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Advertising, Marketing And Promotions Law Year In Review

While Wall Street, the Olympics, and a Presidential Election Dominated Headlines, Green Marketers, Kevin Trudeau (again) and a Naked Cowboy Also Left Their Indelible Marks on 2008

**Joseph Lewczak,
Allison Fitzpatrick
and Matthew Smith**

DAVIS & GILBERT LLP

As the world celebrated the Beijing Olympics and witnessed the rise of China as a world economic power, the U.S. economy continued to falter and not even Michael Phelps's eighth gold medal could ease the financial tensions at home. While a few unscrupulous advertisers took advantage of these troubled economic times with bogus offers and fraudulent schemes, most of the industry responded with promotional pricing, sales events, value meals, coupons and free offers that brought some economic relief to weary consumers.

We explore some of the year's major issues in advertising, marketing and promotion, all of which contributed to making 2008 a memorable year (whether for good or for bad).

Right Of Publicity

After being the first man to break the sound-barrier 60 years ago, Chuck Yeager is now seeking to "break" Cingular for referencing his historic accomplishment in a press release, which he alleged violated his right of publicity and falsely suggested that he had endorsed Cingular's product. Yeager came one step closer to his goal when a California

Joseph Lewczak is a Partner, and Allison Fitzpatrick and Matthew Smith are Associates in the Advertising, Marketing and Promotions practice group of Davis & Gilbert LLP. Authors' Note: The authors gratefully acknowledge the assistance of Jennifer Soussa, Aaron Taylor, and Alison Winter in preparing this article.



**Joseph
Lewczak**



**Allison
Fitzpatrick**



**Matthew
Smith**

court denied Cingular's motion to dismiss, finding that the press release created a likelihood of confusion as to whether Yeager was endorsing Cingular's product.

While he is not exactly Cowboy Tony Romo, Robert Burck is the one and only Times Square "Naked Cowboy." Earlier this year, Burck brought a \$6 million lawsuit against Mars Inc. alleging that two Times Square billboards depicting a guitar-wielding M&M candy in tight white shorts violated his right of publicity and gave the impression that he was endorsing the product. The court dismissed the "Naked Cowboy's" right of publicity claim, citing the fact that New York law does not protect a character created or a role performed by a living person, but the false endorsement claim was allowed to go forward until parties settled the case in November.

Fantasy sports players rejoiced on June 2, 2008, when the U.S. Supreme Court denied certiorari to the Eighth Circuit case which had found that a provider of fantasy sports games did not violate MLB players' rights of publicity by using the names and statistical records of players, thus, allowing fantasy baseball drafts to continue unabated.

Sweepstakes

"That terminator is out there. It can't be bargained with! It can't be reasoned with!" Well, that was not entirely true on September 30, 2008, when California Governor Arnold

Schwarzenegger signed into law a significantly modified version of California Sweepstakes Bill - 2007 SB 1400. The new law requires, among other things, that the "no-purchase-or-payment-necessary" language in the sweepstakes' official rules appear in a separate

paragraph, in capital letters in contrasting typeface - not smaller than the largest typeface used in the text of the official rules.

Late last year, a California court denied a motion to dismiss brought by The Apprentice, Deal or No Deal, 1 vs. 100, and American Idol defendants in the premium text message lawsuit, allowing plaintiffs to proceed with their claim that the reality show sweepstakes constituted illegal lotteries (even though entrants could enter for free on the Internet) because text message entrants paid a 99-cent premium text message fee to play the game and received nothing of economic value in return.

But all was not lost for premium text message promotions. In April, the Georgia Supreme Court unanimously held that non-winning entrants who had paid 99 cents to enter the premium text messaging sweepstakes, which ran during the television show "Deal or No Deal," were not authorized under Georgia's gambling statute to recover from defendants the premium text message charges they had paid to participate in the game.

Children's Advertising

Big Mac, Filet-a-Fish, Quarterpounder, Apple Slices? In July, the FTC released its study on food marketing to children and adolescents, which found that 44 major food and beverage marketers (including Burger King, Coca-Cola, General Mills, Kraft, McDonald's, and PepsiCo.) spent \$1.6 billion to pro-

Please email the authors at jlewczak@dglaw.com, afitzpatrick@dglaw.com and msmith@dglaw.com with questions about this article.

mote their products to children and adolescents throughout 2006, and called for such marketers to implement a number of new self-regulatory measures, including adopting and adhering to meaningful, nutrition-based standards for marketing their products to children under 12 (otherwise known as the "No Pepsi Generation").

At the same time, the Council of Better Business Bureaus released its first report on the progress of the participants in its self-regulation program, the Children's Food and Beverage Advertising Initiative ("Initiative"), which concluded that all participants successfully implemented their pledges to either not advertise to children under 12 or only advertise products that met the specific "better-for-you" criteria. This summer Nestlé USA, maker of Juicy Juice®, Nestlé® and Nesquik® became the fifteenth participant in the Initiative.

In the "what will kids do without the Dark Knight or the Hulk" category, the Children's Advertising Review Unit ("CARU") entered into an agreement with the MPAA to refer to it any advertisements for films that are intentionally placed in children's programming deemed by CARU to be inappropriate for such programming. So far this year, CARU has referred at least ten cases to the MPAA, including advertisements for the "The Incredible Hulk" and "Sisterhood of the Traveling Pants 2."

Environmental Advertising

Throughout the year, the FTC held a series of public workshops as part of the agency's regulatory review of the "Guides for the Use of Environmental Marketing Claims," commonly known as the Green Guides. These workshops focused on the marketing of carbon offset programs and renewable energy certificates, environmental claims for product packaging, and green claims for textiles, building products, and buildings. We can expect additional workshops in 2009 and changes to the Green Guides some time in the future.

In May, the National Advertising Division recommended that Church & Dwight stop advertising claims that its Arm & Hammer Essentials Liquid Laundry Detergent product was more environmentally friendly than other laundry detergents by use of unqualified environmental claims and "green" visuals.

Health And Weight Loss Advertising

What will infomercials do now that their "king" has been dethroned? In August, a federal judge banned Kevin Trudeau from infomercials in which he has an interest for a period of three years and ordered him to pay more than \$5 million in profits from his book, "The Weight Loss Cure 'They' Don't Want You to Know About" because his latest infomercials allegedly misrepresented the

content of his weight-loss book in violation of an earlier court order.

In what may result in a sales boom for Red Bull and vodka, Anheuser-Busch agreed to discontinue its popular alcoholic energy drinks, Tilt and Bud Extra, and to refrain from producing any caffeinated alcohol beverages in the future, resolving claims brought by 11 states that AB had made misleading health-related statements about the energizing effects of its caffeinated alcohol beverages.

In May, Merck agreed to pay \$58 million as part of a multi-state settlement of allegations that its ads for the painkiller Vioxx deceptively played down its health risks. The settlement also requires Merck to submit all new TV commercials to the Food and Drug Administration before they can be aired. Merck is now looking for a painkiller for multi-million dollar regulatory actions.

Privacy / Data Protection

In the "Not In MySpace" category, Attorney Generals from 49 states and the District of Columbia announced a sweeping agreement with MySpace under which the company would adopt new measures to protect children online, including developing new technology for age and identity verification. In January, the operators of imbee.com, a social networking site targeting tweens, agreed to pay \$130,000 to resolve FTC charges that it collected personal information from children without parental consent in violation of the Children's Online Privacy Protection Act.

In two unrelated FTC actions, discount retailer TJX and data brokers Reed Elsevier and Seisint agreed to settle charges that each engaged in practices that, taken together, failed to provide reasonable and appropriate security for sensitive consumer information. The settlements will require that the companies implement comprehensive information security programs and obtain audits by independent third-party security professionals every other year for 20 years.

Life is not so good for Life Is Good, Inc., an online apparel retailer, who settled FTC charges that it failed to protect consumers' personal information and that its security claims made in its online privacy policy were deceptive and violated federal law. The proposed settlement requires the retailer to implement a comprehensive data-security program and obtain audits by an independent third-party security professional every other year for 20 years.

Telemarketing

In August, the FTC announced two amendments to the Telemarketing Sales Rule ("TSR"). The first one bars telemarketing calls that deliver prerecorded messages unless a consumer previously agreed to accept such calls from the seller, and the second one mod-

ifies the TSR's method of calculating the maximum permissible level of "call abandonment" to within two seconds of the consumer answering the phone.

In the largest telemarketing fraud sweep ever, dubbed Operation Tele-PHONEY, the FTC, in cooperation with more than 30 international, federal, state, and local law enforcement agencies, filed 13 separate federal district court complaints against companies that allegedly engaged in deceptive telemarketing operations in which more than 500,000 consumers were defrauded in losses of more than \$100 million.

CAN-SPAM

In May, the FTC announced four new rule provisions to the CAN-SPAM Act, including a provision that modifies the definition of "sender" to make it easier to determine which of multiple parties advertising in a single e-mail message is responsible for complying with the Act's opt-out requirements, and one that clarifies that a "sender" of commercial e-mail can include an accurately-registered post office box or private mailbox to satisfy the "valid physical postal address" requirement.

The FTC also clarified its position with respect to the Act's application to forward-to-a-friend e-mail marketing campaigns: while any inquiry is "highly fact specific," its application would likely turn on whether the seller has offered to pay or provide other consideration to the forwarder, such as money, coupons, discounts, awards, additional entries in sweepstakes or the like, in exchange for forwarding a message.

In the largest settlement of CAN-SPAM to date, online advertiser ValueClick, Inc. agreed to pay \$2.9 million to resolve FTC charges that its advertising claims and e-mails were deceptive and violated federal law. The e-mails and online ads claimed that consumers were eligible for "free" gifts, including laptops, iPods, and high-value gift cards, but failed to disclose that consumers must spend substantial sums of money to obtain the promised "free" merchandise.

* * * *

The regulatory trends for 2008 are certainly consistent with those of 2007 – children's advertising, privacy and data protection, health and weight loss advertising, CAN-SPAM, and telemarketing – with regulators arguably even more aggressive in response to challenging economic times. Look for these trends to continue well into 2009 with further focus and scrutiny on environmental advertising, digital marketing, and violence in videogames and movies. In response to President-elect Obama's successful presidential campaign, we can also anticipate increased use of social networking platforms, viral, and buzz methods of advertising.