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

IN THIS ISSUE

- Copyright Ruling Shores Up Open-Source Software
- Fox and *Warner* Tussle Over Watchmen Rights
- FTC Bans Telemarketer Robocalls
- President of Prescription Drug Site Pleads Guilty
- France Bans Marketing of TV Shows for Babies
- FCC Issues Net Neutrality Penalties Against Comcast

Copyright Ruling Shores Up Open-Source Software

On August 13 a federal appeals court gave a boost to open-source software and user-created Web sites such as Wikipedia.

The U.S. Court of Appeals for the Federal Circuit found that provisions of an agreement called the Artistic License were enforceable under copyright law. The decision provides a possible legal foundation for a key principle behind open-source software and other creations the public is permitted to freely amend and distribute.

The case centers around free software used in model trains, which Robert Jacobsen made available to other users online. Jacobsen, a model train buff, sued Matthew Katzer and his company under copyright law, alleging that Katzer used his software to create commercial software for model trains in violation of the conditions of the software license from Jacobsen.

The U.S. District Court for the Northern District of California ruled that Jacobsen's license, being "intentionally broad," did not impose liability under copyright law. The court suggested Jacobsen could instead claim breach of contract. The distinction meant that Jacobsen was not able to seek the statutory damages or injunctive relief available under

UPCOMING EVENTS

October 21, 2008
ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

For more information

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October 22, 2008
D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

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November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

copyright law.

To the benefit of Jacobsen and other open-source developers, the Federal Circuit reversed the lower court, finding "that the terms of the Artistic License are enforceable copyright conditions."

Observers said the decision could help bolster the legal grounds for open-source software and projects. For the many companies that rely on open-source, this decision provides some welcome reassurance that their rights are enforceable under copyright law.

back to top

Fox and *Warner* Tussle Over Watchmen Rights

The superheroes of *Watchmen*, Warner Brothers' much-anticipated upcoming movie, have a new foe: 20th Century Fox.

On August 13 the U.S. District Court for the Central District of California denied a motion by Warner to dismiss copyright infringement claims made by Fox.

Fox said it will ask the court to block the film's release pending trial. In a statement, a Warner spokesman said the judge's ruling in favor of Fox did not reflect the merits of the case.

In its complaint, Fox alleges that Warner violated its copyrights and interfered with contracts by filming the movie despite agreements under which Fox acquired rights to the graphic novel on which it is based.

According to Fox's complaint, Warner, in acquiring rights through producer Lawrence Gordon, failed to acquire certain rights already owned by Fox, including the right to distribute any picture made by Gordon's company.

If past industry practice is any indication, the parties will likely settle their dispute at some point before the March 2009 scheduled release of the film.

Watchmen is a legendary comic book series written by Alan Moore and illustrated by Dave Gibbons. Originally published in 1986 to 1987 by DC Comics as a limited monthly series, it was later republished as a trade paperback, popularizing the

Sweepstakes, Games & Contests"

Linda Goldstein

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

Kerrie L. Campbell

Marriott Downtown 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"

Linda Goldstein

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

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

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"graphic novel" format. It tells the story of superheroes in an alternate world who confront ethical and personal issues, struggle with neuroses and failings, and—with one exception—lack anything immediately recognizable as superpowers. For many years it was considered too difficult for a Hollywood film, until Zack Snyder, the director of Warner's hit *300*,adopted it as his next project.

back to top

FTC Bans Telemarketer Robocalls

The Federal Trade Commission has banned telemarketing calls using prerecorded messages unless the customer has provided written consent to receive calls.

The new rule is included in the agency's final Telemarketing Sales Rule amendments regarding prerecorded calls. The amendments were released on August 19.

In addition to the ban on robocalls, the FTC has also amended the method for calculating the maximum permissible level of call abandonment (when a call is placed by a predictive dialer but is picked up before the salesperson is ready). The new rule changes that calculation from 3% of a company's daily call volume to the same percentage over a 30-day period.

In addition, under the amendments, all prerecorded sales calls must offer an opt-out feature to permit consumers to immediately add themselves to the caller's do-not-call list.

Allen Hile, FTC assistant director of the Division of Marketing Practices, said the robocall ban clarifies the definition of "established business relationship" under the TSR. He said the change in how call abandonment is calculated was made to help small businesses as well to assist all telemarketers to better target their calling campaigns.

Automated informational calls, such as flight cancellations or appointment reminders, are exempt from the provisions. Charitable fund-raising calls are also excluded from the ban, but charities will have to give consumers the option to opt out of future calls. Certain types of companies, such as banks, telephone companies, and insurance companies are not subject to FTC jurisdiction, although their outside telemarketers are.

The call abandonment amendment will go into effect on October 1. The amendment requiring an automated interactive opt-out mechanism will go into effect December 1, while the amendment requiring consumer permission to receive such calls will go into effect on September 1, 2009.

back to top

President of Prescription Drug Site Pleads Guilty

Jared Wheat, the president of online drug Web site Hi-Tech Pharmaceuticals, has struck a plea bargain with federal prosecutors, ending a long-running probe into the illegal import of discount prescription drugs from Central America.

Wheat, 36, pleaded guilty to conspiring to commit mail fraud and wire fraud, and to import and distribute adulterated and unapproved new drugs. He is expected to serve about two years in prison.

At the same hearing, three other company officers—Stephen Smith, Tomasz Holda, and Sergio Oliveira—also pleaded guilty to the same charge. Sentencing is scheduled for October 21.

Wheat was arrested in September 2006. The government indictment charged him and 10 others with illegally selling about 24 kinds of misbranded pills online. The group sold millions of dollars' worth of drugs before Belizean authorities upset their scheme, prosecutors said.

The company spammed users with ads for cheap, generic versions of Valium, Xanax, Viagra, and other drugs supposedly made in Canada. In actuality, the drugs were manufactured in an unsanitary four-room house in Belize and shipped to customers and wholesalers, prosecutors said.

Prosecutors described Hi-Tech as a dangerous criminal operation. They said Wheat and other company founders talked about using blackmail and assassination to thwart the investigation. Although no charges were filed involving the alleged plots, Holda, the company's vice president, later pleaded guilty to ordering a silencer online.

In turn, Hi-Tech accused prosecutors of being overly aggressive. In a November 2007 statement, the company faulted prosecutors for the suicide of Holda's wife, who shot herself after allegedly being threatened with criminal charges.

Originally, the government sought forfeitures totaling $19.8 million in cash, 27 bank accounts, 17 pieces of real property, and 15 vehicles. Prosecutors said the government would keep $3 million in cash seized when Wheat was arrested.

back to top

France Bans Marketing of TV Shows for Babies

The French government has ordered French channels to cease marketing TV shows to children under 3 years old.

The August 20 ruling by the High Audiovisual Council also requires foreign baby channels broadcast in France—such as Baby TV, which is owned by Rupert Murdoch's News Corp., and BabyFirstTV, which has ties to News Corp.'s Fox Entertainment—to include warning messages for parents.

The Council said its new regulations are aimed at protecting children under 3 from developmental risks that television viewing poses to that age group. Its ruling is designed to prevent programming such as BabyFirstTV and Baby TV on French channels, by preventing them from marketing content as suitable for babies.

"Television viewing hurts the development of children under 3 years old and poses a certain number of risks, encouraging passivity, slow language acquisition, over-excitedness, troubles with sleep and concentration as well as dependence on screens," the ruling said.

Under the ruling, French cable operators airing foreign programs for babies must broadcast a warning message to parents that reads, "Watching television can slow the development of children under 3, even when it involves channels aimed specifically at them."

BabyFirstTV CEO Guy Oranim said he "respectfully objects" to the French council's ruling. He said the channel's content is carefully screened to ensure it is positive and educational, and that the channel encourages parents to ensure their babies don't watch excessive amounts of TV, instead including it in a balanced schedule. He pointed to research suggesting that, even without programming aimed specifically at them, most babies are watching TV anyway.

back to top

FCC Issues Net Neutrality Penalties Against Comcast

On August 19 the Federal Communications Commission released the long-awaited text of its ruling against Comcast regarding the cable operator’s practice of blocking certain file-sharing traffic.

The agency found that Comcast broke agency rules by hindering peer-to-peer BitTorrent transfers. It was the first time the FCC has found that a broadband provider violated its Net neutrality principles. The agency principles state:

1. Consumers are entitled to access the lawful Internet content of their choice;

2. Consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;

3. Consumers are entitled to connect their choice of legal devices that do not harm the network;

4. Consumers are entitled to competition among network providers, application and service providers, and content providers.

Under the ruling, within 30 days of its release, Comcast must disclose "the precise contours" of its current and future network management practices, and submit a "nondiscriminatory network management" compliance plan for FCC approval. The company will not be fined.

If Comcast fails to comply, the FCC said it will be required to "suspend the network management practices" associated with handling BitTorrent transfers.

Comcast has appealed the FCC's 67-page ruling. "The commission's action was legally inappropriate and its findings were not justified by the record, Comcast Executive Vice President David Cohen said in an e-mailed statement. He said that Comcast, the biggest U.S. cable-TV operator, still intends to "comply fully" with the FCC order. There is disagreement over whether the FCC actually has the legal authority to enforce its Net neutrality principles against network providers and others.

The FCC majority found that "Comcast's practices contravene industry standards and have significantly impeded Internet users' ability to use applications and access content of their choice. . . . Moreover, the practices employed by Comcast are ill-tailored to the company's professed goal of combating network congestion. In sum, the record evidence overwhelmingly demonstrates that Comcast's conduct poses a substantial threat to both the open character and efficient operation of the Internet, and is not reasonable."

The ruling may not have a major impact on Comcast’s Net management practices, since the broadband provider has already announced that it will adopt a "capacity management technique that is protocol-agnostic" by the end of 2008.

The issue first came to light last fall when an Associated Press study found that Comcast was hindering BitTorrent traffic.

back to top