



Advertising and Promotion Law News

North America Europe Asia

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I. PROMOTIONS

Attorney General Settles with FreeLotto.com for Deceptive Advertising

The New York attorney general recently settled with PlasmaNet, the owners of FreeLotto.com, for claims that the company used deceptive and misleading advertising with regards to its lottery-style sweepstakes games. Specifically, the AG charged that FreeLotto.com's e-mails to consumers were misleading. The e-mails stated that consumers were being "notified" of "pending" prizes between \$300 and \$10 million and told consumers to "Click to Claim" their prize. According to the AG, the consumers receiving these e-mails had not actually won any prizes but rather were unknowingly signing up for FreeLotto.com's monthly "FreeLotto Automatic Subscription Ticket" ("F.A.S.T.") services, which charged consumers \$14.99 per month to automatically enter consumers in FreeLotto's sweepstakes without having to visit the Web site. In addition to the e-mails, FreeLotto.com's banner advertisements also informed consumers that they had already won a prize, but did not disclose that the consumer had to first register with FreeLotto.com and agree to receive commercial messages from PlasmaNet in order to claim any prize. Under the settlement agreement, PlasmaNet agreed to refund up to three

months of subscription costs to consumers who believe they inadvertently signed up for the F.A.S.T. services.

TIP: When advertising a sweepstakes, do not use language that suggests to consumers that they have already won a prize if they in fact have not yet won. In addition, be careful when using automatic sign-up and renewal methods given the recent scrutiny of such measures by the New York attorney general.

II. ADVERTISING

Free Speech Defense by Game Maker Over Alleged Violation of College Football Player's Right of Publicity Is Rejected on Motion to Dismiss

The Northern District of California recently denied Electronic Art's motion to dismiss a right of publicity claim brought against it by former college football player Sam Keller. The dispute was over the use by EA of Keller's college jersey number, physical characteristics, and other identifiers (such as home state) in EA's *NCAA Football* video game. EA argued that its use of Keller's likeness was a defensible violation of Keller's right of publicity under two different First Amendment arguments: (a) that the use was transformative; and/or (b) that it was merely publishing matters in the public interest (*i.e.*, reporting newsworthy information). In finding that the use was not transformative, the court noted that when looking at the use of Keller's likeness, rather than the game as a whole, EA has shown Keller "as what he was: the starting quarterback for Arizona State University." In finding that the use was not merely news reporting, the court distinguished from fantasy football games (where use of player stats has been found to be protected under the First Amendment). In particular, unlike a fantasy football game where the reporting on the actual facts is necessary for a participant's success in the fantasy football game, in *NCAA Football*, a video game player's success was not dependent on the real-life facts. Moreover, the court noted, EA had provided more than just the bare facts, but had also included other elements, such as the college and university players' physical characteristics and home states.

TIP: If you are considering using a celebrity's name or likeness in your advertisement, take care if you believe that your use is protected by the First Amendment as such a defense is quite limited.

Consumers File Class Action Lawsuit Against Blimpie for Claim That Its Sandwiches Contained Double Portions of Meat

On Feb. 12, 2010, Ronald Williams and Jennifer Clayton (the "Plaintiffs") filed a class action lawsuit against Kahala Corp. ("Blimpie") for violation of the Illinois Consumer Fraud and Deceptive Business Practice Act. The complaint states that Blimpie restaurants advertise "Super Stacked" sandwiches, which, according to the advertisement, contain "double portions of meat" as compared to their non-Super Stacked or "regular" sandwiches. The complaint asserts that Blimpie does not put double meat on all of its Super Stacked sandwiches as compared to their regular counterparts, but charges a premium price for Super Stacked sandwiches. According to

the complaint, the nutrition facts for the Super Stacked sandwiches state that Super Stacked sandwiches contain less than double the amount of protein as compared to their regular counterparts. Furthermore, the complaint asserts that Blimpie advertises Super Stacked sandwiches with no regular counterpart, suggesting that there is no basis of comparison to support Blimpie's claim of "double portions of meat" for certain sandwiches. The Plaintiffs allege that they have regularly patronized Blimpie and ordered the Super Stacked sandwiches with the false belief that these sandwiches contained double portions of meat. The Plaintiffs are asking the court to certify the class, award the class damages, attorneys' fees, costs, and issue a permanent injunction enjoining Blimpie from advertising that its Super Stacked sandwiches contain double portions of meat, without including double portions of meat in such sandwiches.

TIP: Companies that wish to compare their product or service with their other products or services should disclose all relevant facts regarding the basis for the comparison, including any material differences between the products or services being compared.

Bollywood Different From Hollywood At Trademark Office

Even if the mark THE HOLLYWOOD REPORTER has acquired sufficient distinctiveness to be granted trademark registration by the US Trademark Office, that does not support an application to register THE BOLLYWOOD REPORTER, since the two are not legally equivalent. Normally, if an applicant files to protect a mark on an intent-to-use basis, the applicant doesn't have evidence that it has acquired wide public recognition, because it has not in fact been used. One exception is when a legally equivalent mark has been used on related goods or services, and the applicant can establish that this "secondary meaning" will transfer to the new, "legally equivalent" mark." This is, according to an opinion of the Trademark Trial and Appeal Board, a pretty high level of proof. In this case, the Board said, "the marks at issue are not legal equivalents because they have different meanings and engender different commercial impressions. While the substitution of B for H was minor, the Board said that was not a minor misspelling or pluralization of a previously registered mark, nor was it merely the addition of a generic term. Although both connote movie industries, they identify, in the Board's view, different movie industries, and so the Board refused registration of the descriptive mark, THE BOLLYWOOD REPORTER.

TIP: When a trademark arguably is descriptive of the goods and/or services to which it is applied, you must show the Trademark Office that the mark has acquired wide public recognition as a trademark in its own right, unless it is virtually identical to an existing trademark that has acquired that high level of distinctiveness.

U.S. Olympic Committee Accuses Subway of False Association

The U.S. Olympic Committee recently alleged that a Subway television advertisement falsely implies that Subway is affiliated or associated with the Olympics. The commercial features Michael Phelps swimming across an animated map toward Canada accompanied by a voiceover that states that Phelps is swimming to "where the action is this winter." The U.S. Olympic Committee has characterized Subway's commercial as "ambush marketing" and an attempt to associate Subway with the Olympics. The U.S. Olympic Committee has criticized Subway and

other marketers for attempting to "benefit from an association with the Olympic marks without providing any financial support to America's athletes and the global Olympic movement."

TIP: The U.S. Olympic Committee actively enforces its rights to the Olympic marks. It is its position that any implication of an affiliation with the Olympics or use of the Olympic marks may only be made by official sponsors of the Olympics with approval by the U.S. Olympic Committee.

Editorial Content Placed Near Advertisements Still Protected by First Amendment

In 2007, Rolling Stone magazine published an issue containing a four page fold out editorial list of various indie rock bands. On the backs of two of the four pages were advertisements for Camel cigarettes, which made references to underground music but did not include artist names or mention the editorial. Many of the artists objected to having their names published in close conjunction with the Camel advertisements and two artists in particular, filed a lawsuit against Rolling Stone alleging false endorsement, violation of the artists' rights of publicity, and unfair business practices. In a recent court decision, the artists' lawsuit was dismissed on the basis that Rolling Stones' use of the artists' names were protected under the First Amendment and was not commercial speech. The editorial was noncommercial speech because Rolling Stone magazine was in the business of selling magazines and not cigarettes, the intended audience of the editorial was music magazine buyers and not smokers, and the Camel advertisements did not reference the magazine nor did the editorial reference Camel. The court stated that the editorial did not become commercial speech by merely being in close proximity to the advertisement and Rolling Stone did not have any direct interest in the sales of Camel cigarettes.

TIP: Merely placing true editorial content near advertising content is not likely to be enough to lose First Amendment protection. Whether your content is truly editorial content obviously depends on the facts of each situation.

III. PRIVACY

<p>Liisa Thomas Will Be Speaking At THE CANADIAN INSTITUTE'S CONFERENCE ON ADVERTISING & MARKETING LAW To Be Held March 25-26, 2010, in Montréal, Canada.</p>

MA Regulation Regarding Collection of SSN and Credit Card Numbers Went Into Effect March 1

Massachusetts has a new data security regulation that went into effect on March 1 of this year. Under the new regulation, those who "receive, store, maintain, process, or otherwise access [certain limited] personal information in connection with the provision of goods or services or in connection with employment" (these activities defined in the regulations collectively as "owning" data) must have a data security program in place. The type of information that triggers the law is limited to first and last name with one or more of the following: (1) Social Security

number; (2) drivers' license or state-issued ID card number; or (3) financial account or credit card number.

Those who "own" such data about Massachusetts residents must have a security program in place that includes the following: (1) a written security program; (2) an employee in charge of the program and training for all employees about the program and its requirements; (3) provisions for when data is being transported off-site; (4) oversight of vendors who handle such information on the company's behalf; and (5) monitoring compliance with and regular review of the program to ensure its effectiveness. The requirements are more detailed than this overview, but the foregoing gives a good example of the types of things that must be included in a program.

TIP: If you collect Social Security numbers, drivers' license numbers, or credit card numbers from individuals in Massachusetts as part of the provision of goods and services (or in connection with employment), you should ensure that you have sufficient measures in place to protect that data. To meet the laws requirements, you will need to have those measures formalized into a security program that includes the elements required by the Massachusetts law.

It is not clear if the law would apply when Social Security numbers are being collected in connection with sweepstakes/contest awards. However, even if this law doesn't directly apply, companies should still be taking steps to protect sensitive information in order to avoid liability under, for example, data breach notification and unfair business practice laws. This new regulation can give guidance for what a protection program might look like to help avoid limit such liability

German Court Holds Need to Independently Verify Consent When Getting E-mail List from Third-Party Data Broker

A German court held late last year that a travel company that purchased e-mail addresses from a data broker had violated German law. Of particular concern, the company had purchased the e-mail addresses with the intention of using those addresses for its own marketing purposes. The data broker represented that the people whose addresses were listed in the database had consented to receive marketing e-mail messages. However, without independently verifying that such consent had actually been given, the travel company went ahead and sent the individuals on the list marketing e-mail messages. According to the court, the company should have verified that the people on the list had provided consent before sending out the messages. Relying on the representations of the data broker was insufficient.

TIP: American companies seeking to engage in interactive marketing activities in foreign markets, such as sending electronic messages, should keep in mind that standards for obtaining (and verifying) consent can be higher outside of the U.S.

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