

Replacement Advertising on the Web - Is it Legally and Ethically Acceptable?

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Summary

This report discusses the legality and ethics of a new piece of software launched in February 2001, which allows ISP's to overlay advertising banners on any web page on the net with adverts sold by, and controlled by them. Investigations led to discussions about Copyright infringement and European Competition Law. Many examples of Case Law were also investigated for their possible links with issues arising from the use of this software.

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Introduction

This report is being written to try to understand the issues raised, both legally and ethically, by the release of a new piece of software (Fotino) onto the Internet market. In an attempt to answer whether this software is an acceptable addition to the world of the web, only replacement advertising as facilitated by Fotino software will be considered. This is due to the fact that since my investigations into this subject began other software packages have come to light, which may be able to perform this function in a slightly different way.

The problem posed by this software has required investigations from both a practical and theoretical standpoint, in that in practice the software has not yet been adopted by any of the Internet Service Providers (ISP's) and so cannot be fully investigated along this route, yet from investigation I have been able to see the software in action from it's marketing campaign. From a theoretical point of view I have investigated existing laws and cases that I think may be used in the future, either for or against the use of this software, should any of the legal and ethical issues raised be fought in a court of law.

This report is being written for anyone who may have an interest in developing technologies and how they affect both the technological world and society as a whole, ethically and legally. This report will raise issues about the catch-up situation of the legal system and the fast developing world of the internet. Due to the speed at which the world of computers develops I do not feel that this report will provide answers to the problem, but will merely provoke discussion and thought about many issues. The Managing Director of Meltingpoint Technologies - the company who developed the Fotino software, has requested a copy of this report so that he can see the questions raised by this investigation.

Replacement Advertising on the Web

Background

The catalyst for this investigation was an article which appeared on the Telegraph Web site on Monday 12th February 2001 whose headline read;

Websites face great cover-up

The entire advertising model of the internet could be under threat from a new piece of software, originally developed at Brunel University, which is likely to cause a legal storm.

(<URL: <http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>>)

Upon reading the whole of this article (Appendix A) I found it very interesting and thought provoking not only because this software development was so new, having only been released on 12th February 2001, but also because it was originally developed at Brunel University and is being marketed by a local company in Leeds.

This new piece of software called Fotino allows ISP's to control the adverts which appear on a web page. The software allows them to overlay advertising banners on any page on the net with adverts sold by, and controlled by them. It was developed from the idea that ISP's hold more personal information about their customers and can therefore target the advertising much more successfully. (A printout of the Marketing material for the product can be seen in appendix B.)

In the article from the Telegraph web site in an extract taken from an interview with the Chief Executive of Meltingpoint Technologies, Julian Graham -Rack said:

Once the internet user installs Fotino on their computer a website cannot prevent it overlaying their advertising. It means that, like TV, it is the broadcaster that controls the advertising, rather than the programme maker.

(<URL: <http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>>)

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The journalist who wrote this article, Jonathan Lambeth, also spoke to a partner at the law firm Paisner in London, Ian De Freitas who specialises in Internet law. He said;

It seems to me this could be an infringement of the copyright of the web page. It is changing the way it appears on screen.

([URL: http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>](http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>))

Meltingpoint has obviously taken legal advice on this and claims that '*because the software merely covers rather than alters a web page, it does not infringe the page owner's rights.*'

([URL:http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>](http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>)).

During February many articles were to be found on the internet and in IT magazines and journals about this new software. On Thursday 15th February 2001 the Guardian web site held an article (Appendix C) in which Peter Brownlow, a partner at Bird & Bird, a new media legal firm who acts on behalf of dot.coms argued that '*Fotino's new ad service could damage the reputation of online companies if the replacements adverts are not managed sensitively.*'

([URL:http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html>](http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html>)).

For example, in this country the speed limit on the roads is 70mph, yet manufacturers make cars that have the capability of doing 140mph. The issue is how that car is used or abused. Similarly we can see that problems will arise if ISP's start putting Pepsi ads over the top of Coca-cola web sites. Peter Brownlow felt that '*It might be that they (legal problems) can be remedied. It has to be quite clear to the user at the time that the advert was completely unconnected with the site.*'

([URL:http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html>](http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html>)).

Findings

In all the research with regards to advertising I found that the laws and legislation always works to protect the consumer. In this context Fotino helps to protect the consumer by offering better-targeted advertisements from the information provided to the ISP by the consumer. However, All of the laws and legislation about advertising deal with the content of the advert, not the mechanism used to place the advertisement. Internet advertising is not yet covered by UK legislation;

There is as yet no UK legislation that specifically governs advertising on the Internet. Judicial and administrative decisions have held that

ordinary principles apply but have yet to clarify fully the difficult issues of jurisdiction.

([URL:http://www.marketinglaw.co.uk/articles/ad_controls.htm](http://www.marketinglaw.co.uk/articles/ad_controls.htm)).

The Copyright Issue

In the background information provided in the previous section of this report the issue of the breach of copyright law was mentioned as a possible problem of using this software. Meltingpoint took the standpoint that copyright is not being breached as their advertisement is purely overlaying the original website and not actually changing the structure. From this point the argument could be that the advertisement is such a small part of the original page that the principal '*de minimis non curat lex*' (Bainbridge 1999, p. 44) could be used in that the position of the advertisement on a page is '*insufficiently significant to be afforded copyright protection*' (Bainbridge 1999, p. 44). For instance in '*Sinanide v La Maison Kosmeo*, it was held that to quote a bit of a sentence of a literary work was too small a matter on which to base a copyright infringement action.' (Bainbridge 1999, p. 44). Similarly, should the resulting overlaying of an advertisement by Fotino actually be seen as a copyright infringement, then is the advert such a small part of the whole web site that the De Minimis Principle would apply?

However, should this not be the case and the advert be seen to be a substantial part of a web page – due to the revenue it raises to allow the web page to be funded and appear on the web in the first place – then perhaps the case of Shetland Times Ltd v Dr Jonathan Wills (Appendix D), would come into play. Here '*The copying verbatim of headlines by one web site operator from another web site operator held to constitute infringement of copyright under s. 20 Copyright designs and Patents Act 1988.*' ([URL:http://www.lawtel.co.uk](http://www.lawtel.co.uk)). The headlines, although only a very small part of the whole newspaper/web site, were seen to be a significant part because of the information imparted by them and therefore a substantial part of the whole. This can also be seen in Spectravest Inc v Aperknit Ltd where it was said;

In considering whether a substantial part of the plaintiff's work has been reproduced by the defendant, the attention must primarily be directed to the part which is said to have been reproduced, and not those parts which have not.

(Bainbridge 1999, p. 121).

Here the test would be to look at the part of the web site changed by Fotino, isolate it from the rest of the page, and then consider whether it represents a substantial part of the whole page. That consideration '*will be based on a test that is, according to Millet J, qualitative and not, merely, quantitative.*' (Bainbridge 1999, p. 121).

When dealing with the problem of whether the advert is a substantial part of the web page an alternative angle could be whether the ‘*act complained of is likely to harm the copyright owner’s economic interests.*’ (Bainbridge 1999, p. 122). In Cooper v Stephens 1895, it was said that copying even a small proportion of an author’s work could harm the economic interest of said author. The act of overlaying advertisements on a web page could clearly harm the economic interest of the web page owner whose revenue is generated from its advertisers.

The Competition Issue

After reading many articles about Fotino it seemed to me that the ISP’s who use this software could well be in a dominant position in the advertising market on the Internet. This led me to investigate the issue of Competition.

Article 86 of the European Competition Law concerns itself with ‘*the threat posed to competition within the common market by the economic power of single undertakings which enjoy a dominant position in a particular market for goods or services.*’ (Deards & Hargreaves 1996, p 265). This law also concerns itself with any behaviour which may ‘*take unfair advantage of the consumer.*’ (Deards & Hargreaves 1996, p 265).

Fotino, if used by ISP’s may well be seen to have substantial market power and as such may be in a dominant position as defined in United Brands Co. v Commission where the Court of Justice defined dominance as;

A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers.’ (Deards & Hargreaves 1996, p266 – 267).

Here if the use of Fotino causes dominance it could prevent potential competitors from entering the market of advertising and more to the point, weaken the position of existing competitors (Web Page owners and their advertisers) or even drive them out of the market. Although Fotino claims to be putting the choice of the consumer first and foremost in its use, the fact is that should Fotino be extensively used on the internet, the choice of the consumer could well be narrowed down due to web pages going ‘out of business’ through lack of revenue from advertisers.

Article 86a talks of imposing unfair trading conditions on other trading parties, which is what the use of Fotino does to other advertisers, by making it almost impossible for consumers to see the original advertisements.

Article 86c is about applying dissimilar conditions to equivalent transactions with other trading parties, therefore placing them at a competitive disadvantage. This is actually what Fotino has done to the original advertisers, the conditions that apply to the original advertiser are different to the Fotino placed advert which places the original advert at a competitive disadvantage. They cannot trade in the same manner.

The European Competition Law also states that for there to be an abuse of a dominant position it must also affect trade between member states. Although this cannot be proven at this time, due to the fact that no-one is using Fotino as yet, I believe that this software may affect trade in this way. Due to the very nature of the internet the consumer very often receives advertisements for goods and services from outside their own country. ISP's using Fotino could well restrict its advertising to goods and services from within the consumer's own country, thus affecting trade between member states.

As mentioned earlier in the copyright issues section, the principle De Minimis also applies to the effect on inter-state trade. This principle first appeared in Volk v Etablissements Vervaecke Sprl 1969, in which the Court of Justice ruled that;

An agreement falls outside Article 85(1) if it has only an insignificant effect on the market.'
(Deards & Hargreaves 1996, p. 250).

However the court did not specify the market share within which the De Minimis principle applies. *'This position has since been clarified by the Commission in the 1986 Notice on Agreements of Minor Importance.'* (Deards & Hargreaves 1996, p. 251). It states that the minimum figure of 5% of the total market share should be used to determine whether the De Minimis principle is to be used. In this case the statement by Julian Graham-Rack with regard to banner advertising on the web saying *'The performance of banner ads is . . . awful, the click through rate is about 1%'* ([\(<URL:http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html>\)](http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html)) would show that Fotino would have to improve this by at least 4% before it would fall outside of the De Minimis principle.

Conclusion

The issues raised by the investigation of this question have been widespread, many of the issues have not been included in this report because there are simply no answers to them. This is due to the fact that the Internet is such a rapidly developing medium that laws and legislation are continually playing

catch-up. The ethical issues raised again are quite difficult to answer except from my own personal stand-point. The problem with computers is that there sometimes seems to be little or no sense of responsibility among the professionals. Computer professionals need to be encouraged to behave in a more ethical, responsible manner for the long-term good of the IT industry. Computers play a massive part in today's society, because computers are a major part of our lives. By using Fotino the ISP will be able to give consumers more of what they want to see and the advertiser more targeted advertisements, who really wants US advertisements for products not available in the UK. It seems to me that there is room for both selected (as provided by Fotino) and none selective advertising (available on all web pages), especially where the delivery media (the World Wide Web) is world wide and ISP's tend to operate within the boundaries of one country.

We will not know if Fotino will cause a legal storm as suggested in the Telegraph article on 12th February 2001 (Appendix A) until the ISP's begin to use it. As of today there is no-one using it, perhaps it is too hot to handle. In the presentation of this information given to colleagues in my lecture group the question was asked as to whether they considered Fotino to be legal. Out of the 15 answers returned, 12 thought that Fotino would prove to be illegal and 3 thought it would be legal.

Recommendations

It seems to me that it would be wise for any ISP considering using Fotino to consult their legal teams and seek expert advice before going ahead with this software. They will need to thoroughly investigate the possibilities of legal action and the areas in which they may be challenged.

Whatever the outcome, it will be interesting to see if any of the legislation and case law discussed in this report, will be used should Fotino cause legal action to be taken against any ISP brave enough to use the software in the future.

References

Bibliography

BAINBRIDGE, D. 1999. Intellectual Property. 4th ed. Great Britain: Pitman Publishing. pp. 44, 121, 122.

DEARDS, E., HARGREAVES, S. 1996. European Community Law. London: Blackstone Press Ltd. pp 250-267.

Web Sites

Hunt, J, 2001. Guardian Unlimited [online]. UK: Guardian. Available at:
URL: <http://www.guardian.co.uk/archive/article/0,4273,4136232,00.html>
[Accessed 18th February 2001].

Lambert, J, 2001. Electronic Telegraph City News Headlines [online]. UK: Electronic Telegraph. Available at:
<*URL: <http://www.telegraph.co.uk/et?ac=000446462942768&rtmo=Qw00QzaR&atmo=999999...>*>
[Accessed 24th February 2001].

(Author unknown), 1997. Lawtel Case Law [online]. UK: Lawtel. Available at:
<*URL: <http://www.lawtel.co.uk>*>.
[Accessed 4th March 2001]

(Author and year unknown), Analysis – Agency-client Contracts [online]. UK: Marketing Law. Available at:
<*URL: http://www.marketinglaw.co.uk/articles/ad_controls.htm*>.
[Accessed 20th February 2001].

Case Law

Cooper v Stephens [1895] 1 Ch 567
Shetland Times Ltd v Dr Jonathan Wills [1997] FSR 604
Sinanide v La Maison Kosmeo [1928] 139 LT 365
Spectravest Inc v Aperknit Ltd [1988] FSR 161
United Brands Co. v Commission (Case 27/76) [1978] ECR 207
Volk v Etablissements Vervaecke Sprl (Case 5/69) [1969] ECR 295

Statutes

The Copyright Act 1956

The Copyright, Designs and Patent Act 1988 s 16(1), s 17(2), s 20

European Competition Law Article 85(1)

European Competition Law Article 86

Appendix A

Appendix B

Appendix C

Appendix D