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

IN THIS ISSUE

Court Strikes Down California Video Game Law

The Ninth Circuit Court of Appeals has struck down as unconstitutional a California state law requiring labels on violent video games and limiting their sale and rental to minors.

In a February 20 opinion, the court ruled that the labeling requirement violates free speech rights by forcing games to adopt "the state's controversial opinion" about which ones are violent.

The court affirmed a lower court ruling that the California Legislature failed to prove that violent video games cause psychological or neurological harm to kids. "Even if it did, the Act is not narrowly tailored to prevent that harm and there remain less restrictive means of forwarding the state's purported interests," the court wrote.

Such steps include the Entertainment Software Rating Board's voluntary ratings system, educational campaigns, and parental controls, the court said.

Shortly after its enactment, the 2005 law, which requires an "18" label on violent games, was challenged by the video game industry in *Video Software Dealers Association v. Arnold Schwarzenegger*. A lower court enjoined the law in 2006, and later struck it down.

UPCOMING EVENTS

March 16-18, 2009
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Topic:
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Co-Chair & Moderator: Kenneth M. Kaufman

New York, NY
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April 2-3, 2009
PLI's Information Technology Law

The state took an appeal of the decision last October.

Jon Leibowitz to Head FTC

President Obama has selected current Federal Trade Commission member Jon Leibowitz – who is also the commission's sole Democrat – to serve as chairman of the agency.

The administration announced the appointment on March 2. Leibowitz will take over from William Kovacic, who replaced Deborah Platt Majoras in March 2008, when she left the agency to become general counsel of Procter & Gamble.

Observers expect a Leibowitz-run agency to continue its current posture of pushing for industry self-regulation. But Leibowitz has not ruled out FTC regulation of activities such as behavioral targeting.

"Industry needs to do a better job of meaningful, rigorous self-regulation, or it will certainly invite legislation by Congress and a more regulatory approach by our commission," he said last month.

As commissioner, online privacy was a priority for Leibowitz. In November 2007, Leibowitz proposed that online companies should use an "opt-in" approach to cookies instead of the current "opt-out" tactic. He also has floated the notion of a "Do Not Track" list for Internet users.

The FTC is run by five commissioners nominated by the President. Each serves a staggered seven-year term. A maximum of three commissioners can belong to the same political party at any one time. Kovacic and Commissioner J. Thomas Rosch are Republicans, and Commissioner Pamela Jones Harbour, whose term will expire in September, is an Independent. Majoras' spot is currently empty. President Obama is likely to fill those two spots with Democrats or Independents.

Intel and Psion Fight Over "Netbook" Trademark

Intel Corporation is battling with Psion Teklogix, Inc. over the trademark held by Psion for the term "netbook."

Last month, Intel sued for a declaratory judgment that Psion's

Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems

Topic:
"Mobile Advertising and Web 2.0"

Speaker: Linda Goldstein

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April 22-23, 2009
Food and Drug Law Institute 52d Annual Conference

Topic:
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Speaker: Christopher A. Cole

L'Enfant Plaza Hotel
Washington, DC
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April 29, 2009
American Advertising Federation Webinar

Topic:
"Budget Busters: Bongs, Blogs, and Brand Wars."

Speaker: Jeff Edelstein

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June 4-6, 2009
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trademark is invalid. The complaint filed in U.S. District Court for the Northern District of California refutes Psion's claim to an exclusive right to the term, and demands an immediate order canceling the trademark. The Canadian company has countersued, defending its claim to the trademark and demanding triple damages based on Intel's profits on netbook products (about $1.2 billion) plus punitive damages.

In its complaint, Intel argues that the term, which describes a compact, inexpensive, stripped-down laptop used primarily for web browsing and e-mails, has become highly generic, with vendors, press, and consumers using it to describe devices in at least 38 brands, involving many different processors from Intel, VIA, and ARM vendors. It points out that Psion's netbook trademark never enjoyed significant use in the U.S., and has been dormant for some time.

Intel also argues that Psion is guilty of fraud in getting an extension of its trademark. Psion filed for an extension in late 2006, saying it had "used the [term "Netbook"] in commerce for five consecutive years after the date of registration or the date of publication." Psion got its original trademark in 2000 in connection with the netBook computer, which it discontinued in 2003. Intel asserts that this extension filing was fraudulent, "based on material false misstatements."

After Psion pulled its netBook in 2003, the netbook market lay dormant until 2007, when it started building steam. When the market exploded in 2008, industry, consumers, and the press began looking for a descriptive catchword, and Intel brought "netbook" back into use.

In December 2008, Psion began sending cease-and-desist notices to various manufacturers, journalists, and others to stop using the term netbook. The notices were largely ignored, until Google announced last month that it was banning the trademarked term from Adsense ads. This set off a wave of protests. In February, Dell Inc. petitioned the U.S. Patent and Trademark Office to cancel Psion's trademark, due to abandonment, fraud, and genericness.

National Conference 2009

Speaker: Jeff Edelstein

Crystal Gateway Marriott
Arlington, VA
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Obama Nominates Campaign Aide to Lead FCC

President Obama announced on March 3 that he will nominate Julius Genachowski to chair the Federal Communications

Commission.

The announcement came on the heels of months of rumors that Obama would tap Genachowski, and an unintentional confirmation of his choice by an administration official during a morning television talk show several weeks ago.

Genachowski, 47, is widely hailed as the first FCC nominee who is both a business executive and a Washington telecom policy insider. He served as chief legal counsel to FCC Chairman Reed Hundt and clerked for Supreme Court Justice David Souter. He also worked for Barry Dillar's IAC/InterActive Corporation and more recently founded a venture capital firm LaunchBox Digital, which funds start-ups in mobile and Web 2.0 industries.

Genachowski also enjoys unusually close ties to President Obama. They were friends at Columbia University and later at Harvard Law School. Genachowski worked on Obama's campaign from the beginning, writing its technology and innovation plan. He was lauded for crafting the groundbreaking campaign tactics that tapped online social networks and YouTube to raise money and spread Obama's message.

If confirmed as expected, Genachowski will take over an agency charged with developing a strategy to provide every home with high-speed Internet access. Current plans call for bringing broadband Internet to rural and low-income areas within one year. Other challenges include oversight of a difficult nationwide crossover from analog broadcast to all-digital television. Congress is also grappling with the development of an effective and comprehensive communications network for emergency first-responders.

Court: NYC Food Chains Must Post Calories

The Second Circuit Court of Appeals has upheld a New York City regulation that requires most big chain restaurants to display calorie data on their menus.

"This is good news for everyone," said NYC Health Commissioner Dr. Thomas R. Frieden. "Nearly all chain restaurants are now complying with the law. Consumers are learning more about the food before they order, and the market for healthier alternatives is growing. We applaud the court for its decision, and we thank the

restaurant industry for living by the rules."

A three-judge panel rejected a challenge by the New York State Restaurant Association that federal Food and Drug Administration regulations preempted the calorie-count rule, and that the rule violated First Amendment free speech rights of restaurants.

The panel was composed of Judge Rosemary S. Pooler, who authored the decision; Judge Sonia Sotomayor; and Chief Judge Jane A. Restani of the U.S. Court of International Trade, who sat by designation of the Second Circuit.

The panel found that Congress intended to exempt restaurants from the Nutrition Labeling and Education Act of 1990 and left authority to state and local governments to require calorie counts and other information. It also rejected the association's First Amendment stance. "The First Amendment is not violated, where as here, the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City's goal of combating obesity," the court wrote.

The rule, adopted by the city's Board of Health in 2007, initially applied to restaurants that already voluntarily provided nutritional data. In June 2007, the association sued, asserting that existing law governing voluntary food labeling by restaurants prevented the city from establishing its own requirements. In September 2007, a federal district court sided with the association and struck down the rule. But it left open the prospect that the city could require all restaurants, or a defined group of restaurants, to post calorie information.

The city amended the rule to apply to chain restaurants with at least 15 locations nationwide. The new rule was to go into effect in March 2008. The restaurant association again sued, but this time it lost. On appeal, the Second Circuit declined to stay enforcement, but the city agreed not to seek fines until July 18, 2008, to give restaurants time to comply.

The restaurant association may ask the three-judge panel for reconsideration, or may ask the full Court of Appeals to rehear the case. It may also file a cert petition with the U.S. Supreme Court.

States considering menu labeling regulations include Indiana, Florida, Hawaii, Kentucky, Maine, Massachusetts, Minnesota, New York, West Virginia, Maryland, and South Carolina. California passed a menu labeling law last year. Although some people say, "There's thin, and there's New York thin," the city is not, in fact,

the thinnest in the country. That honor goes to Denver (and Colorado is the country's thinnest state). Tipping the scale the other way is San Antonio, ranked as the country's fattest city.

Supreme Court Upholds Failure to Warn Drug Claims

In a decisive setback for the pharmaceutical industry, the U.S. Supreme Court has ruled that plaintiffs harmed by prescription medication may pursue so-called "failure to warn" lawsuits even though labeling complied with Food and Drug Administration requirements.

The Justices split 6-to-3 to uphold a jury verdict of $6.7 million in damages for a Vermont guitarist whose arm had to be amputated after she was injected with an antinausea drug. The drug's manufacturer, Wyeth, had argued that its fulfillment of FDA labeling rules should immunize it from any argument that it failed to adequately warn patients of possible side effects.

The decision came as a major surprise to many Court observers. In recent years, the High Court has ruled several times that federal law should preempt state injury suits. Last year, in *Riegel v. Medtronic*, the Court ruled 8-to-1 that state-law-based suits over injuries caused by medical devices were barred by the express language in a federal law. With *Wyeth v. Levine,* industry supporters were hopeful that the Court would extend that reasoning to cases involving implied preemption, or what might be implied from federal regulatory standards and policies.

The Bush administration had been a major proponent of implied preemption and until *Wyeth,* a conservative Supreme Court has been viewed as sympathetic to those efforts. But *Wyeth*, combined with an Obama-run administration that will likely pull back on such efforts, suggests a much more narrow role for implied preemption going forward.

Writing for the majority, Justice John Paul Stevens found that Congress could have required preemption in the case but had not. "Evidently," he said, "it determined that widely available state rights of action provided appropriate relief for injured consumers." He distinguished *Riegel*, noting that Congress did adopt just such an express preemption provision for medical devices.

Until a recent policy shift under the Bush administration, Justice Stevens wrote, the FDA viewed state personal injury suits as a

useful complement to federal regulation. But in 2006, in "a dramatic change in position," Justice Stevens said, the agency reversed that longstanding policy notwithstanding its "limited resources to monitor the 11,000 drugs on the market."

The agency's new position, Justice Stevens wrote, "is entitled to no weight."

Justice Stevens was joined by Justices Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer. Justice Clarence Thomas concurred in a separate opinion, saying that he objected generally to "far-reaching implied preemption doctrines" that "wander far from the statutory text."

Justice Samuel A. Alito Jr., writing for himself; Chief Justice John Roberts; and Justice Antonin Scalia, said the Court had done an about-face, "turning yesterday's dissent into today's majority opinion" and turning ordinary injury suits into a "frontal assault on the FDA's regulatory regime for drug labeling."