Podcast Transcript

AD Nauseam: A Very Special AD Nauseam – Back to School

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues, with an emphasis on the FTC and the NAD. I'm Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners in Baker Hostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseam, Amy and Daniel have a very special episode focused on getting back to school with a look at how the FTC and the NAD have addressed issues related to kids and learning, and look at some historical cases and recent developments involving COPPA and Ed Tech. With that, welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back to AD Nauseam. At AD Nauseam, we are all about learning and since fall is here, and the little and not so little ones are heading back to school, we thought it might be the right time to talk about kids and learning and educational cases, and the issues that have been raised at the FTC and the NAD in the space.

Kaufman: So, Amy, I know it has been quite a while since either you or I have been in a classroom. I would dare say decades.

Mudge: Oh, yeah.

Kaufman: I don't know about you. I still have that recurring nightmare that it is the end of the semester and I forgot to drop a class and I have to take a final. Like I, literally 30 years, 30-some odd years after being in college, I still have that recurring nightmare. But it got me thinking, you know, some of my all-time favorite TV shows and movies are centered around school. We're both Gen Xers. Clearly, The Breakfast Club was the defining movie for our generation in that realm. But what are some of the other school-themed shows and movies that are near and dear to your heart?

Mudge: Okay. Well, first I'll tell you my recurring dream is about speaking and seeing people naked.

Kaufman: Okay.

Mudge: I don't think that is the way the dreams are supposed to be, but it happens. It happens.

Kaufman: We are wearing clothing right now while we are recording this, in case, lest there be any confusion.

Mudge: It is true. This is not the naked podcast. AD Nauseam is a clean, family-friendly show. My nightmares are more about the work-mares, probably because we've been out of school for so long.

But as far as TV shows, I'm a big fan of the young adult stuff. I watch TV that is probably wildly inappropriate for me, that is much more appropriate for teens. And I bust your chops a lot when you don't go back to the 80s and when you go a little, but I'm going to go 90s and I think Freaks and Geeks is absolutely the best show that is, I don't want to say has ever been done, because maybe there is some I haven't seen, but I love me some Freaks and Geeks.

Kaufman: Freaks and Geeks was amazing, and that cast was only one year, but oh, excellent choice, Amy.

Mudge: How was it one year? That is the, how?

Kaufman: It was only on for one year.

Mudge: And I do also love Heathers, but I have to say I love the Heather's musical. Probably because my daughter was just in it recently and I was actually really surprised. I thought the musical might have been better than the movie.

Kaufman: Oh, my gosh. Oh, my gosh. Okay, so Heathers the movie, one of my all-time favorites. I can't even begin to tell you how many times I saw that, both in film and I had the DVD also.

Mudge: That is because you're dark, Daniel. You are…

Kaufman: I am dark, and it is very dark movie.

Mudge: You are one dark dude.

Kaufman: But the, look, the other school-related show that is near and dear to my heart is Buffy. To me, Buffy is just one of those amazing shows. I avoided watching it for years, but I remember at some point I was like, I'm going to tackle Buffy. And I had my Netflix DVDs, I watched the entire series that way and I am just a huge Buffy fan. So…

Mudge: I've never watched it. Do love many of those actors, but I have not seen Buffy. Maybe I'll put it on my, I guess Netflix has now thrown out DVDs, but I'll put it in my queue.

Kaufman: Yeah, they threw out DVDs quite ceremoniously recently, actually.

Mudge: All right, I'll throw back one for you more recently. I love the Mindy Kaling, Never Have I Ever, which is a more recent, really fun teen show. I think it just shows you that teen angst never goes stale, you can do it in any decade.

Kaufman: Totally true. But, you know, let's turn back to the subject at hand. What are we thinking about here, Amy?

Mudge: So, I think, I really do think that educational cases are what we should be talking about. Both the FTC and the NAD have long looked at cases involving learning and, I mean, for decades. I can't believe I'm going to say this, before you and I started practicing, the FTC brought a substantiation case against Hooked on Phonics, an oldie but a goodie. And then they also brought a case involving the Legacy Learning Systems, that was a how to learn guitar.

Speaking of DVDs, what they were selling was a 20 DVD learning set, which shows you the age, but that resulted in a $250,000 settlement. Doesn't seem like a big gasper in today's dollars. But it did look a lot at online endorsements that were not independent, where there was no disclosure. So, it just kind of tells me that there is a pattern to these cases that we continue to see to this day. And, of course, the endorsers were saying how easy it was to learn guitar using the system, what a great bargain it was with your 20 DVDs. But one, it is hard to learn guitar and two, there weren't disclosures about the commercial nature between these, what we now call influencers, I guess what we then called affiliates, and the legacy.

Kaufman: So, Amy, it may shock you. I played the violin growing up and not the guitar.

Mudge: I did too. I did too. Did you do the Suzuki method?

Kaufman: No, I learned in school, in junior high school and high school. I took violin for many years.

Mudge: Alright. Do you play today?

Kaufman: No. Unfortunately, no.

Mudge: Alright, alright. Me neither. One of my great regrets.

Kaufman: Another learning case that's always been near and dear to my heart, and it actually came out right around the time of *Legacy Learning*, but it was *Your Baby Can Read*. Which I've just always loved the case, it is a great title.

Mudge: No, no. No. Babies can't read. I know you haven't had babies. I have had babies, Daniel. Babies can't read.

Kaufman: I would not argue with that. But apparently, they, revenues were like $185 million. This was a really popular product that cost about $200 per, because who doesn't want your 10 year old to be sitting on your lap reading Harry Potter? But I guess the FTC alleged that those claims were false and/or unsubstantiated. Filed the lawsuit in 2012, few of the parties settled, but then the case litigated for two years. Which is always sort of interesting, you don't see that many substantiation cases litigating, and you would sort of think a case like *Your Baby Can Read* doesn't necessarily jump at you as the case that is likely to litigate for two years, but it did. Eventually it did settle. The FTC settled, a few hundred thousand dollars. Given the amount of revenue, it is a little surprising.

But what is actually really interesting about the settlement, you don't see this in many FTC cases in the orders, but it brings up the issue of trade name excision. There have been a few cases where the FTC has said, you know what, you can't use that name anymore. That name you're using is part of the problem, a big part of the problem. So, in the settlement for *Your Baby Can Read* the company is prohibited from using that term going forward. So, an interesting case on a lot of levels. Unfortunately, we didn't have a lot of nine-month-olds reading apparently.

But I understand there is actually is more to the *Your Baby Can Read* saga that you might want to share with us, Amy.

Mudge: I would love to, because I was actually involved in this saga. I love talking about war stories. Actually, but I have a question for you first. You said some of the parties didn't settle. Was this a case where the FTC moved against the company and also, I'm guessing, individual owners?

Kaufman: It is interesting, Amy, the president and CEO of the company settled in 2012. But the product developer and the primary company continued to litigate for two years.

Mudge: So even back then, in appropriate cases, the FTC was moving against companies and individuals. Which of course, we're seeing today in almost every case.

Kaufman: In, much more broad than you were seeing 10 years ago, that is for sure.

Mudge: Absolutely, absolutely. But back to *Your Baby Can Read*. So, I'm not sure of the exact timing. But *Your Baby Can Read* was at NAD in a case that was brought by one of its competitors, Leapfrog, alleging all the same things that the FTC had alleged to essentially say, look, babies can't read. This is a flash card program that teaches memorization. But that it does not translate in to actually being able to read on a first or second grade level.

And while that case was pending, *Your Baby Can Read*, that it was a parade of horribles for this company, a class action was filed. And NAD loses jurisdiction in the case if they're, you know, we've talked about this, that the advertising has to be national. Well, you can check that box here. But if there is an FTC order, NAD cannot continue with jurisdiction. Here, the FTC case was unfolding, so there was no order. But NAD loses jurisdiction entirely if there is any private litigation that is filed. So, a class action challenge, or a Lanham Act false advertising challenge that is filed by competitors. And here, while the NAD case was unfolding, some class action filings were made in California. And *Your Baby Can Read* came to NAD and said, hey, you lose jurisdiction. And NAD looked very closely at this, and they said, well yes, we're losing jurisdiction to look at the core issues of the name. Is the name deceptive itself? And we lose jurisdiction to look at whether the claims that the program is making are supported. But the class actions don't look at the testimonials. A lot of the infomercials at issue here used Tarrant testimonials. And again, not alleged or not the focus of the class action cases, and so the NAD said, we're going to continue this case just on testimonials. And NAD recommended that *Your Baby Can Read* modify its testimonials to make sure that they're typical and representative of what the program can actually do.

But I think it is a very good example of the kinds of cases that you can have that perfect storm where a company is facing competitor activity, class action activity, and FTC activity all at once. That doesn't happen too often. But when it does, the need to coordinate that and think about that and how you're going to balance the different actions is incredibly important. I mean, for this company, I think they ultimately went bankrupt. So maybe it was just too much to bear.

Kaufman: Yeah. I wonder if part of it was just the enormous volume of sales they were doing. You know, once you're sort of pulling in revenues of well over $180 million, I mean, you're going to attract a lot more attention.

Mudge: Absolutely. Absolutely. And, you know, the other thing that was interesting about this, after the NAD issued this decision, the staff attorney then had learned a whole bunch of, you learn things in these cases. I learned things in these cases about how children learn, the process of learning, and the process of learning to read. And NAD actually brought several monitoring cases after this case and said, hey, we're going to look at this whole industry and see if we should do our own enforcement. And followed up with several other cases looking at claims that were made by educational toys or educational programs.

Kaufman: Well, Amy, I'm proud to say I learned the alphabet from Sesame Street. That was my friend and my learning tool growing up.

Mudge: I did too, that was our jam. That was our jam. We were the first generation of Sesame Street kids, absolutely. Absolutely. Well, this back-to-school is particularly poignant for me. I'm incredibly proud to say that my daughter has just started a teaching career. And as of a week ago, showed up a public school to begin her teaching science, middle school. So, and I have near and dear to my heart are these education programs because we know how hard teachers work in this country. And certainly, how hard they worked over COVID when it was remote learning. And, Daniel, I know that the FTC has been very involved in some of the COPPA cases coming out of Ed Tech that was used so widely, particularly during the pandemic. Can you bring us up to speed on those?

Kaufman: Yeah. Look, the pandemic was enormous in terms of the impact on Ed Tech and all of a sudden, you know, hundreds of millions of kids are at home and COPPA still applied. So, the FTC has been looking closely at how information is being collected from children in the context of Ed Tech. About a year ago, they issued a policy statement on education and COPPA. Went through sort of the history of COPPA, blah, blah, blah. You know what the FTC did to encourage COPPA. But reminds everyone that COPPA is not a notice and choice statute, and the FTC is really focusing on that a lot. They're not fans of notice and choice these days. COPPA is a statute and a rule that has specific use prohibitions, that has retention prohibitions, that has security requirements. So, when you look at different sort of privacy schemes, COPPA has a lot of specific requirements when it comes to collecting information from kids under 13. And the FTC, in this policy statement, makes it very clear that this is an area they care deeply about. It is an area where the FTC can get penalties, so they'll be watching closely.

And not too long after that policy statement issued, we did see an FTC case involving Ed Tech. And the company at issue there, I don't think they're doing business in the U.S. anymore, but Edmodo was the name. They're an Ed Tech company, and they were collecting information from kids without proper consent.

They, information they were collecting was being used for purposes above and beyond what was necessary for educational purposes. Even advertising was being targeted to kids as a result. But the interesting wrinkle in this case is Edmodo had a term in their policies with schools that attempted to deflect responsibility to the schools. Edmodo had a passage that said, the school district or teacher is solely responsible for complying with COPPA. And let's be clear, you cannot contract away your responsibility under COPPA. And of course, the FTC brings an action against Edmodo, makes it very clear that Edmodo is responsible for making sure that COPPA is being complied with.

But to be clear, complying with COPPA in the context of education and schools and teachers is really complicated. We have normal COPPA; we deal with that. But if you're Ed Tech, if you're a school, the rules around how to comply with COPPA and how schools can consent in some situations for kids, very complicated, lots of information on the FTC website about that. But the important lesson here – and obviously if you're in that Ed Tech space, you really need to be looking very closely at those FAQs – you can't shift COPPA responsibility onto others or onto teachers and schools. So, we're going to continue to see lots and lots of COPPA cases coming up in the future from the FTC. And, of course, Congress is also pondering changes to COPPA and the FTC's COPPA rule making. I think that one's been pending since 2019 or 2020, so any day now. Any day now.

Mudge Oh, yeah. We're waiting for that one. I mean, I do think it is really interesting because, I mean, certainly there's been COPPA cases for so long. But the focus and really the, you know, the perceived evil is the idea of targeted advertising directed to children. I wouldn't be surprised if some of these Ed Tech companies thought that they had a pass, some kind of immunity. You know, for doing good things, trying not to advertise necessarily to kids, but really to help coordinate the educational experience. But that is not, in fact, the case.

And similarly, with these education substantiation cases, what I see here is parents are a vulnerable audience. They are desperate to make sure that their children have a leg up. They're very open to being kind of brought in to over-hyped claims of what a product can do as far as making your children the shiny little snowflake that you know that they are. And really, any of the educational claims, those are hardcore performance claims that require competent and reliable scientific evidence. There is so much focus about the need to protect children online from games and from social media. And of course, that is the stuff that we see so much in the headlines. But I think my takeaway from today is if you're making toys or other sort of run-of-the-mill physical things, there is still that same substantiation obligation. And if you're providing tech to support education, the rules are, you know, you still have to abide by those core COPPA principles of making sure that you have the right parental consents in place.

Kaufman: Yeah, absolutely. You know, Amy, it has been very enjoyable doing this very special edition of AD Nauseam. Really appreciate the insights, and that is all we got. Thanks for joining us, everybody.

Mudge: And please, join us next time for AD Nauseam.

Brave: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our AD-ttorneys Law Blog at www.adttorneyslawblog.com, and check out all AD Nauseam podcasts by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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