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## ADVERTISING LAW

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

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### Web site Forum Not Liable for User Comments

A federal court has ruled that ConsumerAffairs.com, an online forum where customers can write about their experiences with various companies, is not legally responsible for comments left by users.

Finding that the Web site is protected as an “interactive service provider” under Section 230 of the Communications Decency Act, the court dismissed a lawsuit brought by New York-based Nemet Chevrolet in March 2008. The car dealer had filed the complaint against ConsumerAffairs.com after finding what it viewed to be defamatory posts on the site. Six user comments were listed in Nemet’s complaint, many from the same account.

The dealership, which denied the truth of the comments, accused the Web site of defamation, tortious interference, and violations of the Lanham Act, the federal false advertising law. The complaint said the comments “discredited Plaintiff’s honesty, credit, and business reputation,” and that because of the “misleading articles,” it lost business and was entitled to damages.

The court disagreed, finding that ConsumerAffairs.com was not involved enough in content creation to be liable for either defamation or tortious interference. As for the Lanham Act claims, the court found that Nemet lacked standing because

### 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

the other parties involved were not competitors of the dealership and the "alleged injury is not of the sort that the Lanham Act sought to prevent."

Web site owners that host online communities have successfully sought the safe harbor of Section 230 of the CDA a number of times in recent years. For instance, in a highly publicized case, a court found that Craigslist was not liable for allegedly discriminatory housing ads, since the online classified ad site was not a "publisher," but merely a provider of online "interactive services."

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## Rosetta Stone Sues Over Keyword Search Ads

Language-software seller Rosetta Stone is suing a rival over a very familiar complaint – using a competitor's trademark in keyword search ads designed to produce sponsored links or ads next to search results that direct traffic to its own site.

Rosetta Stone Ltd. filed a complaint in California federal court against Rocket Languages Ltd., Libros Media Ltd., and members of an affiliated ad program. In its complaint, Rosetta Stone claims that Rocket Languages and its affiliates bought keyword ad searches using the trademarked term "Rosetta Stone," or confusingly similar variations, from several popular search engines.

The result, Rosetta Stone alleges, is that when a searcher types in "Rosetta Stone" or "Rosetta Spanish," ads for Rocket Languages' products appear. Additionally, the complaint states that Rocket Languages improperly uses "Rosetta Stone" in the text of sponsored links. A search on some search engines for "Rosetta Stone," for instance, produces a sponsored link titled "Rosetta Spanish a Scam?"

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## State of Virginia Sued Over "Zero" Chance Lottery

A business professor at Washington and Lee University in Virginia has sued the state for breach of contract for selling lottery tickets after the top prize had already been awarded.

The \$5 scratch-off ticket called "Beginner's Luck" featured a \$75,000 grand prize. But someone had already won the top

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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prize one month before the business professor, Scott Hoover, bought his ticket.

Hoover's lawyer says he has records showing that the Virginia State Lottery sold \$85 million in lottery tickets for which no top prize was available.

Virginia State Lottery Executive Director Paula Otto counters that the top prize represents just a small portion of the money awarded to lottery players. Otto adds that the state has discontinued the practice of selling tickets with no top prizes available.

"We absolutely have always been very open and honest with our players about the way our scratch tickets are distributed," Otto said. "Yes, there were times when there was a scratch game out there that might [have] said 'zero' in terms of the number of top prizes, but our players knew that."

About half of the 42 states that sponsor lotteries continue to sell tickets after the top prizes are awarded. Lottery officials argue that the policy is fair because other prizes are still available, and that tickets and lottery Web sites clearly disclose that the top prize may no longer be available.

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## **AFTRA Approves Contract With Hollywood Producers**

Members of the American Federation of Television and Radio Artists have ratified a new deal with Hollywood's biggest production companies.

AFTRA leaders said 62.4% of its voting members approved the contract, smaller than the margin of approval that typifies union ratification votes, but still a solid majority. The federation has 70,000 members, about 70% of whom are actors.

The vote may create complications for the Screen Actors Guild, whose 120,000 members make it the biggest actors' union. The AFTRA deal stops short of SAG's demands, which include higher pay, more money from DVD sales, limits on product placements, and a bigger take from the use of their work in new media.

SAG members have been working without a contract since July 1, 2008. There are no plans for a strike authorization

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vote, which could take weeks and would require 75% approval. A strike seems less likely now that so many actors have approved the AFTRA deal. About 40,000 actors belong to both unions.

SAG's leaders must now decide whether to risk a strike authorization vote, cede terms they have been pushing for months, or continue the present uncertainty in the face of the increasing impatience of many union members who are losing money as production slows. Hollywood has been operating on provisional production schedules in case it's necessary to shelve movie and television shoots in the event of a strike.

In announcing the results, AFTRA President Roberta Reardon said her union planned to end its split with SAG. The unions had jointly negotiated for years before the recent rift. Steps AFTRA plans to take include a meeting of performers and union leaders and a proposal that various guilds coordinate their efforts prior to any future contract negotiations.

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## **FTC Dumps 42-Year-Old Low-Tar, Nicotine Test**

Under a proposal by the Federal Trade Commission, tobacco companies will no longer be permitted to imply agency endorsement of ads stating cigarettes are "light" or "low-tar."

The proposal would repeal a 1996 policy that allowed tobacco ads to cite tar and nicotine amounts "per FTC method." The agency states that it no longer believes the test accurately measures risk and it does not want smokers to think some cigarettes are safe.

"We want to clarify the FTC's position," says Associate Director Mary Engle. "This test method does not have our stamp of approval."

Engle says that she does not expect ads will change much as a result of any new policy, since some do not mention tar and nicotine levels and others do so only in fine print.

The FTC proposal says the agency started permitting tobacco ads to state tar and nicotine levels "per FTC method" in 1966 with the aim of giving smokers an informed choice on the relative risks of different cigarettes. At the time, it was believed that a low amount of tar could reduce a smoker's risk of cancer.

Although the test showed tar and nicotine levels falling sharply over the past four decades, the levels turned out to be poor predictors of risk, the agency says. That's because smokers of lower-yield cigarettes compensate by taking bigger, deeper, or more frequent puffs to get the amount of nicotine they want.

The agency is accepting public comments on the proposal until August 12. Engle says if the proposal becomes final, the agency will inform consumers that advertised tar and nicotine levels are not an accurate gauge for safe smoking.

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