



ADVERTISING AND PROMOTION LAW ALERT

INTERNET PRIVACY STATEMENTS HELD AS DECEPTIVE ADVERTISING

Deceptive online assurances of privacy were the bases of a recent Lanham Act curiosity out of Oregon.*

BRIEF BACKGROUND

Plaintiff competed with Defendant in providing students free online processing of college applications.

The colleges paid Plaintiff for the service. Defendant got its money by selling personal data in the applications to third parties.

Defendant's privacy statements assured the students that their personal data would not be given to third parties without the applicants' "express consent and direction."

Defendant asked applicants, "Are you interested in receiving information about student loans and financial aid?" A "Yes" reply was deemed by Defendant as express consent and direction to send students' personal data to the fee-paying third parties.

Plaintiff alleged that Defendant's privacy assurances were false or

misleading representations under Section 43(a) of the Lanham Act.

VERDICT AND DECISION

The jury found for Plaintiff and assessed Defendant \$4.5 million in actual damages. The court found the same, treating the jury as advisory for some unexplained reason.

The court also found Defendant's actions to be willful. Based on that, it found an un rebutted presumption of deception. (No survey or other consumer deception evidence was introduced; perhaps the court silently viewed the claim as a literal falsity needing no such proof.)

The court awarded Plaintiff its attorneys' fees due to Defendant's willfulness. But it denied a request for enhanced damages (the actual damages being found sufficient) and disgorgement of Defendant's profits (viewed as an improper penalty under the facts).

There was no express finding that the offending privacy assurance was "commercial advertising or promotion" under Section 43(a). ■

* CollegeNET, Inc. v. XAP Corporation, 483 F.Supp.2d 1058 (D. Or. 2007). Patent claims also were adjudicated in the case.