adbriefs

Current Legal Issues Affecting the Advertising Industry / Winter 2004

Covering Your Ads®

Online Gambling Ads

Who Has the Winning Hand?

GAMBLING IS BIG BUSINESS IN THIS COUNTRY. Casinos are sprouting up in what once would have been considered extremely unlikely places and television shows about poker and other forms of gambling are populating the airwaves. Offshore Internet gambling sites are seeking to cash in on an American audience, and apparently, it's working; and that has prompted the United States Department of Justice ("DOJ") to try to do something about it.

The DOJ and other law enforcement agencies have taken the position that offshore online gambling is illegal in the United States. Indeed, the United States Attorneys' Offices in several districts have successfully prosecuted offshore Internet gambling operations, and law enforcement will likely continue to pursue those types of cases. But bringing those cases often involves first having to track down someone to sue and then, once they're found, having to fight costly and time-consuming jurisdictional disputes that law enforcement officials would prefer to avoid. *(Continued on page 10)*

You Can't Win For Losing:

Taxable Income from Sweepstakes Can't Be Offset by Gambling Losses

The IRS recently held that a marketing sweepstakes winner could not offset the taxable income from his winnings with his gambling losses. Generally, a taxpayer is allowed to deduct losses from wagering transactions against his or her income only to the extent of gains from wagering transactions. However, in this case, the IRS ruled that since the sweepstakes required no purchase to enter (as required by federal and/or state law), it was not a "wagering transaction," and therefore the taxpayer was not allowed to deduct his gambling losses against the income from his winnings. The IRS held that a "wager" has three elements: (1) a prize, (2) chance and (3) consideration. Since there was no consideration necessary to enter the sweepstakes, the requirement of consideration — the "wager" itself — was not met. The taxpayer argued that the cost of the envelope and stamp used to enter the sweepstakes — plus the time and effort expended to fill out the form (15-20 times) — constituted sufficient consideration; however, the IRS was not impressed with the argument.

also in this issue

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ATTORNEYS AT LAW

Revolution in German Advertising Law!

ONE COULD CHARACTERIZE the development of advertising law in Germany over the last five years a kind of "revolution." Advertising law in Germany is based on the "Gesetz gegen den unlauteren Wettbewerb" (UWG), the law against unfair competition, which has been in place since 1909. The law contains two general clauses (a prohibition against misleading advertisements and a prohibition on advertisements that are contrary to "good manners"), which had been interpreted by the courts very narrowly and in a consumer-friendly way. German advertising law was considered to be the strictest advertising law of all EU member states. Because of the influence of the European Union, Germany was – and still is – forced to dramatically change its rules.

The German legal situation in the past:

- Misleading advertising was forbidden. An ad was misleading if 15 of 100 people felt misled by the ad, as determined from the standpoint of a simple, uninformed and disinterested consumer. Consequently, there was a significant risk that an advertisement would be considered misleading under this test.
- Comparative advertising was forbidden by court since 1930 as "against good manners."
- Cold telephone solicitors are still illegal as "against good manners." Unsolicited emails and faxes are similarly prohibited.
- Rebates were allowed only if the reduction was not more than 3% of the price. Additional items – a/k/a "additionals" (i.e. premiums) – could be offered in combination with a purchase only under very limited conditions (e.g., if the value of the additional item was not more than 1-2 DM (0,50 - 1 Euro).

Over the past few years, German advertising law has changed in many ways, including as follows:

- The legality of comparative advertising was introduced by the EU Directive 97/55/EG, implemented into German law in 2000. Since then, comparisons in advertising are allowed in Germany as long as they follow the conditions of the Directive.
- In several judgments, the European Court of Justice (ECJ) has held that the European consumer is not as simple, uninterested and uninformed as the German courts often determined; and, as a consequence, some former German court decisions were overruled.
- The German rebate and the additional law was repealed in 2001. The background of that change was another EU Directive, the eCommerce - Directive 2000/31/EG which states that an advertisement which is in accordance with the law in the country of its origin and published by electronic means may not be considered illegal in any other EU member state.

The German government feared that companies from other EU member states could infringe Germany's rebate and additional law, but not be prosecuted as a German advertiser would be for the same promotion. In this regard, it is important to note that more or less no other EU member state has rebate and additional rules that were as strict as Germany's. Under the eCommerce directive, retaining the German rebate and additional law would have led to German companies still having to obey the conditions of the rebate and the additional law while companies from another EU member state would not have to comply.

Further, a new draft of the Unfair Competition law is on the horizon. This new law will bring some new rules, but primarily reflect a codification of court decisions from the last 20-30 years. This new law will be influenced by a draft for a new directive of the EU Commission (KOM(2003) 68 endg.) regarding unfair commercial practices, which will seek to harmonize what is considered an unfair practice within all EU member states. In any event, it is an exciting time for advertising law in Germany – stay tuned.

adbriefs
Covering Your Ads Around the World
This Issue: Contribution from Germany
Guest Contributor: Dr. Peter Schotthöffer, Schotthöffer & Jennes *www.schotthoefer.de*

A Toast to Dr. Atkins

WINE AND LIQUOR PRODUCERS will soon be able to include carbohydrate and calorie content information in their advertising and on product labels.

Consumers have become used to statements on malt beverage products regarding calorie and carbohydrate content, with certain brands touting their low carbohydrate content both in advertising and on product labels as part of their marketing strategy.

With the continued consumer interest in low carbohydrate foods and beverages, spurred in part by the popular "Atkins diet," the alcohol beverage industry has sought to expand its rights to make claims about the carbohydrate content of its products. In response, the Alcohol and Tobacco Tax and Trade Bureau (TTB), which regulates the advertising and labeling of alcohol beverages, has issued new rules pertaining to wine and distilled spirits. These rules also effectively modify the rules that previously governed malt beverage advertising and labeling to provide for the uniform treatment of a wide range of alcohol beverages.

Under the new rules, wine, distilled spirit and malt beverage ads and labels may now include calorie and carbohydrate information only if a "statement of average analysis" is provided. This statement of average analysis must include not only the number of calories and grams of carbohydrates, but also the number of grams of protein and fat per standard serving size (12 fl. oz. for malt beverages, 5 fl. oz. for wines, and 1.5 fl. oz. for distilled spirits), and no additional information is permitted.

While the TTB rules create an opportunity for wine and distilled spirit producers to begin including information about calorie and carbohydrate content, they represent a new restriction on malt beverage producers. Under prior rules, which applied only to malt beverages, producers could include information about carbohydrate content without including a statement of average analysis. That's now changed. And significantly, where an alcohol beverage product's brand name includes a reference to calories or carbohydrates, such as "light" or "lite," any advertisement that includes the brand name will be considered a representation as to calorie or carbohydrate content; therefore, the advertisement must include a statement of average analysis.

TTB also issued interim rules on the use of descriptive terms such as "low carbohydrate" and "reduced carbohydrate." TTB will approve the use of the term "low carbohydrate" or "low carb" if a statement of average analysis is present and the standard serving size contains no more than 7 grams of carbohydrates. Comparative phrases such as "reduced carbohydrate" and "lower carbohydrate" (or similar terms) may be used if a statement of average analysis is included and the phrase is part of a statement that compares the number of carbohydrates per serving to the number of carbohydrates in another specified product made by the same producer. For example, the following hypothetical wine label would likely be permitted: "Lower carbohydrate - 15 grams of carbohydrates per 5 fl. Oz - less than half the carbohydrates in our [brand name] wine".

Early reaction to the TTB ruling from the alcohol beverage industry has generally been positive. The Wine Institute, an organization comprised of California wineries, issued a statement that it supports voluntary use of the statements permitted by the TTB rules. Peter Cressy, president of the Distilled Spirits Council, was quoted as saying: "More and more consumers are seeking information about the carbohydrate and caloric content of what they eat and drink." Cressy also pointed out that numerous types of spirits, including vodka, tequila, whiskey, bourbon, scotch, gin and rum contain no carbohydrates.

TTB will follow its normal rulemaking process, which includes public notice and comment periods, in formulating a set of standards for the use of descriptive terms such as "low carbohydrate" going forward. The interim rule will continue in effect in the meantime. ■

National Nanny: Will the FTC Re-Apply?

Health and children's advocates are calling for tighter government restrictions on food television ads aimed at kids. And they're banking on the Federal Trade Commission ("FTC") to answer their call.

And who can blame them? How can there be a more ideal candidate for protector of the nation's children than one who with such experience, persistence, and altruism? After all, it was the FTC that in a 1978 rulemaking proceeding known as "kidvid" proposed a ban on television ads to kids 12 and under for cavity-inducing sugared food products and formally considered outlawing all television advertising to children under 8. It was the FTC that created a 300-page staff report supporting its decision, fielded hundreds of public comments, conducted numerous hearings, left a paper trail 60,000 pages deep, and continued its fight until 1981 despite furious outcries from the food industry and the media and lack of support from Congress. And the main concern at the time? Tooth decay.

Sure, the FTC paid the price, suffering a lambasting from the media, including a Washington Post editorial that famously christened the FTC the "National Nanny". And sure, kidvid led Congress to temporarily halt all funding for the agency, forcing the FTC to literally shut down all operations, only to resume functioning after Congress passed legislation stripping the FTC of the very powers that formed the basis for its proposals, the regulation of "unfair advertising."

But back then the issue was tooth decay, the media was limited, and the National Nanny lacked back-up. This time around, the issue is a childhood obesity epidemic in America supported by startling statistics. And Congress is paying attention. At a recent Congressional hearing, the Senate Commerce Committee invited the Association of National Advertisers, the National Restaurant Association, the Kaiser Foundation, and the Center for Science in the Public Interest ("CSPI") to join it in examining how food is marketed to children. CSPI urged Congress to let regulators distinguish between "good foods" and "bad foods" and only allow "good foods" to be advertised to children. The American Academy of Pediatrics, APA and other health-care groups have revealed plans to step up lobbying for similar limits, and at least one organization critical of youth advertising has begun a petition drive urging the FTC to examine the issue.

Even under such pressure, the FTC will not soon want to reclaim National Nanny duties. First and foremost, the FTC appears to have learned its lesson from the first time around, when it failed to find a scientifically sound basis for distinguishing between tooth decay-causing food and non-tooth decay-causing foods and struggled to construct a constitutional definition of where a ban on "junk" foods would be imposed.

Furthermore, the FTC's basic authority under Section 5 of the FTC Act only prohibits unfair or deceptive acts or practices in commerce, 15 U.S.C. § 45. An act or practice is "unfair" if it causes or is likely to cause substantial consumer injury, the injury is not reasonably avoidable by consumers themselves, and the injury is not offset by countervailing benefits to consumers or competition. Whereas the FTC has successfully used and defended this authority to issue its 900 Number Rule and the Children's Online Privacy Protection Act among other things, the unavoid-

First Cocktail

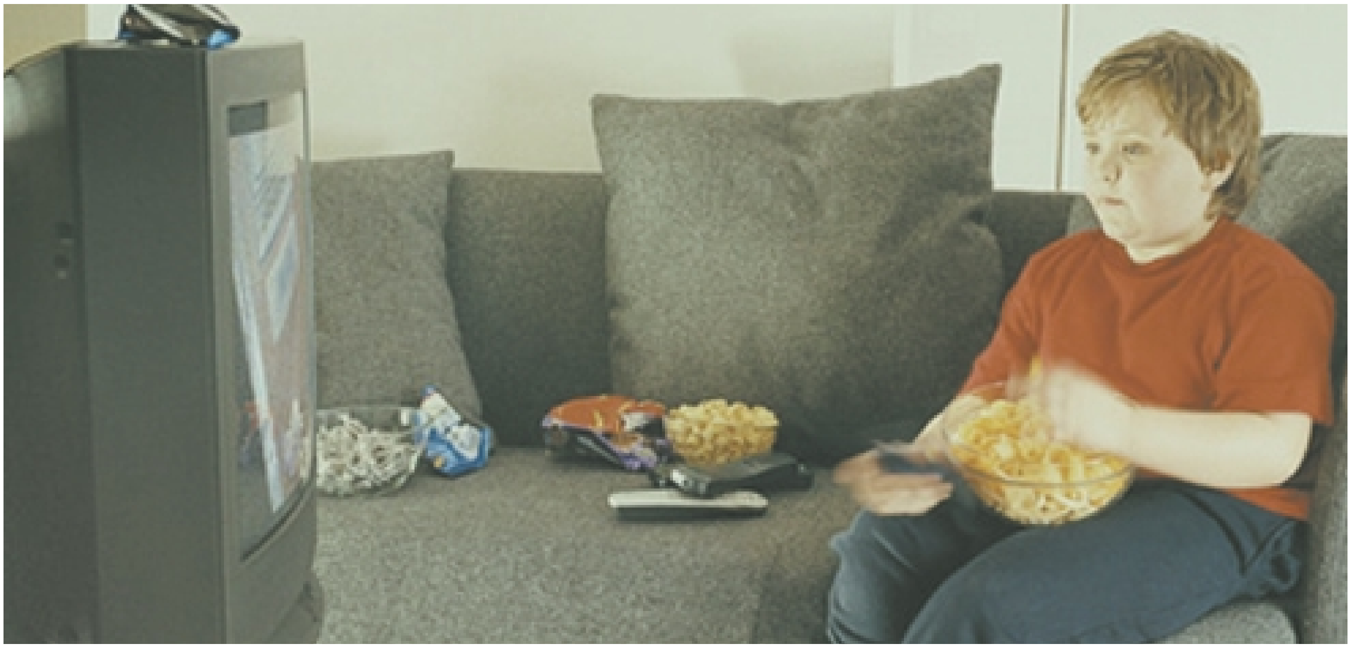
Zima. Skyy Blue. Doc Otis' Hard Lemon Malt Beverage. Tequiza. Jack Daniel's Original Hard Cola. These additions to the beverage market have been variously characterized as "sweet" tasting beverages with "colorful" and "attractive packaging". A new group of lawsuits argues that "kid-friendly" should be added to that list. Armed with statistics of underage alcohol consumption, angry parents are bringing class action suits against some major players in the beer, wine and spirits industry, arguing that the sweet tasting and colorful "alcopops" are deliberately designed and marketed in ways that target minors.

For example, *Hakki v. Zima Co. et al.*, filed in the District of Columbia last November, used the following examples to exemplify youth-centric content for alcohol advertisements: print ads featuring scantily clad young people, websites featuring arcade games and cartoons, and ad copy which references video games, incorporates slang or alludes to sex. The *Hakki* plaintiffs also questioned

ability factor is less compelling with children's advertising because parents are in a better position to curtail the harm by, for example, providing their children with commercial-free programming or resisting their children's pleas for unhealthy foods.

Even if a narrowly-tailored prohibition were justified, the FTC may not be empowered. As mentioned above, when Congress temporarily halted funding for the FTC in response to kidvid, Congress also passed a law barring the agency from implementing any such rule or similar rule in the future. Unless Congress changes this law, it's arguable that the FTC would be limited to challenging individual ads on a case-by-case basis. Finally, all of the FTC's law enforcement and regulatory activities are constrained by the First Amendment's limits on government regulation of commercial speech, and the Supreme Court clearly disfavors speech-restrictive approaches, especially in the context of non-misleading speech regarding lawful activity. Even if the FTC was up for the job again, a proposed ban/restriction on children's advertising would be unlikely to pass constitutional muster.

As a result, the FTC appears poised to promote self-regulation of the industry. It remains to be seen whether self regulation through self-regulatory agencies such as the Children's Advertising Review Unit of the Better Business Bureaus can calm the brewing storm of criticism. But for now, the FTC seems content to allow advertisers to babysit themselves. ■



the placement of the advertisements in magazines with a sizeable percentage of readers under 21, such as *Stuff, FHM, Spin, Glamour, Complex*, and *Maxim*. A complaint filed in Los Angeles last February adds *Motor Trend, InStyle, Cosmopolitan, Vogue, Entertainment Weekly, Road & Track, Jet, Essence, Popular Science, Elle, Marie Claire, Popular Mechanics, ESPN the Magazine* and *People* to the list of suspect magazines with "youthful readerships exceeding the general population."

But these lawsuits go beyond criticizing the content and placement of alcohol advertisements, stretching instead to make broad allegations that certain product-lines have been designed with the primary purpose of luring youngsters to drink. By bringing these cases, the plaintiffs are seeking to send an aggressive message to advertisers: expose your product to someone who can't legally use it, however slightly, and suffer the consequences. In the face of these suits, alcohol advertisers are left to wonder where to draw the line in marketing their brands.

Advertisers rightfully defend their First Amendment rights against what they have characterized as sweeping generalizations of wrongdoing and illegitimate attempts to shift responsibility for underage drinking away from those persons who illegally procure or provide alcohol to minors. Indeed, the exhaustive restrictions sought by the plaintiffs in these cases would leave advertisers with drastically diminished options for reaching adults who are of the legal drinking age.

It remains to be seen how these cases will be resolved, but the implications are important when creating a marketing strategy for products or services that are intended for a limited age group. ■

I Need A Little Privacy, Please

Do you need to be in compliance with the strict, and now readily enforced, European data privacy laws? The answer may surprise you, and the consequences may scare you. If you are collecting "personal information" from European residents, or even just receiving that information, you do need to be in compliance. But this does not just mean consumer information. Contact information for sales leads, distributors, customers, etc. may implicate European privacy laws. If you are not in compliance the result may be hefty fines issued by the European authorities and/or shutting down your operations in Europe.

Now that we have your attention, what are the European data privacy laws? These laws stem from the European Union Directive on Data Protection (the "Directive"), which requires all member countries to enact laws implementing the Directive. The Directive and the implementing laws require much more control, awareness and consumer choice regarding a company's data collection and data usage practices than does the U.S. The United States has adopted a largely self-regulatory model (with the exception of certain highly regulated industries such as financial services and medical record information, as well as the protection of data relating to children).

The European model, embodied by the Directive, is comprehensive and provides for strict enforcement procedures within Europe. The Directive applies to all "personal information" collected from individuals inside of Europe. Personal information is defined as any information which identifies or may be linked to an identified or identifiable person. This includes data ranging from names, addresses, phone numbers, email addresses, to credit card information, tax ID information, and in some instances, IP addresses for computers. It includes internal information (e.g. HR data) and customer data. The Directive also places restrictions on the onward transfer of data to countries that do not maintain "adequate" data protection laws. The EU does not consider the U.S. to maintain "adequate" data pro-

tection laws. Accordingly, transfer of personal information from Europe to the U.S. violates the Directive and the EU data protection laws, unless certain actions and specific safeguards are taken.

While the Directive and the implementing laws are all currently in place, the U.S. Commerce Department and the European Union had previously negotiated a voluntary temporary enforcement standown while U.S. companies got themselves in compliance with the EU regulations. That standown, however, has expired, and U.S. companies are being fined (in the six and seven figure range) by the European authorities.

The U.S. Commerce Department Safe Harbor Program is one of the methods by which a U.S. company can comply with the European data privacy laws. The other primary methods are the use of newly approved contractual language between transferring entities and registering with each specific European country. The Safe Harbor Program, the use of the approved contract language, and separate country registration all require first that a company audit and identify all of its data collection, transfer, security, and maintenance practices. Only after conducting such an audit may a company prepare a privacy policy that will allow it to take advantage of the Safe Harbor Program, the approved contractual language, or individual country registration. Moreover, the Safe Harbor Program requires that a company put in place a dispute resolution procedure (generally arbitration through any number of approved providers) and conduct either internal or external compliance checks (internal reviews must be signed by a company officer) annually to maintain good standing within the Safe Harbor Program.

One of the benefits of the Safe Harbor Program is that it takes enforcement out of the hands of the European authorities. The only enforcement procedures that can take place against a company that has certified under the Safe Harbor Program is an action in the U.S. taken by the FTC or by individuals via private arbitration. A company that utilizes the approved contract language or individual country registration to comply with the EU data privacy laws may still be prosecuted by the European authorities for violations of the relevant European laws, or deviances from the contract provisions.

For a company whose data collection and transfer practices implicate the European data protection laws, compliance procedures are generally broken down into four stages: (1) information gathering; (2) information analysis; (3) privacy policy drafting and compliance procedures (Safe Harbor, individual country or contractual language); and (4) implementation. If your business is implicated by these laws, make sure that you select and implement the compliance procedure that is most cost-effective and best suited to your business. ■

No Pain, No Gain Under California's Proposition 64

WITH THE RECENT PASSING of Proposition 64, California voters approved significant litigation reform that will eliminate frivolous false advertising and unfair competition lawsuits that have historically been brought under Business & Professions Code sections 17200 and 17500 (collectively, the "Unfair Competition Law"). Proposition 64 now places limits on the types of lawsuits that can be brought under California's Unfair Competition Law and seeks to bring California into line with other states.

Prior to Proposition 64, any private person could file a lawsuit alleging unlawful, unfair or fraudulent business practices or false or misleading advertising under the Unfair Competition Law. Under the former statutory scheme, some private plaintiffs had been allowed to seek injunctive and monetary relief on behalf of the "general public" without satisfying class action requirements and without having suffered any injury themselves as a result of the challenged conduct. In extreme cases, plaintiffs had been allowed to sue even though they had never dealt with the defendant!

Furthermore, based on an argument that private plaintiffs only had to show that challenged advertising was "likely to deceive" the public, other private plaintiffs had been allowed to allege false advertising claims even though no consumers had been deceived by the advertising in question and even if the plaintiffs themselves had never relied upon the challenged advertising to buy the products or services in question.

All of this has changed with Proposition 64, which provides that only those who have suffered "injury in fact" and lost "money or property" as a result of the challenged conduct have standing to sue. After Proposition 64, private plaintiffs will have to show more than that the challenged advertising was "likely to deceive."

Importantly, Proposition 64 also eliminates representative actions on behalf of the "general public." Under Proposition 64, plaintiffs will need to satisfy existing class action requirements in order to obtain relief on behalf of any other person.

Proposition 64 does not affect lawsuits brought by public prosecutors such as the Attorney General or District Attorneys. But its repeal of "private attorney general" standing to bring a representative action on behalf of the general public should be effective immediately and be applied to existing cases brought under the old Unfair Competition Law. Plaintiffs who brought such cases on behalf of the general public as a private attorney general now lack standing, and those cases should be dismissed for failure to state a cause of action. Let the motion practice begin. ■

Avoid the Pain of Promotional Plays

A GROWING NUMBER OF MARKETING DIRECTORS are deciding that a contest or game of chance is just the marketing tactic that will drive sales or spur traffic to their retail outlets. Sometimes, however, a promotional contest or sweepstakes can run into a snag. Unfortunately, the Pepsi iTunes game launched during the last Super Bowl is just one of the higher profile examples. By tilting its soda bottles to one side, it was discovered, a customer could see if the bottle cap revealed a code or the words "try again" without having to buy the product. Pepsi took quick action to address the situation by limiting the number of winners per day, but it is still a very unfortunate situation.

While no promotion can be made bulletproof, what follows are some key lessons that will limit the chances for a promotional faux pas.

Clearly define the promotion's goal: Promotions, just like ad campaigns, should not try to message multitask, so don't bog down a promotional campaign to achieve multiple goals. Identify the objective: drive traffic to your locations, increase quarterly sales, build the brand or activate the consumer to interact with the product. Limiting your objectives will strengthen them.

Precisely define the mechanics of the promotion: What is the customer entry point? Internet, retail location, mail-in entry form, etc. How does the consumer win? Knowledge-based contest, game of chance, sweepstakes, etc. What do they win or receive? When do they win? Scratch and win instantly, scan at the retail checkout, mail in and wait 4 to 6 weeks, etc.

Learn how different state laws will influence the promotional campaign budget: Know the federal and state laws for promotions, which are precise and varied. Some states require that you post the complete set of game rules in the sweepstakes print ad. This will force you to purchase larger ads that will add to the campaign's budget. That additional cost is OK, but be aware of these types of details.

Hire a pro who understands the fine details: Brand managers would be best served by hiring a promotional agency that understands the mechanics of contests and frequently works with expert legal firms that understand the law.

Avoid consumer hurdles: The more obstacles you put in the way of the customer, the less likely he or she will be to participate. A promotion should be seamless in the steps the customer needs to interact with the brand, product or retail location.

Aim carefully, pardner: The contest or game-of-chance prize must fit the target demographic and provide enough value for the customer to want to participate. If you decide to partner with another brand, make sure it compliments your brand's position. If you are trying to reach teenage girls, find something that teens have an affinity for -like cell phones-not fishing reels.

Get everyone on the same page: Notify and educate other company divisions if a promotional campaign interacts with their area. Retail managers should be fully informed with easy-to-understand execution materials and guidelines. If the sweepstakes is a business-to-business effort, distributors or field representatives must be fully informed, and in some cases, offered incentives to participate with enthusiasm.

Bring your public relations division in from the start: The public relations staff can have tools in place to quickly promote the contest and winners; smart ones will develop pre-approved management statements ready to distribute to the media if anything backfires.

Finally, make sure it all counts: Agree on realistic measurements and evaluation criteria in the planning phase of any campaign, so you can assess campaign results accurately.

Unlike traditional ads that saturate viewers, a well-conceived and precisely executed promotion can rally consumers and retail partners around your brand. Dynamic emerging marketing technologies will soon offer companies the ability to interact with consumers in real-time, opening tremendous new opportunities. Make sure you're taking the right steps in the promotional game so everyone's a winner. ■

First Published in Brandweek.

By guest columnist Leslie Mait, Vice President of Promotional Operations, The Marketing Store Worldwide, L.P.

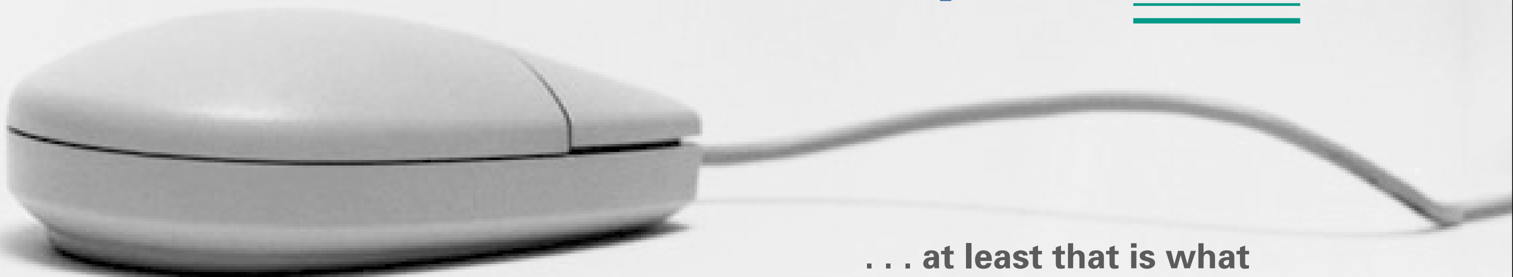
Developed by Vibrant Media, the IntelliTXT system is an online advertising solution technology that will allow web sites to sell the right to advertise on a particular page or in a particular article to the highest bidder, as the software can automatically scan Internet pages for both appropriate advertiser keywords and contextual relevancy. Once a match is found, a small number of words are enhanced to appear as double underlined green hypertext. When the user's mouse cursor glides over the enhanced hypertext, the advertiser's short hand message pops up and, if clicked, this hypertext provides a direct link to the advertiser's web page (with ad rates typically tied to the number of click-throughs).

Proponents of IntelliTXT view the new technology as less intrusive than pop-up ads. Ultimately, they say, IntelliTXT should give control back to the user, who will have the choice to click-on or ignore a sponsor's message. Internet users who are curious or need more information about a topic or a product will be able to find relevant links amidst topical content. And, for readers who find these ads bothersome, all they have to do is avoid moving their mouse cursor over the green double underlined hypertext.

Like all forms of progress, this new technology is not being embraced by everyone. The service has been much maligned by journalists who fear that the service will further erode the once sacred separation between advertising and editorial content. In recent years, advertisers have broken numerous conventional barriers in their effort to find new and creative ways to reach consumers, ranging from thirty second spots shown at movie theaters, to product placements in television shows and feature length movies. And these victories have only served to fuel advertisers' desire to push the threshold further. Major league baseball recently discussed the idea of utilizing the players' uniforms as advertising space, and magazines are receiving significant pressure to open the text of their editorial pages to product placements. However, the negative reaction of the press to this invasion of their hallowed editorial space may be somewhat of an overreaction in this instance.

Those who clamber that allowing IntelliTXT to insert hyperlinks into the text of online articles or editorial content is akin to selling product placements in the middle of magazine text may have lost sight of the true intent of the separation between editorial and advertising mantra. Rather than focusing so closely on the need for the physical separation of the two, critics should recall that the primary reasoning behind the rule is to help prevent consumer confusion about what is (or at least supposed to be) an honest opinion of a journalist trying to provide thoughtful commentary and what is a biased statement of an advertiser trying to move product. The green double underlined format could arguably be sufficiently distinguishable from the normal text contained on the page to cause the consumer to immediately realize that a distinction exists, just as most consumers realize that a distinction exists between television commercials and the programming they support. As this and other creative strategies gain more popularity and penetration, we're sure to hear more about them in the courts of justice and the courts of public opinion. ■

If You Double Underline It... They Will Click



. . . at least that is what online advertisers are hoping with the recent rollout of the new IntelliTXT system.

Online Gambling Ads (continued from page 1)

As a result, the DOJ has elected to pursue a path of what it perceives to be lesser resistance, going after American companies that provide services to offshore gambling sites (as opposed to the sites themselves) on the theory that the American companies are "aiding and abetting" the offshore operations. Enforcement activity was initially directed at the major credit card companies who process the payments. More recently, however, enforcement has turned against the newspapers, online search engines and radio and television networks that run ads for the gambling sites.

In a letter sent last year to the National Association of Broadcasters and other media trade groups, the DOJ asserted "[w]ith very few exceptions limited to licensed sportsbook operations in Nevada, state and federal laws prohibit the operation of sportsbooks and Internet gambling within the United States, whether or not such operations are based offshore." *See* Department of Justice Letter dated June 11, 2003 to the National Association of Broadcasters. In the same letter, the DOJ indicated that it considered ubiquitous ads for Internet gambling operations to be "troubling because [the sheer volume of advertisements] misleads the public in the United States into believing that such gambling is legal, when in fact, it is not." In a thinly veiled threat that perhaps also provides some insight into how strong (or weak) the DOJ thinks its untested legal position is, the DOJ explained that it was sending its letter "as a public service" because it wanted the National Association of Broadcasters and all of its members to "be aware that the entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities."

But is that true? No federal criminal law expressly prohibits the advertising of an Internet gambling site. Several existing state and federal statutes do potentially apply to the underlying gambling operations themselves. But bringing an "aiding and abetting" claim against a newspaper, online search engine, or radio or television station ***for running ads for the sites*** is different from bringing a claim ***against the underlying gambling operations themselves*** and, in the opinion of many First Amendment lawyers and the World Trade Organization (which issued a preliminary ruling earlier this year that prohibiting online gambling operations in the United States would violate America's free trade obligations), is controversial at best.

Aiding and abetting liability has historically been reserved for those who directly benefit from the underlying illegal enterprise. For example, in *U.S. v. Cohen*, 260 F.3d 68, 70 (2d Cir. 2001), the defendant was convicted of violating the Wire Act from an offshore site, where his company, World Sports Exchange ("WSE"), advertised its gambling business "throughout America by radio, newspaper, and television. Its advertisements invited customers to bet with WSE either by toll-free telephone or by internet." *Id.* The Second Circuit observed that since the gambling was illegal in New York, Cohen had violated the federal Wire Act directly and indirectly – by aiding and abetting others to violate the Wire Act – because his business illegally "assist[ed] in the placing of bets as well as the transmission of bets themselves" and he was "in a position to cause others, willfully, to commit acts that would have been crimes had he committed them. He could, therefore, have been found liable for aiding and abetting WSE's ongoing violation" of the Wire Act. *Id.* at 75, 77-78.

The *Cohen* case and other precedent, however, involved essentially a principal of the gambling operation itself and that is a far cry from the situation where an independent third party makes a pure ad buy with an unrelated offline or online publisher, which would not appear to be enough of a connection to support an aiding and abetting claim against the publisher. This is especially true since, when we're talking about advertising, we're talking about constitutionally protected speech, and in the speech context, liability for the conduct of others has historically been reserved for those situations where the person speaking is seeking to and likely to incite imminent lawless action.

Moreover, some offshore online gambling sites offer free entertainment, not just gambling that requires a bet, stake or wager. Others offer a free method of entry and are, therefore, more properly treated as a legal sweepstakes operation. Still others make at least a threshold attempt to screen users based on geographic location, kicking a user out if they say they're in the U.S. and allowing access if they say they're in a jurisdiction that allows online gambling. And what about the argument in the search engine context that U.S. based Internet search engine sites are regularly accessed by people in other countries, where gambling could be legal and, accordingly, advertising to that segment of the user population would also be completely legal.

Despite the shortcomings in the DOJ's position, its efforts against advertisers seem to be working. Google and Yahoo, two of the most popular and widely-used Internet search engines, have announced that they have stopped accepting ads for online gambling on their U.S. sites, as did Overture, MSN and Lycos. But the gambling operations are now fighting back, with at least one lawsuit filed late this year against the DOJ seeking a declaratory judgment that advertising online casinos is constitutionally protected commercial speech. For that and other reasons, this game isn't over. ■

Internet Taxe$:

Can You Hear Them Now?

The federal Internet Tax Freedom Act of 1998 originally imposed a 3-year moratorium on state and local taxation of Internet access and on multiple or discriminatory taxes on electronic commerce. In November 2001, Congress enacted the Internet Tax Nondiscrimination Act, which extended the Internet Tax Freedom Act moratorium through November 1, 2003. The moratorium expired on November 1, 2003.

The House passed a permanent extension of the Internet tax moratorium last year, and the Senate passed a four-year extension on the moratorium on April 30, 2004. The House-Senate conferees are (hopefully) now working on a final bill.

An Internet-based technology that is gaining increased popularity with early adopters and not-so-early adopters alike may be the key conversation piece in the future of Internet taxes, thanks to its distinctive position at the crossroads of traditional telephone services and the evolving Internet. This technology is the type of voice telephone service called Voice-Over Internet Protocol, or VoIP. VoIP technology — which sends your calls over the Internet backbone instead of the traditional telephone network — has swiftly become popular and will doubtless be used routinely by Americans in the near future. But significant taxes and regulatory charges — often approaching 18% of the subscriber fees paid — have traditionally been imposed on telephone services and have raised substantial revenues at all levels of government. Whether these taxes may now be imposed on VoIP — a technology that was not envisioned when the applicable taxes were first enacted — remains to be seen. The FCC recently ruled that VOIP services are interstate in nature and not subject to traditional state public utility regulation, but the Commission did not address whether the general laws of the various states governing taxation, advertising, marketing and other business practices, leaving those issues to be further defined sometime next Spring. ■

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save the date

December 2-3, 2004:
Benjamin Mulcahy will moderate a panel on Branded Entertainment at the Promotion Marketing Association's 24th Annual Law Conference in Chicago.

December 16-17, 2004:
Benjamin Mulcahy will moderate a panel on Promotional Tie-Ins at the ACI Advanced Advertising Law Conference in New York.

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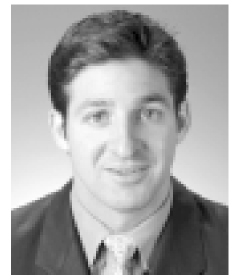

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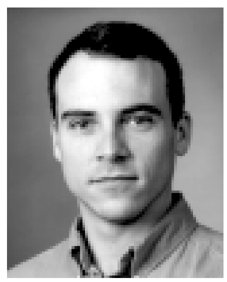

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