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 MARK T JANSEN
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Nuclear Fallout

Judge Gladys Kessler has changed her mind, allowing a suit over radiation exposure filed by WWII veterans to proceed.

Page 3



Cookie Monster

Cristina Arguedas is helping re-create the trial of homemaking maven Martha Stewart. No, she's not playing Martha. See Bar Talk.

Page 4



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MONDAY, AUGUST 16, 2004

Federal judge rules that suit is no Perfect 10

By Jeff Chorney
 RECORDER STAFF WRITER

Don't blame the middleman for pilfered Internet porn.

A San Jose federal judge has decided that credit card companies cannot be held liable for copyright infringements committed by their customers.

The ruling by U.S. District Judge James Ware shuts down a suit filed by Beverly Hills' Perfect 10. The porn purveyor had sued several companies involved with payments over the Internet, including Visa and MasterCard, for completing transactions at sites that sold stolen Perfect 10 images.



WARE

"The ability to process credit cards does not directly assist the allegedly infringing Web sites in copying plaintiff's works," according to the decision, which was released Aug. 6. "Defendants do not provide the means for distributing those works to others, nor do they provide bandwidth or storage space with which to transfer or store the works."

Perfect 10, which had sued under the theories of contributory and vicarious copyright infringement, wanted the credit card companies held liable for facilitating the buying and selling of the stolen images.

But Ware rejected all of the plaintiff's arguments. He gave it room to amend, however, and Perfect 10 will decide within the next 10 days whether to refile or appeal, said Howard King of King, Holmes, Paterno & Berliner in Los Angeles.

"From the beginning, we knew it would probably be decided by a higher court," King said. "I didn't see a lot of rays of hope in Judge Ware's opinion."

Fred von Lohmann, senior intellectual property attorney at the Electronic Frontier Foundation, hailed the decision, calling it an impor-

tant step in the fight against overzealous copyright holders.

"It gives us a clear outer limit for ... copyright infringement," von Lohmann said.

EFF believes broad copyright liability stifles innovation and that the kind of enforcement Perfect 10 was seeking could discourage businesses from getting involved with new technologies and online ventures.

Von Lohmann said the matter is one of two cases in the Northern District of California testing the limits of copyright liability. The other stems from litigation filed against investors in the online file-sharing system Napster. The case is a descendant of the dispute that caught international headlines.

Last month, Judge Marilyn Hall Patel decided that the new Napster case, *UMG Recordings v. Bertelsmann AG*, 04-1351, could proceed. Record companies want investors held liable for infringement of copyrighted songs.

EFF opposes that suit and was disappointed by Patel's decision because it doesn't want courts to determine that "liability climbs the ladder," von Lohmann said.

Michael Page, a partner at Kecker & Van

Nest who represents First Data Corp. in the Perfect 10 case, agreed that the cases were creating important new law.

"These cases ... are all about trying to hold someone else who didn't infringe on a copyright liable," said Page, who also represents Hummer Winblad Venture Partners in the Napster case now in front of Patel. Perfect 10's lawyer, King, represented Metallica and Dr. Dre in the original suit against Napster.

In the Perfect 10 case, Ware said, it comes down to what degree the credit card companies can control the Internet businesses. It's not enough, the judge wrote, for "the defendants to merely have contributed to the general business of the infringer. To have materially contributed to copyright infringement, 'the ... assistance must bear some direct relationship to the infringing acts.'"

Ware cited the older Napster case, *A&M Records v. Napster*, 239 F.3d 1004, as an example where there was "substantial contributing conduct" because Napster provided an online index of tradable, copyright-protected songs.

Reporter Jeff Chorney's e-mail address is jchorney@therecorder.com.