

Massachusetts Software and Internet Council

Legal Issues Series

Hot Topics in Internet Advertising

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Advertising Bargains on the Net?

- Is online advertising dead?
- Cost per CPM (1000 impressions) decreasing
 - 2000: \$3.48
 - 2001: \$2.50
 - 2002: ?
- New ad techniques (far beyond banners)
 - Advertainment
 - Advergaming
 - Pop-up ads and shoshkeles

New Legal Issues

- Pop-Up Ads
- Web Bugs
- Search Rankings
 - Paying for placement
 - Manipulation of the system
- Spam

Pop-Up and Pop-Under Ads

- May 2002: 8 newspapers sue Gator
 - Gator's free form-filling software also serves pop-up ads
 - Plaintiffs claim pop-up ads hide paid advertising, falsely imply that they deliver Gator's ads (including competing services), alter how pages are intended to be shown
 - Gator sues back to stop site operators from preventing users from viewing separate works on their computers
- Nov. 2002: class action against *Bonzi Software* for "Security Alert" pop-up ads
 - Alleges public nuisance and deceptive business practices
 - Seeking \$500 for every person who has received an ad, \$5 for every banner delivered, and an injunction
- ExitExchange's patent on pop-up technology?

Web Bugs

- Web bugs, 1x1 GIFs, pixel tags, beacons
 - “invisible” graphics put on a web page by host or 3rd party (e.g., advertising network)
 - Track site usage, numbers of visitors, IP address
 - Used with cookies to track effectiveness of marketing campaigns or collect profiles
 - Part of the broader debate over online profiling (*Pharmatrak*, D. Mass 2002)
- Jun. 2000: 4 sites challenged by MI AG for failure to disclose bugs in privacy policies
- Nov. 2002: National Advertising Initiative (NAI) and Trustee issued industry guidelines
 - Notify visitors when web bugs are in use and what they are used for

Search Rankings: Paid Placement

- Sale of Trademarked Terms
 - Jan. 2002: *Mark Nutritionals*: sued Alta Vista and other search engines for sale of “Body Solutions” trademark in paid placements
- Non-Trademarked Terms
 - FTC’s June 27 letter to Alta Vista, AOL, Microsoft, others
 - Paid rankings must be clearly delineated as “advertising”, whether or not segregated from other results
 - If paid programs may distort ranking or placement criteria, clearly describe how sites are selected for inclusion

Search Rankings: “Self-Help” Manipulation Techniques

- Ways to trick the engines
 - Bridge pages and unused frames
 - Metatags
 - Page jacking
 - White text
 - Link farms

Search Ranking Manipulation (1)

- Metatags using competitors' trademarks
 - Eli Lilly (7th Cir. 2001): significant evidence of intent to confuse consumers
 - Equitrack (7th Cir. 2002): focus on deception of consumers rather than mere use of trademarks in metatags
 - “It is not the case that trademarks can never appear in metatags, but that they may only do so where a legitimate use of the trademark is being made.”
- Search King v. Google
 - SK sells text links from popular sites to augment Google PageRank for customers
 - Google altered PageRank algorithm and SK customers' and SK's rankings dropped
 - Oct. 2002: SK sued Google, alleging purposeful reduction of Search King's PageRank

Search Ranking Manipulation (2)

- Page jacking and white text
 - Copyright infringement issues
 - Apr. 2000: FTC complaint against Green Flash for “cloaking” customer pages with popular web pages for submission to search engine spiders
 - June 2001: Euregio.net sues Women.com for white text on InternetHoroscopes.com

Spam

- June 2002: Spam banned in EU
 - Unless recipient has opted-in OR
 - Recipient is an existing customer who has not opted-out
- U.S. Anti-Spam legislation
 - Enacted by 26 states
 - Initial doubts under “dormant commerce clause” for unreasonably burdening interstate commerce
 - Recent appeals in CA and WA upheld anti-spam legislation
 - FTC aggressively pursuing fraudulent or deceptive online advertising practices
 - Has recently filed >30 enforcement actions against spammers

Proposed Mass Anti-Spam Law

- Would apply to senders of spam
 - with servers located in MA or
 - outside MA with knowledge that they are sending to a MA resident
- Requires senders to include “ADV” in subject line, and “ADV: ADLT” for adult content
- Prohibits misleading regarding sender’s origin, routing or subject matter
- Requires opt-out
- Statutory damages of \$500/message and qualifies as a deceptive and unfair trade practice under MA Ch. 93A

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