

## How Viable is The Internet For Class Action Notice?

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An article in the July 1, 1996 issue of *The National Law Journal* presciently touted the Internet as an expanding and cost efficient method of providing notice to class members. Although the author did not definitively claim that notice by Internet would replace notice through print and electronic media, he did state: “whether or not electronic notice eventually renders traditional, printed notification obsolete, the two may be considered equivalent in the immediate future.” Eight years later, the verdict is in, at least for now.

The Internet has numerous attributes capable of enhancing the notice function. Internet notice is global, inexpensive and accessible continuously. In addition, as a communication medium, the Internet has particular utility for notice, providing in-depth information and interactive communication that allows contact with counsel and the filing of claims.

Establishing a Web site and registering pertinent search keywords enables Internet users to easily find a notice if they are looking for it. But what about the Internet as the primary means of providing notice to class members? This article addresses this and other key questions concerning the Internet and legal notification, specifically:

- Can class members be specifically targeted?
- Is it as effective as other media?
- Can it replace more traditional media in a notice plan?

### Internet Usage and Trends

The Internet has reached a critical mass as an accepted information source and a key form of communication in today’s society. Internet usage and trends can be studied by demographics, such as age, gender and household income (“HHI”). Data reported by the media research firm MediaMark Research (“MRI”)<sup>1</sup> reveals trends in Internet usage:

#### *Age*

- Nearly 80% of Adults 18 years of age and older (“Adults 18+”) have access either at home, work or elsewhere.
- Over 60% of Adults 18+ use the Internet at least once per month.

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<sup>1</sup> MediaMark Research Inc. (“MRI”) is a nationally accredited media and marketing research firm that provides syndicated data on audience size, composition, and other relevant factors pertaining to major media including broadcast, magazines, newspapers, and outdoor advertising. MRI provides a single source measurement of major media, products, services, and in-depth consumer demographic and lifestyle/psychographic characteristics. Simmons market Research Bureau (“Simmons”) is also a nationally accredited media and marketing research firm that provides syndicated data like MRI.

- Adults 18-54 are more likely than Adults 55 years of age and older (“Adults 55+”) to use the Internet. However, the percentage of Adults 55+ using the Internet in an average month grew 28% in the past two years.

#### *Gender*

- Men are slightly more likely than women to have access to and use the Internet.

#### *HHI*

- Of Adults 18+ with a HHI greater than \$75,000, 86% access the Internet at least once in an average month.
- Of Adults 18+ with a HHI less than \$50,000, only 42% access the Internet at least once in an average month.

#### *Online activities*

The Internet serves many purposes, the most popular being communication through email, chat rooms and instant messaging. Following these uses, information searching is the leading activity on the Internet. Users also consult the Internet for the latest news and current events, as well as financial, sports and medical information. Tracking investments, making purchases and planning travel for personal and business purposes are also popular activities.

Although the at-home universe is more than twice as large as the at-work universe, the Internet is used more heavily at-work. At-work users visit more sites more often.<sup>2</sup> Internet usage is at its highest during the daytime when most users are at work. In fact, the Internet is the most used media during the day.<sup>3</sup>

With the many activities conducted on the Internet, each user is somewhat elusive. In January 2005 Nielsen//NetRatings<sup>4</sup> shows an average of 57-102 different domains visited at-home or at work per person per month. Individual portals and Internet service providers (“ISP”) such as AOL, Yahoo and MSN are widely used. However, each user heads in a different direction once they arrive at a portal on an ISP domain. In addition, visitors tend to select pages of interest, even “bookmarking” Web sites to more easily visit their favorite sites.

#### *Heavy Internet Users*

According to recent MRI surveys, 38% of Adults 18+ visit the Internet one or more times a day, which represents roughly half of all Internet users. These “heavy users” are typically upscale college-educated adults and individuals with a HHI over \$75,000. Because of their frequent use, these users receive the majority of the ad messages delivered. In contrast, the remaining half accesses the Internet less than once a day.

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<sup>2</sup> Nielsen//NetRatings October 2004. Used with permission.

<sup>3</sup> Online Publishers Association/MBIQ Consumption Study, November 2001

<sup>4</sup> Nielsen//NetRatings, Inc. provides Internet audience measurement service and online ad measurement service, and other media and marketing tools to advertisers, agencies, Web publishers etc.

Users in this group are more likely to have average to below average HHI and no college education.

Heavy users of the Internet are information “junkies.” As much as they use the Internet for communication and information gathering, they are also among the heaviest users of offline media such as magazines and newspapers. However, they are below average viewers of television<sup>5</sup>. On the other hand, the light users of the Internet are heavy users of television and radio and light users of newspaper. Their use of magazines is average.

### **Providing Notice Using the Internet**

#### *Web Site Presence*

Virtually all national class actions (and many state class actions) post a Web site to allow class members to enjoy quick, easy, complete and confidential access to case information. A dedicated Web site allows the full notice and any additional documents such as the complaint, settlement agreement and a Frequency Asked Questions, or “FAQ,” section to be posted. The case URL (an address that can specify any Internet resource uniquely) is listed with major search engines to direct searches for specific words relating to the class action. For purposes of quantifying the effectiveness of the Web site in terms of notice, the number of visitors, visits and different pages viewed can be ascertained. A dedicated Web site is an inexpensive and effective means of providing detailed information on a class action.

However, a Web site is a passive information repository, not a proactive notice vehicle. Web site traffic is either driven by search engines or when class members are aware of the case or its surrounding issues and search the Internet for information or by print or electronic notice referencing the Web site.

#### *Email*

Email can be used for notice where viable lists are available. However, “e-noticing” has limitations because of frequently changing and inaccurate email addresses, in addition to spam filters that may bar delivery. With respect to changing email addresses, Yahoo reports that nearly one-third of addresses change in the course of a year. Emails analyzed for the month of April 2004 by Brightmail’s Probe Network, an anti-spam software monitoring service, found that spam accounted for approximately 64% of incoming messages. Other monitoring services cited a figure as high as 87%. In addition, system glitches and in-box capacity restrictions can cause email not to be delivered. However, for quantification purposes, software is available to ascertain which emails were opened by a recipient, thereby providing a back-end evaluation of the percentage of email reaching the class.

#### *Banner and other Display Advertising*

Most Web sites offer display advertising opportunities that may be purchased for notice purposes. These display positions come in a variety of shapes, sizes and technologies. Large and small rectangular banners may run across the top of a page, vertical towers or

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<sup>5</sup> MRI Fall 2004

skyscrapers may run down the side, small buttons may be embedded or square units may be nested in the page content. Ads may “pop-up” before the page content is displayed. They may be delivered “over-the page” with the content covered. They may “pop-under” appearing when a page is closed. Most Web sites allow banners to be animated and capabilities also exist for the use of audio and video messages, known as “rich media.” The Internet Ad Bureau (“IAB”), an industry organization, has developed a set of voluntary guidelines for Web publishers and advertisers for standardized ad sizes and specifications.

On the receiving end, not all visitors will have a chance to see all ad messages presented. Many ad messages require high speed or broadband delivery to be effective. As of July 2004, Nielsen//NetRatings reported only 51% of Web at-home users connect via broadband services. Many consumers use dial-up access, which may be too slow to receive video messages. Also, consumers may be using software designed specifically to block advertising. “Pop-up” blockers will prevent that type of ad from downloading onto the user’s screen.

Despite these limitations, consumer advertisers are increasing their use of Internet banner and display advertising. Spending in 2004 was expected to total \$3.9 billion, a 24% increase over the previous year.<sup>6</sup>

### *Targeting*

The Internet was thought to become an effective targeting tool because user identification and one-to-one communication is theoretically possible. Each computer system connected to the Internet has an exclusive code known as the “Internet Protocol address,” or “IP address.” There are numerous technologies for identifying visitors by IP address, but the methods vary widely by site. Some technologies address ad messages geographically, while others address specific demographic characteristics identified through user registration. However, there are limitations to these methods for targeting class members. Because of unregistered visitors and nonspecific IP addresses, any method is under-inclusive. Browser “cookies” – bits of identifying information stored on users’ computers by the Web sites they visit – can track specific users more reliably than by monitoring IP addresses, but many users block “cookies” as a security measure.

Targeting notice through the Internet is best applied through the selection of related content, where there is a high probability that the visitor is within the class. Even light users may be heavy users of certain sites.<sup>7</sup> Consumers choose their destinations based on the appeal of the content – and once favorite sites are found, they may be revisited often.

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<sup>6</sup> Kris Oser [Online Ad Spending Up](http://www.adage.com) Interactive News (July 29, 2004) at <http://www.adage.com>

<sup>7</sup> Lynn Bolger and Marie Pauline E. Mörn [Internet Audience Dynamics](http://www.doubleclick.com/us/knowledge_central/research/advertising/) DoubleClick Smart Marketing Report (September 2004) at [http://www.doubleclick.com/us/knowledge\\_central/research/advertising/](http://www.doubleclick.com/us/knowledge_central/research/advertising/)

## Online Media vs. Offline Media

### *Quantifying Offline Media*

Media audience measurement began in 1930s and has since continued to evolve. Nielsen<sup>8</sup>, Arbitron<sup>9</sup>, Simmons and MRI are among the established research companies used today.

The surveys produced by these companies provide syndicated data on audience size, composition and other factors pertaining to all major media including broadcast, print and outdoor advertising. The single source measurement techniques used by MRI and Simmons, including in-person interviews and questionnaires, allow for analysis of demographic profiles of individuals in general, as well as profiles of those who use a specific service or product.

In the 1960s, the advertising community began to examine quantifying the number of different people with the opportunity to be exposed to a message. Since a complete census of media usage was impossible, survey data was analyzed at the most granular levels and statistical formulas were developed to serve as predictive models. With the advent of computers, the formulas were further refined. The models used today through data processors like Telmar<sup>10</sup> and IMS<sup>11</sup> were initiated in the 1970s and are the result of ongoing analysis and study of survey results and trends.

Using these measurement tools, notice providers analyze the demographics and media habits of class members. Media vehicles are chosen based on their ability to provide effective and cost efficient reach among the target audience. The selected media vehicles are then measured against the target audience to establish the “reach” of the media program and the “frequency” of exposure to the media vehicles. Reach and frequency estimates are two of the primary measurements used to quantify the media penetration of a target audience.

- *Reach* is the estimated percentage of a target audience reached one or more times through a specific media vehicle or combination of media vehicles within a given period.
- *Frequency* is the estimated average number of times an audience is exposed to an advertising vehicle carrying the message within a given period of time.

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<sup>8</sup> Nielsen Media Research is the leading provider of television audience measurement and related services, worldwide. In the United States, Nielsen's National People Meter service provides audience estimates for all national program sources, including broadcast networks, cable networks, Spanish language networks, and national syndicates.

<sup>9</sup> Arbitron is an international media and marketing research firm providing radio ratings and audience measurement at the local, national and network levels.

<sup>10</sup> Telmar is an international provider of computer based advertising media information services for planning and analyzing media.

<sup>11</sup> IMS is an international provider of information systems for the advertising industry providing media planning and analysis software to analyze both industry and proprietary research.

Conventional media options of newspaper, newspaper supplements, magazines, television and radio are used when class members are likely audience members.

In terms of calculating reach and frequency, the Internet lacks the sophistication of its offline counterparts. Industry leaders have not agreed on which of the available measures offers the most accurate and useful estimates. Tools to estimate the reach of site combinations have only recently become available and patterns have not yet been established.

Web site audiences are reported as total visitors. However, Internet banners are not typically served to each visitor. Banners are sold on a rotating basis and different ads are served each time the page is viewed. Therefore, not all visitors to a site have an opportunity to see a notice banner running there. Ad messages may be delivered to visitors from outside the country or other unintended viewers.

Offline, every reader of a consumer magazine carrying notice has an opportunity-to-see (“OTS”), however, banners purchased on a rotating basis will not be delivered to all site visitors. Writing for MSN Agency Relations on the subject of offline media, David Smith notes:

“vehicle audience is assumed to be the same as commercial audience. While we know that this is not technically the case, there is an OTS for the whole vehicle and at least empirical evidence that most in vehicle audience have been exposed to the message. The Web however is different. When a banner or other type of ad is served it is rarely exposed to the full audience of the site or even the full audience of the page served.”<sup>12</sup>

In addition, heavy users of the site will be more likely to receive the ad than infrequent visitors. In fact, because they return to the same site often, heavy users will probably see the ad frequently, while many moderate and light users may miss the ad completely. A notice campaign may reach only a small percentage of a site’s population.

### **When is Internet Advertising Appropriate?**

Given these characteristics, in most instances, Web sites should be considered only as a component of a paid media notice plan when the probability is high that a Web site visitor may be a class member. This will occur when the class size is comprised of heavy Internet users or when the content of the site specifically deals with case-related topics. For example, in a case involving computer-related products, where the vast majority of Internet Users are potential class members, rotating banners could be used. For other cases, where heavy Internet users make-up the class, specific Web sites may be sought that have a high incidence of class member usage. Two cases studies elaborate:

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<sup>12</sup> David Smith [Online Reach and Frequency – An Update on Progress](http://advertising.msn.com/articles/DaveS_ARF_1.asp) MSN Advertising Agency Relations(June 2002) at [http://advertising.msn.com/articles/DaveS\\_ARF\\_1.asp](http://advertising.msn.com/articles/DaveS_ARF_1.asp)

*In re NASDAQ Market-Makers Antitrust Litigation, M.D.L. No.1023 (S.D.N.Y.)*

The characteristics of NASDAQ traders - upper income and higher education - are an excellent match with the heaviest users of the Internet. Online computer services were found to be a source of financial information for 26% of all investors. Therefore, display advertising on the Internet was integrated into the notice program. Sites were selected that specifically targeted individuals who frequently monitored the stock markets for stock prices and therefore would likely be active and, in many instances, heavy traders. A simple banner advertisement was used that resulted in a higher than average click rate through to the litigation Web site. The sites selected were:

- AOL "Stocks and Investing
- Money Online
- Quote.com
- Fortune Online
- Wall Street Journal Interactive
- Motley Fool
- TheStreet.com
- Money Hyperquotes

Web advertising, however, was not the sole means of notice, as an Internet-only program would miss many class members. A robust print campaign in business and financial magazines and newspapers was the primary notification vehicle based on the media habits of class members and the ability to measure the effectiveness of the program through reach and frequency calculations.

*In re Copper Antitrust Litigation, M.D.L. No.1303 (W.D. Wis.)*

The class consisted of business decision-makers who purchased copper products. Although the class of copper buyers is quite small relative to the total US or Internet population, specific sites serve their business interests and therefore, visitors to the sites were likely class members. Internet advertising on nine sites was employed to reach copper traders, copper dealers, and scrap metal dealers and recyclers, as well as others who used the Internet to monitor copper prices. The Internet advertising supported an extensive direct notice and published notice program in trade and business publications.

### **Summary**

Courts need to be assured that the notice is being delivered to class members. In cases where class members are heavy users of the Internet and Web sites exist that attract a high concentration of class members, online advertising should be considered. Additionally, where accurate addresses are available, email can be used as a notice vehicle. However, the Internet's effectiveness as a notice vehicle is compromised by the challenge to identify and target class members and to measure the reach of these individuals.

Internet users have access to billions of sites making it the most fragmented of all media. As a result, it is difficult to accrue a substantial reach of any demographic through Internet advertising alone. In addition, methodologies for analyzing and quantifying audience accumulation through the Internet are still in their infancy and a standard for an

accurate measurement of the reach of a targeted demographic has not been established. Traditional media, providing an OTS to their entire audience and which can be targeted and measured more precisely, remain better and more efficient at reaching mass targets.<sup>13</sup>

Trends suggest Internet usage will increase among the general population with the exception of lower income groups. Compared to statistics from four years ago, 42% more adults are using the Internet today and 72% more adults access the Internet daily. Individuals with high-speed connections access more frequently than those with dial-up and an increasing percentage of users are switching to high-speed. This should result in increased usage overall.

The pace of Internet change has been dramatic. Technological advances may provide new tactics for directing notice to class members through this medium. As measurement and analysis become more refined, the ability to confidently quantify the Internet's contribution to class action notice plans will improve. The Internet's broad and growing appeal, based in part on the wide number of options it offers consumers and audiences, renders it the most fragmented media of all. As a result, in particular cases, the Internet will continue to be a valuable supplement to other notice vehicles, but its use as the sole or primary notice vehicle will remain limited.

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Katherine Kinsella and Andrew Novak of Kinsella/Novak Communications Ltd., are nationally recognized experts in class action and bankruptcy notification programs. Kinsella/Novak's paid media director, Maureen Gorman, has over 30 years of media buying and planning experience.

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<sup>13</sup> The Media Guru, August 28, 2000 at <http://www.amic.com/guru>