



IN THIS ISSUE

- **Court: Online Ad Contracts Must Specify “Unique” Visitors**
- **Kellogg Faces Backlash for Dropping Phelps**
- **Court Throws Out Copyright Suit Against Veoh Investors**
- **FTC Fines Calling Card Companies \$2.25 Million**
- **BlockShopper Changes Hyperlink Practice to Settle Trademark Suit**

Court: Online Ad Contracts Must Specify “Unique” Visitors

In a win for the Internet information Web site WebMD, a New York court has found that the term “visitors” in an online ad contract is not the same as “unique visitors.”

"The term 'visitors' is unambiguous," Judge Doris Ling-Cohan opined. To ensure that only unique visitors are counted, the parties must specify that expectation in the agreement, she added.

Last year, WebMD sued RDA International for allegedly failing to pay for ads it had bought on the WebMD site. Under their agreement, RDA promised to pay WebMD approximately \$450,000 for the ads. In return, WebMD had guaranteed more than 7 million impressions and at least 36,000 visitors to "WebMD Health Zone and WebMD-related condition centers driving to the www.eucerin.com Web site," according to the court papers. RDA argued that WebMD fell short of its guarantee because it counted each visit separately, even if the same user visited more than once. According to RDA estimates, WebMD met "70-80% of its contractual promises," the decision noted.

The court ruled in favor of WebMD, finding that the contract did not specify that each visitor must be unique. "If defendant wished to be guaranteed 'unique visitors' to the Web site, it



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should have specified such in the agreement," the court wrote. It also noted that RDA did not raise its concerns with WebMD while the contract was in effect.

[back to top](#)

Kellogg Faces Backlash for Dropping Phelps

Marijuana advocates are urging a boycott of products made by Kellogg Co. after it dropped its sponsorship of Olympic star swimmer Michael Phelps over a photograph of him taking a bong hit that appeared in the U.K. tabloid, *News of the World*.

Marijuana Policy Project (MPP), a Washington, D.C.-based lobbying group with 26,000 members, is leading the boycott. Calling the cereal maker's action "hypocritical and disgusting," MPP Executive Director Rob Kampia said, "Kellogg had no problem signing up Phelps when he had a conviction for drunk driving, an illegal act that could have killed someone. To drop him for choosing to relax with a substance that is safer than beer is an outrage."

In declining to try to renew its contract with Phelps, which expires at the end of the month, Kellogg said Phelps' behavior was "not consistent with the image of [Kellogg]." Phelps' image already appears on boxes of Kellogg's Frosted Flakes and Corn Flakes.

A Facebook page with more than 6,000 members also criticizes Kellogg for "criminalizing" Phelps.

[back to top](#)

Court Throws Out Copyright Suit Against Veoh Investors

A federal court in Los Angeles has dismissed a copyright infringement lawsuit by Universal Music Group against investors in the video-sharing Web site Veoh.

The court found that Universal failed to establish that the investors, which include Michael Eisner and a number of other major Hollywood players, exerted control over the company. It ruled that Universal's allegation that some investors served as board members or were authorized to name board members was insufficient to trigger liability. Permitting lawsuits against individuals because they sit on the board of a video-sharing Web site "could invite expansion of potential shareholder liability for corporate conduct, without meaningful limitation," the court wrote.

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The court also found that the Digital Millennium Copyright Act (DMCA) does not obligate Veoh's investors to pull copyrighted material from the Web site.

Although the court gave Universal leave to file an amended complaint, it suggested that the music company "reflect carefully" before doing so. "The court's existing scheduling requirements and the near-certain additional costs and complications that will flow from attempting to go after deep pockets whose potential liability could entail vexing issues of corporate governance caution that 'less may be more,'" it wrote.

Universal sued Veoh in 2007, charging the Web site with building "its business on the back of others' intellectual property" by enabling users to view and share pirated clips. Last August, Universal also sued Veoh's investors.

Veoh is typical of video-sharing Web sites in permitting users to upload clips. Although it does not prescreen clips, it takes down clips that are the subject of content owners' complaints of copyright infringement. Last month, the court ruled in Veoh's favor, finding that the Web site is eligible for safe harbor protection under the DMCA. The court has yet to determine whether Veoh will win under the provision. Last year, Veoh won a similar lawsuit brought by adult entertainment company Io Group.

[back to top](#)

FTC Fines Calling Card Companies \$2.25 Million

A group of prepaid calling card companies will pay \$2.25 million to settle charges by the Federal Trade Commission (FTC) that they misled customers about the number of minutes their cards contain.

It is the first big settlement in the FTC's campaign to curtail deceptive marketing tactics in the sector. An FTC staff attorney said the agency is still pursuing a number of other similar cases, including one in litigation and several more under investigation.

"We're by no means done," the staff attorney said. "This is an issue of great concern to us because we know there is a significant problem in this industry with fraud."

Instances of fraud have grown with the market, which is now a multibillion-dollar industry in which cards are sold in grocery

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and convenience stores nationwide. Practices targeted by the FTC include weekly maintenance and other hidden fees that eat up minutes, or cards that bill in three- or four-minute blocks for calls that only take a few seconds.

The agreement reached last week settles a complaint filed last May against Alternatel Inc., Voice Prepaid Inc., and G.F.G. Enterprises LLC, as well as principals Nickolas Gulakos, Moses Greenfield, Lucas Friedlander, and Frank Wendorff.

According to the FTC, the defendants' ads included a prominent claim that their cards had "no connection charges," while disclosing "hang-up" fees and "destination surcharges" only in fine print and in "terms that were incomprehensible in any language." The FTC said tests revealed that customers received just about half the amount of calling time advertised. The cards retailed for \$2 to \$10 at stores in Florida, Massachusetts, New Jersey, New Hampshire, and Rhode Island.

The defendants were also charged with targeting non-English-speaking immigrants with their misleading ads. Immigrants often rely on calling cards to talk to friends and family abroad.

The card companies did not acknowledge any wrongdoing as a part of the settlement.

[back to top](#)

BlockShopper Changes Hyperlink Practice to Settle Trademark Suit

Real estate news Web site BlockShopper will change how it links to Jones Day and its lawyers to settle a trademark infringement complaint brought by the law firm.

BlockShopper will no longer use the name of the law firm or its lawyers as anchor text for hyperlinks. Instead, it will use the actual URL. For example, instead of writing "Smith is a partner at Jones Day," BlockShopper will write "Smith (www.jonesday.com/smith) is a partner . . ."

A BlockShopper spokesman said the Web site will immediately resume posting articles about real estate buys by Jones Day lawyers. The site had agreed to stop posting pieces about the firm's lawyers while the case was pending. He said the company, which had already spent more than \$100,000, settled the matter to avoid incurring additional litigation costs.

Jones Day sued BlockShopper last August in federal court in

Chicago over postings about real estate purchases by two Chicago associates. The posts included "Jones Day" in the headline and linked to the lawyers' biographies on the firm's site. The 2,300-lawyer firm claimed the items violated its trademark because they might have given readers the impression that Jones Day was affiliated with BlockShopper.

BlockShopper moved to dismiss the case and a group of civil rights advocates, including the Electronic Frontier Foundation and Public Citizen, attempted to file an amicus brief in support of BlockShopper. In November, the court rejected BlockShopper's motion and refused to consider the brief filed by the digital rights advocates.

[back to top](#)