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ADVERTISING LAW

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

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FCC Finds Comcast Violated Internet Open Access Policy

In a precedent-setting ruling, the Federal Communications Commission has found that Comcast Corporation violated agency policy by selectively blocking Internet traffic.

By a 3-2 vote on August 1, the agency voted to enforce its Internet open access policy against the cable company. Although the FCC did not fine Comcast, it ordered it to stop blocking traffic among customers who use BitTorrent and other software used for file sharing, both legal and illegal.

The decision's actual impact on Comcast is probably limited. The cable company has already announced plans to transition away from current practices to a "protocol agnostic" technique that will not single out any particular type of traffic. Under the agency's order, Comcast does have to reveal the details of its past practices, submit a compliance plan to end such practices, and provide details of its new plan to its customers and the agency.

But the order has ramifications that extend far beyond the specific issue of Comcast's particular blocking practices. The issue of open access, or "network neutrality," has divided the Internet community, with service providers fighting it and content providers in support.

With the order against Comcast, the FCC is sending a strong

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signal that it is siding with the content providers (as well as consumer groups that have weighed in on the issue) and plans to enforce the "four freedoms" outlined in its open access policy statement.

The FCC's statement provides that "to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet," consumers are entitled to:

- access the lawful Internet content of their choice;
- run applications and use services of their choice, subject to the needs of law enforcement;
- connect their choice of legal devices that do not harm the network; and
- competition among network providers, application and service providers, and content providers.

The order against Comcast has its genesis in a report released by the Associated Press last fall that revealed that Comcast was secretly blocking access to file-sharing software like BitTorrent. Consumer advocates picked up on the story and filed a complaint with the FCC.

FCC Chairman Kevin Martin, a Republican, suggested the enforcement action. He was joined by Democratic Commissioners Jonathan Adelstein and Michael Copps, and opposed by Republican Commissioners Robert McDowell and Deborah Taylor Tate, who both wrote lengthy dissents.

In a statement, a Comcast spokesperson said the company was "disappointed in the commission's divided conclusion because we believe that our network management choices were reasonable. . . ." She said the company believes the order "raises significant due process concerns and a variety of substantive legal questions." The statement suggests that Comcast plans to file a complaint in federal court requesting that it overrule the FCC's order.

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50 Cent Sues Taco Bell Over Ad Campaign

Rapper 50 Cent has sued Taco Bell over a letter circulated by the Mexican-style fast food chain that encourages the rapper to change his name to "79 Cent," "89 Cent," or "99 Cent."

In a complaint filed last week in Manhattan federal court, 50 Cent, whose real name is Curtis Jackson, charged Taco Bell

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Marriott Downtown Magnificent Mile
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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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with “diluting the value of his good name” and using a guerrilla advertising campaign to mislead consumers into thinking he had endorsed the chain.

“Without seeking or obtaining Jackson’s authorization, defendant Taco Bell made him the star and focus of its nationwide advertising campaign by using his name, persona and trademark to promote Taco Bell’s business and products,” the complaint reads.

According to the complaint, the letter, which was part of Taco Bell’s “79-89-99 Cent Why Pay More” campaign, was used as a way to get around the multimillion-dollar fee the rapper might have charged to use his name.

The lawsuit said the letter was eventually sent to 50 Cent, but only after it had been sent to reporters.

A Taco Bell spokesperson said, “We made a good faith, charitable offer to 50 Cent to change his name to either 79, 89, or 99 Cent for one day by rapping his order at a Taco Bell, and we would have been very pleased to make the \$10,000 donation to the charity of his choice.” Taco Bell is owned by Yum! Brands.

But 50 Cent complains that Taco Bell intentionally wanted consumers to believe that he was endorsing its products. “Indeed, postings on numerous Internet ‘blogs’ castigated 50 Cent for ‘selling out’ by his apparent endorsement of Taco Bell,” the lawsuit said.

Since his debut album release in 2003, Brooklyn-born 50 Cent has built a hip-hop empire, including a record label, a clothing and footwear line, ringtones, and video games. Last year Forbes reported his net worth at \$32 million, making him the second-richest rapper, behind only Jay-Z.

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FCC Bans Discriminatory Ad Dictates

A new rule by the Federal Communications Commission seeks to stop discriminatory advertising practices that disfavor television and radio stations with African-American or Hispanic audiences.

The rule, which went into effect last month, bans the “no urban, no Hispanic” dictates used by businesses to steer ad agencies away from promoting their products on minority-

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owned or -targeted stations.

When they renew their FCC licenses, broadcasters will now have to certify that their advertising practices are nondiscriminatory. In addition, ad sales contracts cannot include provisions banning ad agencies from buying ads on minority-owned or -targeted stations.

Consumer advocates who worked with the FCC on the issue claim that the ruling could result in a 5 to 10 percent increase in ad sales revenue for broadcasters with minority audiences. They are hoping the Federal Trade Commission, which has jurisdiction over ad agencies, will enact a similar rule.

Should the FTC do so, it will face the problem of having to differentiate between the accepted advertising practice of targeting specific demographics and discriminatory actions.

In the late 1990s, the FCC began studying the effects of discriminatory policies on revenue for minority-owned or -targeted broadcast stations. The agency found that 91 percent of the minority radio broadcasters who participated in the study said they had encountered "no urban, no Hispanic" dictates.

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Purely Juice Squeezed for \$1.5 Million in Damages

Pom Wonderful, the beverage that started the pomegranate craze, has won damages of \$1.5 million against Purely Juice for misleading marketing.

Purely Juice, a small California company, claimed that one of its products was "100 percent pure pomegranate juice" and contained "no added sugar or sweeteners." But seven different labs found that the product contained only trace amounts of pomegranate juice and a high percentage of high-fructose corn syrup.

A federal court in Los Angeles sided with Pom Wonderful in finding that Purely Juice made misleading claims in its advertising and labeling.

Lynda Resnick, owner of Pom Wonderful, said her company would continue to challenge the claims of competitors that have jumped on the pomegranate bandwagon in the last few years. "In 2002, when we first started marketing pomegranate juice for the first time, only 4 percent of [the

U.S. population] had tasted it. Now there are 950 products that claim to contain pomegranates. There aren't enough pomegranate groves on the planet to supply the products in the marketplace," Resnick says.

Purely Juice CEO Paul Hachigian said the problem that gave rise to the lawsuit was "a supply chain issue. We were buying 100 percent concentrate. That was part of the spec and the formula. There was never any intent to falsely advertise. It was one production period. We had no idea it occurred. We stopped shipping the product and started shipping an all new product."

Resnick says that after the lab results came in, Pom Wonderful issued a cease and desist notice asking Purely Juice to stop making the 100 percent pomegranate juice claim. It filed the lawsuit after Purely Juice declined to comply with the notice, she says.

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Senators Voice Concerns Over Targeted Web Ads

At a hearing last month of the Senate Commerce Committee, some senators wondered aloud whether the use of behavioral profiling to target Web ads to users was overly invasive of people's privacy.

While acknowledging the usefulness of online ad tracking in some instances, Senator Byron Dorgan, a North Dakota Democrat, likened behavioral targeting to someone following consumers from store to store, taking notes on what they did. He said he was concerned that the data trails left by users could create behavioral profiles that could follow them for years.

Senator Bill Nelson, a Democrat from Florida, compared concerns about targeted ads to those about federal wiretapping in a debate over the foreign intelligence surveillance act. "What I am struck with is that we [have] a similar issue here," he said. "I use the Internet to go online to read the newspapers back home. If suddenly the kinds of articles I am reading . . . are going to be identified with me so someone can target advertising, I'm going to question the underlying basis of this." The question, he said, is how to continue to allow the Internet to evolve yet also respect constitutional and civil rights.

At the hearing, a Federal Trade Commission official advocated voluntary self-enforcement of privacy rights, with the caveat

that marketers should provide users with clearer disclosures. But Microsoft, Google, and Leslie Harris, president-CEO of the Center for Democracy and Technology, urged Congress to pass privacy legislation.

NebuAd President-CEO Robert R. Dykes also defended the privacy practices of his ad-serving firm. Mr. Dykes said that while his company sees every page consumers see, it tracks only “innocuous commercial” information and doesn’t keep any records on individual pages or Web sites seen.

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Facebook Sues German Copycat Site

The popular social networking site Facebook has sued a German company for allegedly running a “knock-off” Web site. In a complaint filed in California federal court, Facebook charges StudiVZ with “copying the look, feel, features and services” of the Facebook site. Facebook brought the suit several months after it debuted a German-language version of its own Web site. StudiVZ, which describes itself as “the most successful social network in Germany, Austria and Switzerland,” says it has 10 million users. In its complaint, Facebook, which claims to have 80 million active users, asserted that any distinctions between the two sites were “nominal.” StudiVZ duplicated whole portions of the site’s design, including such features as the “wall,” which lets users leave messages on each other’s profile pages, and merely replaced “Facebook’s blue color scheme with a red one,” the complaint states. The complaint seeks “to end StudiVZ’s illegal activity to ensure that users are not confused and that Facebook’s reputation remains unharmed.”

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