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ADVERTISING LAW

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

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Anticopying Software Disappears From Downloaded Audiobooks

Following in the footsteps of several major digital music sellers, several of the world's biggest book publishers are forgoing antipiracy technology on electronic downloads of audiobooks.

The move will let customers transfer digital files of audiobooks between computers, iPods, and cellphones, as well as share them with others. Removing copy restrictions could also facilitate the sale of audiobook downloads by online retailers.

The move is intended to spur growth in the audiobook industry, which produced \$923 million in sales in 2007, according to the Audio Publishers Association.

The first to announce that it was stripping D.R.M., or digital rights management software, from its audiobooks was Random House. In a letter to industry partners sent out last month, the world's largest publisher stated that starting this month, it would sell all of its audiobooks as unprotected MP3 files, unless retail partners or authors specified otherwise.

Penguin Group, the second-largest U.S. publisher, is poised to follow Random House's example. A spokesman said the publisher would offer all of its audiobooks as MP3 downloads on eMusic, a major digital music service. The Penguin spokesman said the company decided to offer unprotected audiobook downloads after seeing the major music labels strip D.R.M. from the digital music they sell on Amazon.com.

Simon & Schuster Audio has also announced its intention to offer unprotected downloads of 150 audiobooks sometime this

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 Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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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 of Sweepstakes, Games

spring.

Should the trend take hold, it could shift the balance of power in the realm of digital audiobooks. Right now, Audible, a Seattle company that Amazon.com bought for \$300 million in January, dominates the market. The company provides the audiobooks for Apple's iTunes store. Apple's iPod plays only audiobooks in Audible's format or unprotected formats like MP3. Publishers are loath to limit consumers to a single online store like iTunes for audiobooks playable on the iPod. The unprotected MP3 format will allow other online retailers to sell audiobooks that will work on all digital devices, including the iPod.

Initially, publishers, like the music labels and movie studios, embraced D.R.M. out of concern that pirated copies would cut into revenue. To see if this concern was justified, when it first started offering D.R.M.-free audiobooks for sale, Random House encoded these copies with a digital watermark and monitored online file sharing networks. Its finding: Pirated copies of its audiobooks were actually being made from physical CDs or D.R.M.-encoded digital downloads whose anticopying protections were overridden, not the D.R.M.-free audiobooks.

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Airborne Settles False Advertising Claim

Airborne, a multivitamin and herbal supplement, will settle a false advertising class action for \$23.3 million.

Under the settlement announced March 3, Airborne neither denied nor admitted wrongdoing. The company will refund the monies paid by any consumer who bought its product between May 2001 and November 2007, if they still have receipts. People without receipts are still eligible for refunds for up to six boxes based on average retail prices of \$2.75 to \$10.50. The settlement concludes a 2006 lawsuit brought in federal court for the Central District of California.

Airborne will also buy ads in *Better Homes & Gardens*, *Parade*, *People*, *Newsweek* and several other magazines and newspapers instructing consumers how to get refunds.

Airborne's basic formula contains Vitamins A, C, and E, as well as other nutrients common in multivitamins; the amino acids glutamine and lysine, and an "herbal extract proprietary blend." Created by former second grade teacher Victoria Knight McDowell and her screenwriter husband Thomas Rider McDowell, Airborne initially instructed users to "take it at the first sign of a cold symptom or before entering crowded, potentially germ-infested environments."

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: Issue and Litigation"

[Linda Goldstein](#)

Topic:

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

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

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But in February 2006, ABC's *Good Morning America* questioned the methodology of the clinical trial Airborne cited in support of its claims. Subsequently, Airborne deleted any reference to colds from its packaging. AirborneHealth.com now describes its product as "the best-selling herbal health formula that boosts your immune system to help your body combat germs." The company had projected sales of \$300 million for the fiscal year ending March 31.

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Court Approves Class Action Status for "Vista Capable" Lawsuit

A federal judge in Seattle has given class action status to a lawsuit claiming that Microsoft unfairly profited by touting personal computers as "Windows Vista Capable" even when they couldn't run basic functions of the operating system labeled "Vista Home Basic."

During the 2006 holiday shopping season, "Vista Home Basic" showed up on PCs in an effort by Microsoft to keep up sales of Windows XP computers after an unexpected delay of the debut of Windows Vista.

At a hearing last month, plaintiffs' lawyers argued that all consumers who purchased "Windows Vista Capable" PCs had in common the fact that "each person in our class did not get what they paid for." Microsoft countered that because each customer who purchased a PC labeled "Windows Vista Capable" was privy to different information at the time of sale, the lawsuit should not get class action status. The judge sided with plaintiffs, granting class action status on the grounds that "common issues predominate. . . . These common issues . . . are whether Vista Home Basic, in truth, can fairly be called 'Vista' and whether Microsoft's 'Windows Vista Capable' marketing campaign inflated demand marketwide for 'Windows Vista Capable' PCs."

The judge said plaintiffs could argue that Microsoft had artificially inflated demand – and prices – for computers only capable of running Vista Home Basic by marketing them as "Windows Vista Capable." But at the same time, she said plaintiffs could not continue the lawsuit on the grounds that consumers had been deceived because "an individualized analysis is necessary to determine what role Microsoft's 'Windows Vista Capable' marketing program played in each class member's purchasing decision."

The judge also found that the named plaintiffs could not also represent purchasers who took part in "Express Upgrade," a Microsoft program giving consumers the right to free or low-priced upgrades to Windows Vista after it debuted. She said

"injury" to those consumers was "correlated to the amount spent on the cost of the upgrade program, not the allegedly inflated price of the 'Windows Vista Capable' PCs." But she said plaintiffs could amend their complaint to add a named plaintiff who took part in that program.

A Microsoft spokesman said in a statement, "We are currently reviewing the court's ruling. We believe the facts will show that Microsoft offered different versions of Windows Vista, including Windows Vista Home Basic, to meet the varied needs of our customers purchasing computers at different price points."

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Experian Sues LifeLock Over Fraud Alert Service

Credit bureau Experian has sued fraud alert company LifeLock Inc. for misleading consumers into believing they have to pay for its services when the credit bureaus already offer them gratis.

LifeLock charges consumers \$10 per month to provide temporary fraud alerts with Experian and the other two big credit reporting agencies, remove their names from credit card mailing lists, get their annual credit reports, and assist them in correcting credit records should they become identity fraud victims.

In a lawsuit filed last month in federal court for the Central District of California, Experian accuses LifeLock of violating federal law by re-enrolling consumers in fraud alerts every 90 days and misleading them into believing they have to pay for services that credit bureaus provide for free.

Pursuant to the Fair Credit Reporting Act, such alerts are intended only for consumers who believe they are, or are likely to become, the victims of identity theft, Experian argues in its complaint. Only a consumer or "representative" of a consumer is supposed to be able to ask for a fraud alert. Experian says this does not include private companies such as LifeLock.

Experian also contends that it and the other credit bureaus are losing millions of dollars annually because of costs associated with LifeLock re-enrolling all of its customers in fraud alerts every three months. When a fraud alert is issued on a consumer's credit report, it is "frozen" and cannot be sold to marketers during that time.

Experian is asking for restitution for the costs it has incurred from LifeLock's activity, the profits LifeLock has earned from its alleged illegal practices, compensatory and punitive

damages, and an injunction preventing the company from falsely advertising its services.

Experts say they question how reliable some fraud protection services are, but find Experian's argument that a private company cannot place a fraud alert for a consumer suspect.

Since LifeLock launched its business in 2005, critics have blasted the company for selling a service that consumers can get on their own for free. LifeLock counters that it freely admits in its advertising that consumers can get the services it offers on their own.

The company has grown rapidly. In 2007, LifeLock's subscriber base grew from about 30,000 to 500,000 users, according to numbers provided by the company. Currently, the company said it has about 700,000 active customers and is adding about 120,000 more each month.

LifeLock has faced controversy before. Last summer it was revealed that one of its officers had been sued by the government for deceptive business practices stemming from a credit repair company he ran in the early 1990s. The officer left LifeLock over the summer in the midst of the controversy.

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