

PUBLICATION UPDATE

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The Law of Advertising

Publication 357 Release 107 December 2014

HIGHLIGHTS

The following analytical units in *The Law of Advertising* have been revised during Release 107:

- VOLUME 1: CHAPTERS 5, 6, 7, 11, 12 & 13
- VOLUME 2: CHAPTERS 16, 23, 26, 27 & 29
- VOLUME 3: CHAPTERS 36, 37, 43, 46, 48, 52, 53, 55 & 56
- VOLUME 4: CHAPTER 58

Important Updates

Release 107 features analysis and discussion including:

VOLUME 1: CHAPTER 7 ACCESS TO THE MEDIA

- § 7.05[4][a][i][A] **The Bipartisan Campaign Reform Act of 2002 (also known as the McCain-Feingold Act)** has been updated to cover the U.S. Supreme Court’s invalidation of the BCRA’s aggregate limits on individual contributions on First Amendment grounds.

CHAPTER 11 FEDERAL REMEDIES AVAILABLE TO COMPETITORS

- § 11.02[5][c][iv] **“False or Misleading” “Description or Representation” of “Fact”** has been updated with a Fourth Circuit case holding that confusing similarity cannot be based on a portion of a single word.
- § 11.03[2][b][iii] **Methods of Expression** has been updated with analysis of the elements of a work that may be copyrighted when the work is a “useful article” within the meaning of 17 U.S.C. § 101.
- § 11.03[2][d] **Fair Use** has been updated with a case addressing whether use of the entirety of a non-musical sound recording was a fair use.
- § 11.03[2][g][i] **Collective Works** now contains analysis of *Garcia v. Google, Inc.*, in which the Ninth Circuit held that an actor or actress has an independent, copyrightable interest in his or her performance.
- § 11.03[7][d] **Passage of time** has

been updated with discussion and analysis of the recent U.S. Supreme Court case, *Petrella v. Metro-Goldwin-Mayer, Inc.* The Court reversed the Ninth Circuit, holding that the equitable doctrine of laches does not apply to claims of infringement where the discrete infringing act or acts that resulted in the suit occurred within the three years prior to the date the suit was filed.

VOLUME 2: CHAPTER 29 TESTIMONIALS AND ENDORSEMENTS

- **§ 29.02[2][i] First Amendment Rights** has been updated to reflect the Seventh Circuit's holding in *Jordan v. Jewel Food Stores, Inc.*, that "image advertising" can constitute commercial speech, and is thus not entitled to First Amendment protection, when viewed in context. The case is noteworthy because it reverses the Northern District of Illinois' earlier decision that the advertisement was non-commercial because it did not, *inter alia*, propose a commercial transaction.

VOLUME 3: CHAPTER 36 PROCEDURE BEFORE THE COMMISSION

- **§ 36.03[2][b] Other Innovative Commission Remedies** has been updated with a case affirming the FTC's imposition of an asset freeze on a telemarketer, and declining to require the FTC to calculate the exact amount of unjust enrichment before imposing the freeze.

CHAPTER 37 Enforcement

- **§ 37.03[1][c] Against Whom Should Penalties be Assessed?** has been updated with a Fourth Circuit case addressing the circumstances under which a corpo-

rate officer may be individually liable for an entire damages award in a claim brought pursuant to the FTC Act.

CHAPTER 43 LIABILITIES OF ADVERTISERS

- **§ 43.03 Protection from Liability** has been updated with a Maryland case holding that an insurer who issued a commercial policy that included coverage for advertising injuries had a duty to defend a policy holder against all claims asserted by a plaintiff where the plaintiff brought an unjust enrichment claim based upon the appellant's use of appellee's advertising ideas. The case is noteworthy because it is currently under review by Maryland's highest court.

CHAPTER 52 ADVERTISING BY FINANCIAL INSTITUTIONS

- **§ 52.09[1][c] Credit Repair Organizations Act** has been updated with a case discussing when a business is a credit repair organization within the meaning of the Act. In this case, the business' advertising played a crucial role in the court's determination that the business was a credit repair organization.

CHAPTER 53 CABLE TELEVISION ADVERTISING

- **§ 53.04[3] Copyright Law** now contains new material regarding the U.S. Supreme Court's decision in *ABC, Inc. v. Aereo, Inc.* The material covers the workings of Aereo's system, the majority's reliance upon a comparison of Aereo's system to the CATV systems as the basis for finding that Aereo's near-contemporaneous transmission of broadcast signals over the internet infringed upon the networks' public performance

rights, and the scathing dissent authored by Justice Scalia.

CHAPTER 56 INTERNET ADVERTISING

- **§ 56.05[16] Terms of Service** is a newly-added section addressing how internet service providers and Internet content providers may employ terms of service that impact an advertiser or advertising content creator's ability to advertise over an Internet service, or to utilize content retrieved from the Internet. FTC actions based on deceptive terms of service, or non-disclosure of data collection policies within terms of service, are also discussed.

COMING ATTRACTIONS—LOOKING AHEAD TO 2015

In future updates, the **Law of Advertising and Mass Communication** will contain new material on the following topics:

1. **Terms of Service**—Building upon the contents of newly-added § 56.05[16], the treatise will explore, in greater depth, how internet services and advertisers can craft terms of service that allow for extensive use of consumer data. Litigation and administrative actions concerning the enforceability and legality of various provisions commonly contained in internet terms of service will also be examined, as will the recent FTC staff report recommending that the creators and distributors of mobile phone shopping applications make certain pre-download disclosures to potential users of their apps. This section will additionally address the use of internet content in

advertising and other copyrightable works by exploring the phenomenon of open source licensing.

2. **Actors, Actresses, and Models**—As more states enact laws protecting talent, particularly child actors, actresses, and models, producers and others who make use of performing or modeling talent in their works will need to be aware of these laws and take them into account when drafting agreements or when utilizing performing or modeling talent without a written agreement. This new material will look at recently-enacted laws, such as New York's child model protection law, as well as various court decisions concerning the rights of actors, actresses, and models vis-à-vis producers and directors, as contributors to a work.
3. **"Made in the USA"**—The FTC's settlement with Made in the USA Brand, LLC, a company that purported to "certify" brands that are made in the U.S. and would allow those brands to use its certification mark in exchange for a fee, provides insight into the FTC's present approach to made in the USA claims. New material addressing the FTC's views on the minimum level of evidence a third party certifier would need to present to truthfully certify a good as made in the USA, and of marketers' independent claims that a good is made in the USA, will be supplied.

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