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ADVERTISING LAW

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

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Court Finds Harry Potter Guide Infringes Copyright

A Manhattan federal judge ruled September 8 that a proposed guide to the wildly popular Harry Potter book and film series infringed on the copyright owned by author J.K. Rowling.

The court enjoined the publication of Steven Vander Ark's "Harry Potter Lexicon," ruling that Rowling had established that sales of the book would cause her irreparable harm.

Vander Ark manages a Web site called the Harry Potter Lexicon, which he launched in 2000. The book, which Vander Ark put together in a month, is arranged like an encyclopedia, including characters, magical creatures, locations, and spells from the Harry Potter series.

The court ruled that Vander Ark's publisher, RDR, "had failed to establish an affirmative defense of fair use" and that publication of the book should be blocked. In a 68-page decision, the court found the lexicon included too much "verbatim copying," vied with Rowling's planned encyclopedia, and might compete with her future use of songs and poems from the Harry Potter books, although Rowling herself never made any such claim. The judge awarded Rowling \$6,750 and granted her an injunction blocking the publication of the book.

Rowling brought the suit last year. At the hearing, Rowling

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Ronald S. Katz

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Linda Goldstein

The Carlton Hotel
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D.C. Bar Conference Center
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November 20-21, 2008
PMA's 30th Annual Promotion Marketing Law Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

said the proposed lexicon was a theft, and that Vander Ark had copied large sections of her books without using quotation marks.

Vander Ark said his Web site had made little money over the years and posed little threat to Rowling's future income. He also described Rowling as his literary idol.

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European Parliament Faults “Sexual Stereotyping” in Ads

The European Parliament has voted to chastise the advertising industry for “sexual stereotyping,” adopting a report that pushes advertisers to modify the manner in which they portray men and women.

It’s not clear what impact the nonbinding report, which the legislature adopted by a vote of 504 to 110, will have. But Mary Honeyball, a British lawmaker and a member of the Women’s Rights and Gender Equality Committee, which drafted the report, said legally binding legislation could result.

“What I think it might do is encourage the industry in member states of Europe to improve. The report was passed by a big majority, and so there’s obviously recognition that there is a need to look at this. There is unacceptable stereotyping,” Honeyball said.

The report expresses concern that stereotypes in advertising can “straitjacket women, men, girls, and boys by restricting individuals to predetermined and artificial roles that are often degrading, humiliating and dumbed-down for both sexes.” It lists prototypical examples ranging from Mr. Clean, the muscular 1950s advertising icon, to a Dolce & Gabbana ad in which a woman in spike heels is pinned to the ground and surrounded by men in tight jeans. Among the allegedly provocative images, however, are images that some consumers might view as relatively benign, such as a businessman in a suit in a Lufthansa ad, and a Miele ad in which a woman is baking a cake in an oven.

Nonetheless, the parliamentary vote reveals an increasing discomfort in Europe about how advertisers tout products. The French Senate is weighing a proposal — already passed in the National Assembly — to fine advertisers that promote or incite anorexia as much as €45,000, or \$64,000. Last year, the Spanish government demanded that Dolce & Gabbana pull its

Sweepstakes, Games & Contests”

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Marriott Downtown Magnificent Mile
Chicago, IL

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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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"fantasy rape" ad. The Milan fashion house complied with the request, but not before remarking in the Italian press that Spain was "a bit behind the times." That got Italian lawmakers angry, and the ads were also pulled in Italy.

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Stop & Shop, Whole Foods Settle Trademark Dispute

The Stop & Shop Supermarket Co. and Whole Foods Market have settled a trademark dispute over a marketing campaign by Whole Foods.

Two months ago, Stop & Shop sued the rival supermarket in federal court in Boston, alleging that Whole Foods infringed its trademark with a marketing program called "The Real Deal."

According to the July 22 complaint, Whole Foods launched the complained-of cost-saving effort just weeks after Stop & Shop started an ad campaign called "Real Deal" that offered shoppers money-saving tips. The lawsuit also alleged that Whole Foods' in-store signage reading "Real Steal" on sale products would cause consumer confusion. It requested that Whole Foods pull the program.

After the lawsuit was filed, Whole Foods renamed its promotion "The Whole Deal."

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NebuAd Delays Launch of Targeted Ad Technology

While Congress reviews privacy concerns surrounding its Internet tracking software, NebuAd has postponed plans to market the controversial targeted online ad technology.

This summer, the House Energy and Commerce Committee launched an inquiry into Internet advertising and privacy. The inquiry focused partially on tests conducted by online companies using NebuAd's software, known as deep-packet inspection. The technology allows its users to track virtually all of a consumer's online activity, from surfing and searches to unencrypted communication. Many of the tests took place without the prior written consent of the consumers who were tracked.

In the wake of the resultant outcry among lawmakers and

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privacy advocates, at least seven companies shelved or called off partnerships with NebuAd.

NebuAd appears to be shifting its business strategy to provide support for more traditional forms of online advertising. "Our platform was architected to be a multi-channel ad system," a NebuAd spokeswoman said. "With the Internet service provider channel currently on hold with the events of the summer, we have broadened the focus of our business but continue to enhance our technologies for that ISP channel."

Last week, NebuAd's CEO Bob Dykes resigned to take a job at VeriFone, an electronic payment systems provider, although he will remain NebuAd's chairman of the board.

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Consumers Union Urges FTC to Protect Gift Card Users

Consumers Union, the consumer advocacy group and publisher of *Consumer Reports*, last week petitioned the Federal Trade Commission to protect gift card users when retailers go bankrupt.

Consumers Union was joined by the Consumer Federation of America, National Consumer Law Center, and U.S. PIRG in the filing. The petition called for the FTC to order retailers to maintain a separate trust account for funds from gift card sales and to honor gift cards as long as stores are in business, unless directed otherwise by a bankruptcy court. It urged the agency to declare the failure to do so "an unfair and deceptive practice."

When a retailer files for Chapter 11 reorganization, the fate of unredeemed gift cards is uncertain, because bankruptcy courts treat them as a loan to the company, not cash. According to Consumers Union, the merchant must petition the court to permit it to continue to accept gift cards. If the merchant does not make the request, or if the court rejects it, the only remaining option for shoppers is to file a claim as an unsecured creditor in the bankruptcy proceeding, the advocate says.

Earlier this year, the issue attracted notice when The Sharper Image announced it was suspending its acceptance of gift cards, after it filed for bankruptcy under Chapter 11. Later, the merchant petitioned the court to permit it to take gift cards if customers spent double the value of the gift card on a

single transaction. The chain is now being liquidated.

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Glorious Court Victories for Borat

A Manhattan federal court has dismissed lawsuits by three of the people who interacted with Sacha Baron Cohen's fictional character in the blockbuster mockumentary "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan."

The driver's education teacher in Baltimore who gave Borat a driving lesson and two etiquette coaches had sued Baron Cohen and 20th Century Fox for allegedly engaging in fraudulent tactics to gain their participation in the movie.

In a September 3 ruling, U.S. District Judge Loretta Preska (who has just been nominated to the Court of Appeals for the Second Circuit) wrote that all three plaintiffs consented to taking part in a "documentary-style movie" by signing releases absolving the filmmakers from liability and accepting consideration for their appearances.

In the film, Baron Cohen plays a Kazakhstani journalist named Borat filming a documentary about America. He interacts with people who are unaware that Borat is a fictional character, with frequently hilarious results. A number of participants who didn't appreciate the film's humor—at their expense—sued, claiming the filmmakers tricked them, and that they'd agreed to be filmed for something other than what was released.

So far, the courts have largely sided with the moviemakers.

In April, Preska threw out a defamation claim brought by the businessman whom Borat tries to hug on the streets of New York City. And in February 2007, a Los Angeles judge granted 20th Century Fox's motion to dismiss a lawsuit brought by two of the fraternity brothers with whom Borat hitched a ride, and declined to require the studio to cut out the scene from future screenings or DVD editions.

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