



**Below is an article published last week in Newsweek on the fierce debate over cell phone health warnings.** Thanks to Joel Moskowitz, Director of the Center for Family and Community Health at UC Berkeley, for forwarding this article. Thanks also to the City of Berkeley, Lawrence Lessig, and Ellen Marks of the California Brain Tumor Association for showing courage and perseverance in the face of corporate suppression of the truth. We will be watching this case.

## Cellphone Radiation Warning Sign Sparks First Amendment Battle

Berkeley, California has become ground zero over health debates on the safety of exposure to radio frequencies in cellphones. Ronnie Cohen, Newsweek, Nov 3, 2016

In the back of the Apple Store in Berkeley, California, at the end of the bar where those “geniuses” repair iPhones and MacBooks, is a placard with this warning: “If you carry or use your phone in a pants or shirt pocket or tucked into a bra when the phone is ON and connected to a wireless network, you may exceed the federal guidelines for exposure to RF radiation.” Read the safety instructions in the manual, it tells consumers. Or else.

The Apple Store posted the notice to comply with a Berkeley city ordinance—the first in the nation—requiring retailers to alert consumers to the federal guidelines for safe cellphone use. The warning drew little attention when I visited that Apple Store in October. But such notices drew the attention—and the ire—of CTIA, a trade association representing some of the nation’s largest cellphone



manufacturers and carriers, including Apple, Samsung, Verizon and AT&T. CTIA went to court, arguing that Berkeley's notice infringes on cellphone retailers' First Amendment rights. The ordinance, it said, forced retailers to "distribute its one-sided, innuendo-laden, highly misleading and scientifically unsupported opinion on a matter of public controversy." Berkeley maintains in court documents that the notice is "nothing but an arrow that points to the very manuals written by manufacturers."

The so-called right-to-know ordinance has sparked an epic dispute between two of the nation's foremost, and formidable, legal titans.

CTIA hired Theodore Olson, a former solicitor general who argued the case that put George W. Bush in the White House and is considered one of the nation's most effective U.S. Supreme Court advocates. Berkeley is represented by Lawrence Lessig, a Harvard law professor and cyberlaw expert who last year ran for president as a Democrat to push for an overhaul of campaign finance. The two are now jousting over the Berkeley ordinance in federal court.

Lessig, who helped craft the Berkeley ordinance in a way that he hoped would withstand a cellphone industry lawsuit, is not charging the city for his services. He volunteered because he believes corporations discourage governments from imposing regulations by filing First Amendment lawsuits that are prohibitively expensive to defend, he tells Newsweek. "I'm a constitutional scholar, and I am very concerned," he says.

U.S. District Judge Edward Chen of San Francisco allowed the Berkeley cellphone warning law to take effect in January. In a hearing last year, Chen read from an iPhone manual cautioning that the device could exceed federal radiation-exposure guidelines if carried



closer than five-eighths of an inch from the body. “The mandated disclosure truthfully states that federal guidelines may be exceeded where spacing is not observed, just as the FDA accurately warns that ‘tobacco smoke can harm your children,’” Chen wrote.

The wireless association appealed Chen’s decision to the Ninth U.S. Circuit Court of Appeals in San Francisco. In September, Olson and Lessig debated the matter before a three-judge panel. The judges are expected to issue a written ruling in the next few months.

In determining whether Berkeley’s required notice violates the First Amendment, the court must decide if the statements it makes are true, false or misleading. “These statements are absolutely true,” Lessig told the judges.

“The question is one of tone or interpretation,” said Judge William Fletcher, one of the federal appeals court judges hearing the case. “I read that language and say, ‘Uh-oh, I’m in trouble if I put it in my pocket,’ when in fact I might not be in trouble at all.”

Whether it’s dangerous for Fletcher to carry a cellphone in his pocket is a scientific question. The Federal Communications Commission (FCC) set radio frequency radiation limits in 1996, long before Steve Jobs introduced the first iPhone and children began tucking them under their pillows at bedtime. Since then, scientists have vigorously debated the safety of cellphones. Both Olson and Lessig have insisted they would not engage in that debate. But both have done so.

Here’s Olson: “What the FCC says with respect to cellphones used in the United States is that they are safe,” he told the appellate court. “Safe,” he repeated. “Berkeley’s message communicates: Watch out. If you don’t use them in a certain way, they won’t be safe.”



Fletcher disagreed: “As you know, the science at this point is somewhat indeterminate.”

Lessig argued that the FCC has never made a blanket statement that cellphones are safe in all circumstances, only when used as tested. “We are relying on a regulation of the FCC,” he told the court. “We don’t want to get into an argument about the science.”

A simple disclosure of facts would not violate the First Amendment, but Olson argued that the Berkeley warning is not just a disclosure, because it misleads consumers. Again, Fletcher and Olson clashed.

“The message is if you don’t be careful, you might exceed these guidelines,” Judge Morgan Christen said. Fletcher agreed; Olson didn’t. “If you do exceed the guidelines, the cellphone is still safe,” Olson replied.

In a telephone survey, Berkeley found that 70 percent of registered voters were not familiar with FCC-mandated safety tests—which assumed people would carry phones at a short distance from their bodies. The survey convinced the City Council to require the warning notices.

Lessig pointed the judges to the FCC’s announcement three years ago that it would reassess cellphone radiation safety standards. It has collected about 900 comments on the issue but taken no other action. “The FCC would not be asking for comments about whether there was a health hazard if it had concluded that there was no possible way that a cellphone held against the body could constitute any health hazard,” Lessig said.



The government has assumed that cellphone radio frequencies pose a potential danger only when held closely enough to human tissue to heat it. The only perceived problem was that a phone user might get burned. Recently, though, a \$25 million U.S. government National Toxicology Program study found that male rats exposed to radio-frequency radiation like that emitted by cellphones developed low incidences of two types of tumors—malignant gliomas in the brain and schwannomas of the heart.

In 2011, World Health Organization cancer experts labeled cellphones “possibly carcinogenic.” Many U.S. scientists dismissed the label as overreach, but the new rat study renewed some public health experts’ concerns that cellphone radiation could promote tumor growth.

Christen asked Olson whether cellphone-makers could agree to a compromise: allow the warnings to stand, but “add a sentence at the top that says the FCC has never found that cellphone usage is unsafe.”

Olson stuck closely to the free-speech argument. “It forces a debate on a subject our client wishes not to get into,” he replied, adding that cellphone companies should not be forced to make such a statement because having to do so places “a significant burden on speech.”

All parties agree on one thing: Whether Berkeley has a right to mandate warnings about cellphone safety turns on a question of free speech, not science. Many others outside the courtroom would likely disagree.

<http://bit.ly/2e5RU8U>



Also see:

[Berkeley Cell Phone "Right to Know" Ordinance](#)

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