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## ADVERTISING LAW

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

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### Court Affirms \$120 Million Fine Against Seasilver

The U.S. Court of Appeals for the Ninth Circuit has affirmed a lower court ruling that orders makers of Seasilver dietary supplement to pay an avalanche fine of close to \$120 million for failing to comply with an earlier order.

The ruling requires Jason and Bela Berkes, Seasilver USA, Inc., and Americalo, Inc. to pay nearly \$120 million under a 2004 settlement agreement with the Federal Trade Commission. The agreement prohibited the defendants from making false or misleading claims and included a \$120 million judgment that would be suspended if they paid a \$3 million fine within a specified period. After the defendants failed to comply with the payment terms, the district court granted the FTC's request to enforce the avalanche judgment in June 2006, and the defendants appealed to the Ninth Circuit Court of Appeals.

The FTC's initial 2002 investigation of Seasilver focused on its claims that the dietary supplement was clinically proven to treat or cure 650 diseases, including cancer and AIDS. The marketers also claimed that Seasilver caused rapid, substantial, and permanent weight loss without dieting. The agency alleged the claims were false and unsubstantiated. In 2003, the FTC and the Food and Drug Administration joined forces to seize \$5.3 million in Seasilver inventory.

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### Blockbuster Sued Over Facebook Ad Program

### 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

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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

Blockbuster, the video retailer, is facing a class action lawsuit for its role in Facebook's controversial "social advertising" program.

The lawsuit by Cathryn Elaine Harris, a Texas resident, was filed on April 9 in federal court in Texas. The complaint alleges that Blockbuster, the video rental giant, violates federal law through its participation in Beacon, which shares rental history on "news feeds" of members of the popular online social networking site, unless a member opts out. The lawsuit, which is seeking class action status, asks for damages of \$2,500 per infringement. It does not name Facebook as a defendant.

The complaint states that Blockbuster shared Harris' movie rental history through Beacon, in violation of the 1988 Videotape Privacy Protection Act. The law was passed during the viciously contested nomination of judge Robert Bork to the U.S. Supreme Court in 1987, in the midst of which writer Michael Dolan went to a video store that Bork frequented and obtained a list of 146 videotapes his family had checked out.

Facebook launched the Beacon ad program in November. Privacy groups criticized the plan as violating the privacy of members whose buying history with certain ad partners would be revealed to their friends and families unless they opted out.

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The suit filed in February alleges that buyers were deceived because most purported "Vista Capable" PCs bought before the official retail launch in January 2007 lacked the hardware to run Vista Premium's memory-intensive media center and Aero interface.

A federal judge in Seattle granted 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 court found plaintiffs could argue that Microsoft had artificially inflated demand – and prices – for computers only

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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## OUR PRACTICE

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capable of running Vista Home Basic by marketing them as "Windows Vista Capable." The court also found the named plaintiffs could not 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, although it said plaintiffs could amend their complaint to add a named plaintiff who took part in that program.

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## Comcast To Draft File-Sharing Best Practices

Comcast has announced its intention to draw up a "Bill of Rights and Responsibilities" for file sharing.

The announcement follows on the heels of Comcast's statement last month that it would treat all types of Internet traffic equally. The shift in policy came in response to heavy public criticism after the Associated Press reported last fall that the cable company was blocking certain forms of file-sharing traffic. File sharing is the main means for illegal downloads of copyrighted works, but it is also developing as an inexpensive method for distributing legal video.

Comcast said it hopes to create a "best practices" protocol for Internet service providers to manage file-sharing traffic. The guidelines would also address what kinds of controls should be available to users of peer-to-peer file-sharing applications on their computers. P2P applications typically operate in the background, providing minimal information on what they are doing or how much capacity they are using.

Previously, Comcast announced that it is working with BitTorrent, another file-sharing company, on a mutually agreeable solution to managing P2P traffic.

The Federal Communications Commission is looking into consumer complaints about Comcast's practice of blocking file-sharing traffic. FCC Chairman Kevin Martin has said he is "pleased" the company is planning to stop hindering file-sharing traffic.

Comcast said it would test Pando Networks' file-sharing software on its network as a way to better handle P2P traffic. Pando's software allows transfers of big e-mail attachments between users and large video files from major media companies, such as TV networks. But file-sharing traffic places different burdens on cable ISPs such as Comcast, because neighboring users share data capacity on local lines.

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