

ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

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Court Enjoins Sales of RealDVD

A Northern California court has ordered RealNetworks to temporarily stop selling RealDVD, software that allows users to copy DVDs onto their computer hard drives.

U.S. District Judge Marilyn Patel extended a temporary restraining order on October 7, saying she wanted time to study how the technology works. She indicated that the earliest available date she had open for another hearing was sometime after November 17.

"I am extending the temporary restraining order because I'm not satisfied in the fact that this technology is not in violation," Patel said following the three-hour hearing. "There are serious questions about copyright violations. There are questions about violations of the [Digital Millennium Copyright Act], and violations of these companies' agreement," said the judge, who also oversaw the music industry's lawsuit against Napster, the peer-to-peer file-sharing Web site.

The order comes in the midst of dueling lawsuits between RealNetworks and the Motion Picture Association of America. The MPAA contends that the software violates the DMCA by circumventing anti-copy protections on DVDs to enable consumers to copy movies. The software also violates RealNetworks' agreement with the DVD Copy Control



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Speaker: [Linda Goldstein](#)

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Speaker: [Kerrie L. Campbell](#)

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Association, the group responsible for protecting DVDs against piracy, the MPAA claims. Shortly after the MPAA filed its lawsuit, the court granted its request for a restraining order against RealNetworks.

RealNetworks told the court that RealDVD allows consumers to copy a DVD and store it on a hard drive without circumventing any of its copy protections. Moreover, it said, nothing in the company's agreement with the DVD Copy Control Association prohibits what RealDVD does.

The MPAA countered that the law requires RealNetworks to stay within the parameters of what is specifically allowed by contract, which does not include what RealDVD does. It also argued that the software removed some of the copy protections on DVDs. It said that although the fair use doctrine allows consumers to make copies of videos they own, the software enables them to make unauthorized copies of videos they rented as well.

RealNetworks argued that the restraining order was causing it serious financial harm. At the same time, it contended, sales of RealDVD would not cause any significant hardship to the movie industry because there are already many products on the market that allow consumers to copy DVDs. The movie industry countered that the software not only allows buyers to make unauthorized copies of rented movies, but also gives consumers the impression that such a practice is legal.

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Arbitron's Radio Rating System Draws Controversy

Arbitron Inc. is in a court battle with the states of New Jersey and New York over its new electronic radio ratings service.

Earlier this month, New York and New Jersey filed separate lawsuits against the radio audience research company over the marketing of its Portable People Meter. Both states allege Arbitron is engaged in false advertising and deceptive business practices in violation of state consumer protection and civil rights laws.

Arbitron said that it has countersued both states in New York and New Jersey federal courts, requesting that the attorneys general be enjoined from preventing the launch of its new product.

Magnificent Mile

Chicago, IL

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December 4-5, 2008

Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Speaker: [Linda Goldstein](#)

Topic:

"The Value of Fame: Understanding the Right of Publicity"

Speaker: [Mark S. Lee](#)

Century Plaza Hotel

Los Angeles, CA

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The Portable People Meter, or PPM, is a pager-like method for tracking listening habits that's intended to replace the paper diaries currently in use. The company launched the service on October 6 in New York, Los Angeles, Chicago, San Francisco, and other metropolitan areas after testing it last year in Philadelphia and Houston.

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Arbitron says the PPM is more accurate and reliable. Critics, however, contend that its smaller sample size could result in undercounting minority listeners.

The company said blocking the service would cause "severe irreparable harm" to its business and violate its First Amendment rights to publish its listening estimates.

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Foot Locker Faces Lawsuit Over Gift Card Policy

Foot Locker is defending a lawsuit in New Jersey state court that charges that the store's gift card policies violate state consumer protection laws.

In a lawsuit filed in late August, plaintiff Joseph Vona, who is seeking class-action status, alleges that the retail chain's use of dormancy fees—a small fee charged to the gift card if it has not been used for a period of time—violates a state law passed in 2006.

Foot Locker has moved to have the case transferred to federal court.

According to court filings, Foot Locker, which also owns Lady Foot Locker, Kids Foot Locker, and Champs Sports, estimated it has sold about 50,000 gift cards in New Jersey since April 2006, when it launched the dormancy fee policy. Among the terms and conditions on the back of the card, Foot Locker states it can deduct a service fee of \$1.50 per month from the value of the card for nonuse over 12 consecutive months.

New Jersey is among a number of states that have imposed limits on dormancy fees or banned them outright. New Jersey's Gift Card Act forbids companies from charging the fees until 24 months have passed between purchases, and limits the fees to \$2 per month. The statute also requires notice of any fees to appear in at least 10-point type, a requirement Vona alleges Foot Locker has failed to meet by using significantly smaller type.

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Spammer Couple Fined \$236 Million

An Arizona husband and wife team has been ordered to pay more than \$236 million for spamming a small Internet service provider.

An Iowa federal court ordered Henry Perez and Suzanne Bartok to pay the massive damages award, which was determined using a calculation of \$10 per bulk e-mail. The ruling came after the conclusion of a four-year court battle in which the judge found the couple had deluged CIS Internet Services of Clinton, Iowa, with spam over a four-month period in 2003. Using a program called Bulk Mailing 4 Dummies, the two sent millions of e-mails to CIS servers, forcing the company to install an expensive server upgrade and devote three servers to blocking spam, the court found.

According to CIS owner Robert Kramer III, starting in 2001, CIS gradually became swamped by spam from various sources, to the point where the company was processing about 500 million spam messages a day. Kramer believes his company may have been the target of excessive spam because its domain name, cis.net, was similar to cis.com, the domain name once used by CompuServe, which had been one of the largest ISPs in the United States.

The attacks made it more difficult for CIS customers to navigate the Internet, and Kramer's client base declined from about 5,000 customers in 2001 to just 1,200 by late 2004.

Since 2003, CIS has sued a number of spammers and has won about 10 judgments, according to Kramer. Collecting the money is a different story. Many of the spammers have gone out of business, moved their money overseas, or simply disappeared, he said.

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Massive Spam Operation Shuttered

An Illinois federal court recently ordered the shutdown of an operation described by the Federal Trade Commission as one of the world's biggest spam networks.

The ring, which operated under names such as HerbalKings and Click Fusion, e-mailed billions of unsolicited messages over the last year and a half, plugging herbal pills claimed to

permanently enhance the male anatomy, as well as luxury goods, counterfeit pharmaceuticals, and pornography, according to the FTC.

The probe offers a glimpse into the inner workings of modern spam. To send spam, HerbalKings used a botnet, or a worldwide network of computers on which it had secretly installed malicious software. The New Zealand security firm Marshal Software, which aided in the investigation, estimated in court documents that the group's Mega-D botnet—named after one of its pill products—included 35,000 computers capable of sending 10 billion e-mails a day. In January, the botnet was the world's single biggest source of spam, according to the firm.

FTC officials said the group possibly ranked as the most extensive spam operation the agency had ever come across, with ties to Australia, New Zealand, India, China, and the United States. They said their monitoring of the group's finances revealed it cleared \$400,000 in Visa charges in one month alone.

The commission requested a court order freezing the group's finances under the CAN-SPAM Act of 2003. The government is also pursuing criminal charges against the group.

As is the case with many criminal Internet operations, the activities of HerbalKings were international. The group was illegally selling Propecia, Lipitor, Celebrex, Zoloft, and other prescription drugs and shipping them from India. It was basing its Web sites in China, fulfilling credit cards from the Republic of Georgia and Cyprus, and transferring monies among members using ePassporte, an electronic money network.

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NAD Reveals More Efficient Dispute Resolution Process

The National Advertising Division of the Council of Better Business Bureaus is the advertising industry's self-regulatory watchdog. One of its primary functions is to hear and resolve disputes between advertisers.

An NAD survey conducted late last year showed that the length of time to obtain a decision was an issue for many respondents. In response to those concerns, the NAD has announced a number of improvements geared to ensuring

that cases move through the process as quickly as possible.

1. Requests for extensions: To reduce delays caused by granting of extensions, NAD has implemented a new process in considering such requests.

- NAD attorneys, upon the request of a party, can grant an extension of up to three days.
- To get more time, a party will need the consent of the opposing party.
- If the party is unable to get consent, it must seek the extension directly from the NAD Director, who will grant a further extension only for good cause.

2. Meetings with parties:

- NAD attorneys are now scheduling in-person meetings with parties at the time of the advertiser's initial response and are informing parties that if they wish to meet, they must do so within the 2- to 3-week period following the filing of the final submission in a case.

3. Case opening notifications:

- The NAD has a new system to proactively identify cases in which an opening letter might be misdirected or not recognized by the recipient, thus causing delay. In these cases, NAD will follow up to ensure that the case opening notification has been received, opened, and directed to the right office within the advertiser. This new process will also enable NAD attorneys to more quickly determine if a company intends to participate in self-regulation or if the matter must be referred to the government.

4. Case tracking software:

- NAD now is licensing an electronic case management system configured to fit NAD's procedures and case handling needs.

5. Issuance of NAD decisions: NAD Policies and Procedures provide for issuing a final decision within 15 business days of the last meeting with the parties. For a number of reasons, this deadline is not always met.

- Using the new automated case tracking process, the NAD Director is closely monitoring the timing of the decisions. If for any reason the final decisions will not

be issued within 15 business days, the NAD attorney assigned to the case will call the parties to tell them the status and expected timing of the decisions.

6. Ongoing monitoring:

- NAD is implementing a new system to survey both advertisers and challengers on their experience on a case-by-case basis.

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Antipiracy Bill Signed Into Law

President Bush on October 13 signed into law a measure that will give copyright owners greater sway in fighting trafficking in pirated or counterfeited movies, music, drugs, and software.

The statute, dubbed the PRO-IP Act, establishes a White House office coordinator charged with protecting the nation's intellectual property. Initially the coordinator was to be located in the Justice Department, but after the DOJ complained, the bill sponsors moved it to the Executive Office of the President.

Bill sponsor Senator Patrick Leahy (D-Vt.) said in a statement that the law is among the most important he has put his weight behind. "At a time of financial and economic turmoil, streamlining the government's efforts to protect one of our most important assets—intellectual property—makes good economic sense," he said.

The bill received wide support among industry trade groups seeking to protect intellectual property rights. Digital rights groups and other consumer advocates, on the other hand, fretted that it tilts the balance too far in favor of industry and to the detriment of consumers.

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