

Why it matters: Advertisers should take note, as the potential class action is the first "history sniffing" suit filed against a marketer. Other suits have previously been filed against ad-serving companies; in 2010, Quantcast, a media measurement service, and Clearspring, an ad network, settled a consumer class action that alleged the company violated the plaintiffs' privacy by using Flash cookies for tracking, paying $2.4 million.

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Judge: TCPA Applies to Text Messages

The federal Telephone Consumer Protection Act (TCPA) is not unconstitutionally vague when it requires that companies obtain a user's "prior express consent" before sending them text ads, a U.S. District Court recently ruled.

In 2009, Christopher Kramer filed suit against Autobytel, an automotive referral service, as well as B2Mobile, a text message marketer, and LeadClick, a company that solicits consumer names and contact information.

The plaintiff claimed that he received 10 unwanted text messages – or "wireless spam" – sent to his mobile phone, and that he was entitled to statutory damages under the 1991 TCPA. One of the messages allegedly read: "DEAL ALERT: CARS FROM $99/MO! AVAIL. IN YOUR AREA! GO TO:

WWW.CARS499.COM PROMO: 39075 FOR IMMEDIATELY LISTINGS CALL 1800-387-6230. TO END REPLY STOP."

The Web site directed consumers to MyRide.com, a site operated by Autobytel, and the "from" field of the message listed 77893, a code operated by B2Mobile, according to the complaint. Kramer claimed that he replied "Stop" to the number but continued to receive text ads from the same code.

But the defendants argued they were not liable because it was unclear whether or not the TCPA's requirement of "prior express consent" applied to text messaging.

U.S. District Court Judge Claudia Wilken quickly dismissed the motion, saying the defendants "disregard ample guidance available to ensure compliance" with the statute.

The Federal Communications Commission explicitly stated that the TCPA applied with equal measure to "both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls" in 2003. And in 2009, the 9th Circuit issued an opinion "unambiguously" holding that a text message is a "call" for purposes of the TCPA, the court said.

"Defendants are obliged to examine FCC guidance and court decisions that address express consent for automated marketing under the TCPA," Judge Wilken wrote.

To read the court's decision in *Kramer v. Autobytel, Inc.*, click here.

Why it matters: Other courts have similarly reached the conclusion that the TCPA constitutionally applies to text messages, requiring marketers to obtain prior express consent before sending a message. Two federal courts in Illinois recently agreed with the 9th Circuit decision referenced by Judge Wilken in the decision. Because of the unanimity of courts, marketers who send unsolicited text messages without prior express consent from consumers could face litigation or a costly settlement – in 2008, Timberland settled for $7 million after consumers filed a class action lawsuit alleging they received unauthorized texts advertising the company's products.

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Photo on Twitter Didn’t Grant Blanket License

A New York federal court judge has ruled that a photographer did not grant a blanket license to publish his pictures of the Haiti earthquake by linking to them on Twitter.

Photojournalist Daniel Morel was in Port au Prince, Haiti, last January when a devastating earthquake hit the island. After photographing the immediate aftermath, he uploaded his photos to Twitpic and then posted them on Twitter under the username “photomorel.” Another Twitpic user copied the photos and reposted them on his page almost immediately, which created some confusion about photo credit and ownership. News outlets like CBS, ABC, Getty Images, and Agence France Presse (“AFP”) began to use the photos in newspapers and on television, as well as the Internet.

Morel repeatedly sought to correct the attribution of the photos and license them through his agency, which contacted Getty and the AFP. His lawyers sent a cease-and-desist letter to the AFP, which allegedly continued to publish the photos, even crediting some of them to the other poster.

The AFP then sought a declaratory judgment that it did not infringe Morel’s copyright in the photos, arguing that he gave away his licensing rights under the terms of Twitter and Twitpic. Twitpic’s login page cautions users that they operate under Twitter’s Terms of Service, which grants the rights for Twitter to make users’ Tweets available to “other companies, organizations or individuals who partner with Twitter.” While the site “encourage[s] and permit[s] broad re-use of content,” it also adds that “what’s yours is yours – you own your content.”

Relying on Twitter’s Terms of Service, U.S. District Court Judge William H. Pauley III said that Twitter’s terms only granted a license to share content with its partners – which did not include AFP or Getty. “[T]he provision that Twitter ‘encourage[s] and permit[s] broad re-use of content’ does not clearly confer a right on other users to re-use copyrighted postings. Rather, that permissive language stands in contrast to the express, mandatory terms conferring a ‘license’ and ‘rights’ on Twitter,” the court said. “That language is

ambiguous and insufficient to establish on the pleadings that Morel '*understood* that the promise [Twitter] had [the] intent' to confer a license on other users."

The court further refused to dismiss Morel's claims under the Digital Millennium Copyright Act.

To read the court's decision in *AFP v. Morel*, click here.

Why it matters: Despite the unusual facts and the initial confusion surrounding credit for Morel's photographs, the suit serves as an important reminder. While content on social networking sites like Twitter is meant to be shared, the appropriate steps to respect copyright and ownership of content must be followed.

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Off-Balance: False Advertising Suit Filed Over New Balance Toning Shoes

Shoemaker New Balance has been sued for false advertising over the company's claims that its toning shoes tightened wearers' butt and legs, and could increase calorie burn and muscle activation.

The suit, filed in Massachusetts federal court, seeks class action status and more than $5 million in damages.

New Balance offers a line of "toning" footwear with several products, including the "rock&tone" and "truebalance" shoes, which utilize a patented balance board technology that creates a destabilizing effect. Wearers must then engage core and lower body muscles to stay in balance, which New Balance claims results in muscle toning, additional calorie burning and weight loss.

But plaintiff Bistra Pashamova alleged in her suit that the company's extensive, comprehensive national ad campaign made false claims comparing

the toning shoes to traditional walking shoes. New Balance toning shoes "will result in 16% more activation to the gluteus, 16% more activation to the hamstrings, 14% more activation to the calves, [and] 29% more total muscle activation," over traditional walking shoes, according to the suit, and the ads consistently stated the company's claims were supported by scientific studies. Further claims include "Helping you tone up and slim down with every step" and "Tone muscles you didn't even know you had."

But the scientific tests were not subjected to traditional scientific study, according to the complaint, and were commissioned by New Balance. Independent testing found no statistically significant increase in either exercise response or muscle activation as a result of wearing toning shoes, the suit claims, and further, scientists have expressed concern that wearing toning shoes could lead to injury.

Pashamova seeks to certify a nationwide class for her claims of violation of Massachusetts state law.

To read the complaint in *Pashamova v. New Balance*, click here.

Why it matters: Toning shoes have become big business. The suit cites reports that retail sales of the product brought in $145 million in 2009, up from $17 million in 2008, and sales are expected to continue to increase in the coming years. Despite the profits – or perhaps because of them – manufacturers are now facing a number of suits over claims made about the benefits of the shoes, and the science that supports them. Last fall, three class actions were filed against Skechers, alleging that the company deceived consumers about the health benefits of its "Shape-up" line of toning shoes.

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Health Groups Seek Warning Labels on Sugar-Sweetened Drinks

The Center for Science in the Public Interest has joined with a number of health groups and state agencies in a letter to Dr. Margaret Hamburg, the Commissioner of the Food and Drug Administration, urging her to use the agency's authority to require warning labels on sugar-sweetened drinks.

Specifically, the groups are calling for a rotating series of messages that warn consumers about the risks of weight gain, obesity, diabetes, and health problems by drinking sugary drinks. "In light of the overwhelming evidence linking soft drinks to serious diseases, consumers deserve to know – and soft drink labels should disclose – those health risks," the letter said.

According to one study cited in the letter, drinks like soda pop and others containing sugar are now the single largest contributor of calories to the diet, with as much as 10 to 15 percent of teens' caloric intake, and even toddlers consume fruit drinks and soda pop at an estimated average of seven ounces per day.

Joining the CSPI are health groups like the American Public Health Association and the Trust for America's Health, as well as a number of governmental health departments, including the New York State Department of Health, the Boston Public Health Commission, the Philadelphia Department of Public Health, and the El Paso, Texas, Department of Public Health.

Suggested labels include: "This drink contains 250 calories. Consider switching to water."; "Drinking too many sugary drinks can promote diabetes and heart disease."; and "For better health, the U.S. Government recommends that you limit your consumption of sugary drinks."

The letter requests that the warning labels be placed on drinks that contain more than 1.1 grams of sugar, high-fructose corn syrup, or other added caloric sweeteners per ounce.

"Although by no means a cure for America's obesity problem, warning labels are a standard public health tool that has been effectively used to raise public awareness of the hazards of tobacco use and the excessive consumption of alcoholic beverages," the letter argued. "Placing health messages on [such beverages] would alert consumers to major health risks and reduce the occurrence of diseases linked to obesity and overweight."

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

Why it matters: The CSPI petitioned the FDA with a similar request in 2005, but acknowledged that the idea had more traction with the Obama administration, which has been vocal about reducing childhood obesity and encouraging children to eat more healthfully.

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