
Increasing Controversies over “Pop-Up” and “Pop-Under” Ads

2002-09-19

“Pop-up” ads have become ubiquitous on the Internet. “Pop-up” ads appear in a new window that pops up on top of a user’s web browser, requiring the user to click the window closed before the user can continue. “Pop-under” ads, which are shown through a new window that appears behind a user’s web browser, are a more recent phenomenon. Recently, there have been significant legal developments with respect to both types of ads.

Gator is Sued for Use of Pop-Up Ads

In May 2002, The New York Times, the Wall Street Journal, the Washington Post, the parent company of USA Today and eight other media companies filed suit in a federal court in Virginia against Gator Corporation over software that triggers pop-up ads. The action alleges that Gator, a software company, violates copyright and trademark laws.

Gator makes software that helps users fill in forms on the Internet. When users install this form-filling software, the user also ends up installing an additional application which monitors the user’s web surfing habits and displays pop-up ads when the user visits certain websites. Although the pop-up ads are specifically marked as provided by Gator, the lawsuit claims that many users instead associate the ads with the website that they are visiting. The lawsuit also alleges that some of Gator’s pop-up windows advertise services that compete with the plaintiff media companies’ services. These pop-up ads can also cover up “banner” or other ads on the website, which

have been paid for by other advertisers.

On July 12, the court issued a [preliminary injunction](#) against Gator, prohibiting Gator from using pop-up ads on the plaintiffs' websites. To view a copy of the plaintiffs' argument in support of their motion of that injunction, click [here](#). Nevertheless, the issues surrounding this case have yet to be resolved. Gator, which claims 22 million users and more than 400 advertisers, could well argue at trial that many users willingly install Gator's software and that its pop-up windows are no different than when a user runs instant messaging, email or other programs in separate windows while web surfing.

ExitExchange Claims Invention of Pop-Under Ads

In a related matter, an ad technology provider, ExitExchange, is claiming that it invented pop-under ads. ExitExchange's patent application filing, which was published by the U.S. Patent and Trademark Office in May 2002 , broadly covers any systematic delivery of a window launched after another window is open, including those on devices such as cell phones. Specifically, the invention is directed to a post-session advertising system that may be used in computers, PDAs, telephones, TVs, radios, and similar devices. If the application is approved, ExitExchange would have the right to collect royalties on the use of pop-under ads. Search engines, such as Yahoo, and web publishers, such as The New York Times, have recently begun to adopt the pop-under advertising format.

Given the recent proliferation of pop-under ads, ExitExchange could potentially enjoy a windfall as a result of this patent. Critics will argue, however, that it will be difficult for a single company to claim rights to the invention because of the history of experimentation in online advertising. Furthermore, as seen in the British Telecommunications plc hyperlinks case (discussed in the [April 17, 2002](#) and [September 5, 2002](#) Internet Alerts), even if ExitExchange were to obtain approval for its invention, it is unlikely that ExitExchange will be able to persuade users of pop-under ads to pay

royalties without a legal fight.

Conclusion

The continuing development of these legal issues will likely establish better standards governing many types of advertising on the Internet. In the meantime, companies who rely on revenues from Internet advertising, as well as users of the Internet, software companies and web site operators, should be aware of the legal implications of various technologies used to deliver ads on the Internet, especially as these forms of advertising on the Internet become more sophisticated.