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May 3, 2010

In This Issue

Ready, Set, Go: Time to Put the "i" to Use

The new behavioral targeting icon is about to make its debut. Several agencies have plans to use the icon in a number of ad campaigns, and the Interactive Advertising Bureau (IAB) and the National Advertising Initiative (NAI) have issued technical specifications for use of the icon.

The icon – a lowercase "i" in a circle – will appear in ads when companies use data about consumers to provide them with specific advertisements.

Advertising agencies such as Interpublic Group, Omnicom, and WPP have plans to test the icon in the coming weeks. Cadreon, a buying platform of Interpublic Group's Mediabrands, has indicated that it will use the icon in a forthcoming Microsoft ad campaign.

In the ads, the "i" will appear as an overlay, most likely in the upper right-hand corner, along with accompanying text such as "Why did I get this ad?" "Internet Based Ad," or "Ad Choice."

The technical specs, known as the Control Links for Education and Advertising Responsibly (CLEAR) Ad Notice Technical Specifications, were issued by the IAB and the NAI. The specs explain how the icon should be built into advertisements that rely on behavioral targeting.

If consumers click on the icon for more information, they should receive an explanation of the data stored in the ad, including what network provided the ad and how they can opt out of that ad network.

The specs were intended to meet the requirements set forth in last summer's Self-Regulatory Principles for Online Behavioral Advertising

UPCOMING EVENTS

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Beverly Hills Bar Association

issued by the Federal Trade Commission staff, but also be flexible enough to allow for future expansion as online advertising changes.

Creative specs have yet to be issued for the icon.

Why it matters: Trade groups and advertisers hope the symbol will help to ward off federal regulation of behavioral advertising. There is no legal requirement that advertisers must use the symbol, but trade groups such as the IAB and the Direct Marketing Association are urging companies to begin using it. While the new symbol should help consumers to better understand behavioral advertising and provide standardized notice when it occurs, Rep. Rick Boucher (D-Va.) has promised to introduce a privacy bill later this spring that would regulate online advertising.

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FTC: Media Companies Should "Ramp Up" Self-Regulatory Efforts to Protect Kids

In comments made to the Federal Communications Commission, the Federal Trade Commission said it has recommended that media companies "ramp up" their self-regulatory efforts to protect kids in the digital age.

As part of the FCC's inquiry into whether it needs to update its regulation of children's TV and related media in a multiplatform world, the FTC reviewed its own studies and enforcement efforts.

The agency's comments on "Empowering Parents and Protecting Children in an Evolving Media Landscape" focused on successful enforcement actions as well as consumer and business education.

The FTC noted that in the second quarter of 2010, it plans to launch a multimedia initiative called AdMongo, "designed to promote advertising literacy among tweens," children aged 8 to 12.

The initiative has three goals: to teach children to be aware of advertising and marketing messages, to teach them how to read, analyze, and understand ads, and to show them the benefits of being an informed consumer.

Turning to policy, the agency focused on three areas of concern: the marketing of food and beverages to children, the marketing of violent entertainment to children, and online virtual worlds.

"In each of these [areas], the FTC recommended that industry participants, along with media companies involved in children's marketing, ramp up their efforts at self regulation," the agency said.

The FTC said that a study is due out next year that will address the marketing of snack foods to children. The study will help the agency

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Speaker: Tom Morrison
New York, NY
The Helmsley Park Lane Hotel
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Speaker: Linda Goldstein

determine whether or not media companies adopted its earlier recommendations regarding expanding self-regulations to cover all forms of advertisements and promotions, as well as limiting the use of character licensing to healthier foods and beverages.

Regarding violent content, the FTC said that "marketers can do much more to restrict the promotion of mature-related or -labeled products to children." Looking specifically at the marketing of music and movies, the FTC said the lack of ad regulation has "resulted in ads on television shows that disproportionately attract young teenagers."

In addition, "movie studios directly and pervasively market PG-13 movies to children under 13 on television, in print, and on the Internet, even though the rating is supposed to represent a strong caution to parents that some material may be inappropriate for children under 13." The FTC said it plans to continue monitoring this area.

In light of the ever-increasing use of mobile communications to access various forms of entertainment, especially by children, the agency also recommended that the industry help parents by providing information and effective parental controls.

"[M]obile applications are quickly changing the way that children access entertainment, and may be less familiar to parents and more difficult for them to supervise. Given the sheer volume of applications currently available for mobile devices and the dramatic rate at which applications are proliferating, in the near term, responsibility falls on wireless carriers and individual publishers to provide content information and effective parental controls. The FTC will continue to work with the industry and others to encourage efforts to give parents practical information to help them decide which products are appropriate for their children," the agency said.

Why it matters: While the FTC makes several references to continued monitoring of marketing to children, the comments also stress the importance of industry self-regulation. "Given important First Amendment considerations, the FTC supports private sector initiatives by industry and individual companies to implement its suggestions," the agency said.

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Class Action Filed Over "0 g Trans Fat" Ice Cream

A false advertising class action was filed in California federal court against Dreyer's, claiming that the company mislabeled certain ice cream products with the statement "0 g trans fat."

In the suit, Mirko Carrea claims that Dreyer's and Nestle "engaged in a widespread marketing campaign to mislead consumers about the

New York, NY

The Helmsley Park Lane Hotel

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nutritional and health qualities of their ice cream products," including that their products "were nutritious, healthy to consume, and better than similar ice cream products."

The suit references the companies' front-of-package labels, online advertisements, and other promotional materials, and says the defendants violated the Lanham Act and California's false advertising law.

In addition to the "0 g trans fat" claim, the plaintiff alleges that the defendants advertised the drumstick product as "The Original Sundae Cone" and the "Classic," which he claimed conveyed that the product was based upon original, wholesome ingredients.

That message, the suit alleges, is misleading and deceptive because the product contains a "highly unhealthy, non-nutritious oil known as partially hydrogenated oil that was not contained in the product as originally formulated."

As support for his claims, the plaintiff references a recent warning letter sent by the Food and Drug Administration to the defendants in February 2010. The letter cautioned the defendants that certain products were "misbranded" because the product label made a nutrient content claim – "0 g trans fat" – but failed to include the required disclosure statement.

The plaintiff seeks compensatory and punitive damages.

Why it matters: In addition to concerns about FDA regulation, food manufacturers making nutrient content claims must be ready to face lawsuits over product labels and marketing.

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FDA Proposes Regulations for Broadcasting Prescription Drug Ads

The Food and Drug Administration recently published proposed regulations for broadcasting direct-to-consumer prescription drug ads, with a comment period open until June 28.

Under the FDA Amendments Act of 2007, the agency is required to provide guidance on a provision that requires drug manufacturers to disclose information related to the major side effects of drugs in a "clear, conspicuous, and neutral manner."

"FDA recognizes that these standards require judgment in their application," the notice of the proposed regulations said. "Therefore, the agency does not intend to prescribe a set formula for 'clear, conspicuous, and neutral' major statements because there is more than one way to achieve these standards in a television or radio ad. FDA

intends to be flexible enough to consider the variety of techniques sponsors may use to appropriately convey required risk information in prescription drug ads."

The proposed regulations set out four requirements for the information to be acceptably clear:

• The information must be presented in language that is readily understandable by consumers; medical jargon is not acceptable. For example, if a drug's prescribing information includes a risk of "syncope," a direct-to-consumer ad should mention a risk of "fainting" rather than using the medical term "syncope," according to the proposed regulations.

• Audio information must be understandable in terms of volume, articulation, and pacing; "rushed" reading by an announcer will not comply. "Risk information must be presented at a pace that allows the audience to hear and process it," the proposed regulations said.

• Text must be placed appropriately and presented for sufficient duration and in a size and style of font that allows the information to be read easily. White letters on a gray background, or gray letters on a black background, would not be conspicuous enough.

• The advertisement should not include distracting representations (images, text, music, graphics, or any combination thereof) that take away from the communication of the major statement – particularly if the distractions highlight benefits of the drug.

Several examples are provided of unacceptable advertisements, including ads that use vague information such as "some patients experience this side effect." Instead, the ad should accurately convey the frequency of the risk – "more than half of patients," for example – of the adverse event.

If the proposed regulations are finalized, they will go into effect 90 days after their publication in the Federal Register.

Why it matters: Drug manufacturers should take a close look at the proposed rules as they include greater detail about how the FDA will review direct-to-consumer broadcast advertisements. The FDA noted that it took a random sample of 35 drug ads that aired in 2008 and found that one-third could be judged as being in violation of the newly proposed regulations. Any ad that airs after the effective date will be required to comply with the regulations, so drug manufacturers should follow the road map provided by the proposed regulations for both new and existing advertisements.

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Florida Attorney General Sues Over "Free Trial" Program

Florida's Attorney General filed suit against CleanWhites, a company that markets teeth whitening products, alleging that it enrolled consumers in a monthly subscription program without their knowledge or consent.

Bill McCollum, the state's Attorney General, claims that CleanWhites (and affiliated companies CleanWhites Pro and Advanced CleanWhites) advertised a "free trial" of its teeth whitening products, with consumers only being charged for the cost of shipping and handling.

An investigation reportedly revealed, however, that once consumers were charged, they were automatically enrolled in a subscription program that charged their credit cards between $49.99 and $125 each month.

Consumers complained not only about the monthly charges, the office reported, but also that even after they cancelled their subscriptions, they were charged the full price of the product.

According to the investigation, the companies also provided the credit card information to other Web sites selling similar products.

The lawsuit, filed in Florida state court, seeks full consumer restitution and a permanent injunction prohibiting all three CleanWhites entities and owners from engaging in similar business practices in the future.

Why it matters: A company that offers a "free trial" must be careful to disclose whether costs are associated with the offer, as well as whether a consumer must cancel to avoid future charges. The terms of such an offer must be clearly and conspicuously disclosed prior to a consumer signing up and being charged for any such costs.

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