IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WASHINGTONPOST.NEWSWEEK INTERACTIVE COMPANY, LLC, *et al.*, Plaintiffs, v. THE GATOR CORPORATION, Defendant.	Civil Action No. ____________________

MEMORANDUM IN SUPPORT OF
<u>PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION</u>

Terence P. Ross (VSB# 26408)
Hill B. Wellford, III (VSB# 38983)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, District of Columbia 20036
Telephone: (202) 955-8500

Attorneys for Plaintiffs

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The Plaintiffs[1] and Defendant, The Gator Corporation ("Gator Corp."), are competitors in the business of selling Internet advertising. The value of that business depends largely upon the value of the news and other content appearing on the site on which the Internet advertising will appear. The better the content, the more the site will be visited by Internet users, the more advertisers will want to advertise on the site and the higher the advertising rate that can be charged. The Plaintiffs have been successful in this business because they are among the world's foremost providers of news, information and editorial content and are able to use that content to create some of the most popular, informative and entertaining sites on the World Wide Web -- sites that advertisers want to advertise on.

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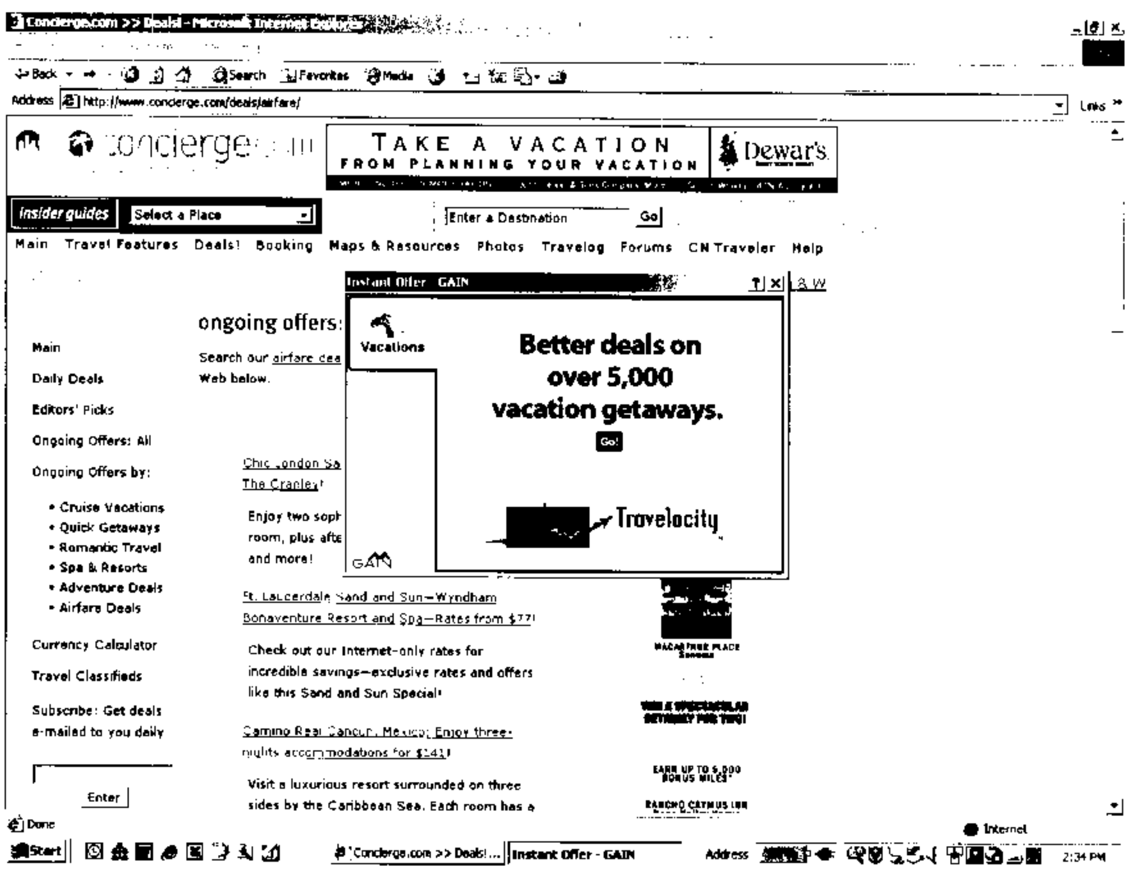
1 A full listing and detailed description of the Plaintiffs is set forth in a supplement appended hereto as Exhibit ("Exh.") A.

In sharp contrast to the significant original content on the Plaintiffs' websites,[2] Gator Corp. is essentially a parasite on the web that free rides on the content of others. Unlike the Plaintiffs that sell advertising on their own websites, Gator Corp. makes money, not by selling advertising on its own site, but by selling advertising for placement on the Plaintiffs' websites without Plaintiffs' authorization.

Thus, in the example below, a Gator Corp. advertisement for travelocity.com, a discount travel website, appeared on the homepage of Plaintiff CondeNet's concierge.com website, an online travel magazine that, among other things, offers discount travel deals and sells advertising to travel companies. It appeared, however, without Plaintiff CondeNet's permission.



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2 A representative listing of the Plaintiffs' websites known at this time to have been victimized by Gator Corp. is set forth in a supplement appended hereto as Exh. B.

Quite simply, Gator Corp. sells advertising space on the Plaintiffs' websites without Plaintiffs' authorization and pockets the profits from such sales. Put into other words, Gator Corp. free rides on the valuable intellectual property rights of the Plaintiffs and the substantial investments Plaintiffs have made, and continue to make, in their websites. This scheme by Gator Corp. constitutes, at a minimum, trademark infringement, unfair competition, copyright infringement and/or contributory copyright infringement and misappropriation. The fact that this wrongful conduct by Gator Corp. takes place on the Internet, rather than more traditional advertising media, such as billboards or newspapers, does not change the applicable law or remedies. And, because the harm caused by Gator Corp. to the Plaintiffs is irreparable, the entry of a preliminary injunction to prevent additional injury to Plaintiffs is mandated.

FACTUAL BACKGROUND

The Internet And The World Wide Web

The Internet is a global network of millions of interconnected computers. The World Wide Web is a portion of the Internet especially suited to displaying images and sound in addition to text. *See* Declaration of Benjamin G. Edelman ("Edelman Decl."), ¶ 6 (appended hereto as Exh. C). Much of the information on the World Wide Web is stored in the form of "web pages," which can be accessed through a computer connected to the Internet (available through commercial Internet service providers or "ISPs"), and viewed using a computer program called a "browser," such as Microsoft Internet Explorer and Netscape Navigator. *Id.* "Websites" are locations on the World Wide Web containing a collection of web pages. A webpage is identified by its unique Uniform Resource Locator or "URL" (*e.g.*, http://www.usatoday.com), and a URL ordinarily incorporates its site's "domain name" (*e.g.*, usatoday.com). *Id.*

The vast majority of Internet websites that deliver news and editorial content, including each of the websites operated by the Plaintiffs, depend in significant part, if not entirely, on revenues from advertisers who pay for advertisements that appear on the pages of the websites, directly adjacent to the content appearing on the same page. *See* Declaration of Caroline H. Little ("Little Decl."), ¶ 9 (appended hereto as Exh. D); Declaration of Jeffrey Webber ("Webber Decl."), ¶ 8 (appended hereto as Exh. E); Declaration of Lincoln Millstein ("Millstein Decl."), ¶ 14 (appended hereto as Exh. F); Declaration of Scott D. Schulman ("Schulman Decl."), ¶ 11 (appended hereto as Exh. G); Declaration of Christopher L. Lambiase ("Lambiase Decl."), ¶ 7 (appended hereto as Exh. H); Declaration of David D. Hiller ("Hiller Decl."), ¶ 7 (appended hereto as Exh. I); Declaration of Sarah Chubb ("Chubb Decl."), ¶ 8 (appended hereto as Exh. J); Declaration of Ray Shaw ("Shaw Decl."), ¶ 8 (appended hereto as Exh. K); Declaration of Eliza Wing ("Wing Decl."), ¶ 7 (appended hereto as Exh. L); Declaration of Robert Ryan ("Ryan Decl."), ¶ 3 (appended hereto as Exh. M). Even those websites that charge subscription fees, such as the Wall Street Journal Website, depend in part upon such advertisements. *See* Schulman Decl., ¶ 11 (Exh. G). In this respect, such websites are analogous to network television news broadcasts, which depend almost entirely on revenues from advertisers who pay for commercials that appear during television programs.[3]

A variety of advertising products are available on the Internet today in a variety of sizes and shapes. The most traditional form of advertising on the Internet, including on the sites operated by the Plaintiffs, is the "banner advertisement." *See* Millstein Decl., ¶ 12 (Exh. F). Banners are portions of web pages in which advertising appears. *Id.* Banner advertisements typically appear on web pages as rectangular blocks positioned either above, below or to the side

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[3] Internet advertising has grown tremendously in the last few years. During 2001, total online advertising revenue reached $7.2 billion. *See* Internet Advertising Bureau, *Internet Advertising Revenue Totaled $1.7 Billion for Q4 2001* (May 2002), *at* http://www.iab.net/. These advertising revenues help keep the overwhelming majority of websites on the World Wide Web free to computer users.

of the content on the pages. *Id.*

Another form of Internet advertising is the pop-up advertisement. *Id.* at ¶ 13. Typically, pop-up advertisements are triggered automatically when Internet users visit particular web pages. *Id.* Pop-up advertisements typically appear on web pages as square or rectangular blocks, but rather than appearing above, below or to the side of the content on the pages, as with banner advertisements, pop-up advertisements appear over or on top of the web page's content, obscuring at least a portion of the content from the viewer. *Id.* The Gator Corp. advertisement on page 2 is an example of a pop-up advertisement. Moreover, unlike banner advertisements, in order to view the content on the web page being visited, a viewer must take the affirmative act of closing the window with the pop-up advertisement by clicking the mouse. *Id.*

The Business Of The Plaintiffs

The Plaintiffs operate websites to deliver news and other content in a timely fashion to Internet users. *See* Little Decl., ¶ 10 (Exh. D); Webber Decl., ¶ 9 (Exh. E); Millstein Decl., ¶ 15 (Exh. F); Schulman Decl., ¶ 12 (Exh. G); Lambiase Decl., ¶ 8 (Exh. H); Hiller Decl., ¶ 7 (Exh. I); Chubb Decl., ¶ 9 (Exh. J); Shaw Decl., ¶ 9 (Exh. K); Wing Decl., ¶ 8 (Exh. L); Ryan Decl., ¶ 4 (Exh. M). Owing in large measure to the superior quality of the Plaintiffs' content, their websites are among the most popular on the Web, making them attractive to a wide variety of advertisers who wish to reach a large, informed and well-educated audience.[4] *Id.*

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4 According to the Nielsen//NetRatings Internet Report, in March 2002 alone, www.nytimes.com served more than 193 million page views, www.washingtonpost.com served more than 99 million page views, www.usatoday.com served more than 98 million page views, www.boston.com served more than 43 million page views, www.chicagotribune.com served more than 26 million page views, www.wsj.com served more than 24 million page views, www.smartmoney.com served more than 16 million page views, www.latimes.com served more than 24 million page views, www.epicurious.com served more than 24 million page views, www.miami.com served more than 13 million page views, www.philly.com served more than 9.4 million page views, www.newsday.com served

[Footnote continued on next page]

The Plaintiffs deliberately design their websites to display their content in a manner that will be visually attractive and easy for site visitors to navigate. Moreover, Plaintiffs take great care and enormous effort to present their content with a specific "look and feel" that will encourage site visitors to remain at the site, delve into the content on the site, and return to the site in the future. Internet users also place a high value on the easy accessibility of a website. If too many pop-up advertisements appear on a website, viewers will become annoyed and may leave the site and/or not return to it in the future. Therefore, each of the Plaintiffs limits the number of authorized pop-up advertisements that appear on their sites to avoid annoying their visitors. *See* Little Decl., ¶¶ 14-16 (Exh. D); Webber Decl., ¶¶ 13-15 (Exh. E); Millstein Decl., ¶¶ 19-21 (Exh. F); Schulman Decl., ¶¶ 16-18 (Exh. G); Lambiase Decl., ¶¶ 10, 13-14 (Exh. H); Hiller Decl., ¶¶ 11-12 (Exh. I); Chubb Decl., ¶¶ 13-15 (Exh. J); Shaw Decl., ¶¶ 13-15 (Exh. K); Wing Decl., ¶¶ 12-14 (Exh. L); Ryan Decl., ¶¶ 7-9 (Exh. M).

Plaintiffs have also established and enforce standards and policies governing the types of goods and services that may be advertised and the content and appearance of advertisements that they deem acceptable. Indeed, Plaintiffs, as a condition of advertising on their sites, reserve the right to reject any advertisement or the content of any advertisement. Such control over advertising is necessary because online advertisements are an integral part of the manner in which the website is displayed to the viewer. Moreover, the Plaintiffs do not display advertising that would be inappropriate with the content on a particular web page. *See* Little Decl., ¶ 18

[Footnote continued from previous page]

more than 9 million page views, www.cleveland.com served more than 8 million page views, www.bizjournals.com served more than 6.5 million page views, and www.concierge.com served more than 2.5 million page views. These page view numbers, however, understate the actual number of page views for these sites because of the consumer panel methodology employed by the Nielsen//NetRatings Internet Report, which tracks only segments of U.S. users and site activity. *See* Nielsen//NetRatings Internet Report for March 2002 (appended hereto as Exh. O).

(Exh. D); Webber Decl., ¶ 17 (Exh. E); Millstein Decl., ¶ 23 (Exh. F); Schulman Decl., ¶ 20 (Exh. G); Lambiase Decl., ¶ 16 (Exh. H); Hiller Decl., ¶ 14 (Exh. I); Chubb Decl., ¶ 17 (Exh. J); Shaw Decl., ¶ 17 (Exh. K); Wing Decl., ¶ 16 (Exh. L); Ryan Decl., ¶ 11 (Exh. M). For example, the Plaintiffs would likely not display an advertisement for a flight-training school on a web page displaying a story about the September 11th tragedy.

Most of the Plaintiffs also offer users the ability to personalize the services available on their sites. For example, users of the Washington Post Website can indicate what types of news stories they would like to see by registering for mywashingtonpost.com. *See* Little Decl., ¶ 12 (Exh. D). As a result of these and other design efforts, millions of people have developed strong relationships with the Plaintiffs' sites, and return to them time and time again. *See* Little Decl., ¶ 12 (Exh. D); Webber Decl., ¶ 11 (Exh. E); Millstein Decl., ¶ 17 (Exh. F); Schulman Decl., ¶ 14 (Exh. G); Lambiase Decl., ¶ 10 (Exh. H); Chubb Decl., ¶ 11 (Exh. J); Shaw Decl., ¶ 11 (Exh. K); Wing Decl., ¶ 10 (Exh. L).

These websites, however, are expensive to operate. The costs that the Plaintiffs incur include the costs of gathering, preparing, editing and updating the news and editorial content and other features that appear on the sites; the costs of designing and organizing the constantly changing individual web pages that comprise the sites, so that each site may serve as an efficient, effective and graphically pleasing mechanism for conveying vast quantities of information; the costs of acquiring, maintaining and operating sophisticated computer servers and other equipment; and the costs of hiring numerous trained professionals to ensure the smooth and continuous availability of the sites every hour of every day. *See* Little Decl., ¶ 17 (Exh. D); Webber Decl., ¶ 16 (Exh. E); Millstein Decl., ¶ 22 (Exh. F); Schulman Decl., ¶ 19 (Exh. G); Lambiase Decl., ¶ 15 (Exh. H); Hiller Decl., ¶ 13 (Exh. I); Chubb Decl., ¶ 16 (Exh. J); Shaw Decl., ¶ 16 (Exh. K); Wing Decl., ¶ 15 (Exh. L); Ryan Decl., ¶ 10 (Exh. M).

For advertisers looking for ways to reach potential customers, purchasing advertising on websites as popular as those operated by the Plaintiffs is an attractive option. Advertising on these sites reaches millions of consumers quickly and easily, and often throughout the workday.

Plaintiffs' Intellectual Property

The Plaintiffs own numerous United States Registered Trademarks. Several Plaintiffs also own pending trademark applications or common law (unregistered) trademarks. The Plaintiffs' websites are copyrighted and Plaintiffs have applied to register their copyrights with the Copyright Office of the United States Library of Congress. The Plaintiffs' registered trademarks are listed at Exhibit P and the Plaintiffs' copyright applications are listed at Exhibit Q, both appended hereto.

The Business Of Gator Corp.

Gator Corp. is also in the business of selling online advertising. Thus, it is in direct competition with the Plaintiffs. But rather than sell advertising on its own website, Gator Corp. sells pop-up ads on other websites **WITHOUT** the permission of or payment to such websites.

Gator Corp.'s unauthorized pop-up advertising scheme is based on a "trojan horse" concept. Gator Corp. gives away a free software application called "Gator." Gator is essentially a "digital wallet" -- it provides users with a mechanism for storing personal information about themselves, passwords, user identification numbers and names and other data that consumers routinely need to input on electronic forms when they shop on the Internet. *See* Edelman Decl., ¶ 9 (Exh. C). Gator assists users in filling out such forms without having to retype the previously stored information. *Id.* Although this appears to be a relatively innocuous software application, in fact, it is a "trojan horse" by which Gator Corp. infiltrates the personal computers of unsuspecting users to perpetrate its unlawful pop-up advertising scheme.

Gator Corp. bundles a software program called "OfferCompanion" together with its Gator digital wallet software program, so that persons who download the Gator application onto their personal computer have OfferCompanion automatically downloaded and installed as well.[5] Because OfferCompanion is bundled with other software programs and automatically downloaded with those other software programs, even sophisticated computer users frequently do not know OfferCompanion has been installed on their computer.[6] *Id.* at ¶ 10.

Once OfferCompanion is installed on a personal computer, whenever a user initiates a browser-based Internet connection, OfferCompanion automatically launches and communicates frequently with Gator Corp.'s computer servers, monitoring the user's activities on the World Wide Web and transmitting that information over the Internet to Gator Corp. *Id.* at ¶ 11. Such software is called "spyware" or "scumware." *See, e.g.,* http://www.scumware.com.

When a PC user visits certain websites, Gator Corp.'s remote computer systems will transmit to the user's computer one or more unauthorized pop-up advertisements to be displayed directly over the content that the owner of the website intended to be displayed. *Id.* at ¶ 12.

Gator Corp.'s unauthorized pop-up advertisements typically appear at approximately the same time as the web page that the user has requested. As a result of Gator Corp.'s unauthorized

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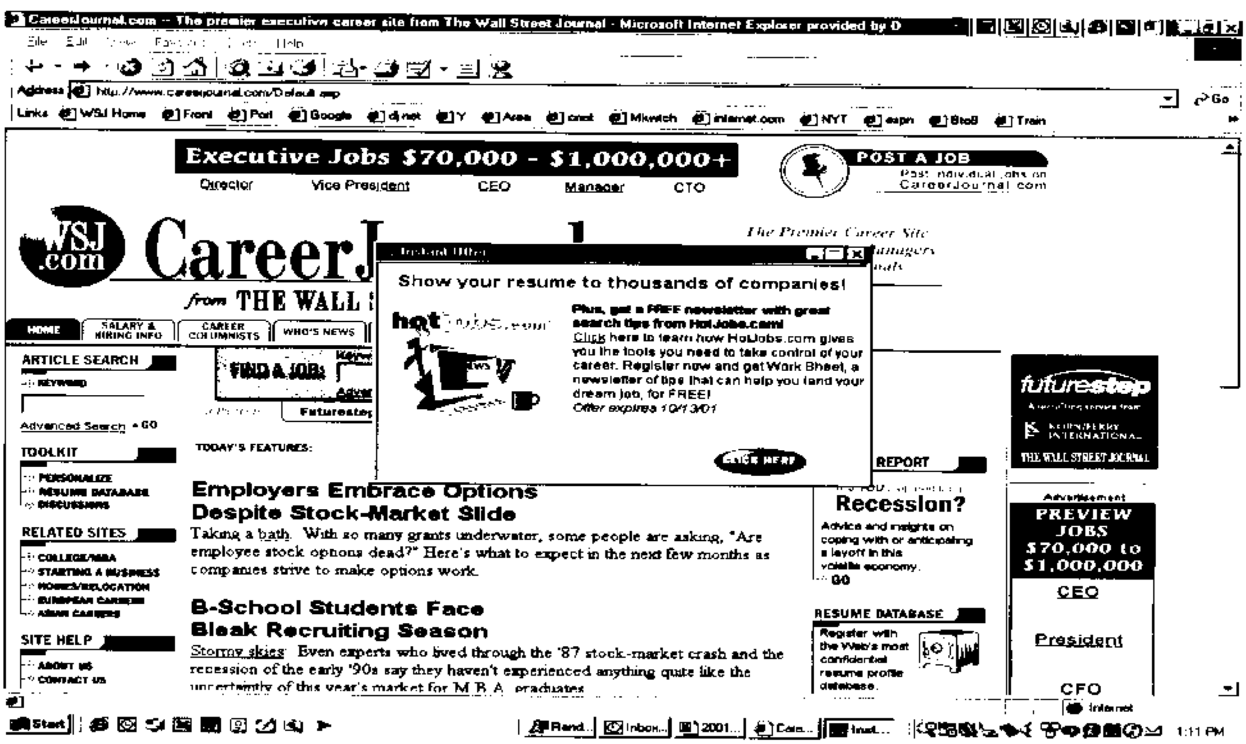
5 In addition, anyone who downloads certain popular free software programs, such as KaZaa or AudioGalaxy, have OfferCompanion automatically downloaded and installed onto their personal computer. *See* Edelman Decl., ¶ 10 (Exh. C). Gator Corp. asserts that OfferCompanion has been installed 27 million times, and that it currently resides on 15 million personal computers.

6 Since April 2002, Gator Corp. has also engaged in what are known as "drive-by-downloads" to place OfferCompanion on PCs. Under this scheme, pop-up advertisements will appear on certain websites and will attempt to install OfferCompanion on the user's PC, sometimes without any action being taken by the PC user (depending on the browser's security settings). *See* Foistware/Spyware- Gator, OfferCompanion, Ticker, GAIN, *available at:* http://www.cexx.org/gator.htm (last visited Jun. 23, 2002).

pop-up advertisements, users ordinarily do not see the web page in the manner the website owner intended to display it. Instead, users see the Gator Corp. pop-up advertisement concealing some of the content the website owner intended to be displayed on that particular web page.[7] *Id.* at ¶ 13.

In the example below, a Gator Corp. pop-up advertisement for hotjobs.com, a website containing online classified recruitment advertising, appears on the home page for Plaintiff Dow Jones' CareerJournal.com Website, a classified recruitment advertising website that competes with hotjobs.com.



The above example of a Gator Corp. pop-up advertisement appeared on the CareerJournal.com Website without Dow Jones' authorization.

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[7] In order for PC users to see the web page displayed as intended by the website owner, they must move their mouse to the pop-up advertisement and click the mouse to close Gator Corp.'s unauthorized pop-up advertisement, thus delaying access to the site's content. *See* Edelman Decl., ¶ 13 (Exh. C).

Gator Corp.'s software was designed to allow Gator Corp. to cause advertisements to be displayed on any website desired. The Gator Software is capable of placing advertisements even on the websites of Gator Corp.'s advertisers' competitors, and it is equally capable of placing advertisements on websites that do not sell advertising or that refuse to permit certain types of advertising. *See* Edelman Decl. at ¶ 14 (Exh. C). Gator Corp.'s pop-up advertising scheme is designed to divert and lure Internet users from the websites they intend to visit to other websites owned by Gator Corp.'s advertisers.[8]

Gator Corp.'s pop-up advertising scheme deliberately targets some of the Internet's most popular and highly trafficked websites, including the sites owned and operated by the Plaintiffs. Since March 1, 2002, the Plaintiffs' websites have been plagued by unauthorized Gator Corp. pop-up advertisements. *See* Little Decl., ¶ 20 (Exh. D); Webber Decl., ¶ 19 (Exh. E); Millstein Decl., ¶ 25 (Exh. F); Schulman Decl., ¶ 21 (Exh. G); Lambiase Decl., ¶ 17 (Exh. H); Hiller Decl., ¶ 16 (Exh. I); Chubb Decl., ¶ 19 (Exh. J); Shaw Decl., ¶ 18 (Exh. K); Wing Decl., ¶ 18 (Exh. L); Ryan Decl., ¶ 13 (Exh. M). Since April 1, 2002, Gator Corp. has specifically targeted several of the Plaintiffs' sites in its marketing to advertisers, including the New York Times Web Site and the Wall Street Journal Web Site. *See* The Gator Corporation, *The Next Generation in Online Advertising: User-Level Behavior Marketing*, p. 3 (Mar. 2002), *at* http://www.imediaconnection.com/content/features/02ibss/gator.pdf.

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8 Gator Corp.'s service, however, is not cheap. Rates for such pop-up advertising campaigns cost $25,000 or more. *See* The Gator Corp. Website, http://www.gatorcorporation.com/advertise/rates.html (last visited Jun. 23, 2002). None of this is paid to the websites targeted by Gator Corp. Thus, Gator Corp. profits from free riding on other websites' content.

The Confusion Caused By Gator Corp.'s Pop-Up Advertising Scheme

Gator Corp.'s pop-up advertising scheme is inherently deceptive and misleads users into falsely believing the pop-up advertisements supplied by Gator Corp. are in actuality advertisements authorized by and originating with the underlying website. Factors that contribute to the inherently deceptive and misleading nature of Gator Corp.'s scheme include, but are not limited to, the following.

- Many people who have OfferCompanion software on their computers are unaware of the presence and operation of that software program, let alone cognizant that its basic function is to place unauthorized pop-up advertisements on websites visited by the user. *See* Declaration of William D. Neal ("Neal Decl."), ¶ 7 (Exh. R).

- Gator Corp. does not prominently advise persons who have downloaded OfferCompanion software that unauthorized pop-up advertisements will be systematically delivered to change the display of content on particular websites. *See* Edelman Decl., ¶ 15 (Exh. C). Even if Gator Corp. delivered such a warning message, there would be no way to eliminate the inherent confusion created by Gator Corp.'s wrongful conduct.

- Because they appear on a user's screen simultaneously, or nearly simultaneously, with the downloading and opening of the requested web page of the targeted website, the Gator Corp. pop-up advertisements appear to be an integral and fully authorized part of the original underlying web page. *Id.* at ¶ 16.

- The Gator Corp. pop-up advertisements fail to suggest they are not authorized and supplied by the underlying website. *Id.* at ¶ 15.

- Even if a user of Gator Corp.'s digital wallet software or some other software program into which is bundled OfferCompanion removes Gator from his or her computer using the "uninstall" feature, OfferCompanion is not removed and continues to operate independently in support of Gator Corp.'s pop-up advertising scheme. *Id.* at ¶ 17.

This is not mere speculation. Plaintiffs conducted a consumer survey to determine whether Gator Corp.'s pop-up advertising scheme was likely to cause confusion. The survey found a high degree of consumer confusion.[9] Among the survey findings were the following.

- Among survey respondents who had Gator on their computer, 55% did not know that it caused pop-up advertisements to appear on their computers when they visited certain websites. *See* Neal Decl. ¶ 7b (Exh. R).

- Among survey respondents who have experienced pop-up advertisements on their computer, 66% believe that "pop-up advertisements are sponsored by or authorized by the website in which they appear" and 45% believe that "pop-up advertisements have been pre-screened and approved by the website on which they appear." *See id.* ¶ 7c.

- Among survey respondents who had Gator installed on their computers, 16% reported that it had been loaded without their knowledge. Indeed, 13% of survey respondents did not even know that the software was loaded on their computer. *See id* ¶ 7a.

Harm To Plaintiffs

Since at least March 1, 2002, Gator Corp. has specifically targeted, and continues to specifically target, the Plaintiffs' websites for the delivery of unauthorized pop-up advertising. Gator Corp. has already delivered thousands, if not hundreds of thousands, of unauthorized pop-up advertisements to the Plaintiffs' websites. All pop-up advertisements that Gator Corp. has displayed on the Plaintiffs' websites have been displayed without the authorization or permission of the Plaintiffs. *See* Little Decl., ¶ 20 (Exh. D); Webber Decl., ¶ 19 (Exh. E); Millstein Decl., ¶ 25 (Exh. F); Schulman Decl., ¶ 21 (Exh. G); Lambiase Decl., ¶ 17 (Exh. H); Hiller Decl., ¶ 16 (Exh. I); Chubb Decl., ¶ 19 (Exh. J); Shaw Decl., ¶ 18 (Exh. K); Wing Decl., ¶ 18 (Exh. L); Ryan Decl., ¶ 13 (Exh. M).

In the short term, Gator Corp.'s pop-up advertising scheme deprives both the Plaintiffs and their advertisers of the benefits intended to be secured by their advertising contracts. In the long term, if left unchecked, Gator Corp.'s pop-up advertising scheme would erode the

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9 *See* Declaration of William D. Neal appended hereto as Exhibit R.

attractiveness of advertising on the Plaintiffs' websites and disrupt or potentially destroy the ability of the Plaintiffs to sell such advertising. This would imperil the economic viability of the Plaintiffs' websites. *See* Little Decl., ¶ 22 (Exh. D); Webber Decl., ¶ 21 (Exh. E); Millstein Decl., ¶ 27 (Exh. F); Schulman Decl., ¶ 23 (Exh. G); Lambiase Decl., ¶ 19 (Exh. H); Ryan Decl., ¶ 15 (Exh. M).

Gator Corp.'s pop-up advertising scheme fundamentally damages the integrity and value of the Plaintiffs' websites in other ways as well.

> ➢ Because Gator Corp.'s pop-up advertising scheme creates the false impression that the pop-up advertisements originated with the underlying website, Gator Corp. deceptively misleads customers into the false perception that the pop-up advertisements appear with the Plaintiffs' authorization and approval. *See* Neal Decl., ¶ 4, 7 (Exh. R).
>
> ➢ The few (if any) visitors to the Plaintiffs' websites who might actually recognize that these unauthorized pop-up advertisements originated with Gator Corp. are nonetheless likely to have the false perception that Gator Corp.'s pop-up advertising scheme operates in cooperation with, rather than in competition with, the Plaintiffs' websites. *Id.* at ¶ 4, 7 (Exh. R).
>
> ➢ Gator Corp. delivers pop-up advertisements without regard for the Plaintiffs' standards and policies as to the type of advertisements and third-party messages that are allowed to run on the Plaintiffs' sites. Thus, the Gator Corp. pop-up advertising scheme destroys Plaintiffs' rights to determine the companies, messages and causes which can be advertised on their sites.[10]

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[10] Each of the Plaintiffs has established and enforces standards and policies governing the types of goods and services that may be advertised on their websites and the content and appearance of advertisements that they deem acceptable. Indeed, each of the Plaintiffs, as a condition of advertising on their sites, reserves the right to reject any advertisement or the content of any advertisement. Such control over advertising is necessary because online ads are an integral part of the manner in which the website is displayed to the viewer. *See* Little Decl., ¶ 18 (Exh. D); ¶ Webber Decl., ¶ 17 (Exh. E); Millstein Decl., ¶ 23 (Exh. F); Schulman Decl., ¶ 20 (Exh. G); Lambiase Decl., ¶ 16 (Exh. H); Hiller Decl., ¶ 14 (Exh. I); Chubb Decl., ¶ 17 (Exh. J); Shaw Decl., ¶ 17 (Exh. K); Wing Decl., ¶ 16 (Exh. L); Ryan Decl., ¶ 11 (Exh. M).

- Gator Corp.'s pop-up advertisements interfere with and disrupt the carefully designed display of content by the Plaintiffs and completely change the "look and feel" of the site that Plaintiffs seek to present.

- As Gator Corp. itself admits, "many users perceive pop-up ads as intrusive." *See* The Gator Corporation, *The Next Generation Online Advertising: User-Level Behavior Marketing,* at p. 4. Gator Corp.'s pop-up advertising scheme undermines the ability of the Plaintiffs to calibrate the frequency of pop-up advertisements on their sites to a number that does not annoy visitors and drive them to other websites.

- Because Gator Corp.'s pop-up advertisements are displayed without regard to the underlying content, a potential for serious reputational damage exists. Imagine, for example, if a Gator Corp. pop-up advertisement for a flight-training school appeared over a story about the September 11th tragedy. Gator Corp.'s pop-up advertising scheme undermines the Plaintiffs' efforts to coordinate advertising and content to avoid such an embarrassing conflict.

See Little Decl., ¶ 21 (Exh. D); Webber Decl., ¶ 20 (Exh. E); Millstein Decl., ¶ 26 (Exh. F); Schulman Decl., ¶ 22 (Exh. G); Lambiase Decl. ¶ 18 (Exh. H); Hiller Decl., ¶¶ 17-21 (Exh. I); Chubb Decl., ¶ 20 (Exh. J); Shaw Decl., ¶ 19 (Exh. K); Wing Decl., ¶ 19 (Exh. L); Ryan Decl., ¶ 14 (Exh. M).

Gator Corp.'s pop-up advertising scheme enables Gator Corp, without the permission of the websites it targets and without having to make any investment or exert any effort to create and develop content that attracts and holds viewers, to profit from pop-up advertisements displayed over websites that have not authorized, do not want and are directly injured by such parasitic interference with the display and appearance of their sites.

Gator Corp.'s pop-up advertising scheme operates in direct competition with the sites of the Plaintiffs, because Gator Corp. seeks to sell Internet advertising services in the very same marketplace of advertisers to which the Plaintiffs sell advertising services. *See* Little Decl., ¶ 23 (Exh. D); Webber Decl., ¶ 22 (Exh. E); Millstein Decl., ¶ 28 (Exh. F); Schulman Decl., ¶ 24

(Exh. G); Lambiase Decl., ¶ 20 (Exh. H); Hiller Decl., ¶ 23 (Exh. I); Chubb Decl., ¶ 21 (Exh. J); Shaw Decl., ¶ 20 (Exh. K); Wing Decl., ¶ 20 (Exh. L); Ryan Decl., ¶ 16 (Exh. M). Unlike the Plaintiffs, however, Gator Corp. participates in this market without providing valuable news and editorial content to attract visitors to the web pages on which the pop-up advertisements are displayed. Gator Corp. merely free rides on the Plaintiffs' efforts and investment in developing content. To the extent Gator Corp. derives any revenue or profit from its pop-up advertising scheme, it does so solely by unfairly free riding on Plaintiffs' substantial investments to develop and operate their famous websites and on Plaintiffs' valuable copyrights and trademark rights.

ARGUMENT

The test for a Rule 65(a) motion is well established. *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193-96 (4th Cir. 1977). When reviewing a motion for a preliminary injunction, the district court must consider the following factors: (1) the likelihood of irreparable harm to the plaintiff if a preliminary injunction is denied; (2) the balance of hardships between the plaintiff and defendant; (3) the likelihood that the plaintiff will succeed on the merits; and (4) whether the public interest is served by granting the requested relief. *E.g., Ciena Corp. v. Jarrard*, 203 F.3d 312, 322 n.2 (4th Cir. 2000) (noting factors taken from *Blackwelder Furniture Co.*, 550 F.2d at 193-96 (4th Cir. 1977)); *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 690 (4th Cir. 1992) (same, in a copyright infringement case).

Moreover, the *Blackwelder* factors must be considered in the context of a sliding scale. Where the balance of hardships tilts decidedly in plaintiff's favor, plaintiff is entitled to an injunction if it demonstrates likelihood of success on the merits *or* if it merely presents "grave or serious questions" that are fair ground for litigation and for more deliberate investigation. *Blackwelder Furniture Co.*, 550 F.2d at 195-96. For this reason, "the balance of harm evaluation should precede the determination of the degree by which the plaintiff must establish the likelihood of success on his part." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 813 (4th Cir. 1992).

I. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION UNDER *BLACKWELDER*.

A. Irreparable Harm Is Presumed In Trademark And Copyright Cases.

When a plaintiff pleads a *prima facie* case of copyright infringement, it is accorded a presumption of irreparable harm. *E.g., Service & Training, Inc.*, 963 F.2d at 690; *Bourne Co. v. Tower Records*, 976 F.2d 99, 101 (2d Cir. 1992); *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1553 (3d Cir. 1992). The same presumption of irreparable harm is accorded when a plaintiff pleads a *prima facie* case of trademark infringement. *E.g., Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 938 (4th Cir. 1995) ("[a] finding of irreparable injury ordinarily follows when a likelihood of confusion or possible risk to reputation appears" (citations omitted)); *Fabrication Enters., Inc. v. Hygenic Corp.*, 64 F.3d 53, 61 (2d Cir. 1995); *Opticians Ass'n of Am. v. Independent Opticians of America*, 920 F.2d 187, 196 (3d Cir. 1990). Intellectual property by its very nature is closely associated with its owner, meaning that infringement will directly affect that owner; thus, infringement "gives rise to irreparable injury, in that plaintiff has lost control of its business reputation [and] there is a substantial likelihood of confusion of the purchasing public. . . ." *Long John Silver's, Inc. v. Washington Franchise, Inc.*, 209 U.S.P.Q. 146, 149 (E.D. Va. 1980).

Because this case involves causes of action for both trademark infringement and copyright infringement, irreparable harm is presumed. Thus, the first factor of the *Blackwelder* test favors issuance of a preliminary injunction.

B. The Balance Of Hardships Decidedly Favors Plaintiffs.

The above-described harms[11] suffered and being suffered by Plaintiffs are severe and will continue absent a preliminary injunction. In contrast, the harm to Gator Corp. (if any) would be slight.

The preliminary injunction sought by Plaintiffs is very limited in scope -- it would only bar Gator Corp. from perpetrating its pop-up advertising scheme on Plaintiffs' websites. Gator Corp. would not be forced to suspend operations; it could continue to place pop-up advertisements on any of the millions of other sites on the World Wide Web. Thus, the exclusive possible harm to Gator Corp. is the loss of any profits it might derive from selling pop-up advertisements on the Plaintiffs' websites. And, the mere loss of profits is not cognizable in weighing the balance of hardships. *E.g.*, *Warner-Lambert Co. v. Northside Dev. Co.*, 86 F.3d 3, 8 (2d Cir. 1996) (loss of profits does not merit any weight in the balancing analysis); *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988) ("where the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such argument in defense 'merits little equitable consideration.'") (*quoting Helene Curtis Indus. v. Church & Dwight Co.*, 560 F.2d 1325, 1333 (7th Cir. 1977)).

Thus, the balance of hardships tips decidedly in favor of the Plaintiffs. Accordingly, the second factor of the *Blackwelder* test also supports issuance of a preliminary injunction.

C. Plaintiffs Are Likely To Prevail On The Merits.

Because the balance of hardships tilts decidedly in favor of the Plaintiffs, they need only demonstrate that this lawsuit presents "grave or serious questions" that are fair ground for litigation. *Blackwelder Furniture Co.*, 550 F.2d at 195-96. As discussed below, Plaintiffs

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11 *See supra* pp. 13 - 16.

clearly meet this standard. Indeed, Plaintiffs meet even the higher standard of demonstrating a likelihood of success on the merits.

1. Plaintiffs Are Likely To Prevail On Their Trademark Infringement Claim.

Count I of the Complaint alleges that Gator Corp.'s pop-up advertising scheme infringes Plaintiffs' registered trademarks in violation of Section 32 of the Lanham Act. 15 U.S.C. § 114(1)(a). Confusion as to Plaintiffs' sponsorship of or affiliation with Gator Corp.'s pop-up advertising scheme is actionable as trademark infringement. *See Anheuser-Busch, Inc. v. L&L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992); *IDV N. Am., Inc. v. S&M Brands, Inc.*, 26 F. Supp. 2d 815, 826 (E.D. Va. 1998) (a likelihood of confusion exists if consumers are likely to believe, mistakenly, that the infringer's goods "are sponsored or approved by" the trademark owner). Gator Corp.'s pop-up advertising scheme uses Plaintiffs' trademarks by inserting its pop-up advertisements on the page views that feature Plaintiffs' trademarks. Indeed, Plaintiffs' trademarks are clearly visible beside Gator Corp. pop-up advertisements, creating an unauthorized association between the two.[12]

The elements of a trademark infringement claim are: ownership of a valid, protectible mark and proof that the defendant's use of the mark in commerce is likely to cause confusion. *E.g.*, *Lone Star*, 43 F.3d at 930; *Teaching Co. Ltd. P'ship v. Unapix Entm't, Inc.*, 87 F. Supp.2d

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[12] Copies of a representative sampling of page views on which Gator Corp. pop-up advertisements were displayed on Plaintiffs' websites are appended hereto as Exhibit S.

567, 575 (E.D. Va. 2000). By virtue of their registered marks,[13] Plaintiffs have established the first element of the infringement test -- ownership of valid and protectible marks.[14]

With respect to the second element -- likelihood of confusion -- the Fourth Circuit requires that consideration be given to seven factors. *See Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984). Those factors are: the similarity of the two marks, similarity of the two services, similarity of the two facilities or devices, similarity of the advertising used by the two parties, strength or distinctiveness of the plaintiff's mark, the defendant's intent and actual confusion. *Id.* [15] Because Gator Corp. is using the exact marks, services, facilities or devices of the Plaintiffs and is intentionally placing their pop-up advertisements directly on Plaintiffs' websites, the only open issue under the *Pizzeria Uno* test is the issue of confusion.

The Fourth Circuit and this Court recognize appropriate consumer survey evidence as strong evidence of a likelihood of confusion. *E.g., Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Corp.*, 148 F.3d 417, 423 (4th Cir. 1998); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455,

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[13] Certificates of registration for each of Plaintiffs' trademarks are appended hereto as Exhibit T.

[14] A certificate of registration of a trademark is "prima facie evidence of (1) the validity of the mark and its registration; (2) the registrant's ownership; and (3) the registrant's 'exclusive right' to use the mark on or in connection with the goods and services specified in the certificate of registration." *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 816 (4th Cir. 2001). *See also Glover v. Ampak, Inc.*, 74 F.3d 57, 59 (4th Cir. 1996).

[15] In *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455 (4th Cir. 1996), two additional factors were suggested for consideration: the quality of the defendant's product and the sophistication of the consuming public. 81 F.3d at 463-64. Neither of these factors, however, are relevant here. As this Court has noted, "[c]onsideration of the quality of the defendant's product is more appropriate in situations involving the production of cheap copies or so-called 'knockoffs'. . . ." *IDV North America, Inc. v. S&M Brands, Inc.*, 26 F.Supp. 2d 815, 832 (E.D. Va. 1998). Moreover, buyer sophistication will only be relevant when the typical consumer of the product at issue possesses some expertise regarding the product. *Id.* Thus, neither factor is appropriate for consideration here.

467 (4th Cir. 1996); *Teaching Co. Ltd. P'ship,* 87 F. Supp. 2d at 584; *IDV N. Am., Inc.*, 26 F. Supp. 2d at 829; *Black & Decker (U.S.), Inc. v. Pro-Tech Power, Inc.*, 26 F. Supp. 2d 834, 851 (E.D. Va. 1998); *Selchow & Righter Co. v. Decipher, Inc.*, 598 F. Supp. 1489, 1497 (E.D. Va. 1984). Indeed, where confusion as to sponsorship or endorsement is at issue, a survey may be the only available method of showing the public state of mind. *See Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 522 (10th Cir. 1987) (discussing applicability of survey evidence demonstrating likelihood of confusion regarding product source).

In reviewing a consumer survey to determine whether it demonstrates a likelihood of confusion, a district court must focus on what percentage of the surveyed consumers evidenced confusion with respect to the alleged infringing activity. A confusion level of as low as 10% among survey respondents is sufficient to support a finding of likelihood of confusion. *See Sara Lee*, 81 F.3d at 467 n.15. *See also Teaching Co., Ltd. P'ship*, 87 F. Supp.2d at 583-84 (survey evidence showing 16% of respondents were confused supported finding of likelihood of confusion); *Harrods Ltd. v. Sixty Internet Domain Names*, 157 F. Supp.2d 658, 678 (E.D. Va. 2001) (survey evidence showing between 23% and 31% of respondents believed an infringing mark was used, approved, or permitted by the senior user demonstrated that the mark was confusingly similar).

Plaintiffs' consumer survey amply demonstrates the likelihood of consumer confusion arising from Gator Corp.'s pop-up advertising scheme. Among survey respondents who experienced pop-up advertisements, 66% believe that "pop-up advertisements are sponsored by or authorized by the website in which they appear" and 45% believe that "pop-up advertisements have been pre-screened and approved by the website on which they appear." Thus, Plaintiffs' trademark expert, William D. Neal, concluded that "Gator Corp.'s pop-up advertisements are likely to cause confusion, or to cause mistakes, or deceive as to the affiliation, connection or association of such pop-up advertisements with the websites on which the pop-up advertisements appear and are likely to cause confusion as to the origin, sponsorship, or approval of the pop-up advertisements." Neal Decl., ¶ 4 (Exh. R).

2. Plaintiffs Are Likely To Prevail On Their Unfair Competition Claim.

Count II of the Complaint alleges that Gator Corp.'s pop-up advertising scheme constitutes unfair competition in violation of Section 43(a) of the Lanham Act. 15 U.S.C. § 1125(a)(1)(A). Section 43(a) prohibits a broader range of conduct than a claim for trademark infringement under Section 32. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Unfair competition involves "any deceptive marketing [or] appropriation of intangible trade values" that tends to mislead the public. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1(a) (1995).

Section 43(a) is written as if it had Gator Corp.'s pop-up advertising scheme in mind. In the words of the statute, Gator Corp.'s pop-up advertising scheme is a "device, or [a] combination thereof . . . which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association" of Gator Corp.'s pop-up advertisements with Plaintiffs' websites, and therefore confuse "as to the origin sponsorship, or approval of [Gator Corp.'s] services, or commercial activities by another person." As discussed above, Gator Corp.'s pop-up advertising scheme confuses 66% of respondents to a consumer survey. Quite simply, almost two-thirds of consumers believe that an "affiliation, connection or association" exists between Gator Corp.'s pop-up advertisements and the websites on which they appear. Because this belief is false, Gator Corp. is liable for unfair competition.

3. Plaintiffs Are Likely To Prevail On Their Copyright Claims.

Count IV of the Complaint alleges that Gator Corp.'s pop-up advertising scheme infringes Plaintiffs' copyrights in their websites in violation of the Copyright Act. 17 U.S.C. § 106. Count

V of the Complaint alleges that Gator Corp.'s pop-up advertising scheme constitutes contributory copyright infringement in violation of the Copyright Act. *Id.* More specifically, Counts IV and V of the Complaint allege that Gator Corp.'s pop-up advertising scheme infringes Plaintiffs' exclusive right to display their copyrighted works publicly, 17 U.S.C. § 106(5), and their exclusive right to prepare derivative works based upon the copyrighted work, 17 U.S.C. § 106(2).

Anyone who violates these exclusive rights of a copyright owner may be held liable as a direct infringer. 17 U.S.C. § 501(a). Anyone who, "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another," may be held liable as a contributory infringer. *ALS Scan, Inc. v. Remarq Cmtys., Inc.*, 239 F.3d 619, 621 n.1 (4th Cir. 2001) (*quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). Gator Corp.'s pop-up advertising scheme operates as both direct copyright infringement and contributory infringement. It is direct infringement because Gator Corp. transmits the unauthorized pop-up advertisements to the user's PC where it is displayed over the content of the website being visited. It is contributory infringement to the extent that the PC user's act of initiating a browser-based Internet connection with Gator Corp. software that results in an alteration of the Plaintiffs' websites is itself an act of direct infringement because Gator Corp. materially contributes to that infringing conduct.

Plaintiffs must prove two elements to establish a *prima facie* case for copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).[16]

The creator of a work owns the copyright in the work. 17 U.S.C. § 201(a). As described above, the Plaintiffs are the creators and owners of their websites and the content that appears on them. Accordingly, they own valid copyrights. Therefore, the only remaining element to be proved to establish copyright infringement is whether Gator Corp. has invaded one of the exclusive rights of a copyright owner -- in this case, the exclusive right to display a copyrighted work to the public and the exclusive right to create derivative works.

(a) Gator Corp.'s Pop-Up Advertising Scheme Infringes Plaintiffs' Exclusive Public Display Right.

Use of the Plaintiffs' websites is governed by a "terms and conditions of use." Through these terms and conditions of use, the Plaintiffs grant site visitors a license to use and display the site. They do not grant a license to alter the site or change its appearance. In fact, the terms and conditions of use prohibit commercial use of the content on the site and/or forbid any alteration of the site or its appearance. *See* Little Decl., ¶ 19 (Exh. D); Webber Decl., ¶ 18 (Exh. E); Millstein Decl., ¶ 24 (Exh. F); Hiller Decl., ¶ 15 (Exh. I); Chubb Decl., ¶ 18 (Exh. J); Wing Decl., ¶ 17 (Exh. L); Ryan Decl., ¶ 12 (Exh. M). It is well-settled law that any use of a copyrighted work that exceeds the license granted by the copyright owner is infringement. *See MacLean Assocs., Inc. v. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 773-74 (3d Cir. 1991) (use of a software application that exceeded the scope of the copyright owner's intended

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[16] In this context, "[c]opying . . . is used in the broad sense of invasion of one of the exclusive rights secured to copyright owners under the Copyright Act." *Dynamic Solutions, Inc. v. Planning & Control, Inc.*, 646 F. Supp. 1329, 1337 n.12 (S.D.N.Y. 1986). *See also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.02[A] at 8-27 (2001) ("'Copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights."). In this case, two of the exclusive rights of the copyright owners are at issue -- the exclusive right to display and the exclusive right to prepare derivative works.

permission constituted copyright infringement). *See generally* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.15[A] (2001).

Gator Corp.'s pop-up advertising scheme alters the appearance of Plaintiffs' websites by covering a portion of the content on the web page on which the pop-up advertisements appear. This constitutes infringement because it alters the manner in which that web page is perceived by the visitor to the site. *See New York Times Co. v. Tasini*, 533 U.S. 483, 499 (2001) (in determining whether copyright infringement has occurred, a court must focus on the work "as presented to, and perceptible by, the user."). Quite simply, the copyrighted work is being displayed in a different manner than intended by the copyright owner. [17] Thus, Gator Corp.'s pop-up advertising scheme infringes the Plaintiffs' exclusive right to display publicly their copyrighted websites.

(b) Gator Corp.'s Pop-Up Advertising Scheme Infringes Plaintiffs' Exclusive Right To Prepare Derivative Works.

Gator Corp.'s pop-up advertising scheme, by modifying the Plaintiffs' websites, creates what are known as "derivative works" under the Copyright Act. 17 U.S.C. § 101.[18] Creation of a derivative work can occur whenever additions to, deletions from or edits of copyrighted work occur. *See, e.g., WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 626 (7th Cir. 1982) (deletion of text from cable retransmission of television program infringed copyright); *National*

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[17] Section 106 of the Copyright Act accords a copyright owner the exclusive right "to display the copyrighted work *publicly*." 17 U.S.C. § 106(5) (emphasis added). A display can be "public" if it is transmitted "to the public." 17 U.S.C. § 101. Communication of a copyrighted work over the Internet constitutes a transmission "to the public" and, therefore, is a *public* display. *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies*, 2001 U. Ill. L. Rev. 83, 87-92.

[18] A "derivative work" is a work "based upon one or more preexisting works" which consists of "editorial revisions, annotations, elaborations, or other modifications." 17 U.S.C. § 101.

Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533, 544 (W.D. Tex. 1980) (addition of unauthorized advertisements to book constituted infringement); *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 21 (2d Cir. 1976) ("[U]nauthorized editing of the underlying work . . . would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright").

Such a derivative work may not be created without the permission of the copyright owner. One court has summarized this rule succinctly: "if the publisher of a book leaves the inside covers blank the book seller [cannot] inscribe the Lord's Prayer on them in order to broaden the book's appeal." *WGN Cont'l Broad.*, 693 F.2d at 626.

The *National Bank of Commerce* case is particularly instructive here. In that case, the defendant purchased quantities of *All Around the House*, a book by Ms. Heloise Bowles of *"Hints from Heloise"* fame, for use by its distributors as a "give-away" to customers. 503 F. Supp. at 537. After receiving the books, however, the defendant added promotional messages and artwork inside the front and rear covers of the book and interspersed through the text. *Id.* The district court held that "the addition of advertising material to the text of a book . . . was an infringement of the copyright if the addition was done without authority." *Id.* at 544.

Gator Corp.'s pop-up advertising scheme is legally indistinguishable from the *National Bank of Commerce* case. Gator Corp. has added promotional messages to Plaintiffs' copyrighted web pages just as Shaklee added promotional messages to copyrighted pages of Heloise's book. And, just as in *National Bank of Commerce,* Gator Corp. has deprived the Plaintiffs of their right to "have control over the context and manner in which [the copyrighted] work is presented." *National Bank of Commerce,* 503 F. Supp. at 544. Thus, Gator Corp.'s pop-up advertising scheme infringes the Plaintiffs' exclusive right to prepare derivative works.

4. Plaintiffs Are Likely To Prevail On Their "Hot News" Misappropriation Claim.

Count VI of the Complaint alleges that Gator Corp.'s pop-up advertising scheme constitutes "hot news" misappropriation. The Supreme Court has described such misappropriation as the following:

> [actions] amount[ing] to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not[,] with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.

International News Serv. v. Associated Press, 248 U.S. 215, 240 (1918).

The elements of this tort are: (1) the collection by plaintiff of time-sensitive information; (2) at a cost; and (3) the use of that information in such a manner that constitutes "free riding" on the plaintiff's efforts; (4) by a defendant in direct competition with plaintiff; (5) that so reduces the plaintiff's incentives to produce the product or service such that its existence or quality is substantially threatened. *E.g., National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997). Plaintiffs clearly can establish each of these elements of a *prima facie* case.

With respect to the first element -- time sensitive news -- much of the content posted on the Plaintiffs' websites is highly time sensitive and represents late breaking news. For example, the Washington Post Web Site is updated continuously throughout the day, depending on the news of that day. Of course, the collection of this information costs money, thus satisfying the second element -- the cost of collection.

As for the third element -- free riding -- Gator Corp. clearly is free riding on the Plaintiffs' websites. Gator Corp.'s pop-up advertising scheme involves no investment in the collection and dissemination of news, but nonetheless Gator Corp. profits from using the Plaintiffs' content. This is the very definition of free riding.

The fourth element -- that Plaintiffs and Gator Corp. be direct competitors -- is also clearly met. Plaintiffs and Gator Corp. both endeavor to make money by selling online advertising.

Finally, as to the fifth element – reduction in the Plaintiffs' incentive to continue publishing -- as discussed above, Plaintiffs have been and will continue to be harmed absent entry of a preliminary injunction. In particular, Gator Corp.'s pop-up advertising scheme undercuts the incentive to operate these websites because Gator Corp., not plaintiffs are deriving the economic benefit from the sites without incurring the expense of operating the site.

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Thus, Plaintiffs are likely to succeed on at least five of their causes of action pled in the Complaint, even though they need only meet the lower standard of demonstrating that this suit presents "grave or serious questions." Accordingly, the third factor of the *Blackwelder* test also supports the issuance of a preliminary injunction.

D. The Public Interest Favors Issuance Of A Preliminary Injunction.

Both the Lanham Act and the Copyright Act embody a Congressional statement that the public interest is best served by protection of intellectual property rights. *See Anheuser-Busch, Inc. v. L&L Wings, Inc.*, 962 F.2d 316, 320 (4th Cir. 1992) (Lanham Act); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 976 (4th Cir. 1990) (Copyright Act). Quite simply, a preliminary injunction here will serve to protect the public by preventing consumer confusion and by preserving the incentives embodied in the nation's copyright regime to continue publishing the websites being victimized by Gator Corp.'s pop-up advertising scheme. Accordingly, this fourth factor of the *Blackwelder* test also supports the issuance of a preliminary injunction.

CONCLUSION

The World Wide Web has been one of the great boons to the spread of information in modern times. It has made possible the rapid dissemination of news, research and advice to the general benefit of mankind. Unfortunately, some unscrupulous individuals and companies have taken advantage of the World Wide Web to make a fast buck at the expense of others. Gator Corp. is one such parasite on the Web that does nothing more than free ride on the hard work and investments of Plaintiffs and other website owners. Gator Corp.'s pop-up advertising scheme is patently unlawful under any number of legal theories and should be stopped without further delay. Because Plaintiffs have established an entitlement to preliminary relief under Rule 65(a) of the Federal Rules of Civil Procedure and because each of the *Blackwelder* factors favor issuance of a preliminary injunction, the Court should grant this motion.

Respectfully Submitted,

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Terence P. Ross (VSB# 26408)
Hill B. Wellford, III (VSB# 38983)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, District of Columbia 20036
Telephone: (202) 955-8500

Attorneys for Plaintiffs