

Fanning the Flames of Internet Opportunity Without Creating a Legal Inferno

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Overview

- Expansion of Domain Name System
- Privacy
- Mobile Devices/Mobile Advertising
- Social Networking
- Online Advertising
 - Children’s Online Privacy Protection Act
 - FTC Green Guides – Sustainability
 - 2011 Endorsement-Related FTC Cases
- What You Can do to Protect Your Company

Expansion of Domain Name System: Update on Launch of New gTLDs

- Currently 22 gTLDs such as .com, .net, .coop
- Potential for indefinite number of new gTLDs (Limit of 1000 in first round)
- Application period January 12, 2012 – April 12, 2012
- Application fee \$185,000; additional costs
- Yearly registry fee \$25,000 plus additional fee for registries with >50,000 domain names
- Minimum ten year commitment
- Several lawsuits threatened
- Oct 19. ANA petitioning Dept. of Commerce to intervene



Examples of Expected Applications

- **Generics**

- .shop
- .site
- .news
- .bank
- .app
- .kids
- .homes
- .bank
- .money
- .horse
- .movie
- .music
- .web
- .phone
- .health
- .fam

- **Cause**

- .green
- .eco

- **Brands**

- .canon
- .hitachi
- .unicef



- **Geographic**

- .nyc
- .boston
- .chicago
- .dallas
- .miami
- .pdx (Portland)
- .seattle
- .sfo
- .paris
- .vegas
- .california
- .florida
- .arab
- .africa

For lists, see: <http://www.netglds.com/new-gtld-list>
<http://www.register.en/uk/news/reu-new-gtld-newsflash.asp>

New Generic Domain Names: What You Can do to Protect Your Company

- Consider applying for own brand to establish private island on the internet
- Plan defensive registration strategy for second-level domain names
- Plan enforcement strategy
- Monitor impact on search engine rankings



Breaches

- Breaches and incidents frequently occur, are reported and publicized by the media and on the internet
- Legal issues and business considerations
- Data crosses country borders

State breach notification laws

- Cover personal information, meaning name, plus any of:
 - social security number
 - driver's license number
 - financial account information (e.g., credit card, bank account, etc.)
 - in some cases, health information

Enforcement of state breach notification laws varies

- State attorney general enforcement in Minnesota
- Private right of action in California
- Administrative fines in Florida

Massachusetts privacy regulation

- Covers any entity (regardless of whether in Massachusetts) with access to Massachusetts resident personal information
- Written information security program (WISP) is required
- Reporting a breach to the Massachusetts attorney general (which is required under the Massachusetts breach notification law) could trigger an investigation of a reporting entity, including that the entity submit its WISP for review
- 2011 Massachusetts attorney general privacy enforcement actions

Massachusetts privacy regulation

- Requires written information security program mandating encryption of personal information transmitted wirelessly and stored on portable devices
- Revisit applicable entity policies (e.g., technology and electronic communications):
 - Entity access to and monitoring of employee-owned devices
 - Applicability to entity and employee-owned mobile devices

Federal HIPAA / HITECH Act breach notification

- Applies to covered entities and business associates
- Covered entity means (i) health plan, (ii) health care clearinghouse or (iii) health care provider
- Business associate that (i) on behalf of a covered entity, performs activity involving use or disclosure of individually identifiable health information or (ii) provides legal, actuarial, accounting, consulting, management, administrative, accreditation or financial services for the covered entity involving the disclosure of individually identifiable health information from the covered entity to the person

Federal HIPAA / HITECH Act breach notification

- Protected health information means individually identifiable health information relating to health care treatment, a health condition or payment for the provision of health care
- Covered entity notification to each individual, U.S. Department of Health and Human Services (if breach involves more than 500 individuals) and prominent media outlet (if breach involves more than 500 residents of state or jurisdiction)
- Business associate notification to covered entity

Enforcement of federal HIPAA / HITECH Act

- U.S. Department of Health and Human Services enforcement
- Civil penalties
- Criminal penalties
- State attorney generals also can bring civil actions
- No private right of action

Review information and documentation and determine applicable laws

- Personally identifiable information – what, where and in which form is it?
- Which company policies and procedures and agreements have provisions relating to privacy and confidentiality?
- Determine which laws apply and what the requirements are (e.g., policies and procedures and agreements)
- Sometimes, policies and procedures are advisable, though not required by law

Be prepared

- Prepare policies and procedures and ensure they are consistent and integrated with company policies and procedures
- Devise a roadmap of what to do in the event of a possible breach
- Consider handling of investigations
- How should a company respond internally and externally to media, employees and others about breach circumstances and status?

Privacy developments

- Securities and Exchange Commission issued CF Disclosure Guidelines: Topic No. 2 in October 2011 – guidance for public companies on disclosure of cybersecurity risks and cyber incidents
- White House cybersecurity proposal in 2011
- Department of Commerce green papers in 2010 and 2011

Privacy developments

- Federal Trade Commission 2010 preliminary report on privacy is anticipated to be finalized by year-end 2011
- FTC proposed amendments to the Children's Online Privacy Protection Act in September 2011

Mobile Devices/Advertising

- Tech Status/Advertising Opportunities
- Business Outlook
- Recent FTC Enforcement Action
- Class Action Litigation
- Employer vs. Employee Device Ownership



iPhone Apps – Increased Transparency

Description

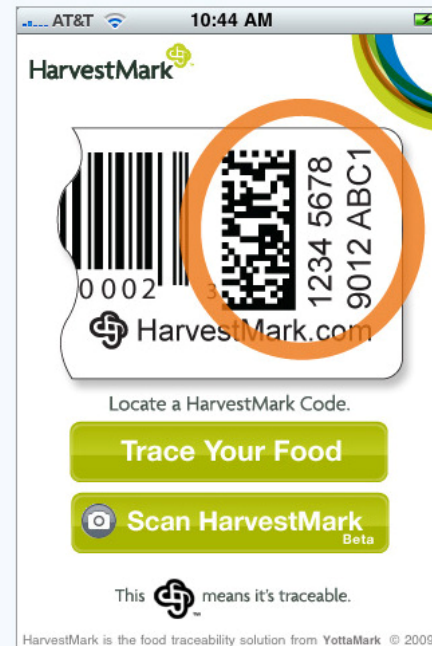
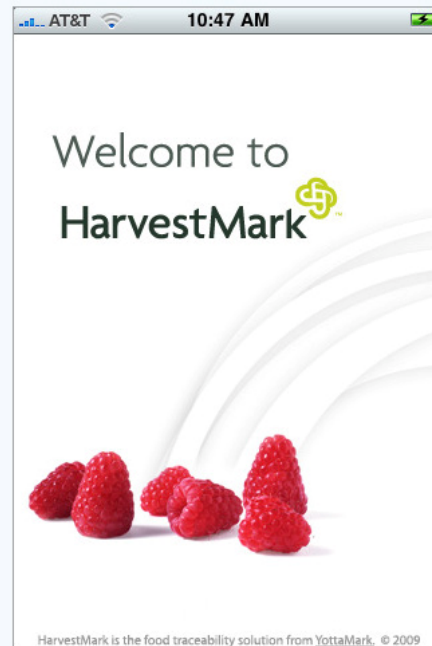
You want to know more about the fresh food that you buy, like where it was grown and if it's safe.

Now you can trace your food back to the source using your iPhone wherever you see the HarvestMark logo.

[YottaMark, Inc. Web Site](#) > [HarvestMark Food Traceability Support](#) >

[...More](#)

iPhone Screenshots



GADGETS

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APPDEALS &
REWARDS

MUSIC

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SUBSCRIBE TO GET NEWS!

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THE WALL STREET JOURNAL

Top 10 Apps 2010

FAST COMPANY

Top 10 Most Innovative
Companies in Retail 2011Mashable
All That's New on the Web

Top 10 Apps to Watch in 2011

TechCrunch

Best Social Commerce App -
Runner-up (Crunchies)

xconomy

"Shopkick is a startup on fire."

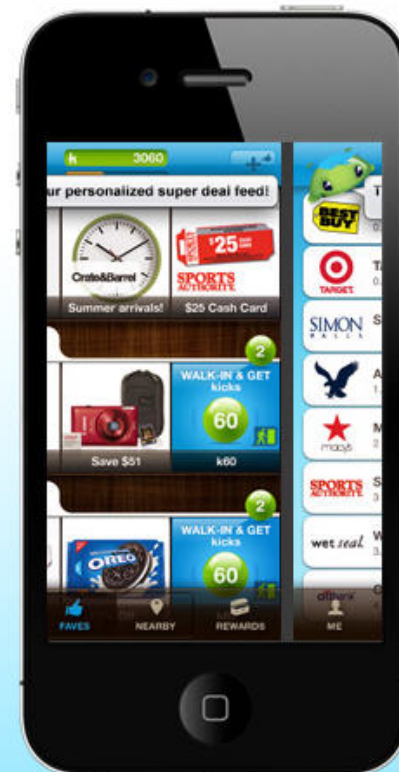


Crate&Barrel

SIMON
MALLSSPORTS
AUTHORITY

west elm

wet seal



iPhone Screenshots



In-App Advertising and Sales

- Apple's iAd platform – advertising within apps
- In-app purchases accounting for significant portion of app developers' revenue
 - Virtual goods
 - Upgrades

Mobile Devices: New Uses in Retail

- Quick response codes
- Shelf-edge TVs (NFC in next generation)
- In-store wireless networks
- Shopping apps
- Increased consumer transparency



New Functionalities of Smartphones

- Credit card reader
 - Square



- Mobile payments/digital wallet
 - Near Field Communication (NFC)
 - Internet companies
 - Google Wallet
 - Zong (eBay/PayPal)
 - Banks
 - In2Pay pilot programs
 - Credit card companies



Mobile Devices: Business Outlook

- Tipping point reached in February 2011 - sales of smartphones (101M) outpaced sales of PCs (92M) in Q4
- 35% of American adults own a smartphone
- Q1 and Q2 2010, 1 in 4 adults lived in a wireless only household (51% of adults 25-29)
- Source: *Pew Internet and American Life Project*



Mobile Devices: Business Outlook

- 75% of marketers surveyed will be increasing mobile ad budget (*July 2011, Interactive Advertising Bureau*)
- 35% say will increase by > 50%
- Mobile web (HTML5) versus mobile apps versus in-app advertising conundrum
- Customers will get product info through mobile devices and buy through mobile payment systems



Apps: What Data is Being Collected?

- Example: Millennial Media
 - Age
 - Gender
 - Income
 - Ethnicity
 - Sexual Orientation
 - Political Views
 - Parental Status



Apps: What Data is Being Collected?

- Example: iPhone App Developers Can Access
 - Unique Device Identifier (UDID)
 - Contacts in your address book
 - Current GPS coordinates
 - Photos in your photo gallery
 - Email account information
 - Phone info (including last number called, etc.)
 - Videos watched and searched
 - Web search history
 - Keyboard cache

Social Networks: What Data is Being Collected?

- Example: Facebook's OpenGraph Apps "Frictionless Sharing"; Facebook Gestures
 - What you read (books, articles)
 - Songs you listen to/music videos you watch
 - TV shows you watch
 - Movies you watch (outside U.S.)
 - Your exercise results (where you ran, etc.)
 - What you cooked
 - What you are wearing
 - What you want
 - Where you are traveling

Privacy: How is Our Data Being Shared?

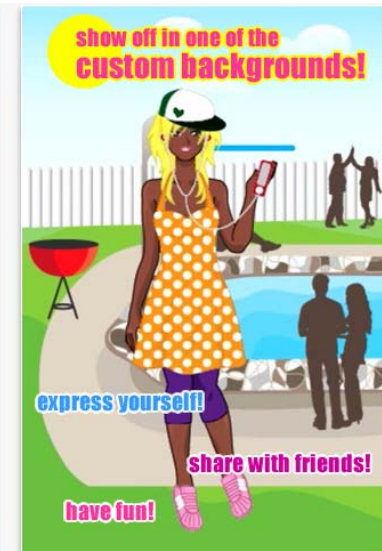
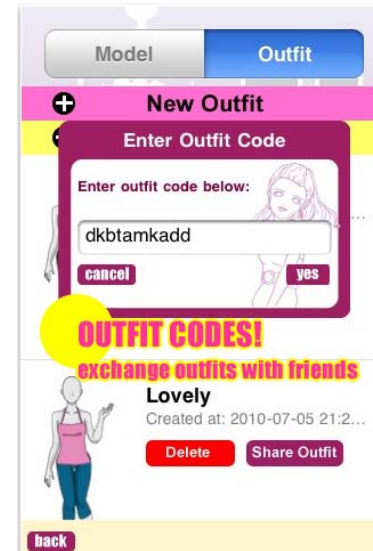
- Social networking companies are sharing it
 - Facebook's Timeline: Old content no longer obscure
 - Post log-out tracking
- Apps are sharing it
- Mobile devices are sharing it
- Some is leaked when our connections have weak privacy settings
- Search engines are sharing it

Online Privacy: What do the Law and Regulations Say?

- State Privacy Laws and Existing FTC Precedent
 - Notice and consent
- Proposed Federal Legislation Including “Do Not Track” – None has Passed
- FTC Preliminary Staff Report: *Protecting Consumer Privacy in an Era of Rapid Change* (December 2010)
 - Increased collection of consumer data
 - Lack of understanding undermines informed consent
 - Distinction between personally-identifiable information and non-PII becoming less relevant
 - Privacy by design
 - Final report expected by end of 2011
- Children’s Online Privacy Protection Act (FTC Rule Being Updated Now)
 - Proposed: include geolocation information and “certain types of persistent identifiers used for functions other than the website’s internal operations, such as tracking cookies used for behavioral advertising” in definition of “personal information”
 - Comments due November 28, 2011

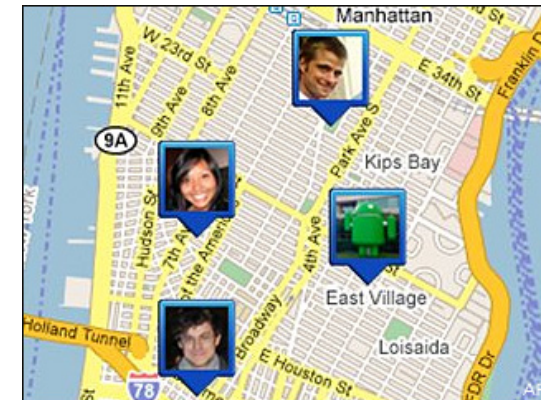
FTC's First Mobile App Case

- *W3 Innovations* (August 2011)
- First FTC case re mobile apps
- Apps and blog resulted in company collecting 30K email addresses and 600 full names from children without following COPPA
- \$50K penalty; delete info collected; comply with COPPA in future
- Warning to other app providers



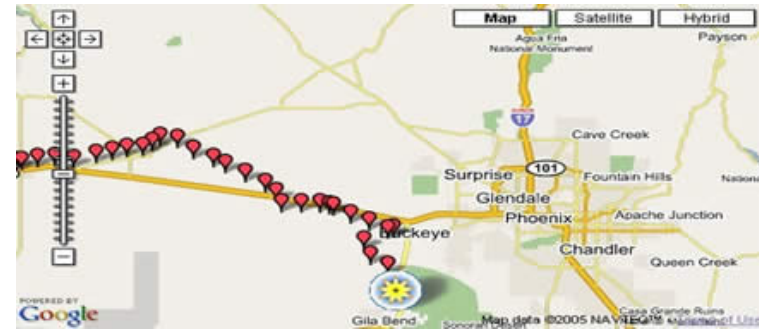
Mobile Devices: Apps and Privacy

- *Wall Street Journal* Article: *Your Apps Are Watching You* (Dec. 2010)
- Recent Study of 1,400 iPhone Apps
 - >50% transmitted device ID
 - Device ID can be linked to Facebook or Google and can determine user name
 - 36 tracked device location
 - 5 mined data from user address book
 - Source: *PiOS: Detecting Privacy Leaks in iOS Applications* (Feb. 2011)
- Only 19% of Top 340 Mobile Apps Contain Link to Privacy Policy (*TRUSTe/Harris Interactive, April 2011*)



Mobile Devices: Apps and Privacy

- *In re iPhone Application Litigation Class Action*
- Multiple Cases Combined
- Allegations Include
 - Unique Device Identifier & browsing history
 - No way to block visibility to app developers
 - App developers sell dossiers of info about user searches tied to UDID to tracking companies
 - Combining info can lead to effective real-time tracking of user location and activity
- Motion to Dismiss Pending (Filed June 2011)



Similar Pending Cases

- Low v. LinkedIn
- Brown v. Google
- Jefferys v. Google



Mobile Devices: Employer vs. Employee Liable Mobile Devices

- Increased freedom, flexibility and control for employees versus cost, compliance and security concerns of employers
- Expense/volume discounts
- Security - apps, protecting and wiping devices, sensitive data, viruses, camera phones
- Support costs
- Monitoring/blocking difficult
- Privacy
- What do your policies say? How are they implemented?
- Good Technology or competitors – mobile device security



Apps: What are the Business Implications?

- If employees installing apps on mobile devices connected to company network, data is vulnerable
- If employees using social networks on company computer or mobile device connected to company network, data is vulnerable
- If company collecting information from Facebook users on Page need privacy policy
- If company collecting information through Facebook app, Twitter app, LinkedIn app, or Android app need privacy policy (Apple's requirements unknown)
- If company developing or using app, comply with partner website's rules
- Encourage everyone to carefully select privacy settings

Mobile Devices: What You Can do to Protect Your Company

- Improve sustainability of practices/products to improve/maintain good rankings in world of increased transparency
- Keep up with trends re mobile advertising and mobile payments and offer your customers useful information and services through new mobile platforms/opportunities to pay using mobile devices
- Before you offer an app, work with legal to develop privacy policy and practices to minimize liability risk
- If you choose to participate in a third-party apps' service or allow advertising networks to place ads on your website, conduct due diligence on their privacy practices/add contract requirements
- Consider confidentiality concerns in connection with employee mobile device and app usage
- Make careful decisions about whether to connect employee-owned devices to your network
- Before launching text messaging capability, involve legal early in this heavily regulated and litigated area
- Be aware of potential pitfalls regarding commercial messages conveyed by email, text messaging, social media, etc.



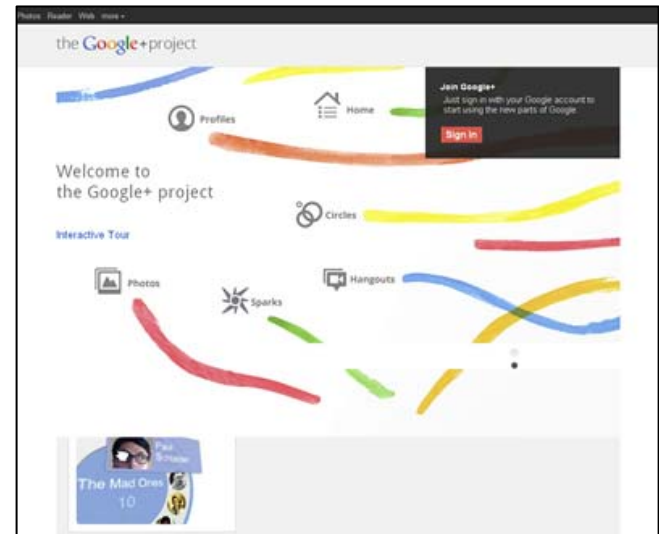
Social Networking

- Overview of business use of social networks
- Hot Topics
 - Changes to Facebook Profiles
 - Privacy
 - Social Networking Policies
 - Employment Issues



Google Plus

- Launched June 2011 – testing phase
- Over 25M users by August 2011
- Public launch September 2011
- Business profiles coming later this year
 - list fans, employees, management
 - verify business ownership
 - more than one location possible
- For preview of appearance, see <http://www.socialmediadialogue.com/google-plus-for-business-pages-to-launch-later-this-year/654/>
- Ford Motor Company
- Group messaging features
- Privacy protections designed in
- Will it overtake Facebook?



Changes to Facebook Profiles

- Timeline (Go-live date has been pushed several times)
 - <http://www.facebook.com/about/timeline>
 - Scrapbook of your life
 - Your friends have easy access to your past (be careful with whom you connect as a friend)
 - You can choose who sees which events
- Facebook Gestures
 - No longer just “Like” – any verb can now be a button (reading, watching, listening, want, cooked, etc.)
- Tickers
 - Real-time conversations (Google+ Messenger)

Changes to Facebook Profiles (cont'd)

- Graph Rank
 - Interests of you and your friends dictate what will appear in your news feed, ticker and timeline (demonstrated by sharing and liking)
- Friend Lists (Google+ Circles)

Changes to Facebook Profiles (cont'd)

- Increased integration with apps
 - Hardwiring – need only ask once
 - Automatic sharing (is reading, is listening to, is watching)
 - Examples
 - Spotify
 - Rhapsody
 - Rdio
 - Slacker
 - VEVO
 - Yahoo News

Changes to Facebook Profiles (cont'd)

- Subscribers versus Friends (Like Follow on Twitter)
 - When to enable subscribers versus setting up a Page?
- Share (Like Retweet in Twitter)
 - No need to have “Liked” Page to Share
- Visual changes
- Characters in Posts – 500 max increased to 5,000 (Google+ unlimited)

Property: Are Social Networking Accounts and Applications Property or Contract Rights?

- Law and Regulations
 - Contract law
- Policies
 - Facebook: no transfer of rights without Facebook's written permission (accounts and apps)
 - Twitter: non-assignable license to use software; cannot assign app rights w/o Twitter's written consent
 - Tip: corporate developers should use company email address on account; app associated with single Twitter account
 - LinkedIn: No transfer of accts permitted; app developers need LinkedIn's written consent to transfer rights
 - Google: Cannot transfer rights to use Google's software without permission; rights in development agmt cannot be assigned without written approval
 - Apple: App agreement not disclosed publicly

5 common provisions in social media policies

- Use common sense and do not be misleading
- Do not disclose confidential or proprietary information
- Do not disclose material nonpublic information
- Comply with company policies and applicable law
- Identify yourself and fully disclose your affiliation when you communicate about the company

Employees' right to engage in protected concerted activities

- Under the National Labor Relations Act, both union and non-union employees have the right to engage in protected concerted activities:
 - Right to discuss (*i.e.*, complain about) working conditions with coworkers
- National Labor Relations Board has reviewed more than 100 cases involving social media:
 - Key issue is whether policy chills employees' participation in protected concerted activities

Employees' right to engage in protected concerted activities

- Beware of policy provisions that prohibit:
 - Disparaging the company, management, etc.
 - Discussing wages, corrective actions, investigations, etc.
- When investigating or responding to employees' online activity, avoid actions that could be considered interference with employees' right to engage in protected concerted activities:
 - Threats
 - Unlawful surveillance
 - Selective enforcement of company policies

Social Networking: What You Can do to Protect Your Company

- Social networking is multi-disciplinary - all areas that are implicated should work together
- Protect the brand – proactively register usernames on key social networks for company’s most important brands
- Monitor social networks for infringement/other bad acts (impersonators, overreaching fan sites, etc.)
- Review procedures and revise or establish new policies as needed
- Make sure policies are consistent and integrated
- Train and educate employees and others with responsibility (e.g., marketing, customer service, human resources, public relations, legal department, etc.) on false advertising, endorsement rules, making statements about your goods or services and those of competitors, and company policy on responding to negative posts
- Enforce social networking policy with employees
- Develop crisis management plan that includes social networking sites before the crisis occurs
- Check with international counsel if company has likers from outside U.S.
- Add terms of use and privacy policy to company Facebook Page and register DMCA agent with Copyright Office
- Consider insurance coverage

Online Advertising: Children's Online Privacy Protection Act

- Websites designed for kids or
- General audience website that collects info from kids under 13
- Individually identifiable information about a child
- Verifiable parental consent before collection

Children's Online Privacy Protection Act

- **Playdom** (2011)
- Disney company offering multi-player games
- Policy – prohibit children under 13 from posting info online
- Violated own policy – allowed posting of PI by kids under 13
- Did not obtain parental consent before collecting
- Policy OK; practice not OK
- \$3M penalty to FTC



Children's Online Privacy Protection Act: What You Can do to Protect Your Company

- If collecting personal info from users online or allowing free-form posting by users online
- Make sure privacy policy and practices comply with COPPA
- Monitor revisions to COPPA underway



Online Endorsement Issues

Federal Trade Commission endorsement guidelines

- People positively discussing a product or service online must disclose if paid or get a free product or service
- Advertisers are liable for a “paid” blogger’s false statements
- Advertisers have a duty to instruct “paid” blogger on appropriate notice he or she must give about payment and on the need for truthfulness and substantiation of claims
- Advertisers must monitor the “paid” blogger’s compliance with endorsement rules
- Bloggers are liable for false statements they make about advertiser’s products or services
- If company employee posts anything positive online about employer’s products or services, fact of employment must be disclosed
- If members of the public receive something (e.g., points or free products) for passing along message to friends, they must disclose that fact to friends

FTC Actions Based on Endorsement Guidelines



save the date

LOFT SUMMER 2010
EXCLUSIVE BLOGGER PREVIEW!

TUESDAY
JANUARY 26, 2010
4PM TO 5PM

INDUSTRIA SUPER STUDIO
356 WEST 12TH STREET
AT WASHINGTON STREET

COME TAKE A SNEAK PEAK AT LOFT'S
SUMMER 2010 COLLECTION BEFORE
ANYONE ELSE! BLOGGERS WHO
ATTEND WILL RECEIVE A SPECIAL GIFT
AND THOSE WHO POST COVERAGE
FROM THE EVENT WILL BE ENTERED IN
A MYSTERY GIFT CARD DRAWING WHERE
YOU CAN WIN UP TO \$500 AT LOFT!!!

RSVP
MIMI@LOFTONLINE.COM

LOFT

PLEASE NOTE ALL BLOGGERS MUST POST COVERAGE FROM YOUR EVENT TO THEIR BLOG WITHIN 24 HOURS IN ORDER TO BE ELIGIBLE FOR A GIFT TO POSTS MUST BE SENT TO MIMI@LOFTONLINE.COM ALONG WITH THE CODE ON THE BACK OF YOUR GIFT CARD OR ENTERED TO YOU AT THE EVENT. YOU WILL BE NOTIFIED OF YOUR GIFT CARD AMOUNT BY FEBRUARY 2ND, 2010. GIFT CARD AMOUNTS WILL VARY FROM \$10 TO \$500.

FTC Actions Based on Endorsement Guidelines

- *Legacy Learning Systems* (March 2011)
 - Astroturfing by affiliates (which get commissions for referring users to website, if users buy)
 - “Putting it simply: Learn and Master Guitar emerged from our test as the King of ‘learn guitar at home’ courses.”
 - Legacy instructed affiliates to comply with FTC endorsement guidelines but failed to implement reasonable monitoring program
 - \$250K settlement with FTC
- *Reverb Communications* (Aug. 2010)
 - Astroturfing by public relations firm (which received % of app sales)
 - Gaming apps sold through iTunes store
 - PR firm posted reviews that endorsed client’s apps and appeared independent
 - “Amazing new game”
 - “GREAT, family-friendly board game app”
 - Delete comments still on internet; not do it again
 - No \$ penalty

Sustainability – it's not easy being green

- FTC's Green Guides cover general principles and specific types of environmental marketing claims (e.g., recyclable / recycled content)
- Environmental advertising and marketing practices that are inconsistent with the Green Guides could result in FTC enforcement action
- FTC proposed revisions to the Green Guides in late 2010

Thinking of utilizing text messaging?

- Involve legal sooner rather than later since text messaging is highly regulated
- In 2011, the FTC alleged violation of the FTC Act and the CAN-SPAM Act in its first enforcement action against a sender of unsolicited text messages
- Recent class action litigation on text messages

Increasing regulation of gift cards and loyalty / award programs

- Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009
- Recent Financial Crimes Enforcement Network (FinCEN) final rule regarding money services businesses regarding stored value: sellers and providers of prepaid access
- State gift card laws
- State escheat laws
- State money transmitter laws

Online Advertising: What You Can do to Protect Your Company

- Set policies and train employees and any other endorsers on FTC endorsement guidelines
- Monitor compliance
- Coordinate marketing and legal regarding “green” initiatives and marketing
- Evaluate current websites, portions of websites, or apps that children may be able to access
- Be sensitive to information regarding children
- Even general audience websites need to comply with COPPA (privacy policy, practices, etc.)

Any Questions?

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