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ADVERTISING LAW

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

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Cablevision Can Offer Remote Storage DVRs

In a decision that could have major ramifications for advertisers, content providers, and cable and satellite companies, the Second Circuit Court of Appeals has overruled a district court ruling blocking Cablevision Systems Corp. from introducing a remote-storage digital video recorder system.

The ruling, *Cartoon Network, et al. v. CSC Holdings, Inc., and Cablevision Systems Corp.*, is a win for cable operators because it would let them cut costs associated with in-home DVRs, one of their biggest expenses, as well as increase their roster of on-demand offerings. But it is a blow for programmers and advertisers, because users of DVRs tend to skip ads.

The remote-storage DVR system would let viewers record and store shows on Cablevision servers, then play them back at their leisure. With a standard in-home DVR, shows are recorded and stored on a hard drive in the box.

The district court had found that with a remote-storage DVR system, Cablevision "would be engaging in unauthorized reproductions and transmissions" of copyrighted TV shows and movies. Cablevision argued that there was no difference between the remote-storage system and a standard DVR.

In an August 4 order, the Second Circuit sided with

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Cablevision, finding that the remote-storage DVR did not violate copyright laws. The court said that even though Cablevision would have to create a system to support remote recording by viewers, that system is basically akin to a VCR, the manufacturers of which were held free from infringement liability in the Supreme Court's landmark *Sony Betamax* case.

Writing for the court, Judge John M. Walker said, "We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command." It is the customer, and not Cablevision, that is making the copy, Walker wrote, and therefore Cablevision cannot be directly infringing upon the programs' rightsholders.

But the court did not completely shut the door on arguments that a contributor to the creation of an infringing copy could be held liable for direct infringement.

"We need not decide today whether one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy. We conclude only that on the facts of this case, copies produced by the RS-DVR system are "made" by the RS-DVR customer, and Cablevision's contribution to this reproduction by providing the system does not warrant the imposition of direct liability," the court wrote.

The court also declined to opine on whether Cablevision could be held liable for contributory infringement, stating, "We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement."

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New York Passes Label Law for Video Games

Under a new law signed on July 22 by New York Governor David Patterson, video games sold in the state must be clearly labeled with ratings for violent content.

But the New York Civil Liberties Union argues that the law is unconstitutional. It says that it plans to file a lawsuit alleging the statute violates free speech rights. The rights group said

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that courts have invalidated as unconstitutional similar laws in California, Illinois, Michigan, Minnesota, and Washington state.

The U.S. video gaming industry already voluntarily submits to ratings under a system akin to movie ratings. The new law says that rated games must be labeled with their rating and that new video game consoles must include parent-controlled lockout features by 2010.

The law also sets up an advisory council to look at “the connection between interactive media and real-life violence in minors exposed to such media” and to review and analyze the ratings developed by the Entertainment Software Ratings Board.

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Study: Kids’ Restaurant Meals Are Calorie-Packed

Parents seeking a healthy, low-cal meal for their children might just have to cook it themselves.

A recent report by the Center for Science in the Public Interest analyzing kids’ meals at 13 major restaurant chains found 93 percent of 1,474 possible choices top 430 calories, the per-meal amount recommended by the National Institute of Medicine for children ages 4 through 8.

Although some restaurant menus include healthy choices, “parents have to navigate a minefield of calories, fat, and salt to find them,” the report said.

Some kids’ meals contain more than double the 430-calorie threshold. One meal at Chili’s featuring fried chicken, cinnamon apples, and chocolate milk topped out at 1,020 calories, while another featuring cheese pizza, fries, and lemonade contained 1,000 calories. Burger King’s “Big Kids” meal with a double cheeseburger, fries, and chocolate milk packs 910 calories, and Sonic has an 830-calorie “Wacky Pack,” including grilled cheese, fries, and a slushie.

Overall, Subway’s kids’ meals fared the best. Just 6 of 18 “Fresh Fit for Kids” meals — which include a mini-sub, juice box, and a side of apple slices, raisins or yogurt — went over the 430-calorie threshold. Subway, however, is the only chain that does not include calorie-packed sodas with kids’ meals.

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The report also found that 45% of children's meals went over recommended limits for saturated and trans fat, and 86% were high in sodium. Eating out now accounts for a third of children's daily caloric intake, twice what it was 30 years ago, the report noted.

The National Restaurant Association, a trade group representing restaurants and food outlets, said the industry trend was to give consumers "more detailed nutritional information and choice in menu options." The group emphasized that "exercising parental responsibility is key to childhood nutrition."

The report suggests that restaurants:

- Change kids' menus to cut calories, saturated and trans fat, and salt, and add items like fruits, vegetables, and whole grains.
- Change default sides from French fries and soda to fruit or vegetables and low-fat milk or water.
- Provide nutritional information on menus and menu boards.

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FDA Will Use Fake DTC Ads To Test Consumer Reactions

The Food and Drug Administration plans to use ads for a fake blood-pressure medicine to test whether images distract consumer attention from safety warnings.

The FDA says it will conduct an online survey of 2,400 consumers ages 40 and older seeking their reactions to the simulated ads, according to an August 5 notice on the agency's web site. The study must first be approved by the Office of Management and Budget.

Companies spend \$30 billion a year in the United States on direct-to-consumer ("DTC") drug marketing, triple the amount of a decade ago, according to a recent study in the New England Journal of Medicine. Each year, the FDA warns dozens of companies about ads and marketing materials the agency considers misleading. Invariably, the drug companies who receive warning letters comply by pulling or revising the complained-of spots. The study is aimed at determining what factors or techniques in ads contribute to misperceptions.

A standing complaint of consumer groups is that drug spots

unfairly underplay risk factors.

The FDA plans to develop a number of spots for the fake high blood pressure drug employing various images and text while a narrator reads the risk information. Some of the visuals will highlight the drug's benefits to determine if such visuals distract consumer attention away from safety warnings.

The agency first suggested the study last August as a survey of 1,020 consumers in shopping malls. It then made extensive modifications to the study's methodology as a result of comments it received, including changing the mode of surveying and the type of questions asked.

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Greyhound Pulls Ads After Beheading on Bus

Greyhound has put the kibosh on an advertising campaign that emphasized the relaxing nature of "Riding the Pup" after one of its passengers was accused of beheading and cannibalizing another traveler.

The ad's unfortunate tag line: "There's a reason you've never heard of `bus rage.'"

A Greyhound spokeswoman said all the ads had been removed. "Greyhound knows how important it is to get these removed and we are doing everything possible," she said.

Forty-year-old Vince Weiguang Li, who immigrated to Canada from China in 2004, is charged with second-degree murder in the death of 22-year-old carnival worker Tim McLean. He has yet to enter a plea, although apparently he asked the judge hearing his case to "Please kill me."

The bus was traveling at night along an isolated stretch of Canadian highway from Edmonton, Alberta, to Winnipeg, Manitoba, when the other 34 passengers and the driver heard "blood-curdling screams" and fled the bus, bracing the door on their way out to trap the assailant inside, witnesses said.

According to reports, McLean had been asleep when Li struck, stabbing him repeatedly in the chest with a "big Rambo knife."

Prosecutors said police observed Li eating pieces of his victim and taunting police and bystanders with the head when they

surrounded the bus immediately following the July 30 attack. After a three-hour standoff, Li jumped out of a broken window and was subdued by police.

A judge has ordered a psychiatric evaluation of Li before his next scheduled court appearance on September 8.

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