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## 'PARASITIC' ADVERTISING

### TV Networks Challenge Truck Stops' Replacement Ads

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AN UNUSUAL ALLIANCE of broadcast and cable television companies is fighting what it regards as the highjacking of expensively produced programming. Their unlikely adversary: a truck-stop chain.

Several networks have filed a lawsuit in the Southern District of New York to prevent truck-stop giant Flying J Inc. from replacing network advertising with its own commercial messages in satellite-delivered programs. The company owns 177 truck stops, one of them in Pembroke, N.Y., which, the complaint says, serve an average of 140,000 customers per day.

The plaintiffs in *American Broadcasting Companies v. Flying J*, 1-06-CV-02967--including, ABC, CBS, Disney, Fox, Spelling Television Inc., Universal Television, and Turner Entertainment Network--accuse Flying J of copyright infringement and unfair competition.

Flying J sells pre-recorded advertisements for products ranging from 'Trucker's Magazine' to 'Gear Keeper' gear attachment systems. It leases equipment from segOne, Inc., which uses a robot to automatically switch from network advertising to truck-themed advertisements stored in the device. According to the networks' complaint, Flying J's so-called 'Plaza TV' charges \$30,000 a month for a 30-second ad.

'Through their parasitic 'Plaza TV' advertising business, Defendants are reaping what they have not sown and have taken the skill, expenditures, and/or labor of Plaintiffs and used them to compete against Plaintiffs for their own commercial advantage,' the plaintiffs argue.

The networks list advertiser TON Services, Inc., which they say is a wholly owned subsidiary of Flying J, as a co-defendant in their complaint; segOne is not a defendant. The plaintiffs say they rely on revenue from the 'bona fide advertisements defendants are replacing with their own.' They claim that they are losing money because Flying J is eliminating ads that help them support their programming and profiting from its own advertising.

'The commercial time sold to advertisers for viewing by the television public is a primary...financial means by which networks and cable channels are able to make

television programming available to their viewers. Defendants have misappropriated and continue to misappropriate this valuable opportunity.'

The suit comes at a time when increasing competition has eroded the revenue base of programming offered by television networks and cable television outlets.

Jeffrey D. Sullivan, a partner at Baker Botts and head of its intellectual property division, who is not involved in the litigation, said the case is significant because bars, restaurants, even health clubs, could advertise in a similar fashion if Flying J is successful.

John Delaney, a partner at Morrison & Foerster who specializes in intellectual property and who also is not involved in the action, said the case highlights the challenges content providers now face in controlling and maintaining the integrity of their programming.

'Perfectly Legal'

Flying J attorney Chris Sprigman, an associate professor of law at the University of Virginia, has filed a motion to dismiss the complaint. It is returnable July 3 before Southern District Judge Deborah A. Batts.

Flying J accuses the networks of misusing the copyright law 'as a weapon of intimidation against a perfectly legal and beneficial technology that the Broadcasters wish to bring under their control.'

The company claims that the segOne device, which it compares to 'a fancy remote control,' does not make a copy of programming but merely changes from one program to another, in the manner of a digital video recorder (DVR) like TiVo.

The networks argue that Flying J's use of the advertising replacement system in conjunction with their programming is beyond the scope of a limited 'homestyle exception' contained in 17 U.S.C. §110(5)(A) for bars and other commercial establishments that 'publicly perform copyrighted works using the kind of apparatus commonly used in private homes.'

Flying J's motion counters that the exception is irrelevant because Flying J's 'display of the networks' content is undertaken via a negotiated commercial license' with the satellite television provider EchoStar for which Flying J pays a fee.

Also, the company argues that the plaintiffs have not made out a state claim of unfair competition because they have not alleged that the truck stops have breached confidential relationships, a fiduciary duty or a trade secret.

Mr. Sprigman declined to elaborate on the arguments in his papers.

Partner Paul B. Gaffney and associates Christopher N. Manning and Jessamyn S. Berniker of Williams & Connolly represent the networks and cable companies. Mr. Gaffney also declined to comment.

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