

UNITED STATES



Susan Rosenfeld
Reed Smith Hall Dickler
srosenfeld@reedsmith.com
www.reedsmith.com
www.adlaw.com

1.	
Topic:	American Telemarketing Association to Appeal Do-Not-Call Registry
Parties:	ATA v. FTC
Where:	U.S. Court of Appeals for the Tenth Circuit
When:	March 2004
What Happened:	<p>The American Telemarketing Association ("ATA") will appeal the decision of the United States Court of Appeals for the Tenth Circuit that upheld the federal Do Not Call Registry. "We believe that the rights to free speech are being unduly trampled under the guise of consumer protection," said Tim Searcy, the ATA's executive director, "and now we'll take our appeal to the highest level."</p> <p>Breaking ranks, the other challenger to the Registry, the Direct Marketing Association ("DMA"), will not appeal. The DMA is continuing its work with the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC") to improve the process, such as devising a better way for telemarketers to update their call lists each month using the FTC's database. The DMA already has its own guidelines and its own registry. They would like consumers to control incoming calls through company-specific 'do-not-call' lists in an opt-in system.</p>
Comments:	Those who chose not to comply with the regulation until after the appeal is concluded are in legal limbo. There is no assurance that the appeal will be entertained by the Supreme Court, which hears fewer than 3% of all appeals made to it.

2. Case Report	Mattel v. Forsythe
Topic:	"Food Chain Barbie" Parody Is Fair Use
Where:	U.S. Court of Appeals for the Ninth Circuit
When:	February 23, 2004
What Happened:	<p>Having just survived a breakup with Ken, Barbie may need another shoulder to cry on in face of a loss suffered at the hands of the US Court of Appeals for the Ninth Circuit. The court upheld a district court judgment that a series of photographs entitled "Food Chain Barbie" constitutes a fair use parody of Mattel's copyright. The court rejected Mattel's claim that defendant Tom Forsythe had infringed its copyright by marketing photographs that portrayed naked Barbie dolls provocatively posed in kitchen equipment.</p> <p>While the court found that the purpose of the parody was commercial, the court believed the photographs could not reasonably substitute for Barbie when directed at a market for adult-oriented photographs. The court found that the parody was not intended for Barbie's target market: little girls.</p> <p>The court's decision is reminiscent of a 2003 decision in which the same court ruled against Mattel in a matter against MCA Records, producers of a 1997 top 40 hit song entitled "Barbie Girl". Among the reasons the court rejected Mattel's complaint against MCA Records was the parody nature of the song.</p>

	The court found that Barbie has transcended her origin as a plaything, and indeed is now an original, one-named icon: "She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon ... With fame often comes unwanted attention."
Comments:	The very purpose of parody is to satire and ridicule, so it's rare for anyone – or anything – targeted by a parody to be pleased. On the other hand, success and fame come with a price, even for icons like Barbie.

3. Case Report:	AOL/Earthlink v. Connor-Miller Software
Topic:	AOL and Earthlink File Spam Suits
Where:	U.S. District Court in Orlando, FL/U.S. District Court in Atlanta, GA
When:	February 18, 2004
What Happened:	<p>AOL and Earthlink have separately filed lawsuits against parties they allege are responsible for sending millions of unwanted commercial e-mail messages. In a complaint filed in the U.S. District Court in Orlando, AOL claimed that three Florida residents sent at least 35 million unsolicited e-mails to its subscribers in a five month period, prompting 1.5 million complaints from the ISP's subscribers. AOL accuses the defendants of violations of the Virginia Computer Crimes Act, the Federal Computer Fraud and Abuse Act, and State of Florida Common Law. AOL also asserts that the would be spammers provide software to others in Thailand to evade its filters, in defiance of federal and state law. AOL is seeking an injunction against further unwanted e-mail, \$1.6 million in statutory damages, plus other damages. The case is a refiling of a case originally brought in Virginia that was dismissed on venue grounds.</p> <p>EarthLink's lawsuit was filed in U.S. District Court in Atlanta against 16 individuals in five states that it claims are responsible for sending 250 million spam messages. Earthlink, which is based in Atlanta, had filed the suit in August against 100 unknown defendants identified as the "Alabama Spammers." Earthlink alleges that the ring used "spoofing" and fraudulent methods to disguise their identities and to establish fraudulent EarthLink accounts.</p> <p>Since 1997, AOL has filed 25 cases against spammers and, in December, aided in the State of Virginia's criminal action against two North Carolina men. The case was refiled after an action originally brought in Virginia was dismissed for improper venue. One of the defendants told Reuters that the company simply provided network services and never sent commercial e-mail. In May, EarthLink won a \$16.4 million civil judgment against a spammer who sent 825 million unsolicited e-mails. The defendant was then indicted on criminal charges.</p>
Comments:	A report released by Sophos, an Internet security firm, shows that Americans are responsible for 57% of all junk e-mail. If that percentage is correct, then regulation or restrictions in the United States under the recently enacted CAN SPAM Act might make a dent in the mailbox overflow, provided the industry, including ISP's and legitimate marketers take the Act seriously. Unlike Europe, the United States has adopted an opt-out format for email, allowing marketers more freedom to target potential customers. But if the Act's goal of reducing spam is not achieved, the industry can expect far more restrictive legislation.

4. Case Report	1-800 Contacts v. WhenU
Topic:	PopUp Ads Attract Amicus Briefs
Where:	U.S. District Court for the Southern District of New York
When:	February 18, 2004
What Happened:	The Electronic Frontier Foundation (EFF) has filed amicus briefs in the litigation in which 1-800 Contacts sued adware firm WhenU.com. The United

	<p>States District Court for the Southern District of New York enjoined WhenU from displaying pop-up ads, holding that there was a likelihood of customer confusion that a retailer endorsed or licensed a competitor's product when that competitor's ad appeared after the retailer's name is typed into a browser bar. Google, too, has filed an amicus brief.</p> <p>EEF takes the position that WhenU's advertising methods are no different from offline advertising that diverts consumers' attention with competing products while they shop. EEF claims that the precedent is dangerous because it attacks the medium, not the content. EEF maintains that 1-800 Contacts should have been required to show that consumers were actually confused about an ad's point of origin. EEF also criticized the court's finding that the only reason a consumer would search for 1-800 Contacts website would be to purchase its products. Further, the user is responsible for WhenU's software having been installed on his computer and thus, presumably, he is interested in receiving competing ads.</p> <p>A recent report from Forrester research claimed that 64% of web users found pop-ups irritating. Worse, 60% of users surveyed claimed that they mistrusted companies that used pop-ups. A study by Bunnyfoot Universality purportedly showed that pop-ups do not have time to load before a web surfer has closed them: the average time for a pop-up to display the company's logo was 8.5 seconds but the time taken for a user to shut the ad down was just 2.5 seconds. Moreover, only 2% of users remembered the brand advertised. Rob Stevens, director of business behavior at Bunnyfoot Universality, said that brands could be doing themselves irreparable damage by refusing to give up pop-ups. "Brands are undoubtedly committing commercial suicide by insisting on using pop-ups. The effect of such techniques goes way beyond annoying the user; they frustrate, they impose and they engender mistrust. Pop-ups are therefore not just a huge waste of money; they are also extremely negative for a brand." Fourteen per cent of users say they have installed pop up stoppers on their machines. A year ago, only 1% had.</p>
Comments:	<p>While the war over pop-ups and paid placement in search engines is being waged in the courts, the reality of the marketplace and consumer preference are likely to be the final arbitrators of the efficacy of pop-up advertising. Meanwhile, a lot of money is being spent on something that marketers are likely to abandon before the courts establish any nationwide precedent. Remember the chaos when cybersquatters were "stealing" valuable URL's at the expense of legitimate trademark owners? Seen many lately? Perhaps the controversy over pop-ups and paid placement is deja vu and will fade with the passage of time, not the decisions of judges.</p>

5. Case Report	American Blind and Wallpaper Factory v. Google and AOL
Topic:	American Blind Sues Over Keying Descriptive Terms
Where:	U.S. District Court for the Southern District of New York
When:	January 27, 2004
What Happened:	<p>While Google awaits a decision in its request for a declaratory ruling by a California federal court on the issue of keying and descriptive terms, American Blind, which has asked that the California case be dismissed, apparently was not content to wait and has sued Google as well as America Online Inc., AOL subsidiaries, Netscape Communications Corp. and CompuServe Interactive Services Inc., Ask Jeeves Inc., and EarthLink Inc., which use Google's listings, about keyword-based advertising practices as well as search algorithms and Web index. While the keying issue for trademarked terms may be moot given the recent decision by the U.S. Court of Appeals for the Ninth Circuit in Playboy's keying lawsuit against Netscape, American Blind's suit is more extensive, alleging that Google infringed on its trademarks by returning non-sponsored Web search listings from competitors when certain descriptive</p>

	<p>terms, not trademarks, were queried. The company charges that consumers are doubly confused by Google's labeling of paid results as "sponsored listings," without mention that they are ads. American Blind's complaint labels this "inherently deceptive."</p> <p>American Blind seeks discovery on Google's algorithms and search technology. It has requested damages as well as a temporary and permanent injunction to bar Google from listing its competitors for keywords that match or are similar to its trademarks.</p> <p>Google ranks its 3 billion Web pages by proprietary algorithms. Google also runs keyword-based paid search through its AdWords program. Those listings appear before or alongside the Web search results on its site and those of its partners. While a search on Google for American Blind's exact trademarks, including "American Blind & Wallpaper Factory," "American Blind Factory" and "DecorateToday," lead to American Blind's site, Google takes the position that descriptive terms do not violate trademarks when entered in a search query. Further, Google argues that it uses editorial judgment embodied in its algorithms and technology, which invokes the protection of the First Amendment. Google has tried to avoid conflict with trademark holders, often barring competitors from bidding on keywords that match unique trademarks.</p>
Comments:	<p>The ongoing battle for search engine placement seems to have no end. As soon as one court provides guidance, another suit seems to be filed, raising more novel reasons why the practice should be prohibited. At this rate, it will be years before definitive rules are established.</p>

6.Case Report	Hakki v. Beer Institute, Coors Brewing, Heineken, Mike's Hard Lemonade, etc.
Topic:	Alcoholic Beverage Advertising Under Attack
Where:	Superior Court, Washington, D.C.
When:	November 13, 2003
What Happened:	<p>In a lawsuit echoing one brought against the tobacco industry a few years ago, a group of alcoholic beverage makers and the Beer Institute have been sued for allegedly targeting underage drinkers. The claims are that alcohol producers use ads that appeal to young people. For example, the suit criticizes one defendant for its commercial featuring a young man licking a rum flavored drink off a woman's midriff, giving the "impression that the use of [such] products is associated with sexual prowess, physical attractiveness, heightened confidence and immunity from the consequences of rule breaking and risky behavior."</p> <p>The alcohol producers who have commented defend that their target consumer is of legal drinking age. For its part, the Beer Institute has also cast doubt on the success of the lawsuit, pointing out that "In the last five years, the Federal Trade Commission, ... has conducted several vigorous reviews of alcohol beverage advertising and underage drinking. It has consistently concluded that the beer industry markets its products in a responsible manner."</p> <p>The suit seeks class action status for all parents whose under age children purchased alcohol and all profits made by the defendants for the past 21 years.</p>
Comments:	<p>Marketers are perfectly free to target audiences who may legally purchase and consume their products. The fact that such advertising may arguably have some attraction to others, including those under the age of 21, is not a basis to criticize otherwise legitimate targeted marketing. If the principle put forward in this case prevails, marketers would be forced to ignore legitimate markets for fear of attracting class actions on behalf of consumers who are not their intended target, irrespective of the truthfulness or legality of the advertising.</p>

	The foundation of this case is fatally flawed and one can only hope the courts see through it.
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7. Case Report	Newton v. Beastie Boys
Topic:	Beastie Boys Sampling Did Not Infringe on Composer's Copyright
Where:	U.S. Court of Appeals in the Ninth Circuit
When:	November 4, 2003
What Happened:	<p>On November 4, 2003 the Ninth Circuit U.S. Court of Appeals ruled that the Beastie Boy's repeated sampling from a jazz recording did not amount to infringement of the composer's copyright in the composition itself. The case concerned a six-second, three-note cut from a 1981 recording of the jazz song named "Choir." The recording was of a performance by plaintiff James W. Newton, who both performed and composed the song. The Beastie Boys repeated the sampled segment a number of times during their song.</p> <p>The Beastie Boy's expert, Dr. Lawrence Ferrara, called it a "common, trite, and generic three-note sequence."</p> <p>The Ninth Circuit dismissed the copyright infringement claims on the grounds that there was no infringement because there was minimal use of the sample. Judge Mary Schroeder wrote in the appellate court's November 4, 2003 decision. "Newton is in a weak position to argue that the similarities between the works are substantial, or that an average audience would recognize the appropriation."</p>
Comments:	Sampling is quite common in music, particularly rap. On that basis, the decision is not surprising and supportive of the creative genre of rap. The case, however, may also have application to sampling in advertising. The court's logic should have as much application to sampling of music in advertising as it does in rap. Time will tell whether this case will ultimately stand for that proposition but it does give some precedent upon which the advertising industry may rely.

8. Case Report	Maureen Marder v. J. Lo
Topic:	J. Lo Sued Over Video In Flashdance Flap
Where:	Federal Court in Los Angeles, California
When:	November 15, 2003
What Happened:	<p>Jennifer Lopez was sued for copyright infringement with respect to J.Lo's Spring 2003 music video showcasing her song "I'm Glad." The video depicted scenes from the 1983 movie Flashdance. The lawsuit was filed in federal court in Los Angeles by Maureen Marder, claiming to be the real-life inspiration of the main character in Flashdance, a welder by day and dancer by night. Lopez referred to her video as an "homage" to the film.</p> <p>"Flashdance owes both its story and its soul to Maureen Marder," said her lawyer, Robert Helfing. Marder allegedly only received \$2,300, and has been unwilling to grant sequel rights or permit any further use of her identity or story. The complaint alleged that Marder "conferred at length" with Flashdance screenwriter Joe Eszterhas about her life and provided materials "with the express understanding that it would be included" in the screenplay. It goes on to allege that Paramount Pictures registered a copyright on the movie in 1983 without disclosing Marder's co-authorship.</p> <p>Marder's lawsuit sought damages for the music video's alleged unauthorized depiction of her life, for which Lopez did not seek her permission. Marder's lawyer said her lawsuit was to prevent his client again seeing her life depicted on the screen without compensation. He described his client as penniless, disabled with a spinal injury, and trying to raise a teenage daughter. The</p>

	<p>lawyer claims that Lopez ignored his attempts to resolve the claim without litigation.</p> <p>J. Lo has won the battle. The case was recently dismissed.</p>
Comments:	<p>Unauthorized depictions of private figures is always controversial. In this instance, however, one question will ultimately be whether Ms. Marder is a public figure with few rights to control the commercial exploitation of her life. As far as advertising is concerned, this is an interesting case to follow as it relates to tribute ads for public figures who win a race or match or accomplish a record. If Marder has no rights to stop a video made in "homage" to her life, what rights does a celebrity have to stop an advertiser from publishing a one-time congratulatory ad when the celebrity wins an award? In all likelihood, advertisers will never see their rights rise to the level of music videos. Somehow, courts seem to think one is entertainment and the other only the peddling of wares.</p>

9. Issue	Fox versus Fox Entertainment
Topic:	Fox In A Snit Over Sister Channel's Simpsons Spoof
Where:	CA
When:	October 29, 2003
What Happened:	<p>After recently dropping a lawsuit against humorist Al Franken for mocking them in his new book, "Lies and the Lying Liars Who Tell Them," Rupert Murdoch's Fox News Network threatened to go to battle again, this time against the Simpsons, which happens to be broadcast by its sister network, Fox Entertainment.</p> <p>According to the show's creator, Matt Groening, whose edgy cartoon is now in its 14th year, the station took issue with an episode that satirized Fox News' rolling ticker. In a nod to Fox News' well-known anti-Democratic party stance, the ticker included headlines such as "Do Democrats cause cancer?" and "92 percent of Democrats are gay." The network later backed down. "Fox said they would sue the show and we called their bluff because we didn't think Rupert Murdoch would pay for Fox to sue itself. We got away with it," Mr. Groening claimed, in an interview with Terry Gross of National Public Radio.</p> <p>Though Fox News denied that it had threatened to take legal action ("We're scratching our heads over here. We liked the cartoon," said Robert Zimmerman, a spokesman for Fox News) there were repercussions, said Groening. "Now Fox has a new rule that we can't do those little fake news crawls on the bottom of the screen in a cartoon because it might confuse the viewers into thinking it's real news," he said.</p>
Comments:	Humor seems to be under attack everywhere lately, including attacks by Fox against itself! That's entertainment.