



CLASS ACTION LITIGATION



REPORT

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In increasing numbers, Americans are migrating from print media to online news, forcing class action lawyers and judges to rethink the best way to provide class notice to potential class members, writes author Jeanne C. Finegan. A best practicable notice effort, she writes, needs to incorporate “both traditional and non-traditional media to notify potential class members.” She recommends enlisting the help of a notice expert “to understand emerging consumer behaviors and trust factors with various media.”

On Demand Media Could Change the Future of Best Practicable Notice

By JEANNE C. FINEGAN, APR

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In the last five years, the American consumer has witnessed an on-demand media explosion. Americans are customizing their media use to fit their lifestyles. From CNN on your Blackberry to purchasing a sofa at the touch of your iPhone, we are all customizing media to fit our lifestyles. As consumers we are no longer satisfied to just sit down and watch the network morning news; instead we switch on the TV, log on to the computer, check our email and scan the Web all at the same time. The behavior is called “concurrent media exposure,”¹ and creates a challenging environment for advertisers and for Legal Notice administrators. As a result, class action lawyers and judges may need to think about Notice in an entirely new way.

This article will explore new media, evolving media usage habits of the American public and how, in the future, a best practicable Notice effort will need to evolve

¹ Holmes, M.E., Papper, R.A., Popovich, M.N., & Bloxham, M. (2006). *Engaging the Ad-Supported Media Observing Consumers and their Interactions with Media*. Retrieved March 2, 2008, from Ball State University Web site: www.bsu.edu/cmd/media/pdf/mms-ad-supported-media.pdf.

with those habits. It will explore why both traditional and non-traditional media might be used in the future to notify potential class members. Additionally, it will also explain why it's important to consult with a media expert ahead of time, to understand emerging consumer behaviors and trust factors with various media.

The Impact of Time Shifting. In just over 13 years, the Internet has become both a positive and negative driver of media. An amazing 81 percent of Americans are online,² using the Internet for everything from banking and shopping to streaming news or watching television. On balance, the time spent online seems to be reducing the time spent with more traditional media.³ It's all a matter of convenience. Digital Life America reports that nearly 80 million people are watching at least one of their favorite television shows by way of the Web. In doing so, many are time-shifting their viewing.⁴ Time shifting has the potential for a two-fold impact: First, moving to a different time other than a planned schedule could potentially delay receiving important, timely ad messages; and second, some time shifters avoid commercials. That means important messages could be missed all together.

In addition to television viewing, the Internet also has had a big impact on newspaper. Much has been written about the sharp decline in newspaper readership over the last 30 plus years. Interestingly, newspaper readers haven't all gone away, many have just moved online, and traditional media research has lagged measuring this trend. "Despite readership declines, newspapers, by a substantial margin, are the leading destination for people interested in checking advertising and shopping information."⁵ While hard copy newspaper still has strong support, particularly with older demographic groups, greater numbers of Americans, particularly 18 to 34-year-olds, have moved from hard copy newspaper to reading the local newspaper online. This is just one shift in media behavior that could necessitate a future adaptation in Legal Notice, possibly incorporating both hard copy as well as the online version of a given publication.

There are other interesting trends in media usage that could have a future impact on class action outreach efforts such as mobile advertising (advertising on your cell phone) and cell phone-only households (no landline). Some shifts will be useful in future Legal Notice. However, it's important to understand how consumers use, trust and depend on emerging media. These trends could impact the future reasonability standards governing dissemination of Notice in class actions and whether these emerging media can be measured with confidence.

² Lenski, J. & Rose, B. (2006). *Internet and Multimedia 2006: On Demand Media Explodes* Retrieved March 2, 2008, from Arbitron Edison Media Research Web site: www.edisonresearch.com/home/archives/2006/06/internet_multim_4.php.

³ *Id.*

⁴ (2008). *Digital Life America Q4 '07. Summary* retrieved March 3, 2008, from Center for Media Research Blog: http://blogs.mediapost.com/research_brief/?p=1650.

⁵ MORI Research (2006). *Consumer Usage of Newspaper Advertising*. Retrieved February 27, 2008, from The Newspaper Association of America Web site: www.naa.org/advertiser/Consumer-Usage-Report.pdf.

Just look at how Notice has evolved so far. Early in 1996, one of my cases, *In re: Louisiana-Pacific Inner-Seal Siding Litigation*, Civil Action Nos. 879-JE, 1453-JE, D.C. Ore. (1995), was one of the first class actions ever to use an Internet Web site as a communications hub. Visitors could see what the product looked like and read, at their convenience, important documents. It was a novel approach then, but today, it is rare for a Notice program not to have a Web site and/or some other Internet media component.

Rule 23 Notice Standards

Federal Rule of Civil Procedure 23(c)(2) requires that in class actions filed under Rule 23(b)(3), potential class members be given the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Notice requirement of Rule 23(b)(3) is guided primarily by two decisions of the United States Supreme Court. In *Eisen v. Carlisle & Jacquelin*,⁶ the Court reaffirmed the plain language of Rule 23(b)(3), establishing that due process requires individual notice of membership in a (b)(3) class to all class members who are identifiable through reasonable effort. The *Eisen* Court also applied the due process requirements of an older decision, *Mullane v. Central Hanover Bank & Trust Co.*⁷ In *Mullane*, the Court established that due process is served by "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present the objections."⁸ Together, the decisions create a requirement of actual notice to reasonably identifiable claimants and a more flexible standard of "reasonableness" to unidentifiable "interested parties." Through *Mullane*, the Supreme Court provided for a flexible Notice process that is guided by practicality. It is this same practicality that will continue to clear the way for Notice incorporating new media.

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⁶ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

⁷ *Mullane v. Central Hanover Bank & Trust Co.*, 311 U.S. 306 (1950).

⁸ *Id.* at 314.

⁹ Reach refers to the percentage of unduplicated audience exposed once during a notice campaign. Frequency refers to how many times a target audience had the opportunity to see the message.

of times for them to take action on the message, if they so choose.¹⁰

In determining what constitutes reasonable Notice, courts have generally considered three factual elements: (1) the size of the class; (2) whether the class members can be identified easily (for individual notice purposes); and (3) the probability that the Notice reached its intended audience. Methods for disseminating Notice originally came in three basic forms: (1) individual mailings; (2) publication in print newspapers, magazines or television; and (3) physical postings (on a store window, for example). Now, with the Internet and the proliferation of electronic, on-demand media, including “behavioral” and statistical reach and frequency analyses, lawyers and judges in the future may need to view Notice in an entirely different way.

The Evolution of Media and the Consumer

Until the introduction of the Cable News Network (CNN) in 1980 and a more user friendly Internet in the mid 90s, the media environment remained relatively unchanged.

Prior to 1970, the American public depended on only three television networks, one national public broadcasting network, limited cable and radio networks, and many local radio stations and newspapers for their daily information.¹¹ We were an undemanding and captive audience. Today, we have become a global community with millions of Web sites and thousands of magazines, newspapers, TV networks, and satellite radio stations, and our desire for individualized media access reflects our need for immediate information.

One of the unhappy consequences (at least for advertisers and Legal Notice administrators) of increased consumer expectation and sophistication is that consumers have learned to deflect a huge amount of information. Growing channels of communication afford delivery of targeted messages, but also create enormous competition for audience engagement. A recent study revealed that 70 percent of Internet users have spam- or ad-blocking software installed on their computers, and that 37 percent of Digital Video Recorder (DVR) users say that “skipping through commercials” is the most important reason to prerecord shows.¹²

How is this consumer—so expert at avoiding ads and any information not specifically requested—to be notified of potential membership in a class action? To start, class action practitioners must recognize that today’s consumer can only be reached through media of choice.

¹⁰ It is important to note that no matter how carefully a notice program is designed, *response* rates cannot be controlled, nor is a certain response rate required in order to prove effectiveness. The purpose of notice is to provide the opportunity for a reasonably calculated exposure, not to ensure action based on that exposure. A high-income earner who is busy may not be motivated to act on an offering of \$20 for a specific service or product, but that does not mean the notice of the offer failed.

¹¹ See *Duke University Library Digital Collections – Radio and Television Subcategories*. Retrieved March 3, 2008, from Duke University Library Web site: www.library.duke.edu/digitalcollections/adaccess/radio-tv.html.

¹² Lenski, J. & Rose, B. (2006). *Internet and Multimedia 2006: On Demand Media Explodes* Retrieved March 2, 2008, from Arbitron Edison Media Research Web site: www.edisonresearch.com/home/archives/2006/06/internet_multim_4.php. *Supra*.

This means media research must be incorporated when drafting a plan. Class action practitioners, with the help of a Legal Notice expert, need to understand how a target audience uses media. Once an expert has developed an appropriate media plan to reach the potential class members, messages need to be crafted to grab the attention, hold the interest and resonate with the target audience.

Notification in Today’s Media Environment

Selecting the Medium

In creating a class action notification program that will reach today’s consumer, Notice experts rely on nationally syndicated media research bureaus such as Mediamark Research & Intelligence, LLC., Simmons Market Research, Nielsen, Scarborough, Arbitron, or comScore, along with a host of others internationally to provide statistical projections of demographic characteristics, brand preference, media engagement and consumption habits of various target groups—critical information for the creation of an effective Notice program.

Electronic media opens up countless ways in which class members can be reached (e-mail, text messages, mobile media, RSS feeds, etc.), and as a result, what constitutes adequate Notice will undoubtedly continue to evolve and expand. This flexibility was recognized recently in the *Sony BMG CD Technologies Litigation*, Case No. 05cv09575, (S.D.N.Y. 2006). The approved Notice program included email notice, a pop-up banner notice, and enhanced search engine notice. In this litigation, plaintiffs alleged that software technologies embedded in music CDs to restrict consumer use actually reported customer information to Sony and installed hidden files on computers. In addition to print notice, the district court approved a unique electronic notice in the form of pop-up banners appearing when a user installed one of the CDs with an active connection to the Internet.¹³

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More recently, a California district court held that e-mail notice was “particularly suitable” in a case where the class members’ claims arose from their visits to the defendants’ Web sites. In *Browning v. Yahoo Inc.*, WL 4105971 (N.D. Cal. 2007), a group of plaintiffs sued Yahoo! alleging violations of the Credit Repair Organization Act. While the Notice plan was supported by other elements, including a direct mail effort, it is clear that the court was recognizing the reasonability of using both traditional and more innovative approaches in

¹³ Hearing Order ¶ 10:5, Jan. 6, 2006, *Sony BMG CD Technologies Litigation*, Case No. 05cv09575, (S.D.N.Y. 2006).

line with media consumption habits of this target audience.

In contrast, in *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623 (D. Colo. 2002), a Colorado district court held that e-mail notice to employees and players of an online game company was inappropriate because it “inherently has the potential to be copied and forwarded to other people via the internet with commentary that could distort the notice approved by the Court.”¹⁴ The court feared that electronic dissemination of notice would result in non-class members filing claim forms, “compromis[ing] the integrity of the notice process.”¹⁵ The court concluded that notice by first class mail “ensures the integrity of a judicially controlled communication directed to the intended audience.”¹⁶

Tailoring the Message

Rule 23(c)(2)(B) requires that “[t]he notice must clearly and concisely state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; and the binding effect of a class judgment.”

The challenge is to translate complex legal concepts and language into a more inviting, everyday—possibly more creative—format. In the future, we could see a move to create a greater sense of urgency with creative techniques using color, bold borders or other graphics in Summary Notices.¹⁷

Additionally, in international settlements, “plain language” and increased creative concepts may only be

¹⁴ *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623, 630 (D. Colo. 2002).

¹⁵ *Id.* at 631.

¹⁶ *Id.*

¹⁷ See Adams, A.S. & Edworthy, J. (1995). *Quantifying and Predicting the Effects of Basic Text Display Variables on the Perceived Urgency of Warning Labels: Tradeoffs Involving Font Size, Border Weight and Colour*. *ERGONOMICS*, (38, 11), 2221-2237.

the tip of the iceberg. International settlements will also require greater insight regarding language and cultural issues, i.e., do international class members even understand a U.S. Court’s legal directive to provide Notice? Some foreign publications perceive the class action outreach effort as “taking sides.” Therefore, some publications in foreign countries may want to see the actual U.S. Court documents before they will agree to publish Notice. This legal review will take time, which will need to be considered when building a publication timeline. Additionally, providing Notice in a U.S. Action to Germany or Spain, for example, means taking into consideration the potentially different media consumption habits of that country’s population.

International media decisions can be greatly enhanced by using either pan-regional or in-country syndicated media research bureaus akin to our Mediamark Research and Intelligence (MRI). In order to have some surety that you have created an outreach program that has a high likelihood of reaching a target audience, it’s critical to understand the media and cultural environment in which you are placing your Legal Notice. Not all countries use or depend on media the way we do in the United States.

Conclusion

As Legal Notice experts, we must analyze a host of variables in order to create a Notice program that appropriately targets the right people, taking into consideration the tendency of consumers to ignore, avoid and deflect messages. In the future, in addition to the harder statistical analysis of target audience reach and frequency, we could also see a move to justify non-traditional media through increased psychographical studies including behavioral tendencies. In the future, a well-designed program could incorporate a greater degree of multi-media and communication outreach efforts. Also, notices could incorporate more creative approaches to notify class members both in the United States and in global settlements, thereby helping to ensure that rights of class members are protected.