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## Brief Speaker Bios:



### **Andrew J. Hollander**

Andrew J. Hollander is Of Counsel at K&L Gates LLP and concentrates his practice in intellectual property including online legal issues. Mr. Hollander's intellectual property experience includes assisting clients in all stages of growth in identifying, protecting and enforcing their intellectual property assets, including by registering and enforcing trademarks including clearing brand names, obtaining and enforcing patents, protecting creative works and enforcing copyrights, online and computer law, domain names, advertising law, and licensing agreements and other contracts. Mr. Hollander advises on IP due diligence for mergers and acquisitions, as well as IP audits to identify and value one's own IP. He is responsible for global trademark portfolios comprising thousands of trademarks in more than 140 countries. His diverse experience includes representing clients in the fields of computer software and hardware, online services, travel, health and beauty aids, consumer packaged goods, and financial institutions.

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### **Melissa Landau Steinman**

Melissa Landau Steinman is a partner in Venable's award-winning Advertising and Marketing Law practice group, focusing on advertising, marketing and new media, as well as distribution antitrust. She works with clients from every sector of industry at every stage of distributing consumer products and services, counseling some of the nation's largest consumer products services companies on advertising and promotions, distribution, pricing, warranties, product safety and other matters. She has represented clients in both private and government litigation, and also has appeared before self-regulatory bodies such as the National Advertising Division of the Better Business Bureaus. Ms. Steinman has extensive experience in consumer promotions law, with specialized expertise in social media, gift cards, rebates, "free" gifts, and promotional sweepstakes and contests law.



## Brief Speaker Bios:



### **David G. Mallen**

David G. Mallen is the Deputy Director of the CBBB'S National Advertising Division (NAD), the investigative arm of the advertising industry's self-regulatory organization and is responsible for the review of a broad range of national advertising campaigns in traditional and new media. In the course of analyzing legal, communication, and claim substantiation issues, he has resolved hundreds of advertising disputes and provided legal guidance to industry on the advertising of food and drug products, telecommunication services, computer and Internet technology, environmental claims and consumer household products. David is a popular public speaker and frequently lectures on advertising self-regulation, Green Marketing, scientific claim substantiation and sensory testing, international advertising issues and ethics.

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### **Justin Brookman**

Justin Brookman is the Director for CDT's Project on Consumer Privacy. Prior to joining CDT in January 2010, Mr. Brookman was Chief of the Internet Bureau of the New York Attorney General's office. Under his leadership, the Internet Bureau was one of the most active and aggressive law enforcement groups working on internet issues, and Mr. Brookman brought several groundbreaking cases to protect the rights of online consumers. He brought the first regulatory actions against spyware and adware companies, as well as against the advertisers who funded those companies. He also brought several privacy cases against companies who misused or misappropriated consumers' personal information, including the first enforcement of Gramm-Leach-Bliley's restrictions on the use of consumer financial data. In 2009, Mr. Brookman brought the first case against a company for "astroturfing" --- or seeding internet message boards and blogs with fake positive reviews.

► For more information about the speakers, you can visit: [http://www.knowledgecongress.org/speakers\\_2012\\_Social\\_Networking.html](http://www.knowledgecongress.org/speakers_2012_Social_Networking.html)



The growth of social media as a business tool in the last 10 years has been nothing short of prolific. Companies are using this clever medium to expand their bottom lines in exciting ways. It's a powerful business tool, however it does not come without risks. Companies must have a complete understanding of the legal issues related to social networking in order to address the legal implications, mitigate the risks, and make the most of their social networking strategy. The Knowledge Group is assembling a panel of key regulators and thought experts to help companies understand the legal issues surrounding the use of social networking. In a two-hour Live Webcast, speakers will not only provide valuable insights on how to navigate through potential pitfalls but they will also discuss different issues in the mix including:

- Information Security
- Privacy
- Intellectual Property
- Advertising Law
- Employment Law Issues
- eDiscovery and Litigation
- Social Media Policy
- Risk Mitigation
- Regulatory Updates
- And Answers to Questions Submitted by You!



## Featured Speakers:



### SEGMENT 1:

**Andrew J. Hollander**  
*Of Counsel*  
K&L Gates LLP

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### SEGMENT 2:

**Melissa Landau Steinman**  
*Partner*  
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### SEGMENT 3:

**David G. Mallen**  
*Deputy Director, National Advertising  
Division*  
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### SEGMENT 4:

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*Director, Consumer Privacy Project*  
Center for Democracy & Technology



**SEGMENT 1:**

**Andrew J. Hollander**  
*Of Counsel*  
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## **Introduction**

Andrew J. Hollander is Of Counsel at K&L Gates LLP and concentrates his practice in intellectual property including online legal issues. Mr. Hollander's intellectual property experience includes assisting clients in all stages of growth in identifying, protecting and enforcing their intellectual property assets, including by registering and enforcing trademarks including clearing brand names, obtaining and enforcing patents, protecting creative works and enforcing copyrights, online and computer law, domain names, advertising law, and licensing agreements and other contracts. Mr. Hollander advises on IP due diligence for mergers and acquisitions, as well as IP audits to identify and value one's own IP. He is responsible for global trademark portfolios comprising thousands of trademarks in more than 140 countries. His diverse experience includes representing clients in the fields of computer software and hardware, online services, travel, health and beauty aids, consumer packaged goods, and financial institutions.



# Social Media Law

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**SEGMENT 1:**

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## Trademarks / Branding

- Word, phrase, design, or combination that identifies market source of goods/services
  - Facebook®





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## Trademarks / Branding

- Brand clearance
- Social media complicates clearance of new brands
  - Netflix's new brand dubbed "Qwikster", but @qwikster was taken
- Takeaway – clear Twitter handles, user names, etc.



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## Trademarks / Branding

- Police your rights or lose them, in U.S.
  - aspirin, yo-yo – now in U.S. public domain
- Quality control
  - Naked license by failure to impose adequate quality control in Yahoo! Groups network – FreecycleSunnyvale v. The Freecycle Network, 626 F.3d 509 (9<sup>th</sup> Cir. 2010).
- Takeaway – put TM quality control in Terms of Use



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## Trademarks / Branding

- Unlawful uses
  - Notify social media platform if user-generated content (UGC) violates Terms of Use or controlling law
- Username squatting
  - Creating account just to take advantage of username
  - Notify social media platform
  - But first-come, first-served otherwise



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## Social Media “Paperwork”

- Policies
  - Rules and expectations for company-related use of social media by employees and others
  
- Agreements
  - Contractual provisions setting “ownership” of social media followers, content, passwords, etc.





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## Social Media Policies – Checklist (partial)

- Intellectual property
  - Trademarks – your own, those of others
  - Copyrights – your own, those of others
  - Proprietary information and trade secrets
  
- Advertising / FTC
  - Disclose affiliation, make disclaimer
  
- Privacy
  
- Discrimination / harassment
  
- Defamation



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## Social Media Policies – Checklist (partial)

- Respect customers, vendors, others
- Respect fellow employees and company itself – but may not chill lawful association
- Who may speak for company
- Supplements existing company policies, but doesn't replace them
- Transparency, accuracy
- Give examples of proper behavior



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## Social Media Policies – Sample Clauses

- “1. Know and follow IBM’s Business Conduct Guidelines.”
- - **IBM Social Computing Guidelines**



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## Social Media Policies – Sample Clauses

- “1. Disclose. ...Be transparent: Use your real name, identify that you work for Intel, and be clear about your role.”
  - “2. Protect. Make sure all that transparency doesn’t violate Intel’s confidentiality or legal guidelines for commercial speech—or your own privacy.”
- - Intel Social Media Guidelines



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## Social Media Policies – Sample Clauses

- “Just in case you are forgetful or ignore the guidelines above, here’s what could happen. You could:
  - Get fired (and it’s embarrassing to lose your job for something that’s so easily avoided)
  - Get Best Buy in legal trouble with customers or investors
  - Cost us the ability to get and keep customers”
- - **Best Buy Social Media Policy**



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## Social Media Policies – Sample Clauses

- “Do not discuss numbers and other sales figures (non-public financial or operational information), strategies and forecasts, legal issues or future promotions/activities.”
- - Nordstrom Social Networking Guidelines



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## Social Media Policies

- Making a social media policy work best
  - Train employees
    - “Certified Online Spokespeople” - Coca-Cola
  - Engage broad team
  - Periodic review on lessons learned and whether meets current needs



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## Social Media Agreements

- Who “owns” followers?
  - @PhoneDog\_Noah generated 17,000 Twitter followers, then employee left and changed handle to his name, @noahkravitz.
    - PhoneDog v. Kravitz, 2011 WL 5415612 (N.D. Cal. 2011).





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## Social Media Agreements

- Who “owns” identity of social media account?
  - Social media director used personal Twitter and Facebook accounts to promote employer. During the year after car accident resulted in social media director’s medical leave, employer accessed her passwords and posted to her Twitter and Facebook accounts.
    - Maremont v. Susan Fredman Design Group, Ltd., 2011 WL 6101949 (N.D. Ill. 2011).



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## Social Media Agreements

- Who “owns” passwords and access info to social media accounts, and content?
  - Social media director produced videos, blogs, social media pages for employer. She signed “Work Product Agreement” stating employer owned content, and confidential info must be returned on request.
    - Ardis Health, LLC v. Nankivell, 2011 WL 4965172 (S.D.N.Y. 2011).



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## Social Media Policies and Agreements

- Takeaways
  - Agree in advance where possible
    - Put do's and don'ts in social media policy
    - Who "owns" followers, social media identities, content, passwords and other access info



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## Audit / Due Diligence

- When was last time social media platforms audited?
- What if inaccurate or outdated content?
  - Failure to correct website that showed incorrect loan delinquency rates was one basis large financial institution fined \$4.5 million by FINRA
  - Sarbanes-Oxley (Section 409) requires “rapid and current” disclosure of material changes. Twitter?



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## Employment Law and Social Media

- Pitfalls
  - “Facebook firings”
  - Overbroad rules in social media policy



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## Employment Law

- “Facebook firings”
  - Non-profit social services provider unlawfully discharged employees for responding to FB post saying a coworker “feels that we don’t help our clients enough [here]. I about had it! My fellow coworkers how do u feel?”
    - Hispanics United of Buffalo, NLRB Case 3-CA-27872 (2011)
  - “Concerted activity for ... mutual aid or protection” protected under Section 7 of National Labor Relations Act, unionized workers or not



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## Employment Law

- Overbroad rules in social media policy
  - “Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees.”
  - “Employees are prohibited from posting pictures of themselves which depict[] the Company in any way.”
  - Employees may not make “disparaging comments about the company through any media, including online blogs, other electronic media or through the media.”



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## Pharma and Medical Device Companies

- FDA's social media policy guidelines not finalized
- Issues include:
  - Fair and balanced
  - Risks
  - Adverse events
  - Links to prescribing information





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**SEGMENT 2:**

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## **Introduction**

Melissa Landau Steinman is a partner in Venable's award-winning Advertising and Marketing Law practice group, focusing on advertising, marketing and new media, as well as distribution antitrust. She works with clients from every sector of industry at every stage of distributing consumer products and services, counseling some of the nation's largest consumer products services companies on advertising and promotions, distribution, pricing, warranties, product safety and other matters. She has represented clients in both private and government litigation, and also has appeared before self-regulatory bodies such as the National Advertising Division of the Better Business Bureaus. Ms. Steinman has extensive experience in consumer promotions law, with specialized expertise in social media, gift cards, rebates, "free" gifts, and promotional sweepstakes and contests law.

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## Effectively Using New Promotional Techniques on Social Media and Mobile Applications Without Violating the Law

February 8, 2012

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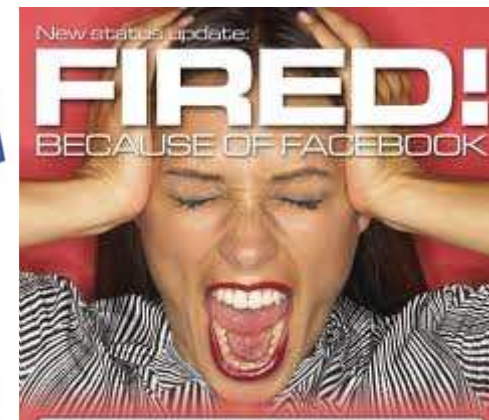


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# Understanding the Legal Issues in Social Networking

## What's All The Buzz?





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## Risks and Benefits of Social Media

**Risks Are Significant:** Damage to reputation, legal violations, exposure of trade secrets/leaks, forum for complaints, distraction

- **Study** of companies with 1,000 or more employees reported that 17% had issues with employee's use of social media
  - 8% of respondent companies fired someone for behavior on SM sites
  - 15% had disciplined employees for violating sharing/posting policies
  - 13% had investigated an exposure event
  - 17% disciplined an employee for violating blog/board policies
- Promotions gone wrong: United Airlines guitar fiasco; Dominos employee video; #McDstories McDonald's tweets
- Sunk cost arising from dismissed employees, plus potential for litigation/exposure from content that being posted
- ***But there are benefits to social media too:*** exposure; advertising; member networks; collaboration opportunities; real time customer service; interactive contests and promotions; collection of information; etc.



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## Follow Advertising and Promotions Law Principles

- **Reminder: Basic advertising and promotions law principles apply to all advertising and promotions on social media, as well as any terms and conditions imposed by the specific platform (e.g. Facebook rules for advertising, prize promotions)**
  - **All** claims require objective, verifiable substantiation, whether affirmatively communicating about products/services or responding to a question by a user
  - **Applies to everyone speaking on behalf of company** (can't use third party to make claims that you could not otherwise make)
  - Some options:
    - Use claims that have already been vetted and approved for other media
    - Refer back to substantiated source/static set of info to ensure consistency



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## Creating an “Inner Circle” Site: Feature Ideas and Legal Issues

- Rewards Programs
- Blogger Issues/Comments
- Sweepstakes and Contests
- User-Generated Content and Intellectual Property
- Refer-a-Friend/CAN-SPAM
- Mobile Functions
- Daily Deals and Gift Cards
- Auctions of Special Packages
- Privacy Issues





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## Rewards Programs on Social Media

- Not heavily regulated
  - Class actions largely unsuccessful
    - Consumer protection/UDTPA
    - Breach of contract
  - Airlines and banks/credit cards
- Terms and conditions very important
  - Must reserve right to change/modify
  - Notice?
- Can create tax issues
- Possible unclaimed property issues
- Collection of information as part of sign-up can trigger privacy concerns → What about CA Song-Beverly Act and similar state laws (e.g., NJ)?
  - Restricts the type of information a retailer can collect at point of sale
    - *NJ Retail Merchants Ass'n v. Sidamon-Eristoff* (2012 3d Cir. decision re NJ stored value card law)
  - Song-Beverly does not apply to online transactions  
*Salmonson v. Microsoft* (2012); *Mehrens v. Redbox* (2012)







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## Blogging Issues: Endorsements and Testimonials

***Are social media posters/commenters and bloggers receiving inducements subject to FTC rules re endorsements and testimonials?***

FTC revised Endorsements and Testimonials Guides in 2009 to include examples addressing social media

- Bloggers or other social media marketers who have a relationship with the company about which they are blogging must disclose the relationship
- Entity needs to have policy/procedures to make sure bloggers disclose and monitor compliance
  - So, “influencer” who receives money or in-kind payments, including samples or rewards, rewards points, must disclose relationship
  - Employees blogging on their own time should also disclose affiliation when talking about the company



“You walk the walk and talk the talk. We need someone who can also blog the blog.”  
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## Blogger and Marketer Liability

- **Ann Taylor file closing:** FTC closed file when found retailer had policy, showed agency will be reasonable if advertiser has disclosure policy
- **Reverb settlement:** Agency employees posted false blog entries
- **Legacy Learning Systems** settlement: Legacy allegedly paid affiliate marketers to post favorable online reviews of instructional music DVDs that seemed to be from ordinary consumers without making disclosures
- **Lifestyle Lift:** First state “astroturfing” case; cosmetic surgery case provider fined \$300K by NY AG
- **Hyundai file closing:** Hyundai’s marketing agency gave bloggers gift certificates as an incentive to include links to Hyundai videos in their posts and/or to comment on Super Bowl ads. File closed because: (a) Hyundai did not know in advance about the incentives; and (b) offering an incentive to post about/endorse a Hyundai product was contrary to the social media policies of both Hyundai and its marketing agency
- **How to avoid future liability?**
  - Create a policy that requires employees that provide incentives to bloggers to instruct them to disclose they received compensation
  - Require media or ad agencies to have the same policy
  - Monitor some, if not all, of the bloggers receiving compensation, and notify and/or terminate those in violation



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## Prize Promotions on Social Media

Prize promotions are heavily regulated under federal and state law

- MUST be reviewed by experienced legal counsel
- May include customer giveaways, skill contests, employee contests/trade promotions, trade show drawings, raffles

First step in evaluating any promotion is ensuring that it is not an illegal lottery (and thus gambling). Lotteries are generally defined as

1. The awarding of a *prize*
2. By *chance*, where
3. The participants have been required to submit *consideration* to enter

**Need RULES: contract with the participant; required by law:**

- Should be readily available to all participants and clearly set forth the details of the promotion
- Include provisions protecting the promotion sponsor from liability.
- Required disclosures include odds of winning, terms and conditions (e.g., eligibility and deadlines), and ARV of prizes

Some states requires registration and bonding of sweepstakes

Use for marketing/data collection purposes raises privacy issues



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## Contests/Sweepstakes

- **Social Media platforms have own rules:**
  - **Facebook :**
    - Promotion may not be administered directly on the site, must be administered off site or through a third-party application on a tab
    - Cannot require use of Facebook features or condition entry to the promotion upon taking any other action on Facebook, e.g., liking a status update or uploading photo, commenting on a Wall, checking into a Place, uploading a photo
      - However, can condition entry on a user's action *as part of the* entry process.
      - E.g., may require that users "like" a Facebook page and **then** submit a completed entry form to enter.
    - Cannot use Facebook features (e.g., "Like" button) as a voting mechanism or use Facebook to notify winners
    - Cannot directly or indirectly indicate that Facebook is a sponsor or administrator of, or associated with, the promotion
    - Must include specific releases, acknowledgments and disclosures regarding Facebook's non-affiliation with the promotion and the promotion sponsor's collection of data from entrants in the rules and on entry form



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## Contests/Sweepstakes

### Promotions rules for social media platforms (cont.):

- **Twitter:**
  - Discourages creation of multiple accounts; rules regarding retweeting to enter
  - Limits number of tweets/entries to one per day
    - E.g., don't encourage retweets to win
  - Recommends including @usernameMention in tweet entries so will be visible in user timeline
  - Suggests including relevant "hashtag" topics in tweet entries
    - E.g., #promotion or #companyname).
- **Google:** Prohibits prize promotions on Google+



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## User Generated Content on Social Media

1. Prize Promotion rules/terms of use should include provisions releasing IP rights and limiting liability
  - Limit to only those rights needed—don't overreach
  - How does one obtain the signed, written release required to obtain copyright?
2. Screen and/or regularly review promotion entries, postings and comments.
  - Consider removing posted promotion entries if they pose legal risk
  - BUT, many companies no longer remove negative comments on websites due to backlash ("a screenshot is forever"), address in other ways
3. Consider using disclaimers stating that the sponsor had no hand in producing the user-generated content, and, where appropriate, stating that the content does not reflect the opinions of the sponsor
4. Use other tools such as DMCA policies, CDA to protect against infringing content



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## Advertising Litigation: User Generated Content



- **Subway v. Quiznos** (Doctor's Associates, Inc. v. QIP Holder LLC)
  - Quiznos sponsored a nationwide UGC contest where people submitted videos comparing a Quiznos sandwich to a Subway sandwich. To generate interest, Quiznos posted user-generated video examples
  - Subway sued Quiznos for false advertising under the Lanham Act, claiming the examples contained false and misleading statements
  - **Issue:** Whether Quiznos was immune to false advertising claims under Section 230 of the Communications Decency Act for the videos submitted by the contestants
  - Section 230: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."
  - Case settled soon after the court denied Quiznos' motion for summary judgment in February 2010



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## Refer a Friend and Email Components Federal CAN-SPAM Act

- Marketers may be subject to CAN-SPAM if they offer consumers payment or other consideration (coupons, points, additional sweepstakes entries) to forward a commercial email or provide addresses.
- Messages sent via Facebook can be subject to CAN-SPAM: **Facebook Inc. v. MaxBounty, Inc.**
- CAN-SPAM Act: commercial e-mail solicitations must include:
  1. Opt-out mechanism (must be honored within 10 business days)
  2. Sender's physical postal address
  3. Disclosure that message is a solicitation ("ADV" in subject line not required)
  - **Prohibitions:**
    1. False header information
    2. Misleading subject lines
    3. E-mail address harvesting/dictionary attacks
- Commercial message: primary purpose is to advertise or promote a product or service (includes comment on a commercial website).
  - "Transactional" messages, such as purchase or entry confirmations, are not subject to CAN-SPAM's requirements





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## Mobile Marketing

- KEY → **express prior authorization** to receive marketing messages from the sender
- Adequate disclosures with limited space
- Mobile Marketing Regulators:
  - FTC: encourage self-regulation
  - FCC:
    - **CAN-SPAM**: “Mobile service commercial messages” (“MSCM”) is a commercial email sent to an email address referencing the Internet domain of a wireless carrier. The FCC maintains a list of wireless domain names that that can be used to send emails to wireless devices
    - **TCPA**: Prohibition on use of automatic dialing systems or an artificial or prerecorded voice to make commercial calls to wireless devices without the call recipient’s prior consent applies to text messages
  - State laws
    - Florida AG specific disclosures required; e.g., indicated that price and terms of offer would need to be within 125 pixels of submit field, with other information presented in a minimum font size/color that contrasted with background
  - Industry trade associations
    - Mobile Marketing Association Guidelines



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## Text Messaging Promotions

- Same laws as prize promotions conducted through traditional media, plus unique issues:
  - Text message as *consideration*?
    - *American Idol/Deal or No Deal Cases*
    - *Hardin v. NBC Universal, Inc. et al*
  - Current thinking
    - Promotions involving standard text messaging charges are probably relatively low risk
    - BUT premium text-messaging promotions are still a challenge. Consider:
      - Free AMOE
      - *Offering something of equal value (e.g., free ring-tone, wallpaper, t-shirt) in return for entry.*





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## Daily Deals

### Set-Up

- Paid Value + Promotional Value = Daily Deal
- Ex. Buy 20 min. massage for \$25, with a value of \$100 (75% savings) on 01/26/2012. Promotional value expires on 03/26/2012. Paid value expires 03/26/2017
- Advertise/communicate through various platforms: email, “white-label” sites, social media

### Current Events

- Numerous class actions filed against *Groupon* and *Living Social* in February and March 2011
- Class actions have now consolidated.
  - *In re: Groupon, Inc. Marketing and Sales Practices Litigation*, MDL No. 2238 (U.S. Dist. S. Cal.)(15 lawsuits)
  - *In re: LivingSocial Marketing and Sales Practices Litigation*, MDL No. 2254 (US Dist. DC)



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## Daily Deals Legal Issues

- Is a Daily Deal certificate a gift card or a coupon?
  - Federal gift card law--CARD Act (2009) and regulations promulgated by Fed Reserve Board that extend to electronic transactions and codes
  - State gift card laws: Often no definition of "gift card"; trading stamp laws may require some cash value for coupons but little else in terms of regulation
- Restrictions on expiration dates/fees
  - CARD Act: Gift cards cannot expire within 5 years from the date activated; limitations on fees; requirements for disclosures
  - State laws:
    - May be more or less restrictive than federal law as to expiration date/fee requirements (incl. prohibition)
    - Other variations/requirements such as cash-out, exceptions
- Abandoned Property Principles
  - Is an unused gift card abandoned property?
  - Do gift cards escheat to the state? If so, when?
  - Are there record-keeping requirements (i.e., due diligence)?



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## Auctions and Reverse Auctions



- Bid on item; may be asked to pay for each bid (money, points)
- Functions much like a sweepstakes, similar issues, need similar disclosures
- Note: US gaming policy recently relaxed
  - DOJ reversed its position on the applicability of the U.S. Wire Act to online gambling that does not involve sports betting
  - May clear the way for States to enable intra-state online gaming
  - May signal that the Federal government will consider licensing and regulation of permitted online gambling
  - Indicates less strict interpretations of games of chance v. lottery issues
  - Important for “gamification”, advergaming as well



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## Avoiding Future Problems

- Ensure substantiation of advertising/website claims
- Implement appropriate terms and conditions and policies; keep them up to date. *E.g.:*
  - Social media policy (consider *internal* and *external* policies) and training
  - DMCA takedown
  - Blogger policy and monitoring
  - Privacy/data security policy
  - Document retention
- Make appropriate disclosures, whether required by law or aimed to protect from liability for third-party content
- Ensure proper disclosure of company affiliation by all
- Secure trademark rights and register user names
- Know what's out there: monitor employee and third party activity (UGC, bloggers) – third parties can help
- Address consumer complaints promptly
- Be prepared for a crisis
- Think before you speak!



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Understanding the **Legal Issues**  
in **Social Networking**

Melissa Landau Steinman  
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[www.Venable.com](http://www.Venable.com)

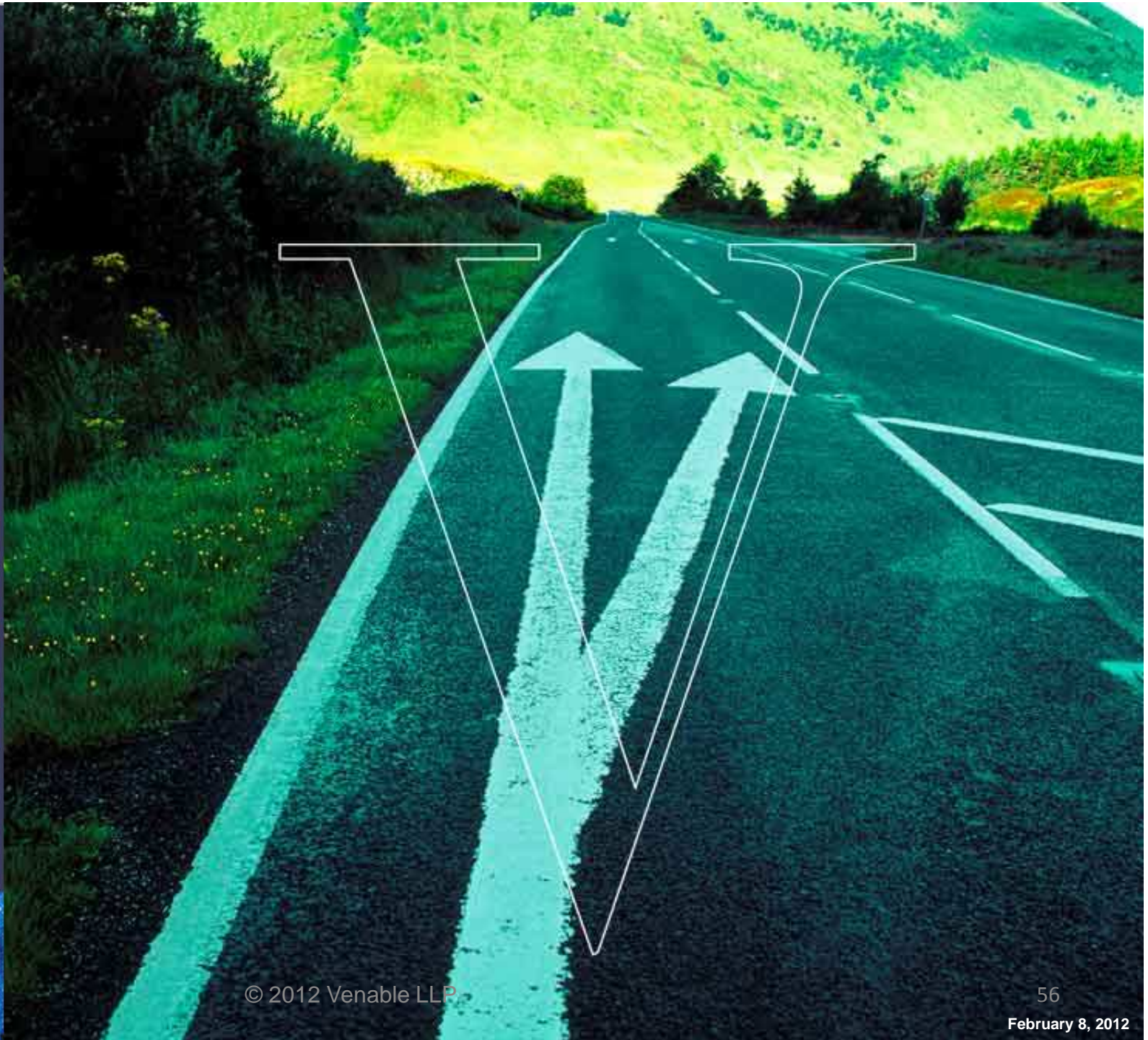
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**SEGMENT 3:**

**David G. Mallen**  
*Deputy Director, National Advertising  
Division*  
**The Better Business Bureau**

## **Introduction**

David G. Mallen is the Deputy Director of the CBBB'S National Advertising Division (NAD), the investigative arm of the advertising industry's self-regulatory organization and is responsible for the review of a broad range of national advertising campaigns in traditional and new media. In the course of analyzing legal, communication, and claim substantiation issues, he has resolved hundreds of advertising disputes and provided legal guidance to industry on the advertising of food and drug products, telecommunication services, computer and Internet technology, environmental claims and consumer household products. David is a popular public speaker and frequently lectures on advertising self-regulation, Green Marketing, scientific claim substantiation and sensory testing, international advertising issues and ethics.



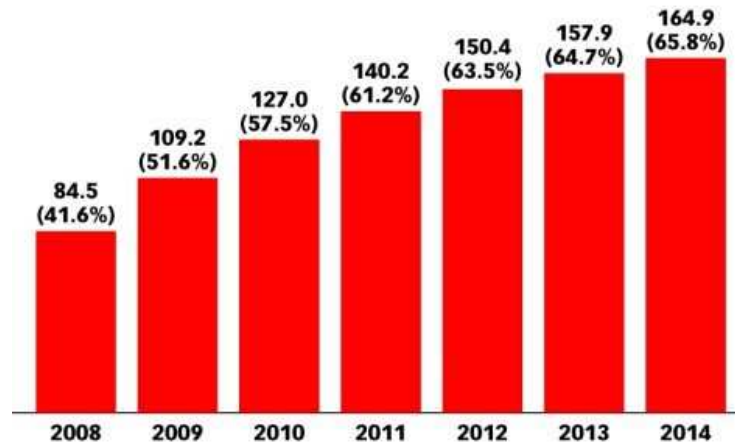
## Legal Issues in Social Media:

### Advertising rules of the road and self-regulation

David G. Mallen  
Deputy Director  
National Advertising Division, CBBB  
February 8, 2012

## Advertising and Social Media

**US Social Network Users, 2008-2014 (millions and % of Internet users)**

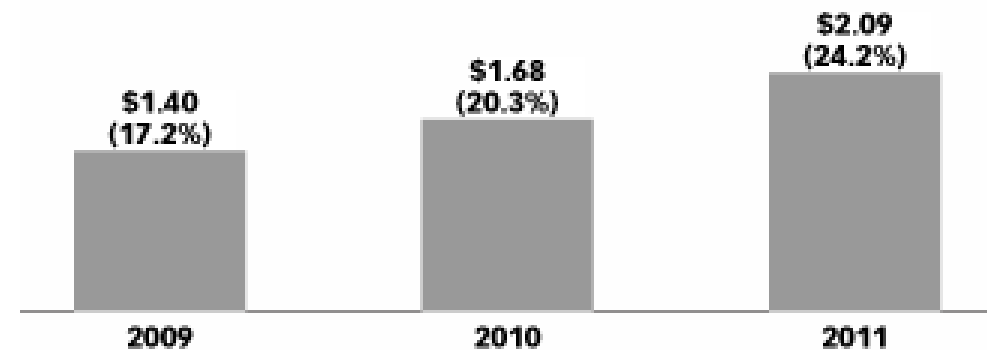


Note: use at least monthly via any device  
 Source: eMarketer, April 2010

114808

www.eMarketer.com

**US Social Network Ad Spending, 2009-2011 (billions and % change)**



Note: growth rate based on unrounded figures  
 Source: eMarketer, July 2010

118037

www.eMarketer.com



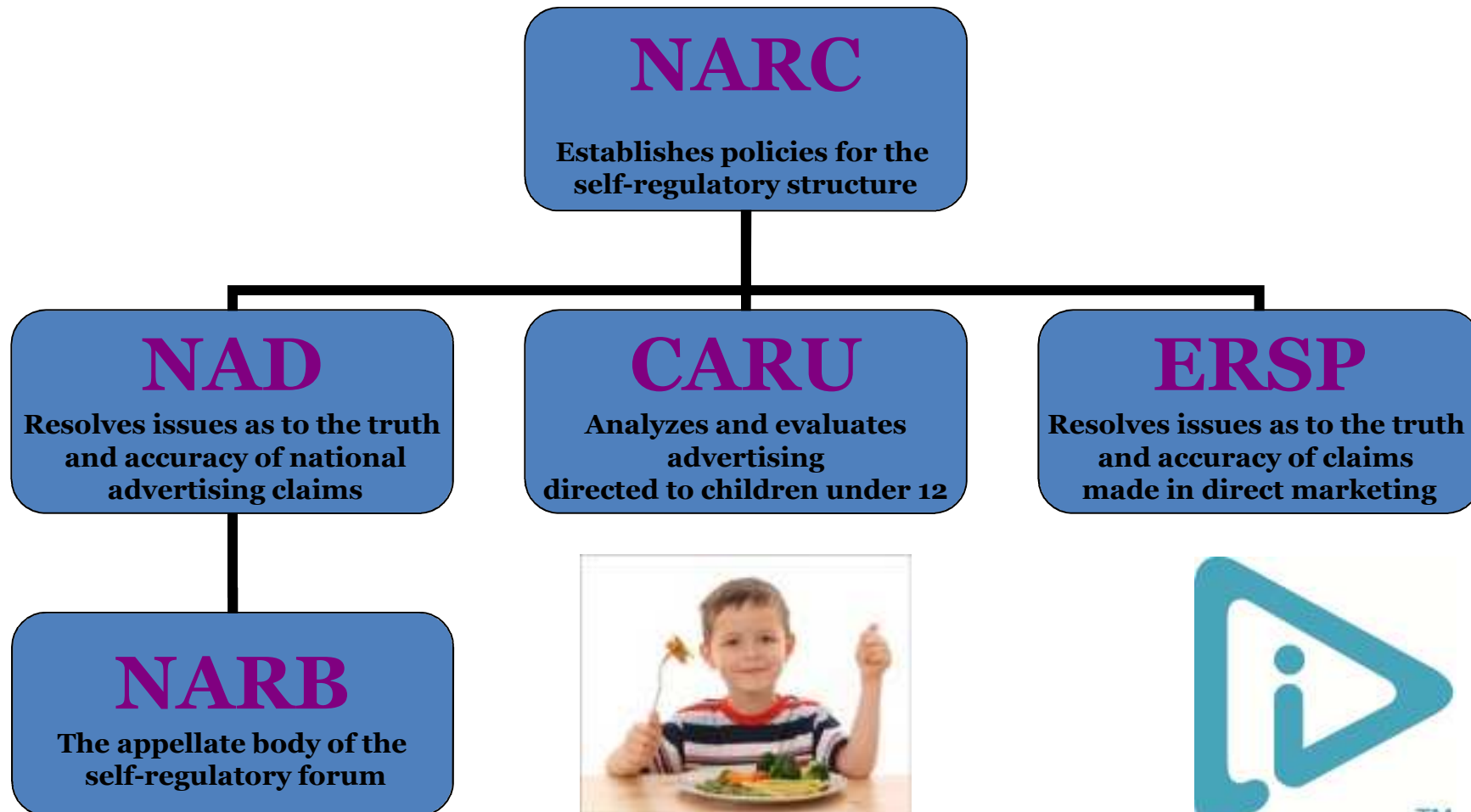
## Advertising in Social Media

- Applying Advertising Law to Social Media
  - Section 5 of the FTC Act
- Consumer Content
- Endorsements and Testimonials
- Facebook “Likes”
- Role of Advertising Self-regulation

## The Advertising Industry's Self-Regulatory System



## Advertising Self-Regulation



Children's Food and Beverage Advertising Initiative

## Issues examined by NAD

- Product testing
- Implied Claims
- Disclosures
- Demonstrations
- Testimonials
- Endorsements
- Green Claims

*“Tastes as good as the leading brand!”*

***“4 out of 5 Pediatricians Recommend...”***

***“Cleans 80% better...”***

***“Clinical Tests Prove!”***

## Consumer Testimonials in Social Media

The screenshot shows a Facebook page for "Liquid HCG Diet". The page layout includes a navigation bar at the top with "facebook" and a search bar. Below the navigation bar, the page title "Liquid HCG Diet" is displayed with a "Become a Fan" button. The main content area is divided into several sections:

- Wall:** A list of user posts. Visible posts include:
  - Jennifer Andrews Mangham: "can anyone recommend some type of oil free body lotion. im as dry as the desert, need some relief:)"
  - Tracy Pierce: "I used Curel, it's been approved for HCG"
  - Vicki Tibbetts: "I was told you can use mineral oil? Is that true?"
  - Shelly Wash: "can truvia replace stevia?"
  - Jennifer Andrews Mangham: "ive been told yes."
  - Jennifer Andrews Mangham: "is lemon juice (from bottle) ok to put w/truvia for lemonade?"
  - Tara Simpson: "huh, I was just wondering that about 15 minutes ago. I would like to know the answer as well."
  - Joanne Godin: "Today, on my blog http://joannes-disappearing-act.blogspot.com/ I created a page outlining the benefits of HCG and telling how people gain and lose weight. I hope it answers some questions for you or friends. It is called, "On fitness, fatness and HCG(ness)."
  - Vickie Mull Christenson: "I read your first line and I was hooked!! I also am a redhead! We are a special group that I am proud to be a part of. Not always so because as a child I hated it. Now I love it!! My how time changes things..."
  - Joanne Godin: "I'm like you, Vickie. We are part of the smallest minority group in the world. Go red team!"
- Info:** A section with a "Liquid HCG DIET" logo and text: "Add to My Page's Favorites", "Suggest to Friends", and "http://www.LiquidHCGDiet.com 100% Money Back Guarantee! For info or to order visit our site." Below this, it states: "This group is for customers and users of the Liquid HCG diet. Share your successes, ask questions and help others with their weight loss jour".
- Information:** A section titled "Information" with text: "Founded: For more info or to order visit http://www.LiquidHCGDiet.com or call us at 1-800-980-7208 Mon-Fri 9am-11pm EST."
- Fans:** A section titled "Fans" showing "6 of 30,422 fans" and three profile pictures of fans: Erica Srutowski, Mary Catherine Chanza, and Charlene Mcfadden.
- Right Side:** A sidebar with "Create an Ad" and three advertisements: "Play Broomball in NYC", "Want A Killer Good Time? Mafia Wars", and "Yukon Blonde LIVE".



## FTC Reverb Settlement



For Release: 08/26/2010

**Public Relations Firm to Settle FTC Charges that It  
Advertised Clients' Gaming Apps Through Misleading  
Online Endorsements**



## FTC Guides Concerning Endorsement and Testimonials

### Testimonials

- Testimonial endorsement claims must be supported in the same way as any advertising claim made directly by the advertiser.

### Endorsements

- Both the advertiser AND the endorser may be liable for false or unsubstantiated claims made in an endorsement, or, for failing to disclose material connections..

### Blogger Rules

- Disclosure of Material Connections

### FTC Activity

- Hyundai (December 2011)



# Blogs and Disclosure

## Prostate Health Blog

Prostate Health Blog

Page 1 of 3

### Herbal Groups, Inc. (Prostalex Plus) Case #5005 July 2009

#### Prostate Health Blog

A blog about resources on prostate therapy, mens' health industry news, and much more.

WEDNESDAY, JULY 30, 2008

#### Summer special!

We're put together a summer special package to get the word out that

About Me

Name:  
Prostalex Plus  
Location:

We're put together a summer special package to get the word out that prostate health is very important. Maybe you know a guy that isn't too hip on his health. Send him to prostalexplus.com and encourage him to get a summer special and give it a shot. The package includes a 30 day supply of Prostalex Plus, one Longlife Solutions Multivitamin, and a diet and exercise booklet that has great tips and recipes for boosting health overall. Click here to visit the order page.

going on with the people living around you so why not share your new found love for prostate health with them. A simple question like, "Have you had a prostate exam lately?" can break the ice and provide a moment to laugh before starting a conversation. It's a fact that some men are afraid to go to the doctor for routine check ups so encourage your male friends and family members to stay healthy now before minor issues turn into major problems. Labels: barbecue, exam, friends, prostate health

posted by Prostalex Plus @ 2:20 PM 0 comments

MONDAY, APRIL 21, 2008

#### New Years Resolutions

Many of us have forgotten our New Years Resolutions while some of us are still maintaining our lofty goals! Personally I am working on maintaining and improving my health overall for 2008 and beyond. Of course prostate health is vitally important to me and so is keeping a high level of cardio fitness through bicycle racing. You don't need to take things to extremes like I do but you can do a few things daily to help you.

- Summer special!
- Summer is right around the corner!
- New Years Resolutions
- Your health matters
- News: Prostate Test Flaws Prompt New Strategy
- Natural Products Expo West
- Your health
- Media Buzz
- Exercise prevents cancer
- Prostatitis
- Archives
- January 2008
- February 2008
- March 2008

## Celebrity Endorsements

THE EPIDEMIC THE PROJECT THE TECHNOLOGY THE HELMET THE CAPTAIN THE EVOLVED

THE MESSIER PROJECT

PROTECT PERFORM EVOLVE

Welcome to *The Messier Project*, a collaboration between Cascade Sports, the head protection experts, and hockey legend Mark Messier.

Check out *The Captain*, a blog on Mark and his efforts to evolve the game.

seven MOND 90 PROFIT

### THE CAPTAIN

#### The Captain on the 2010 Playoffs and a Season in Review

By *theCaptain* April 6th, 2010, under Uncategorized

(1.) The NHL is featuring your Stanley Cup-winning moment with the Rangers in '94 in its NHL 2010 Playoff "History Will Be Made" television campaign. It is a really powerful spot that is sure to bring back a lot of memories for fans in New York and around the world. How does it feel to see that spot on TV and for that moment to be a part of the "History Will Be Made" campaign? What memories does it bring back for you?

Well, I can say that I felt a tremendous amount of pride seeing that commercial for the first time. It brought back so many memories of the hard work, dedication, and commitment from many people in the organization. Almost 16 years later, we all share a common experience that has created a bond forever with the team and the great fans of the New York Rangers.

(2.) With the regular season winding down and the NHL Playoffs soon to begin, who do you have your eye on as Stanley Cup contenders?

I cannot remember another season where I felt the Stanley Cup could be won by so many different teams. In my mind, when the playoffs start, the playoff seedings will not guarantee success for the top teams. I really believe the first round may bring about a few surprises. Ultimately, this kind of parity creates a lot of excitement, anticipation and great games.

(3.) Nearing the end of the 2009-2010 NHL regular season, the first for The Messier Project and the M11, how would you hope to see use of the M11 grow at the pro level next season?

We knew going into the season that it was going to be a process for us at the professional level, and we are ok with that. We really want the players themselves to believe in our product. I think many players know who we are after a very successful season. As the idea of wearing a more productive helmet becomes the norm, I think players will continue to turn to us to get the protection they deserve and need to stay in the game.

- The Captain

### THE MESSIER PROJECT

Welcome to The Captain, a blog dedicated to The Messier Project's goal of evolving the game of hockey. Check in regularly catch up with Mark Messier and his efforts.

Search

Archives

- April 2010
- March 2010
- February 2010
- January 2010
- December 2009
- October 2009
- September 2009
- August 2009
- July 2009

Categories

- Concussion (1)
- GM Meetings (1)

- The Mark Messier Project and claims about the Protective capability of the M11 Helmet
- NAD found the connection was transparent and that a reasonable consumer would expect a compensation arrangement between Messier and Cascade.

Tuesday - August 19th, 2011

CoastalContacts.com

Like us! To get 1 of  
5,000 Free Frames!

\*conditions apply



**Terms & Conditions:** Offer valid on Tuesday August 19, 2011 starting at 9am EST until midnight or until 5000 frames have been given away. Lenses, upgrades and shipping & handling extra. Coupon eligible frames only. Valid for first time free recipients only. Limit one per household.

What does it mean  
to “Like” a  
company on  
Facebook?

## Endorsement?



***"This one has the most friends."***

## Facebook “likes” are Social Endorsements

- **Communication of the total number of “likes”**
- **NAD considered whether:**
  - actual consumers “liked” the Coastal fan page, and
  - whether consumers who participated in the like-gated promotion actually received the benefit of the promotion
- **NAD: “...the outcome of this case would be quite different if ... consumers who participated in the like-gated promotion could not or did not receive the benefit of the offer, or, the advertiser used misleading or artificial means to inflate the number of ‘likes.’”**



## FTC Enforcement and Affiliate Marketing

 **FEDERAL TRADE COMMISSION**  
Protecting America's Consumers

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**For Release:** 01/25/2012

### FTC Permanently Stops Six Operators from Using Fake News Sites that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products

#### Alleged Fraudulent Affiliate Marketers will Surrender Assets under Settlements

Six online marketers agreed to settlements with the Federal Trade Commission that will permanently halt their allegedly deceptive practice of using fake news websites to market acai berry supplements and

#### E-mail this News Release

If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

#### Related Items:

[Federal Trade Commission, Plaintiff, v. Ricardo Jose Labra, individually, Defendant](#)  
(United States District Court for the Northern District of Illinois, Eastern Division)

As part of its ongoing crackdown on bogus health claims, the proposed settlements will require that the six operations make clear when their commercial messages are advertisements rather than objective journalism, and will bar the defendants from further deceptive claims about health-related products such as the acai berry weight-loss supplements and colon cleansers that they marketed.

The defendants also are required to disclose any material connections they have with merchants, and will be barred from making deceptive claims about other products, such as the work-at-home schemes or penny auctions that most of them promoted. The settlements also require that these defendants collectively pay roughly \$500,000 to the Commission because their advertisements violated federal law. This money amounts to most of their assets.

news, CBS, CNN, USA Today, and Consumer Reports. Investigative-sounding headlines presented stories that purported to document a reporter's first-hand experience with acai berry supplements – typically claiming to have lost 25 pounds in four weeks, according to the FTC complaints.

The proposed settlements impose monetary judgments in the full amount of the commissions the

[Vaughn, individually and doing business as Lead Expose, Inc., and Uptown Media, Inc., Defendant](#)



## NAD and Viral Marketing

YouTube - Popcorn - Cell phones : made by CARDO SYSTEMS


Page 1 of 2

Worldwide (All) English (US) Sign Up QuickList (0) Help Sign In

Home Videos Channels Community

Worldwide (All) English (US) Videos Search advanced Upload

**Popcorn - Cell phones : made by CARDO SYSTEMS**



This is a video response to Popcorn et portable : c'est une vidéo virale CardioSystems !

Rate: 301 ratings Views: 650,560

Share Favorite Playlists Flag

MySpace Facebook Digg (more share options)

**Commentary** Statistics & Data

Video Responses: 5 Text Comments: 552

Video Responses (5) Sign in to post a Video Response

00:45 bollescom 01:12 ALLIES110 00:53 mdrnro... 00:34 systame

View All Play All

Text Comments (552) Sign in to post a Comment

Show: average (-5 or better) Help

danzigjebus (5 days ago) Reply 0  
cancer causing!

softballkitten90 (1 week ago) Reply 0  
that was awesome I mean how they did that

TheEmoBeatsFan (2 weeks ago) Reply +4  
how about...4 lap tops glazing a ham....

pjdambra (2 weeks ago) Reply +3  
Amazing power of the internet to create such a world wide HOAX

From: Kratz1987  
Joined: 2 months ago  
Videos: 3  
Subscribe

Added: May 30, 2008 (More info)  
Saw that today: http://www.cardosystems.com.....  
Embed: Customize  
<object width="425" height="344"><param name="movie" value="http://www.....</param></object>

Search (results displayed below)

**More From: Kratz1987**

**Related Videos**

Pop corn cell phones - The Truth !  
00:33 From: passion356  
Views: 341,524

Five cellphones meet popcorn  
01:27 From: BalloonEclipse  
Views: 259,444

Apple iPhone Popcorn Trick - Uber Creative  
00:27 From: uberfoundedotcom  
Views: 293,568

cell phone popcorn myth busted  
00:40 From: mrvmtz  
Views: 49,894

Cell Phone Popcorn Debunked  
00:54 From: dshaughnessy  
Views: 237,954

**Promoted Videos**

These Colors  
04:47 From: lonelycoorm...

Malibu U. -  
Ep. 2: Blin...  
04:52 From: EgoTV

226 Days In  
Vietnam  
09:18 From: LonelyPlanet

EPA Says  
You're  
Worthle...  
03:50 From: viropop

http://www.youtube.com/watch?v=vPfrdXsZ1PE&NR=1

8/1/2008

- Video clips placed by advertisers on video-sharing websites may be considered national advertising.
- NAD noted that the absence of any mention of a company or product does not absolve an advertiser from the obligation to possess substantiation for objectively provable claims that are communicated.

## NAD Case Reports

- NAD case reports are available via online subscription at: <http://www.nadreview.org/>
- Archives serve as a research tool offering education, guidance and support; access NAD decisions, NARB appeals and more;
- Search by issue, company, date or key phrases

National Advertising Division - Windows Internet Explorer provided by Council of Better Business Bureaus

http://www.nadreview.org/start.aspx

National Advertising Division

MEMBERSHIP NEWSROOM CONTACT US

HOME ABOUT NAD CASE REPORTS & PROCEDURES NATIONAL ADVERTISING DIVISION

Welcome to the website of the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB). Our mission is to review national advertising for truthfulness and accuracy and foster public confidence in the credibility of advertising. Policy and procedures for NAD are established by the National Advertising Review Council (NARC).

ABOUT US CASE REPORTS MEMBERSHIP NEWSROOM

NAD Conference is sold out. There are open seats available for CARU, click here

Statement on Amended Filing Fee Schedule, July 27, 2009

*In the Press...*

- NAD RECOMMENDS L'OREAL MODIFY CERTAIN CLAIMS FOR HIGH RESOLUTION REFILL-3X FACIAL CREAM - September 17, 2009
- NAD REVIEWS UNIVERSITY MEDICAL'S CLAIMS FOR 'ACNE FREE' PRODUCTS FOLLOWING CHALLENGE BY NEUTROGENA - September 17, 2009
- NAD DETERMINES P&G CAN SUPPORT CERTAIN CLAIMS FOR 'ALIGN' ADVERTISER VOLUNTARILY DISCONTINUES CERTAIN CLAIMS - September 14, 2009
- NAD RECOMMENDS UNILEVER MODIFY CERTAIN CLAIMS FOR 'DOVE THERAPY' HAIR CONDITIONERS - September 14, 2009
- NAD FINDS BRAIN RESEARCH LABS CAN SUPPORT CERTAIN CLAIMS FOR 'PROCERA AVH,' BUT RECOMMENDS COMPANY DISCONTINUE CERTAIN CLAIMS - September 14, 2009
- NAD FINDS SENSA CAN SUPPORT EXPRESS CLAIMS FOR WEIGHT-LOSS PRODUCT, BUT RECOMMENDS SENSA DISCONTINUE

start | Ads & Commerc... | Microsoft Powe... | National Advert... | Document1 - Mi... | 4:03 PM



# Thank you!

**David G. Mallen**

**212-705-0121**

**[dmallen@nad.bbb.org](mailto:dmallen@nad.bbb.org)**



**SEGMENT 4:**

**Justin Brookman**

*Director, Consumer Privacy Project*

**Center for Democracy & Technology**

## **Introduction**

Justin Brookman is the Director for CDT's Project on Consumer Privacy. Prior to joining CDT in January 2010, Mr. Brookman was Chief of the Internet Bureau of the New York Attorney General's office. Under his leadership, the Internet Bureau was one of the most active and aggressive law enforcement groups working on internet issues, and Mr. Brookman brought several groundbreaking cases to protect the rights of online consumers. He brought the first regulatory actions against spyware and adware companies, as well as against the advertisers who funded those companies. He also brought several privacy cases against companies who misused or misappropriated consumers' personal information, including the first enforcement of Gramm-Leach-Bliley's restrictions on the use of consumer financial data. In 2009, Mr. Brookman brought the first case against a company for "astroturfing" --- or seeding internet message boards and blogs with fake positive reviews.



# Understanding the Legal Issues in Social Networking

## KnowledgeCongress

### February 8, 2012

Justin Brookman

Director, Consumer Privacy

Center for Democracy & Technology

@JustinBrookman

## Abusing Privacy and the Anonymity of the Internet: Attacking Hostiles



- Contractual bar on testing or criticism?
  - *NY v. McAfee, NY v. Blue Coat Systems* --- assertion of enforceable prohibition on testing and criticism unenforceable and deceptive



## Abusing Privacy and the Anonymity of the Internet: Attacking Hostiles

- Contractual assignment of copyright over all online reviews
  - DMCA: review sites will actually pay attention
  - Companies can weed out undesirable reviews
  - But . . . illegal? Medical Justice example:
    - CDT complaint against Medical Justice
    - Public Citizen complaint against Medical Justice doctor
    - Medical Justice ends practice within 24 hours
- We have a legal mechanism for dealing with this negative online comment: defamation law



## Ethical Data Collection and Usage in Social Media

- Secondary usage
  - The fishbowl problem
  - “Commonly-accepted” in U.S.? Problematic in Europe?
  - Data appending from name, email?
- Secondary (unnecessary) collection
  - Mobile, Facebook
  - Collection and usage of location, other sensitive information





## Ethical Data Collection and Usage in Social Media

- Secondary disclosure
  - Selling email lists to others
    - Don't change your terms after the fact: New York v. Gratis Internet
  - Data brokers
    - Subject to FCRA as information furnisher? User expectations?
- Secondary publication
  - Sears
    - Deceptive failure to disclose upfront trumps language in EULA
  - Recent Google and Facebook settlements
    - Deceptive and unfair under Section 5 of the FTC Act

## Google and Facebook

- Google --- try to create a social network from scratch



- Facebook settles with FTC over new sharing rules
- Private or semi-private info → public or semi-public
  - User information shared in unexpected way

## Guerilla Marketing?

- *Duick v. Toyota* --- abuse of others' personal information

### TOYOTA MATRIX YOUR OTHER YOU

YourOtherYou is a unique interactive experience enabling consumers to play extravagant pranks. Simply input a little info about a friend (phone, address, etc.) and we'll then use it, without their knowledge, to freak them out through a series of dynamically personalized phone calls, texts, emails and videos. First, one of five virtual lunatics will contact your friend. They will seem to know them intimately, and tell them that they are driving cross-country to visit. It all goes downhill from there. The Matrix integrates seamlessly into the experience and you can follow the progress of your prank in real-time online. Each piece of the campaign assures that the experience is as Google-proof as possible.

YOUROTHERYOU.COM



## The COPPA trap

- *In re Xanga* (FTC settlement, 2006)
- Asked users to input their date of birth
  - BUT, didn't screen <13 users from submitting and publishing lots of personal information
- Settled with Federal Trade Commission for \$1 million in civil penalties
  - Also, 20 years of audits and FTC monitoring
- Constant pressure on Facebook, Google, others to protect kids online

## State “right of publicity” laws: Can you use your customers’ likeness?



## Abusing Privacy and the Anonymity of the Internet: Faking Friendlies

- Beyond online reviews
  - Standalone blogs (Wal-Mart, Sony)
  - Internet Message Boards (Whole Foods, Lifestyle Lift)
    - Repurposing actual customer reviews?
    - Soliciting/rewarding positive reviews?
    - Like-gating?
  - Wikipedia (Diebold, CIA)
    - From Wikipedia: “**Neutral point of view** is a fundamental Wikipedia principle. NPOV is absolute and non-negotiable.”
  - Social media landscape constantly changing --- don't take advantage of user confusion to deceptive promote product

## Q&A:



### SEGMENT 1:

**Andrew J. Hollander**  
*Of Counsel*  
K&L Gates LLP

K&L GATES



### SEGMENT 2:

**Melissa Landau Steinman**  
*Partner*  
Venable LLP

VENABLE<sup>®</sup> LLP



### SEGMENT 3:

**David G. Mallen**  
*Deputy Director, National Advertising  
Division*  
The Better Business Bureau



### SEGMENT 4:

**Justin Brookman**  
*Director, Consumer Privacy Project*  
Center for Democracy & Technology

▶ You may ask a question at anytime throughout the presentation today. Simply click on the question mark icon located on the floating tool bar on the bottom right side of your screen. Type your question in the box that appears and click send.

▶ Questions will be answered in the order they are received.



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