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ADVERTISING LAW

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

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FTC Pushes MPAA and Toy Makers To Review Kid Film Marketing

The Federal Trade Commission is urging the Motion Picture Association of America to reconsider guidelines that allow some PG-13 movies to be marketed to young children.

The agency is also pushing toy manufacturers, fast-food chains, and retailers to review how they sell movie-based toys to young children.

The action follows a complaint filed by an advocacy group last summer that the film *Transformers* was inappropriately marketed to children as young as two years old. The Campaign for a Commercial-Free Childhood said TV spots advertising the film appeared during the shows *Fairly Odd Parents* and *Jimmy Neutron*, both rated by the television industry as TV-Y, or for kids two years old and up. The movie, based on Hasbro Inc.'s popular line of robot toys, was rated PG-13—meaning it might not be suitable for children under 13—for violence, brief sexual humor, and language.

Although the FTC suggested industry groups review their policies, it did not force them to take any action.

In a letter sent last week to the Boston-based advocacy group, FTC Associate Director Mary Engle said the MPAA lacks specific guidelines on where PG-13 movies can be advertised and instead considers each movie on a case-by-case basis. "A more explicit policy, incorporating objective criteria, would provide better guidance to industry members and ensure that PG-13 movies are not marketed in a manner inconsistent with the rating," she wrote. The letter suggested that the MPAA could follow the lead of the video game industry, which takes

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Topic:

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into account the age of the TV audience when advertising games for more mature children.

An MPAA spokesperson said the association's rules were stricter than those in the video game industry because each piece of advertising was evaluated separately. If there is cause for concern, the MPAA will restrict where or when the ad can be shown, something that's done frequently, he said.

The MPAA has voluntarily barred advertising R-rated movies to children, but treats PG-13 movies differently because the rating is a suggestion, unlike an R-rating, which prohibits viewers under 17.

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Standoff Over Password Underscores Digital Dilemma

Federal prosecutors are asking a U.S. District Court in Vermont to order a man to type a password that would unlock files on his computer, despite his claim that doing so would constitute self-incrimination.

The case, involving child pornography, is believed to be the first of its kind. Coming at a time when users are increasingly turning to encryption to protect the contents of their computers, it raises a novel issue concerning how to balance privacy rights and civil liberties against the government's responsibility to protect the public. Federal officials say that encryption is allowing criminals to communicate their plots in secret, and that there needs to be a way for the courts to permit law enforcement to access the evidence.

On November 29, Magistrate Judge Jerome Niedermeier ruled that compelling Sebastien Boucher, a 30-year-old Vermonter, to enter his password into his laptop would violate his Fifth Amendment right against self-incrimination. "If Boucher does know the password, he would be faced with the forbidden trilemma: incriminate himself, lie under oath, or find himself in contempt of court," the judge said.

The ruling, which the government has appealed, is causing controversy. Civil liberties advocates say the decision was exactly right, and that the government will simply have to find other methods to get encrypted information. But others argue that the ruling is dangerous for law enforcement, because it will spur terrorists, drug dealers, and pedophiles to encrypt their documents, knowing that the police can't access them.

Boucher was arrested in 2006, when driving across the border from Canada into Vermont. An inspection of his car by a U.S. Customs and Border Protection inspector revealed a laptop with a video file that appeared to be a preteen undressing and

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Topic:

"The Value of Fame: Understanding the Right to Publicity"

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

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performing a sexual act, among other graphic images, according to the government's affidavit.

The agents seized the laptop but could not get access to the content on the drive Z because it was protected by Pretty Good Privacy, popular encryption software that requires a password for decryption.

A government computer forensics expert testified that it is "nearly impossible" to access the files without the password, the judge wrote. "There are no 'back doors' or secret entrances to access the files," he wrote. "The only way to get access without the password is to use an automated system which repeatedly guesses passwords. According to the government, the process to unlock drive Z could take years . . ."

In his ruling, Niedermeier said forcing Boucher to enter his password would be like asking him to reveal the combination to a safe. The government can force a person to hand over the key to a safe because a key is physical, not in a person's mind. But it cannot compel a person to reveal a safe combination because that would "convey the contents of one's mind," which is a "testimonial" act protected by the Fifth Amendment, Niedermeier said.

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Toy Makers Seek To Shutter Scrabulous

The makers of Scrabble are trying to shut down Scrabulous, an online version of the word game that is one of the most popular applications on the social networking site Facebook.

Hasbro, which owns the rights to Scrabble in the U.S. and Canada, and Mattel, which owns the rights elsewhere, contend that Scrabulous infringes their copyrights and trademarks.

The companies jointly issued cease-and-desist notices to four parties involved in the development, hosting, and marketing of Scrabulous, according to a letter Hasbro is sending to consumers.

Scrabulous, one of the ten most used applications on Facebook, attracts more than 600,000 daily active users. People can also play at Scrabulous.com. There are authorized Scrabble games online, but Scrabulous has gained popularity because it is free, easy to play with friends, and easy to access on Facebook. News of the toy companies' action prompted Scrabulous fans to start a "Save Scrabulous" group on Facebook and push others to lodge protests with the companies.

In the letter Hasbro is sending to those who protest, the company urges Scrabulous fans to switch to legal Scrabble

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sites. "We are not surprised that fans have thoroughly enjoyed playing Scrabulous on Facebook.com," the letter says. "What consumers may not realize, however, is that Scrabulous is an illegally copied online version of the world's most popular word game."

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Online Privacy An Increasing Concern For Consumers

Nearly two out of three consumers expressed concern about the privacy of personal data when shopping online, as reports of loss or theft of credit card information and other data rose to record highs.

Sixty-one percent of Americans said they were very or extremely concerned about privacy when buying online, an increase from 47 percent in 2006. Until last year, that figure had largely been dropping since 2001.

Newer Internet users and people who do not shop online tend to be more worried, according to the survey from the University of Southern California's Center for the Digital Future.

Last year, more than 125 million records were reported compromised in the U.S., a sixfold increase from the nearly 20 million records reported in 2006, according to the Identity Theft Resource Center.

Data breaches frequently result from lost or stolen computer equipment, though the single largest breach involved online hacking. Early last year, retail giant TJX Companies disclosed that a data theft had exposed tens of millions of credit and debit cards—most of which were collected during brick-and-mortar retail transactions—to potential fraud.

Despite expressed concerns, the number of online shoppers is on the rise, attracted by the convenience of Internet retail. As of 2007, two-thirds of users shopped online, compared with just half a year earlier. Most spend \$100 or less a month online, and two-thirds of online shoppers have reduced buying at brick-and-mortar stores.

With credit card fraud, a customer's liability is capped at \$50, and even that amount is often waived. Customers frequently learn of fraudulent charges quickly if they check their accounts online or are notified by their banks, which have security measures in place to flag suspicious transactions. Identity theft, on the other hand, can take months and sometimes years to uncover and resolve.

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Seinfelds Sued Over Cookbook

An author who claims Jerry Seinfeld's wife plagiarized her cookbook has sued the famous couple for copyright and trademark infringement.

The lawsuit, seeking unspecified damages for copyright and trademark infringement, was filed earlier this month in Manhattan federal court by Missy Chase Lapine, who authored *The Sneaky Chef: Simple Strategies for Hiding Healthy Foods in Kids' Favorite Meals*. Neither her publisher, Running Press, nor HarperCollins, who published Jessica Seinfeld's *Deceptively Delicious* book, are named in the complaint.

In October, HarperCollins published Mrs. Seinfeld's *Deceptively Delicious: Simple Secrets to Get Your Kids Eating Good Food*. The lawsuit said the Seinfelds were warned even before the book was published that it had blatant similarities to Lapine's book.

Still, when Jerry Seinfeld appeared on CBS' *Late Show with David Letterman* in October, he suggested Lapine was a crackpot and declared his wife not guilty of "vegetable plagiarism," the lawsuit said.

The lawsuit also quoted him telling Letterman: "Now you know, having a career in show business, one of the fun facts of celebrity life is wackos will wait in the woodwork to pop out at certain moments of your life to inject a little adrenaline into your life experience." It said Seinfeld also noted that Lapine has three names and that "if you read history, many of the three-name people do become assassins." Then Seinfeld added, "Mark David Chapman. And you know, James Earl Ray. So that's my concern," the lawsuit recalled.

The lawsuit said a reasonable person watching Seinfeld on Letterman's show would conclude that he had described Lapine as mentally ill with "potentially violent or, at a minimum, hostile, tendencies, proclivities and activities."

A lawyer for the Seinfelds disputed the charges, suggesting Lapine was seeking publicity to boost her book's sales.

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