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WHAT'S INSIDE

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AMERICANS WITH DISABILITIES ACT

Maryland election board appeals ruling on online ballot tool access

The Maryland attorney general's office has appealed a federal judge's Sept. 4 decision ordering the state to allow disabled voters to use an online tool to officially mark their absentee ballots in the November election.

National Federation of the Blind Inc. et al. v. Lamone et al., No. 14-2001, appeal filed (4th Cir. Sept. 24, 2014).

Maryland's current absentee ballot program, which requires voters to mark ballots by hand, violates the Americans with Disabilities Act, 42 U.S.C. § 12101, U.S. District Judge Richard D. Bennett of the District of Maryland said.

The online ballot-marking tool, while less than perfect, allows people with disabilities to vote privately and independently, and gives the National Federation of the Blind and the other plaintiffs meaningful access to a fundamental right, the judge said.

"Our clients are looking forward to being able to vote absentee in the same private and independent manner as other Maryland voters in this November's election," plaintiffs' attorney **Jessica P. Weber** of **Brown Goldstein Levy LLP** in Baltimore said.

REUTERS/Gary Cameron

Weber added that her team is confident the 4th U.S. Circuit Court of Appeals will uphold the judge's "well-reasoned" decision.

In a statement, NFB President Mark Riccobono called the case a "victory," adding that it protected the fundamental rights of Maryland voters with disabilities.

Nikki Charlson, a deputy administrator at the **Maryland State Board of Elections**, one of the

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COMMENTARY

Web accessibility for the visually impaired under the ADA

Dykema Gossett PLLC attorneys Michael P. Wippler and Orly M. Henry discuss how the legislative history of the Americans with Disabilities Act shows how Congress intended the law to adapt to new technology and what's in store for website operators in 2015.

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Web accessibility for the visually impaired under the ADA

By Michael P. Wippler, Esq., and Orly M. Henry, Esq.,
Dykema Gossett PLLC

Advocates for the visually impaired have long taken the position that companies are legally obligated to make their websites accessible. More recently, they have begun filing suits to press the issue, with some success. In light of these high-profile cases and pressure from the disabled community and its advocates, the Department of Justice has also gotten involved in this evolving area of the law, including announcing plans to propose regulations on Web accessibility, and intervening in private litigation to apprise the courts of its expansive reading of the Americans with Disabilities Act's general nondiscrimination prohibition.

BARRIERS TO WEB ACCESSIBILITY

In particular, visually impaired individuals may experience significant barriers to accessing the Internet. Many disabled individuals use assistive technology to convert a website's visual information into speech that is read aloud to enable them to navigate or access information contained on websites.

Websites often provide information in such a way that screen readers or other assistive technology cannot retrieve the information to present it in an accessible manner. For example, assistive technology cannot "read" an image or interpret navigational headings, links or data tables. Online forms, which are essential to requesting information and accessing goods and services, are also often unusable by individuals with disabilities. In these ways, it can be difficult or impossible for disabled individuals to fully access the information presented by a website, make online purchases, or otherwise interact with a website without assistance.

Advocates for the visually impaired have long taken the position that companies are legally obligated to make their websites accessible. More recently, they have begun filing suits to press the issue, with some success.

ADA AND RELATED JUSTICE DEPARTMENT REGULATIONS

The antidiscrimination mandate of Title III of the ADA requires "equal access" to "any place of public accommodation, by any person who owns, leases (or leases to), or operates a place of public accommodation."[1] Places of public accommodation are broadly defined to include restaurants, retail stores, movie theaters, recreational facilities and other physical spaces specified in the statute.[2] Accessibility of websites is not specifically addressed in the ADA or Justice Department regulations at this time.

In June 2008 the Justice Department announced that it intended to propose rules on disability nondiscrimination for state and local government services.[3] Though the agency did not plan to include Web accessibility provisions in the rules, it received numerous comments urging it to address this issue under the ADA.[4] Based in part on these comments and other concerns, on July 26, 2010, the Justice Department announced its intent to issue regulations on website accessibility.[5]

In explaining the legal foundation for these new regulations, the agency stated that while the Internet as we know it today did not exist when the ADA was enacted by Congress in 1990, it now "plays a critical role in the daily personal, professional, civic, and business life of Americans."[6] The Justice Department noted that disabled individuals found many websites more difficult or impossible to use because of the lack of accessible features. By design, these websites put individuals with disabilities at a "great disadvantage" with respect to accessing goods and services, education, social networks, entertainment, and information, the agency said.[7]

The public comment period for the Justice Department's proposed rules ended Jan. 24, 2011. Since then, the agency has announced dates for the next step, which is currently scheduled for March 2015.[8] Despite the delay, however, the department has, by intervening in private litigation, shown that inaccessible websites do not comply with the requirements of the ADA.

JUSTICE DEPARTMENT INTERVENTION IN PRIVATE LITIGATION

The Justice Department has intervened in private litigation on the basis of the ADA's broad nondiscrimination mandate in Title III and has directly refuted arguments that accessibility is not required in the absence of specific regulations. Litigants should


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remember that courts may defer to the Justice Department's expertise and agency authority.

H&R Block

The National Federation of the Blind of Massachusetts and two of its members filed suit against accounting giant H&R Block, alleging the company's website was not accessible to the blind. The Justice Department moved to intervene in the suit and, in December 2013, the judge granted the agency's motion.[9] The Justice Department filed a broader complaint alleging that H&R Block violated the ADA by having a website that was inaccessible to people with various disabilities — not just the blind.[10] The complaint alleged that assistive technologies long in use by disabled individuals, such as screen reader software, refreshable Braille displays, keyboard navigation and captioning, were not compatible with H&R Block's website.

The Justice Department and H&R Block entered into a consent decree in March. Under the terms of the five-year consent decree, H&R Block's website, tax filing tool and mobile apps will conform to a privately developed set of guidelines for website accessibility, the Website Content Accessibility Guidelines 2.0 AA.[11] The website will be accessible by Jan. 1, 2015, the start of the next tax filing term. There will be other accessibility deadlines over the five-year term of the decree. The company also agreed to some additional terms, including monetary settlements to the two individual plaintiffs and a civil penalty.

Lucky Brand

In April the Justice Department filed a statement of interest in support of a private, disabled plaintiff who sued Lucky Brand clothing stores over an inaccessible point of sale, or POS, device.[12] Like websites, POS devices are not currently subject to specific technical standards under the ADA. POS devices allow customers to swipe a debit or credit card to complete a purchase. Blind individuals cannot independently use these devices when making a debit card purchase if they do not have a tactile keypad or audio prompts for them to input their personal identification numbers without assistance.

The plaintiff asserted that retailers must provide a way for blind customers to input their PINs into POS devices without requiring outside help. Lucky Brand countered with two main arguments in its motion to dismiss:

- POS devices are not required to be accessible because the ADA has not promulgated specific technical standards for them..
- The plaintiff was not denied access because he could have made his purchase using alternative methods, including cash, credit and debit card payment processed as a credit card charge.[13]

As an interested party, the Justice Department then responded to Lucky Brand's arguments. First, the agency stated that the lack of technical standards for POS devices did not mean they are not required to be accessible. Rather, the ADA's general prohibition against discrimination on the basis of disability, and its requirements for effective communication with the disabled, mean that Lucky Brand has an obligation to makes its POS devices accessible for use by disabled customers.[14]

> Many disabled individuals use assistive technology to convert a website's visual information into speech that is read aloud to enable them to navigate or access information contained on websites.

In response to Lucky Brand's second argument, the Justice Department asserted that the fact that the plaintiff could complete his purchase through other means does not support dismissal of the claims, "as the ADA prohibits not only outright exclusion but also unnecessary differential treatment."[15]

The Justice Department noted that there are many instances where it has found barriers to access for disabled individuals not specifically identified to be prohibited under Title III of the ADA. By way of example, the agency said it "has long considered websites to be covered by Title III despite the fact that there are currently no specific technical requirements for websites currently in the regulation or ADA standards." The Justice Department explained that public accommodations have some flexibility in complying with Title III's general requirements of nondiscrimination and effective communication until specific technical requirements have been promulgated, "but they still must comply."

The judge granted without prejudice Lucky Brand's motion to dismiss for lack of standing because the complaint failed to adequately identify a time in the future when the disabled plaintiff intended to visit a Lucky store.[16]

> Accessibility of websites is not specifically addressed in the ADA or Justice Department regulations at this time.

COURT HOLDS NETFLIX SUBJECT TO ADA

Even in cases without Justice Department intervention, courts have held that the accessibility requirements of the ADA apply to websites.

In 2011 the National Association of the Deaf brought suit against Netflix, claiming that the DVD rental site violated the ADA by failing to provide closed captioning on the majority of its online streaming programming. In June 2012 a federal judge in Massachusetts denied Netflix's motion for judgment on the pleadings.[17] The judge ruled that the ADA's accessibility requirements apply to Web-only businesses, saying "the fact that the ADA does not include Web-based services as a specific example of a public accommodation is irrelevant."[18]

The judge said that the ADA's legislative history made clear that Congress intended it to adapt to changes in technology.[19] The parties settled shortly thereafter, submitting a joint consent decree ensuring closed captions on 100 percent of Netflix's streaming content within two years.[20]

BUSINESS CONSIDERATIONS

Of course, providing accessibility to a website for disabled individuals entails costs, in development and, in some instances, maintenance. But those costs can reap benefits, including lowering litigation exposure. In addition, an accessible website makes a company's goods and services available to a new segment of the market

— the disabled population. And because of the limited mobility that afflicts many disabled individuals, this is a market segment that may perform a tremendous amount of its commerce online. Thus, for some businesses, the cost of a new accessible website, or of retrofitting an existing website, may well be a wise investment. WJ

NOTES

[1] 42 U.S.C. § 12182(a).

[2] 42 U.S.C. § 12181(7); 28 C.F.R. 36.104.

[3] Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34466-01 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

[4] *See* Dep't of Justice, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, RIN 1190-AA61, Advanced Notice of Proposed Rulemaking, *available at* http://www.ada.gov/anprm2010/web%20anprm_2010.htm/.

[5] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460-01 (proposed July 26, 2010) (to be codified at 28 C.F.R pts. 35 and 36); *see* https://federalregister.gov/a/2010-18334/.

[6] *Id.*

[7] *Id.*

[8] Dep't of Justice, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, RIN 1190-AA61 (Spring 2014), *available at* http://federalregister.gov/r/1190-AA61/.

[9] *Nat'l Fed'n of the Blind et al. v. HRB Digital LLC et al.*, No. 1:13-cv-10799-GAO, *motion to intervene granted* (D. Mass. Dec. 10, 2013).

[10] *Nat'l Fed'n of the Blind v. HRB Digital LLC*, No. 1:13-cv-10799-GAO, *intervener complaint filed* (D. Mass. Dec. 11, 2013).

[11] *Nat'l Fed'n of the Blind v. HRB Digital LLC*, No. 1:13-cv-10799-GAO, *consent decree filed* (D. Mass. Mar. 25, 2014). The WCAG 2.0 is a privately developed set of guidelines for website accessibility and thus far appears to be the accessibility framework favored by the Justice Department.

[12] *New v. Lucky Brand Dungaree Stores*, No. 14-CV-20574, *statement of interest of the United States filed* (S.D. Fla. Apr. 10, 2014). The Justice Department cited Title III of the ADA, its implementing regulations, and "potential forthcoming rulemaking concerning different types of equipment and electronic information technologies" as its legal authority to file the statement of interest.

[13] *New v. Lucky Brand Dungaree Stores*, No. 14-CV-20574, *defendant's motion to dismiss filed* (S.D. Fla. Mar. 14, 2014).

[14] *See* 42 U.S.C. §§ 12182(a) and (b)(2)(A)(iii).

[15] *See* 42 U.S.C. §§ 12182(a), (b)(1)(A), (b)(2)(A)(iii).

[16] *New v. Lucky Brand Dungaree Stores*, No. 14-CV-20574, motion to dismiss granted (S.D. Fla. Apr. 21, 2014). One day later, the plaintiff filed an amended complaint, *New v. Lucky Brand Dungaree Stores, Inc.*, No. 14-CV-20574, *amended complaint filed* (S.D. Fla. Apr. 22, 2014), but then voluntarily dismissed the claim a short time later, but it is not clear why. The plaintiff's attorney has not commented and Lucky Brand denies a settlement.

[17] *Nat'l Ass'n of the Deaf v. Netflix Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012).

[18] *Id.* at 200.

[19] *Id.* at 200-01.

[20] *Nat'l Ass'n of the Deaf v. Netflix Inc.*, No. 11-30168, *consent decree filed* (D. Mass. Oct. 9, 2012).

Fox News video snippets in media database is fair use, N.Y. federal judge rules

A company offering an online media-monitoring tool — a comprehensive, searchable database of worldwide news coverage that displays video clips and transcript snippets — may include Fox News Network's footage in the product, a New York federal judge has ruled.

Fox News Network LLC v. TVEyes Inc., No. 13 Civ. 5315, 2014 WL 4444043 (S.D.N.Y. Sept. 9, 2014).

TVEyes Inc. transformed Fox's original content to serve a different, useful purpose — its tool allows users track and monitor how and what news is reported worldwide, U.S. District Judge Alvin K. Hellerstein of the Southern District of New York decided.

He agreed with TVEyes that this is a fair use of the copyrighted content and granted the company's partial summary judgment motion in Fox's infringement suit.

Last July Fox sued TVEyes, saying its database wrongfully included 19 hour-long programs that aired on the Fox News Channel and the Fox Business Network between Oct. 16, 2012, and July 3, 2013.

This violated the network's exclusive rights to the content under the Copyright Act, 17 U.S.C. § 101, Fox said.

"We are very pleased with the decision," **TVEyes CEO David Ives** said. "We have no comments beyond what was stated in the judge's decision."

Fox News Network did not respond to a request for a comment on Judge Hellerstein's ruling.

Fair-use factors

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
- The nature of the copyrighted work.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- The effect of the use upon the potential market for or value of the copyrighted work.

REUTERS/Jonathan Alcorn

According to the judge's order, "TVEyes is the only service that creates a database of *everything* that television channels broadcast, 24 hours a day, seven days a week."

Its database allows subscribers to monitor and track news reporting in real time across more than 1,400 TV and radio station broadcasts worldwide. Users can search by terms or phrases across specific dates or time periods to see how different stations are covering the news, the judge said.

Users can also set up email alerts to track the results, which they can also share on social media sites, according to the order.

Once a subscriber searches the database for a term, it returns the number of times the news mentioned the term, listing any relevant hits in reverse chronological order. Each result shows a thumbnail image of the particular show that used the term, which users can click to watch a 14-second video clip of the coverage, and to read a snippet of the transcript, the judge said.

TVEyes admitted that it included Fox's footage in its database and created 14-second video clips to display in search results, but it argued in court documents that this was a fair use of the content under Section 107 of the Copyright Act, 17 U.S.C. § 107.

The parties submitted cross-motions for summary judgment on whether the database infringed Fox's exclusive rights to the content.

Judge Hellerstein found that TVEyes did not violate the network's intellectual property rights and granted TVEyes' motion.

Considering the four fair-use factors, he found that the first and fourth factors — the purpose of using the copyrighted content and the economic impact on its market — weighed in TVEyes' favor.

Although the company offered a commercial database, it transformed the copyrighted content and created a new service, the judge said.

The nature of the copyrighted work — the second fair-use factor — did not affect the judge's decision, but he did note that Fox's footage was informational and there is greater leeway for using this type of copyrighted content.

Finally, it was necessary for TVEyes to include the entire hour-long programs in its comprehensive database to deliver the relevant excerpts, clips and snippets in search results, the judge said, finding the amount was copying was not unreasonable.

> "TVEyes is the only service that creates a database of *everything* that television channels broadcast, 24 hours a day, seven days a week," the judge said.

The judge, however, did not rule on whether TVEyes' other features — allowing users to search for clips by date and time, archive and download email results, and share them via social media — are integral to its product and deserve "fair use" protection. WJ

Attorneys:
Plaintiff: Dale M. Cendali, Brian Leary, Felicity S. Kohn, Johanna Schmitt and Joshua L. Simmons, Kirkland & Ellis, New York

Defendant: Andrew H. Schapiro, Jessica A. Rose, Todd S. Anten and Quinn Emanuel Urquhart & Sullivan, New York

Related Court Document:
Order: 2014 WL 4444043

See Document Section B (P. 32) for the order.

Ex-employee suing over lost iPhone data must produce device

A man who alleges his former employer remotely wiped his personal iPhone must show what information and data he allegedly lost to prove damages for theft and trespass, a New York judge has ruled.

Advanstar Communications Inc. et al. v. Pollard et al., No. 652153/12, 2014 WL 4613020 (N.Y. Sup. Ct., N.Y. County Sept. 16, 2014).

Andrew Pollard, who managed a fashion trade show for Advanstar Communications Inc. before he left to work for a competitor, never allowed his former employer to inspect the device, Justice Jeffery K. Oing of the New York County Supreme Court said in a Sept. 16 order.

Although Advanstar admitted to remotely wiping Pollard's personal phone, the judge said, without an inspection of the device, the court has no meaningful account of what Pollard lost.

Justice Oing denied Pollard's motion for partial summary judgment on his conversion and trespass claims, finding unresolved factual issues.

He also rejected Pollard's claim that Advanstar violated the Stored Communications Act, 18 U.S.C. § 2701, when it accessed his iPhone without his authorization.

Pollard never alleged that Advanstar unlawfully intercepted any files while they were in transmission or stored on his cellphone provider's server, the judge said. Rather, he alleged Advanstar remotely deleted files saved on his device.

The SCA does not apply to those stored files, the judge said.

According to the order, the issues concerning Pollard's personal iPhone arose in a lawsuit Advanstar filed against him in 2012 after he left the company to join competitor Global Apparel Network Inc.

Before he left, Pollard allegedly took confidential and proprietary information, including customer lists and other computer files, to share with his new employer, Advanstar said.

Pollard countersued Advanstar, alleging it remotely wiped all files from his personal iPhone once he gave notice about his resignation.

According to the order, when Pollard began working for Advanstar, the company set up his personal iPhone to access the company's email server, which allowed him to communicate with business contacts using that device. Pollard says he never authorized the company to access, interfere with or delete files on the phone.

REUTERS/George Frey

A former employee of Advanstar Communications alleged it remotely wiped all files from his personal iPhone once he gave notice about his resignation. An iPhone 5S is shown here.

In addition to his business contacts and notes, the remote wipe erased all his personal contacts, notes, text and instant messages, voicemails, photographs, videos, and music, the order says. None of this information was backed up or stored elsewhere, Pollard says.

Pollard's countersuit included counts for conversion, trespass and violations of the Stored Communications Act.

In February Pollard filed for partial summary judgment on these claims, saying it is undisputed that Advanstar accessed his personal device and deleted all of his files without authorization.

Justice Oing tossed the SCA claim, ruling that the law does not protect the files saved on Pollard's device.

In addition, Pollard never allowed Advanstar to inspect his phone, only his computer, but Advanstar's forensic computer examination showed he may have made backup copies of the iPhone data allegedly lost, the judge said.

Therefore, outstanding factual issues — such as whether Pollard actually lost any data and what damages should be awarded for those losses — precluded summary judgment on the other two claims, the judge ruled, denying Pollard's motion. WJ

Attorneys:
Plaintiff: Joseph J. Ortego, Nixon Peabody LLP, New York

Defendant: Christopher Serbagi, New York

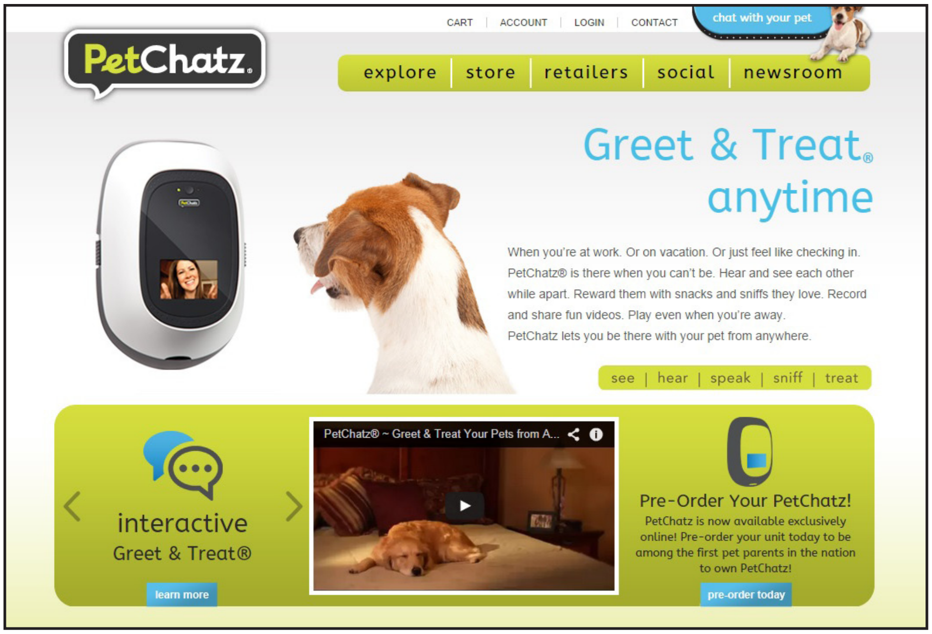
Related Court Document:
Order: 2014 WL 4613020

See Document Section C (P. 44) for the order.

Judge tosses 'Skype for pets' patent suit

By Patrick H.J. Hughes, Managing Editor, Westlaw Daily Briefing

A California federal judge has dismissed for lack of personal jurisdiction an accused infringer's suit against the holder of a patent that allows owners to talk to their pets over the Internet.



Courtesy of www.petchatz.com

Plaintiff Petzilla Inc. and defendant Anser Innovation are competitors in the market for remote pet-communications devices. Asner is the assignee of a patent for a "domestic animal telephone" used in the PetChatz product, shown here in a screenshot.

Petzilla Inc. v. Anser Innovation LLC, No. 14-1354, 2014 WL 4744434 (N.D. Cal. Sept. 23, 2014).

Finding the maker of PetChatz video-communication devices did not enforce or defend its patent in the forum, U.S. District Judge Edward M. Chen of the Northern District of California granted Anser Innovations LLC's motion to dismiss.

Petzilla Inc., located in San Jose, Calif., and Minnesota-based Anser are competitors in the market for remote pet-communications devices, according to the judge's order.

Anser is the assignee of U.S. Patent No. 7,878,152, which covers a "domestic animal telephone" used in the PetChatz product, the order said.

Online reviews and blogs describe the PetChatz product as a "Skype for pets," a two-way video system that sits on an electrical socket at a pet's eye-level to allow owners to see, talk and dispense treats to their pets.

Petzilla developed a product called PetziConnect, which Petzilla described in its complaint as "a device that plugs into a standard electrical outlet and includes a real-time video camera, a microphone and a food dispenser."

In 2013, after some discussion over a licensing deal, Anser sent a cease-and-desist letter, which led Petzilla to file suit seeking a declaration of non-infringement, according to the opinion.

ASPECTS OF A PATENT LICENSE

In March Petzilla voluntarily dismissed its first complaint and in April filed an amended complaint that included information about Anser's connections to the Northern District of California in an attempt to establish jurisdiction.

Petzilla appeared to agree the court lacked general jurisdiction over Anser because the complaint offered no evidence to show Anser had continuous and systematic contacts with the forum.

Instead, Petzilla argued specific jurisdiction was established from Anser's efforts in the forum to enforce its patent rights, even if such actions were "isolated and sporadic."

Petzilla initially claimed the cease-and-desist letter established specific jurisdiction, but Judge Chen said more was required to show Anser had attempted to enforce its patent rights in the forum.

Petzilla added that an agreement between Anser and the pet-treat distributor Tuffy's Pet Foods Inc. contained aspects of a patent license, qualifying it as "enforcement" activity.

Tuffy's makes "treat packs" for individual use or use through PetChatz products, according to the opinion.

Although no PetChatz products had been shipped to California at the time of the complaint's filing, the agreement gave Tuffy's rights to use Anser's intellectual property to sell its treat packs in California, where Tuffy's already does business.

Because the patent does not disclose pet food, and the agreement only gives Tuffy's the right to make and sell treats used in connection with the patent, the agreement "confers no rights to Tuffy's to enforce the '152 patent," Judge Chen said.

Petzilla argued that claim differentiation establishes that the treats are covered by the patent, as the treats are mentioned in one dependent claim, but not in an independent claim.

The dependent claim incorporates by reference all the limitations of the independent claim, and therefore does not render the treats as an element of the patent, the judge said.

Finding Tuffy's had no "proprietary or ownership interest of any kind in the IP of Anser," the judge granted Anser's motion to dismiss. WJ

Attorneys:
Plaintiff: Nicolas S. Gikkas, Palo Alto, Calif.

Defendant: George R. Morris, King & Spalding, Redwood Shores, Calif.

Related Court Document:
Order: 2014 WL 4744434

TinyCo, Yelp settle online privacy charges

Mobile game company TinyCo Inc. and online review site Yelp have settled separate Justice Department charges that they improperly collected information from children through their mobile apps.

United States v. Yelp Inc., No. 3:14-cv-04163, proposed stipulated order filed (N.D. Cal. Sept. 16, 2014).

United States v. TinyCo Inc., No. 3:14-cv-04164, proposed stipulated order filed (N.D. Cal. Sept. 16, 2014).

The Justice Department alleged in the U.S. District Court for the Northern District of California that both companies violated the Children's Online Privacy Protection Act, or COPPA, a federal law that restricts the collection of information from children online.

TinyCo, the San Francisco-based company behind the mobile app games Tiny Pets and Tiny Monsters, will pay a $300,000 civil penalty and must delete any information collected from children under 13 under the terms of a proposed stipulated order.

Under a separate order, Yelp will pay a $450,000 civil penalty and delete any information it collected from registered users under 13.

The Justice Department filed the complaints on behalf of the Federal Trade Commission, which announced entry of the proposed orders Sept. 17.

"As people, especially children, move more of their lives onto mobile devices, it's important that they have the same consumer protections when they're using an app that they have when they're on a website," Jessica Rich of the FTC said in a statement.

COPPA applies to operators of commercial websites and online services directed to general audiences that include children under 13.

The law, among other things, requires these operators to post privacy policies, provide parental notice, and obtain verifiable consent from a parent or guardian before collecting personal information from children.

TINYCO

According to the FTC's complaint, many of TinyCo's apps, which have been downloaded more than 34 million times, are targeted to children.

Some of the company's apps include an optional feature that collects email addresses from all users, including children younger than 13. The company allegedly failed to follow the steps required under COPPA before acquiring such personal information, the suit says.

YELP

In a complaint also filed in the District Court, the FTC alleged that from 2009 to 2013, Yelp Inc. collected personal information from children without first notifying parents and obtaining their consent.

During their registration process, several thousand users provided a date of birth showing they were under age 13.

Yelp allegedly collected this information, which included their names, email addresses, locations and other information that they posted on the online review site, the complaint says.

WESTLAW JOURNAL/Kim Sachs

The stipulated orders filed in each case are subject to court approval, the FTC said. WJ

Related Court Documents:
TinyCo complaint: 2014 WL 4721674
Yelp complaint: 2014 WL 4721673

Judge tosses Xbox LIVE privacy action

A Seattle federal judge has thrown out a lawsuit by six former Xbox LIVE subscribers who claim Microsoft violated their privacy by disclosing their personal information to data-mining companies.

Mendoza et al. v. Microsoft Inc., No. C-14-316-MJP, 2014 WL 4540213 (W.D. Wash., Seattle Sept. 11, 2014).

Granting Microsoft's motion to dismiss the suit, U.S. District Judge Marsha J. Pechman of the Western District of Washington ruled that the plaintiffs failed to back up their claims that they had been harmed by the software giant.

"Plaintiffs do not allege a single fact to support their allegation that Microsoft allegedly retained and disclosed personally identifiable information," the judge said.

Xbox LIVE is a subscription-based gaming portal that provides online gaming and video rental services.

According to the judge's order, the plaintiffs alleged that Microsoft retained their names, addresses, video programming viewing histories and other personal information after they canceled their Xbox LIVE memberships.

REUTERS/Wolfgang Rattay

The plaintiffs alleged that Microsoft retained their names, addresses, video programming viewing histories and other personal information after they canceled their Xbox LIVE memberships.

The company then allegedly sold the information for profit to data-mining companies in violation of the Video Privacy Protection Act, 18 U.S.C. § 2710; the California Customer Records Act, Cal. Civ. Code § 1798.80; and the state's unfair-competition law, Cal. Bus. & Prof. Code § 17200.

But Judge Pechman found most of the plaintiffs' allegations were largely based on "information or belief" or "conjecture." She said they failed to allege with particularity how Microsoft violated the VPPA and CRA.

"Absent is any allegation as to who Microsoft disclosed this information to, when the disclosures occurred and how they occurred, let alone that these acts particularly injured the named plaintiffs," the judge wrote.

The plaintiffs also lack standing for their unfair-competition law claims because they did not allege a particularized injury caused by Microsoft, she added. WJ

Attorneys:
Plaintiffs: Lish Whitson and Kristy Lee Stell, Lish Whitson PLLC, Seattle

Defendant: Rebecca J. Francis and Stephen M. Rummage, Davis Wright Tremaine LLP, Seattle

Related Court Document:
Order: 2014 WL 4540213

Adobe says early-cancellation fee 'not unconscionable'

Adobe Systems Inc. has asked a California federal judge to dismiss a lawsuit alleging the company charges customers an illegal early-termination fee when they cancel their subscriptions to its Creative Cloud software package.

***Mahlum v. Adobe Systems Inc.*, No. 5:14-cv-02988-HRL, motion to dismiss filed (N.D. Cal., San Jose Div. Sept. 18, 2014).**

The lawsuit alleges the fee, which can total hundreds of dollars, constitutes an unlawful penalty under California's unfair-competition law, Cal. Bus. & Prof. Code § 17200, and Consumers Legal Remedies Act, Cal. Civ. Code § 1750.

But in its motion to dismiss filed in the U.S. District Court for the Northern District of California, Adobe says the fee is a "fair and reasonable alternative means of paying the contract."

The suit concerns Adobe's subscription-based service that allows customers to access its Creative Cloud package, which includes Photoshop, Illustrator, Adobe Muse and other popular applications.

> "Payment of 50 percent of the remaining contract obligation is unreasonable for cancellation of a Web-based subscription service," the suit says.

The annual plan costs customers $49.99 per month for one year of access to the full package. But when a customer cancels the service more than 30 days after subscribing, Adobe imposes an early-termination fee totaling 50 percent of the remaining balance of the yearly commitment price, according to the suit by plaintiff Scotty Mahlum.

"Payment of 50 percent of the remaining contract obligation is unreasonable for cancellation of a Web-based subscription service and does not reflect a reasonable

REUTERS/Leonhard Foeger

endeavor by defendant to fix fair average compensation for its losses," the suit says.

The class-action complaint seeks a permanent injunction blocking collection of the early-termination fees. It also seeks a court order requiring Adobe to pay back all fees it has collected from the proposed class of Creative Cloud subscribers (see *Westlaw Journal Computer & Internet*, Vol. 32, Iss. 3).

Moving to dismiss the suit, Adobe says the fee is "not unconscionable."

"A fee of 50 percent less than the remaining contractual obligation does not 'shock the conscience,'" Adobe said, quoting the 9th U.S. Circuit Court of Appeals' decision in *Schneider v. Verizon Internet Services*, 400 Fed. Appx. 136 (9th Cir. 2010).

The company adds that the cancellation option is a beneficial contractual term "because it always costs less to cancel than to continue the agreed upon subscription." WJ

Attorneys:
Plaintiff: L. Timothy Fisher and Annick M. Persinger, Bursor & Fisher, Walnut Creek, Calif.

Defendant: Trenton H. Norris, Zachary B. Allen and Arnold & Porter, San Francisco

Related Court Documents:
Complaint: 2014 WL 2938073
Motion to dismiss: 2014 WL 4721669

Use per se standard to judge Silicon Valley wage-fixing case, workers tell court

A class-action lawsuit accusing six high-tech companies of conspiring to fix and suppress employee wages and mobility should be analyzed as a per se, or inherently illegal, antitrust violation, a group of employees has argued in a new court filing.

In re High-Tech Employee Antitrust Litigation, No. 11-CV-2509, plaintiffs' reply in support of motion for application of per se standard filed (N.D. Cal., San Jose Div. Sept. 12, 2014).

A per se violation is afforded an irrebuttable presumption of anti-competitive effect from a defendant's alleged conduct, while the other approach, the rule of reason, looks at whether the alleged conduct's anti-competitive effects outweigh its pro-competitive justifications.

The employees claim in a reply motion filed Sept. 12 in the U.S. District Court for the Northern District of California that the offending conduct in this case is an allocation scheme that falls under the precept of the per se rule.

"[W]e find it unnecessary to engage in the 'incredibly complicated and prolonged economic investigation' under the rule-of-reason standard where, as here, the alleged agreement is a 'naked restraint' with no possible pro-competitive justification," the complaint says.

ALLEGED CONSPIRACY

According to the class-action complaint, the named plaintiffs all worked as salaried software engineers for Adobe, Apple, Google, Intel, Intuit, Pixar and Lucasfilm between Jan. 1, 2005, and Jan. 1, 2010. Pixar and Lucasfilm are subsidiaries of Disney.

During that time, the companies entered into "do not cold call" agreements, promising not to poach each other's specialized, salaried employees. These agreements skewed the economics of the labor market and drove down salaries and other labor costs, the complaint asserts.

In addition, senior executives sat on one another's boards and "actively participated in negotiating, executing, monitoring compliance with and policing violations of the bilateral agreement," the suit says.

Agreements between the defendants skewed the economics of the labor market and drove down salaries and other labor costs, the complaint asserts.

THE SUIT

The employees filed suit in the District Court, alleging violations of the Sherman Act, 15 U.S.C. § 1; California's related Cartwright Act, Cal. Bus. & Prof. Code § 16720; and the state's unfair-competition law, Cal. Bus. & Prof. Code § 17200.

The companies moved to dismiss the suit in 2012, which U.S. District Judge Lucy H. Koh denied. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509, 2012 WL 1353057 (N.D. Cal., San Jose Div. Apr. 18, 2012).

The suit sufficiently "details the actors, effect, victims, locations and timing of the six bilateral agreements between defendants," the judge wrote.

She also granted the plaintiffs class certification in October 2013. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509, 985 F. Supp. 2d 1167 (N.D. Cal., San Jose Div. Oct. 24, 2013).

The plaintiffs settled their dispute with Pixar, Lucasfilm and Intuit in July 2013, and Judge Koh approved the settlement May 16. The remaining defendants — Apple, Google, Intel and Adobe — reached a tentative settlement with the plaintiffs a week later on May 23.

Judge Koh rejected that settlement Aug. 8, finding that while the remaining plaintiffs had since gained class status and their case has thus become much stronger over the past year, the remaining defendants were offering proportionately too little in comparison with the first settlement. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509, 2014 WL 3917126 (N.D. Cal., San Jose Div. Aug. 8, 2014).

PER SE RULE

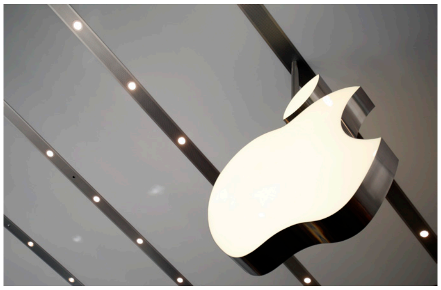
The employees are now asking the court to apply the per se rule to the case against the remaining defendants.

The remaining defendants counter that the rule of reason is the presumptive rule and the plaintiffs have not shown why a departure from that standard is needed.

The employees counter that the defendants have not explained how their agreements do anything other than harm competition.

"Instead, they have offered a hodge-podge of irrelevant authority that they have mischaracterized," the reply motion says. WJ

Related Court Documents:
Plaintiffs' reply motion: 2014 WL 4654598
Defendants' response motion: 2014 WL 1514798



REUTERS/Yuya Shino

REUTERS/Edgar Su

Industry giants such as Apple and Lucasfilm are among the defendants.

California man gets 3 years for trying to sell military secrets

An ex-Air Force employee has been sentenced to more than three years in federal prison for attempting to pass off sensitive military satellite information to an individual posing as an agent of the Chinese government.

United States v. Orr, No. 2:13-cr-00872, defendant sentenced (C.D. Cal. Sept. 8, 2014).

Judge Beverly Reid O'Connell of the U.S. District Court for the Central District of California also ordered Brian Scott Orr to serve three years of supervised release and to pay a $10,000 fine. Orr, 42, of Marina Del Rey, Calif., pleaded guilty in March to one count of retention of stolen property, the Justice Department said in a statement.

According to a grand jury indictment and his plea agreement, Orr was a civilian employee at the U.S. Air Force Research Laboratory in Rome, N.Y., from 2009 to 2011. His duties included identifying and evaluating vulnerabilities in the Air Force's computer network used to control military satellites.

Retention of stolen government property

Public money, property or records:

Whoever embezzles, steals, purloins or knowingly converts to his use or the use of another or without authority sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof, or

Whoever receives, conceals or retains the same with a intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted …

Shall be fined under this title or imprisoned not more than 10 years, or both, but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

—18 U.S.C. § 641

Former Air Force employee Brian Scott Orr told an undercover FBI agent that he was the "foremost expert" on attacking the agency's computer network, prosecutors say.

Orr was granted a top-secret security clearance, which allowed him to access sensitive government information. Prosecutors said he used the security clearance to obtain materials for 31 training courses on how to operate most aspects of the computer network and related satellites.

The training materials are restricted for use only by certain federal employees and government contractors and clearly state they are the property of the U.S. government and that export is strictly forbidden under the Arms Export Control Act.

Orr illegally retained these items after he stopped working for the Air Force in January 2011, the charges said.

Prosecutors said that in September 2013 Orr began communicating with a person posing as a representative of the Chinese government but who was actually an undercover FBI agent.

Orr met with this operative twice in October and November 2013 and received $7,000 in exchange for providing the stolen training materials on password-protected USB devices, the Justice Department said.

Orr allegedly used a number of sophisticated techniques in his dealings with the undercover agent to conceal his plans to sell the military information. Prosecutors say he hacked the undercover agent's phone to gain access to the telephone account and other identifying information and used a prepaid phone to set up meetings.

The Justice Department said Orr told the agent he was the "foremost expert on attacking the computer network" and that he could destroy or disrupt U.S. military satellites on China's behalf.

Orr also allegedly offered to reveal how to destroy the network for a "big reward," but told the agent he would need to be taken out of the country in order to "actually do something to this network." WJ

Related Court Documents:
Indictment: 2013 WL 9678193
Plea agreement: 2014 WL 4635315

Ballot tool access

CONTINUED FROM PAGE 1

defendants in the case, also responded to the decision.

"According to the judge's order, the state of Maryland is required to provide an accessible method for voters with disabilities to make selections on an absentee ballot," she said.

Assistant Maryland Attorney General Julia Bernhardt, who filed the appeal, said her office does not comment on pending litigation.

MARYLAND'S ABSENTEE-VOTING PROGRAM

According to Judge Bennett's opinion, currently in Maryland, a voter must mark an absentee ballot by hand before submitting it to a local election board. Absentee voters who need assistance can choose a person to mark their ballot.

For several years, Maryland has been developing a software tool that allows absentee voters to receive their ballots electronically and to mark them online before printing them out for submission.

The current version of this tool has accessibility features for voters with disabilities, Judge Bennett said, and the National Federation of the Blind helped to create it.

Last year, the Maryland Legislature passed a law, Md. Elec. Law. § 9-308.1, saying the online ballot-marking tool qualified as a "voting system." The law requires a supermajority of the five-member Maryland Board of Elections to certify the tool before it can be used for absentee ballots in any election.

At the board's meetings in February, April and July, it failed to certify the tool for use in the primary or upcoming general election, the opinion said. During the July meeting, at least two members said they needed more information about the tool's security, despite a December 2013 report concluding the tool was secure and an independent audit confirming the methods used to reach that conclusion, the judge said.

ACCESSIBILITY

In May the National Federation of the Blind and three individual plaintiffs — Kenneth Capone, Melissa Riccobono (who is married to NFB President Mark Riccobono) and Janice Toothman — sued the Board of Elections in federal court for violating the Americans with Disabilities Act, 42 U.S.C. § 12101, and other laws.

Without access to the online-ballot marking tool, the plaintiffs do not have meaningful access to vote independently and privately, the complaint said.

The evidence showed the tool is relatively secure and highly accessible for disabled voters, Judge Bennett said, noting that it is compatible with reasonably up-to-date computer and screen access software.

Additionally, Maryland already allowed a version of the tool to be used for overseas voters in 2012, which allegedly caused no problems.

Orly M. Henry, an associate at **Dykema Gossett PLLC** who was not involved in the case, has written about a related topic, website accessibility under the Americans with Disabilities Act.

"The Maryland decision recognizes that the federally protected right of a disabled individual to privately and independently cast a vote by absentee ballot may supersede the state's interest in complying with its own laws," she said.

"Our clients are looking forward to being able to vote absentee in the same private and independent manner as other Maryland voters in this November's election," plaintiffs' attorney Jessica P. Weber of Brown Goldstein Levy LLP said.

Capone has cerebral palsy and cannot use his arms or legs, Riccobono is blind, and Toothman is blind and deaf, the order said.

They must get assistance for their absentee ballots because they cannot mark their ballots by hand, the complaint said.

Judge Bennett held a hearing on the issue in mid-August and found that the online ballot-marking tool was a reasonable modification that protected the plaintiffs' fundamental rights to vote independently and privately.

The board's failure to certify the tool in time for the election should not prohibit the plaintiffs from being able to use it in November, he said.

"Other states should take notice that absentee voting systems, particularly where offered to all voters, may need to accommodate the disabled, even if alternative methods of voting are made accessible," Henry added. WJ

Attorneys:
Plaintiffs: Daniel F. Goldstein and Jessica P. Weber, Brown Goldstein & Levy, Baltimore

Defendants: Attorney General Douglas F. Gansler and Assistant Attorney General Julia D. Bernhardt, Baltimore

Related Court Document:
District Court opinion: 2014 WL 4388342

See Document Section A (P. 19) for the opinion.

NEWS IN BRIEF

$500K SUIT FILED OVER @OCCUPYWALLSTREETNYC ACCOUNT

A New York nonprofit associated with the Occupy Wall Street movement has sued a Detroit-based educator and activist in Manhattan for allegedly changing the @OccupyWallStreetNYC Twitter account's password, locking out the account owner. According to the state court complaint, Adbusters Media Foundation created the Twitter account to spread awareness about a New York protest starting Sept. 17, 2011. About two days before the event, it transferred the account to Marisa Holmes, a local activist. Since then, Holmes allowed Justin Wedes and other organizations, including plaintiff OWS Media Group, administrative access to the Twitter account, which had 170,000 followers. This August, however, Wedes wrongfully took over the account, the suit says. On Sept. 16, Holmes transferred her rights the account to OWS, the suit says. The nonprofit seeks $500,000 in damages and an order compelling Wedes to return the account.

***OWS Media Group Inc. v. Wedes*, No. 0159126-2014, complaint filed (N.Y. Sup. Ct., N.Y. County Sept. 17, 2014).**

Related Court Document:
Complaint: 2014 WL 4628586

FLORIDA HIGH COURT OKS STATE AGENCY'S TRADEMARK FIGHT

A Florida state agency can sue a private company offering competing online education services for trademark infringement, the Florida Supreme Court has ruled. The Florida VirtualSchool, a state agency, sued K12 Inc. and a local affiliate for using "Florida Virtual Program" and "FLVP" to offer their services and designing a website similar to the state agency's site, which allegedly confused consumers. A federal judge dismissed the case in 2012, finding the Florida Department of State, not the Florida VirtualSchool, owned the school's trademarks, so FLVS had no standing to sue. On appeal, the 11th U.S. Circuit Court of Appeals certified the question about the ownership of the school's trademarks to the state high court, which ruled FLVS had a license to use the trademarks and could sue to protect its intellectual property rights.

***Florida VirtualSchool et al. v. K12 Inc. et al.*, No. SC13-1934, 2014 WL 4638694 (Fla. Sept. 18, 2014).**

Related Court Documents:
Opinion: 2014 WL 4638694
Federal trial court order: 2012 WL 2920998

EPA'S POLICY ABOUT DELETING TEXTS STILL AT ISSUE

The U.S. Environmental Protection Agency must continue defending against part of a lawsuit claiming it wrongfully destroyed over 5,000 text messages on government-issued mobile devices without saving any as public records, a federal judge in Washington has ruled. In response to the decision, EPA press officer Jennifer Colaizzi said the judge did not find the EPA had violated any laws. Based on the judge's ruling, think tank Competitive Enterprise Institute may move forward with its enforcement and *mandamus* claims relating to whether the agency needs to notify the National Archives about its destruction of work-related texts. The judge dismissed CEI's other claims relating to federal records and open information. In a blog post, CEI said the decision means EPA officials will need to rethink their position that all text messages on government-issued devices are personal rather than work-related.

***Competitive Enterprise Institute v. U.S. Environmental Protection Agency*, No. 13–1532, 2014 WL 4359191 (D.D.C. Sept. 4, 2014).**

Related Court Document:
Opinion: 2014 WL 4359191

CASE AND DOCUMENT INDEX