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# The Internet Advertising Battle: Copyright Laws Used to Stop the Use of Ad- Blocking Software

John L. Hemmer\*

## I. INTRODUCTION

Advertisers' methods of reaching their consumers constantly push the limits of how much product exposure is tolerated. Consumers have accepted that commercials segment television shows, radio programs take sponsor breaks, and newspapers and magazines are cluttered with paid postings. These media outlets provide free or discounted information in exchange for a marketing audience. Regulation, media standards and consumer choice have controlled the intrusiveness of advertisements in traditional media outlets. However, an interactive media source, the Internet, has yet to find a consumer/advertiser equilibrium.

Recent technological innovations threaten the role of advertisement-supported content.<sup>1</sup> The Internet, video-on-demand, advanced video recording devices, and cell phones have ushered in an age of interactivity with content.<sup>2</sup> Such interactivity allows unprecedented manipulation of an advertisement-funded media source.<sup>3</sup> Consumers now have the ability to delete the very advertisements that make possible the information they enjoy.<sup>4</sup> Over the past several years, highly intrusive Internet advertising tactics have exceeded the level of consumer acceptance.

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\* Student, Temple University James E. Beasley School of Law, J.D. expected May 2006. The author would like to thank Professor Donald Harris and Temple Journal of Science Technology and Environmental Law editor Mystery Bridgers for their guidance and suggestions.

<sup>1</sup> See Lauren J. Flynn, Software Ad Blockers Challenge Web Industry, N.Y. TIMES, June 6, 1999, <http://www.nytimes.com/library/tech/99/06/biztech/articles/07adco.html> (ad blocking software, if widely adopted, would alter the flow of revenue and challenge the very structure of the emerging internet industry).

<sup>2</sup> *Id.*

<sup>3</sup> See *id.* (citing significant recent increases in the number of people using ad blocking software).

<sup>4</sup> *Id.*

In response to the barrage of unwanted information on the Internet, consumers have decided to fight back.<sup>5</sup> More and more Web users are utilizing free Web Browsers that block advertisements.<sup>6</sup> Ad-blocking software helps users cut out undesired pop-up windows and in-page graphics allowing for quicker viewing because sites that contain large graphics and animation take much longer to load than text alone.<sup>7</sup> Though this emerging Web software makes viewing content quicker and less distracting for the consumer, ad-blockers are challenging the Web industry and causing concern for Web site owners.<sup>8</sup> Online advertisers fear that this software could cut off their revenue and challenge the fundamental structure of an advertisement-funded Internet.<sup>9</sup>

When Web sites with these annoying tactics surpassed viewers' approbation for online advertising, ad-blocking software was created.<sup>10</sup> Ad-blocking software reduces page impressions and click through rates causing advertisers to reduce their investment. If ad-blocking software becomes widely used, Web site owners may have to turn to copyright law to protect their advertisements. Web site owners could make a "derivative works" claim under the Copyright Act against users of ad-blocking software and if successful, hold the producers of the ad-blocking software contributorily liable. Consumers will not be able to rely on the fair use defense to copyright infringement and may eventually be prevented from blocking online advertisements. Because ad-blocking software is not a legal solution to preventing unwanted advertisements, consumers may eventually have to rely on government regulation, even though Congress has been reluctant to get involved. This paper will first discuss how ad-blocking software is a violation of copyright law, then why the fair use defense by consumers will be unsuccessful, and finally how government regulation will be required to solve the problem.

#### Consumer Action: Ad-blockers and browser configurations

The Internet has brought the marketing industry extraordinary opportunities, causing marketers to invest millions of dollars in developing e-commerce into a viable media.<sup>11</sup> Originally, Web sites sold some of their prime viewing space to sidebar and banner advertisers.<sup>12</sup> However, because advertisements in the margins of Web pages are so common and similarly placed, they are also easily ignored.<sup>13</sup> This has caused the cost of these advertisements to drop, and has made it more

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<sup>5</sup> Sean Carton, The Future of Online Advertising, [http://www.clickz.com/experts/ad/lead\\_edge/article.php/828141](http://www.clickz.com/experts/ad/lead_edge/article.php/828141) (noting that advertisers must find ways to cut through the clutter to get to consumers who are bombarded constantly by commercial messages).

<sup>6</sup> Flynn, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Douglas J. Wood, The Future of Online Advertising and Ad-Blocking, Oct. 2001, <http://www.gigalaw.com/articles/2001-all/wood-2001-10-all.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Flynn, *supra* note 1, at 1.

difficult for Web site owners to make a profit.<sup>14</sup> In order to turn a profit and catch a Web surfer's eye, the online advertising industry is turning to more aggressive interactive advertisements.<sup>15</sup>

Around 1997, when thousands of new sites were born and billions of dollars in venture capital flowed into them, advertising on the Internet meant "banner ads," the 468x60-pixel ads at the top Web pages.<sup>16</sup> Over the next few years, popular sites like Yahoo could charge \$30, \$50, even \$100 per thousand impressions, or views, to run a banner ad on their pages.<sup>17</sup> These advertising rates provided fuel for much of the venture capital boom on the Web. The idea was that sites could start up and increase their page impressions to make easy money from banner ads.<sup>18</sup> If a site could generate 100 million page impressions per month, it could make \$3 million per month with banner ad rates at \$30 per thousand impressions.<sup>19</sup> This pay model derived from what magazines would typically charge for full-page color ads.<sup>20</sup>

Since 2000, advertisers concluded that banner ads were not as effective as full-page magazine ads or 30-second TV commercials.<sup>21</sup> At the same time, there was an incredible glut of advertising space.<sup>22</sup> Thousands of sites had a million or more page impressions available per month, and companies like DoubleClick began collecting these sites into massive pools of banner-ad inventory.<sup>23</sup> The over supply and lack of clicks per impression caused the banner advertising rates to plummet.<sup>24</sup> Today, Web sites will rarely charge more than 50 cents per thousand impressions.<sup>25</sup> In order to charge more than 50 cents per thousand impressions, Web sites have to offer ads that either have a lot more branding power, get a much higher click-through rate, or only charge per click.<sup>26</sup> Therefore, today you find many different advertising formats and experiments on the Web driven by both advertisers and web site owners to get the viewer's attention.

Advertising only works because of an implicit social contract between the consumer and the media source to get free content in exchange for receiving messages. A slightly more realistic version for television is: "I'll get that free content and I'll view your ads *only* if they aren't obnoxious or too numerous. If they are, I'm heading to the fridge."<sup>27</sup> On the Internet, consumers do not have this bargaining

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<sup>14</sup> See Doug Isenberg, Are Pop-Up Advertisements on the Web Illegal, GIGALAW.COM, August 2002, at <http://www.gigalaw.com/articles/2002-all/isenberg-2002-08-all.html> (discussing the legality of pop-up ads under intellectual property laws).

<sup>15</sup> See *id.*

<sup>16</sup> Rick E. Bruner, The Decade in Online Advertising: 1994-2004, DOUBLECLICK, April 2005, 3, [http://www.doubleclick.com/us/knowledge\\_central/documents/research/dc\\_decaderonline\\_0504.asp](http://www.doubleclick.com/us/knowledge_central/documents/research/dc_decaderonline_0504.asp).

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Bruner, *supra* note 15, at 4-9.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> Bruner, *supra* note 15, at 16-20.

<sup>27</sup> Tig Tillinghast, *Zapping Ad Zappers*, CLICKZEXPERTS, October, 2001, [http://www.clickz.com/experts/archives/media/buy\\_101/article.php/897021](http://www.clickz.com/experts/archives/media/buy_101/article.php/897021).

power. Web users no longer have the choice of ignoring unwanted ads. Pop-ups, animation, and ads that expand to cover the requested text require the user to close the ad in order to continue.<sup>28</sup> In television, there are industry standards that govern the length, content, and volume of commercials as well as the choice to walk away or change the channel for a few minutes.<sup>29</sup> By comparison, Web advertisers have a captive audience who are taking advantage of this mostly unregulated media source to make forced ads as attention-grabbing as possible.<sup>30</sup>

At present, there is very little regulation of Internet advertising.<sup>31</sup> As a result, consumers have imposed their own advertisement regulation. Web users download Web browsers that help control what is sent to their computers. These programs work by blocking pop-ups, videos, expanding ads, or graphics before they appear on the user's screen. In some instances, especially for those advertisers who pay a Web site per click or "hit," these programs are allowing Web users to get information from the Internet while leaving the Web site owner completely or partially unpaid.<sup>32</sup>

Ad-blocking software poses very high risks for some companies. As software continues to block pop-up and other forms of Internet advertising, certain copyright questions arise: (1) Is advertisement deletion by consumers infringement; and (2) is enabling the deletion contributory infringement?

#### A. Copyright Law

Article I Section 8 Clause 8, of the United States Constitution permits Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>33</sup> The clause authorizes federal copyright law, which grants authors the exclusive right to make various uses of their work.<sup>34</sup> The current Copyright Act protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which [such works] can be perceived, reproduced, or otherwise communicated."<sup>35</sup>

According to the Act, "[a] work is 'fixed' in a tangible medium of expression when its embodiment... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>36</sup> A Web page may contain pictorial or graphic works, musical works, audiovisual works, and sound recordings.<sup>37</sup> Even though they are stored in

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<sup>28</sup> Keith Regan, *Connecting With the Future of Online Ads*, E-COMMERCE TIMES, September 7, 2001, <http://www.ecommercetimes.com/story/13400.html> (Statement of Richard Gotham, director of Interactive Advertising Bureau)("What [advertisers] want to understand is how they can interrupt the user, get their attention, create some form of strong impression.").

<sup>29</sup> *Supra* Flynn, note 1.

<sup>30</sup> *Id.*

<sup>31</sup> *But See* Leah Brannon, *Regulating Drug Promotion on the Internet*, 54 FOOD & DRUG L.J. 599 (1999). (describing the sparse Internet regulation of drug promotion).

<sup>32</sup> *See* Pop-Up Killer Review, [http://www.tucows.com/adkiller95\\_default.html](http://www.tucows.com/adkiller95_default.html) (listing 138 tested pop-up blockers)(last visited October 10, 2005).

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>34</sup> 17 U.S.C. § 106 (2000).

<sup>35</sup> *Id.* § 102(a).

<sup>36</sup> *Id.* § 101.

<sup>37</sup> *See* Daniel L. Hayes, *Server-Related Issues*, in INTELLECTUAL PROPERTY FOR THE INTERNET 75, 79

digital form on the Web, copyright law protects all of these works.<sup>38</sup>

Efforts to block advertising may present issues of copyright infringement because it interferes with Web owners' exclusive right to control how their Web pages are displayed. The "exclusive right" that is granted to authors allows them to engage in and authorize how their work is viewed.<sup>39</sup> The exclusive rights involved in the use of ad-blocking software include the exclusive right to prepare derivative works,<sup>40</sup> to distribute copies of the copyrighted material,<sup>41</sup> to publicly display the work,<sup>42</sup> and to display the source of the copyrighted material.<sup>43</sup> Anyone who engages in an unauthorized use of the copyrighted material is subject to civil liability.<sup>44</sup> If an advertisement is blocked, then a new unauthorized work, the site without the advertisement, is created from the original.

#### *Right to Prepare Derivative Works*

Once the Web pages are viewed with the advertisements removed, Web site owners can claim that their right to create a derivative work from its copyrighted work has been violated. The Copyright Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation ... abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."<sup>45</sup> As mentioned, a copyright owner has the exclusive right to create derivative works and thus may bring an infringement action against those who produce unauthorized derivative works.<sup>46</sup>

Some examples of commonly recognized derivative works include movies based on books,<sup>47</sup> translations of works from one language to another,<sup>48</sup> and new arrangements of existing musical works.<sup>49</sup> The definition in the Copyright Act further states that "[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of

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(Lewis C. Lee & J. Scott Davidson eds., 1997).

<sup>38</sup> *Id.*

<sup>39</sup> See 17 U.S.C. §§ 408-412 (providing certain legal rights for authors who register their works, but noting that authors who do not register their works still possess a copyright in them).

<sup>40</sup> *Id.* § 106(2).

<sup>41</sup> *Id.* § 106(3).

<sup>42</sup> *Id.* § 106(5).

<sup>43</sup> See *id.* § 1201(a)(1) (stating that "(A) to 'circumvent protection afforded by a technological measure' means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure. A technological measure 'effectively protects a right of a copyright owner under this title' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title").

<sup>44</sup> *Id.* § 501.

<sup>45</sup> *Id.* § 101.

<sup>46</sup> See *id.* §§ 106(2), 501(b).

<sup>47</sup> See, e.g., *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 60-63 (1911) (commenting that, as long as an author consents to the dramatization of a novel, films based on books are lawful and can themselves be copyrighted).

<sup>48</sup> See *Grove Press, Inc. v. Greenleaf Publishing Co.*, 247 F. Supp. 518 (E.D.N.Y. 1965) (treating English translations of works published by French author as derivative works).

<sup>49</sup> See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164-78 (1985) (acknowledging music publishers' rights to license derivative works consisting of different recordings of a song).

authorship, is a 'derivative work.'"<sup>50</sup>

Ad-blocking software creates significant alterations to the original Web page. Many Web site owners, depending on the scope and amount of advertising that is blocked, view this situation as a substantial modification of their Web sites.<sup>51</sup> For example, a single Web site may have a pop-up window with supplemental information, a banner at the top or side of the page, a graphic that plays a short clip with sound, and an animated cartoon that moves around the accessed window until minimized.<sup>52</sup> All or some of these items can be removed before they appear on the user's screen with the use of ad-blocking software.<sup>53</sup> These modifications may cause the partially blocked Web page to become an infringing derivative work.

No court has directly addressed the issue of copyright infringement with regards to ad-blocking software. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*,<sup>54</sup> however, is instructive. There, the plaintiffs, copyright holders and a licensee, owned the rights to a collection of art that had been published in a commemorative book.<sup>55</sup> The defendant bought this book, removed selected prints, mounted the prints onto ceramic tiles, and sold the tiles.<sup>56</sup> The plaintiffs sued the defendant for, *inter alia*, copyright infringement and the court granted the plaintiffs' motion for summary judgment.<sup>57</sup> On appeal, the court of appeals held that the defendant had prepared derivative works in violation of 17 U.S.C.S. § 106 by borrowing and mounting pre-existing copyrighted art images without the plaintiffs' consent.<sup>58</sup> Similarly, Web users are allowed to display a Web site for free in exchange for viewing the advertisements. The users are not allowed to create a derivative work by removing the ads and then displaying that derivative work.<sup>59</sup>

Though Web site viewers cannot create derivative works, they are permitted to make certain changes. *Lee v. A.R.T. Co.*<sup>60</sup> involved facts similar to *Mirage* but resulted in a different outcome. The plaintiff artist sold her creations to various stores.<sup>61</sup> One of the stores sold some of plaintiff's postcards and lithographs to the defendant's art company, which mounted the works on ceramic tiles and resold them.<sup>62</sup> The Seventh Circuit held that the mounting of the plaintiff's note cards and lithographs on ceramic tiles did not qualify as derivative works because the

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<sup>50</sup> 17 U.S.C. § 101.

<sup>51</sup> See Flynn, *supra* note 1 (one Web site owner felt so strongly against ad blocking software that his company wrote software code to prevent those using ad blocker software from logging onto the company's Web site).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 856 F.2d 1341 (9th Cir. 1988).

<sup>55</sup> *Id.* at 1342.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1342-43.

<sup>58</sup> *Id.* (holding that the "first sale" exception of 17 U.S.C.S. § 109(a) did not apply because defendant's rights to the first sale of the works were limited to transfer of his ownership interests in the particular copy of plaintiffs' book, a resale, which defendant had purchased and nothing else). The first sale exception allows a consumer to sell or otherwise dispose of his or her possession of the copy they purchased without the authority of the copyright owner. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 125 F.3d 580 (7th Cir. 1997).

<sup>61</sup> *Id.* at 580.

<sup>62</sup> *Id.*

mounting involved no transformation of the original work.<sup>63</sup> The mounting process was simply like changing a picture's frame.<sup>64</sup> Thus, the owner of a work may change the way a work is displayed and have it repackaged.<sup>65</sup> These acts result in creating a derivative work rather than simply making a copy.<sup>66</sup>

Consumers using ad-blocking software cannot argue that the change made by the software before it is seen by the consumer is a decorative change similar to changing a picture frame or packaging. The advertisements are a significant part of the original work because the Web site owner wants the ad to be seen as much, possibly even more than, the other content in order to turn a profit. The content and impression of the ads are not merely a decorative addition. They are there for their content and/or pathways, hyperlinks, to products. On the other hand, under *Lee*, ad-blocking browsers would be able to control how the outer browser appears such as tool bars and text color and size because they are decorative changes that do not change the content of the Web page being accessed.

Similar copyright issues have been addressed in suits against third party pop-up advertisers. In *1-800 Contacts, Inc. v. WhenU.com, Inc.*,<sup>67</sup> the Web site owner sued the distributor of software that caused an unauthorized pop-up advertisement to be displayed when Web viewers went to their Web page. The pop-up software was downloaded onto the user's computer and would display a pop-up tailored to what was being viewed on their Internet browser.<sup>68</sup> The court interpreted the Web site argument to suggest that "any action by a computer user that produced a computer window or visual graphic that altered the screen appearance of Plaintiff's website, however slight, would require Plaintiff's permission."<sup>69</sup> The plaintiff compared the pop-up ads to the ads in *National Bank of Commerce v. Shaklee Corp.*,<sup>70</sup> where advertisements added to and interspersed throughout the text of a copyrighted book were found to be "unauthorized additions" to the book text, in violation of the book author's copyright.<sup>71</sup>

The *WhenU* court rejected the argument that third party pop-ups created a derivative work and distinguished *Shaklee* by reasoning that the changes from pop-ups were transitory and lacked a fixed display.<sup>72</sup> The *WhenU* court based its holding on the fact that the Web site was not altered and only temporarily obstructed.<sup>73</sup> Arguably, if the consumer was unable to close the pop-up and the pop-up was instead imbedded onto the Web site contained in the same browsing window, it would have been sufficiently similar to *Shaklee*. In comparison, ad-blocking software creates a fixed display and is similar to *Shaklee* except the advertisements are being removed rather than added. Because ad-blocking software makes a

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 582.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 309 F. Supp. 2d 467, 471 (S.D.N.Y. 2003), rev'd on other grounds, 414 F.3d 400 (2005).

<sup>68</sup> *Id.* at 477.

<sup>69</sup> *Id.* at 487.

<sup>70</sup> 503 F.Supp. 533 (W.D. Tex. 1980).

<sup>71</sup> *Id.* at 486 (citing *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980)).

<sup>72</sup> *Supra* note 67.

<sup>73</sup> *Id.*

permanent change, it is analogous to *Shaklee*, and thus infringement.

Other cases support this view. In *WGN Continental Broadcasting Co. v. United Video, Inc.*,<sup>74</sup> the Seventh Circuit noted that a copyright licensee who “makes an unauthorized use of the underlying work by publishing it in a truncated version is an infringer - any unauthorized editing of the underlying work, ... would constitute an infringement of the copyright.”<sup>75</sup> The Web user could be viewed as having an implicit copyright license to publish the pages on a computer. By publishing the “truncated version” without advertisements, the software user is violating its implicit license. A Web site owner could argue that blocking an advertisement without permission is an unauthorized edit of their Web page, i.e., changing and altering the content of their page, thereby creating an unlicensed derivative work of the original Web page's content.

Along with pop-up advertising, Web site owners can also compare ad-blocking to the related issue of “framing.” Framing allows a Web site owner to build a frame or border of text or graphics on its own site and pull a Web page from another site into that frame or border, thus allowing it to offer the other site's context within the frame on the owner's own site, passing the content off as its own.<sup>76</sup> Under copyright law, placing one's Web site “within a frame comprised of portions of another Web site can create an unlicensed derivative work, in violation of the owner of the framed site's exclusive rights under the Copyright Act.”<sup>77</sup>

In *Washington Post Co. v. Total News, Inc.*,<sup>78</sup> plaintiffs, a group of news companies, alleged misappropriation, copyright and trademark infringement, and false advertising as a result of Web links/frames by the defendant Total News, Inc.<sup>79</sup> Total News' site incorporated links to other news-related companies' Web sites that were framed by Total News' logo and paid advertisements.<sup>80</sup> In some cases, the advertisements on the original sites were obscured by Total News' frame or competed with the user's attention with Total News' own advertisements.<sup>81</sup> Plaintiffs characterized Total News' site as a “parasitic” Web site with little original substantive content.<sup>82</sup>

The stakes in the suit were high, because if Total News' compilation of news sites were to become popular, it could reduce the visibility of the news organizations' own advertising and permit Total News to profit from others' sites without paying them for the use of their sites.<sup>83</sup> The case settled in June 1997, with Total News agreeing not to display their news stories within a frame on their site and the media companies agreed to grant Total News a “linking license” so it could still hyperlink to stories on

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<sup>74</sup> 693 F.2d 622 (7th Cir. 1982).

<sup>75</sup> See *id.* at 625 (quoting *Gilliam v. Am. Broad. Co.*, 528 F.2d 14, 20 (2d Cir. 1976)).

<sup>76</sup> See Hillel I. Parness, *Framing the Question: How Does Kelly v. Arriba Soft Advance the Framing Debate?*, 7 No. 1 Cyberspace Lawyer 9, 9 (Mar. 2002).

<sup>77</sup> *Id.*

<sup>78</sup> Complaint, *Washington Post Co. v. Total News, Inc.*, No. 97 Civ. 1190 (S.D.N.Y. 1997), available at <http://www.nd.edu/~pbellia/total.html>.

<sup>79</sup> *Id.* at ¶¶1, 58.

<sup>80</sup> *Id.* at ¶¶8, 30.

<sup>81</sup> *Id.* at ¶¶35-36, 75.

<sup>82</sup> *Id.* at ¶8.

<sup>83</sup> *Id.* at ¶¶36, 39, 41, 52.



their sites.<sup>84</sup>

A similar case, *Futuredontics Inc. v. Applied Anagramic Inc.*,<sup>85</sup> was also settled out of court but first resulted in a legal decision on copyright infringement. The plaintiff, Futuredontics, was a dental referral business and the exclusive licensee of the phone number “1-800-DENTIST,” a registered service mark owned by defendant Applied Anagramics, Inc. (AAI), a dental marketing service.<sup>86</sup> Futuredontics established an Internet site containing its own copyrighted text and graphics.<sup>87</sup> AAI later established an Internet site that included a link reproducing Futuredontics' Web pages within a frame.<sup>88</sup> The frame included information about AAI and links to AAI's other pages.<sup>89</sup>

The United States Court of Appeals for the Ninth Circuit affirmed the denial of the preliminary injunction, agreeing with the lower court that the plaintiff had not sufficiently demonstrated either irreparable injury or that the balance of hardships tipped sharply in its favor because the plaintiff had presented no evidence of any tangible harm caused by the frame.<sup>90</sup> However, following the denial of its motion for a preliminary injunction, the plaintiff filed an amended complaint that included a claim under the Copyright Act alleging that by framing the plaintiff's site, the defendant had created an infringing derivative work.<sup>91</sup>

The defendant moved to dismiss the copyright claim pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) for failure to state a claim, arguing that its framing of the plaintiff's site did not constitute a derivative work as a matter of law under *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*<sup>92</sup> The defendant argued that, like *Galoob*, its frame did “not incorporate a portion of a copyrighted work in some concrete or permanent form.”<sup>93</sup> The district court denied the defendant's motion to dismiss because the *Galoob* case did not conclusively determine whether the defendant's framing constituted a derivative work.<sup>94</sup> Because the court was ruling solely on the plaintiff's motion for a preliminary injunction and the defendant's motion to dismiss, which were both denied, the decision merely provides an indication that the court might rule that framing amounts to infringement.

In light of the courts' decisions in *Futuredontics* (arguably accepting the idea that framing may be an infringement) and the well-publicized settlement in *Total News*, many practitioners counsel against framing and instead suggest that clients simply provide links. Although there was no judicial decision in the *Total News* case, it is

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<sup>84</sup> See Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 422-423 (1998) (discussing settlement).

<sup>85</sup> 45 U.S.P.Q.2d 2005 (C.D. Cal. Jan. 30, 1998), *aff'd*, 152 F.3d 925 (9th Cir. 1998), available at 1998 WL 417413.

<sup>86</sup> *Id.* at 2008.

<sup>87</sup> *Id.* at 2009.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2006-7.

<sup>91</sup> *Id.* at 2008.

<sup>92</sup> 964 F.2d 965, 968, (9th Cir. 1992) (holding that Galoob's Game Genie enhancement cartridge did not create a derivative work).

<sup>93</sup> *Futuredontics*, 45 U.S.P.Q.2d at 2010 (quoting *Galoob*, 964 F.2 at 968).

<sup>94</sup> *Id.* at 2010-11.

viewed by many commentators as standing for the principle that cutting out advertisements from other sites is unacceptable, and that framing is not generally permitted, at least not in a commercial context.<sup>95</sup> Whether future decisions may cause this to change is unclear. From *Futuredontics*, it seems that the derivative works claim may succeed if actual damages are shown.<sup>96</sup>

Once the removal of the ads is determined to be a derivative work, the alternative uses and the intent of the software distributor must be considered. In *Universal City Studios, Inc. v. Sony Corp. of America (Sony)*,<sup>97</sup> the Supreme Court considered the threat to the television industry from a new technology, the video recording device (VCR), that allowed consumers to skip commercials.<sup>98</sup> In *Sony*, the plaintiffs predicted that companies would be less willing to pay for advertising if VCR owners fast-forwarded through commercials upon playback, or deleted commercials while recording programs.<sup>99</sup> The evidence in *Sony* showed that the VCR's principal use was "time-shifting" or taping a program for later viewing in its entirety, which the court found to be a fair, noninfringing use.<sup>100</sup> In addition, there was no evidence that Sony had desired to bring about time shifting in violation of copyright or had taken active steps to increase its profits from unlawful ad removal.<sup>101</sup>

A recent Supreme Court case, however, considered a case where there was evidence of intent to violate copyrights.<sup>102</sup> In *MGM Studios, Inc. v. Grokster, LTD*, the defendants distributed free software that allows computers to share electronic files through peer-to-peer<sup>103</sup> networks.<sup>104</sup> After Napster was held liable for controlling a centralized server that allowed users to share infringing works,<sup>105</sup> software programmers developed the peer-to-peer technology that removed the central server and allowed users to exchange the files from each other. The Court in *Grokster* found this to be unacceptable and held that one who distributes a device with the object of promoting its use to infringe copyright, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.<sup>106</sup> Ad-blocking software distributors will have difficulty avoiding this ruling because their software is labeled with their intent and there are no other possible non-infringing uses. The distinguishing fact is that because this has yet to be adjudicated, software distributors do not necessarily have an intent to infringe Web owners' copyrights.

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<sup>95</sup> Keller, *supra* note 83 at 423.

<sup>96</sup> Actual damages could be shown by a lack of advertisement revenues.

<sup>97</sup> 464 U.S. 417 (1984).

<sup>98</sup> *Id.* at 423.

<sup>99</sup> *Id.* at 425.

<sup>100</sup> *Id.* at 423, 454-55.

<sup>101</sup> *Id.* at 438.

<sup>102</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, 75 USPQ2d 1001 (U.S. 2005).

<sup>103</sup> Peer-to-peer (P2P) or user-to-user is a network that relies on computing power at the edges or ends of a connection rather than in the network itself. Users share files directly with each other rather than relying on a centralized server. <http://www.answers.com/peer-to-peer>.

<sup>104</sup> *Grokster*, 75 USPQ2d at 1002.

<sup>105</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>106</sup> *Grokster*, 75 USPQ2d at 1003.

The *Grokster* Court also addressed the difficulty in proving actual infringement. The Court noted that the extent of the software's use, ironically, determines the profits of the distributors because the more the software is used, the more ads are sent out and the greater the advertising revenue.<sup>107</sup> The Court can infer from the revenue generated the extent of the infringement.<sup>108</sup>

Ad-blocking software changes the original Web site. The software modifies the site, displays it in a way its author did not intend, and transforms it into something else entirely, altering the author's copyrighted work by integrating it into something else the author did not create nor authorize. Unauthorized ad-blocking of Web sites thus creates an infringing derivative work.

#### B. Contributory Infringement

Though not liable as a direct copyright infringer, the producers and distributors of ad-blocking software can nonetheless be liable for contributory infringement.<sup>109</sup> Proving contributory infringement was vital to the plaintiffs' case in *Sony* and it will be vital in the ad-blocking context.<sup>110</sup> As in *Sony* and *Grokster*, a finding by the Court that ad-blocking constitutes copyright infringement would be meaningless without a further judicial statement holding the software distributors contributory liable. Absent a finding of contributory infringement on the part of the software distributors, Web owners will face the near impossible task of trying to enforce their rights against individual users. The need for such a shortcut is obvious because "the private nature of home copying and the minuscule damage caused by an individual act of infringement make judicial enforcement highly problematic. Nevertheless, aggregate damages can be enormous."<sup>111</sup>

In deciding the question of contributory copyright infringement, the Supreme Court in *Sony* declared, if "liability is to be imposed on [the defendant] in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material."<sup>112</sup> The *Sony* plaintiffs argued that infringing uses outweighed non-infringing uses, and that the majority of copyright holders would object to wholesale copying of their programs.<sup>113</sup> The Court Of Appeals agreed, finding that

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<sup>107</sup> *Id.* at 1004.

<sup>108</sup> *Id.*

<sup>109</sup> The concept of contributory liability permeates all areas of the law yet the Copyright Act does not expressly provide for liability under this theory. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1979) (discussing absence of contributory liability provision in the Copyright Act, unlike the Patent Act). The closest congressional declaration for the imposition of contributory liability in the copyright context is found in the closely related field of patent law. The Patent Act expressly brands anyone who actively induces infringement of a patent as an infringer, 35 U.S.C. §271(b), and further imposes liability on certain individuals labeled "contributory" infringers, §271(c). Despite the lack of express authority, the Supreme Court has observed that "[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." *Sony*, 464 U.S. at 435. Web users are not directly liable because it is the software, not the user herself, that alters the Web site.

<sup>110</sup> *Sony*, 464 U.S. 417.

<sup>111</sup> Gary S. Lutzker, *DAT's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991 - Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 153 (1992).

<sup>112</sup> *Sony*, 464 U.S. at 439.

<sup>113</sup> *See Universal*, 480 F. Supp. at 468 (responding to defendant's contention that sports, religious and

VCRs were not suitable for any substantial non-infringing use even if some copyright owners elect not to enforce their rights.<sup>114</sup> The Supreme Court found this argument unconvincing, however, and extensively cited the district court's findings as to consenting copyright owners in holding that the VCR is *capable* of substantial non-infringing uses.<sup>115</sup> The Court's main objective, in discussing authorized fast forwarding or paused recording also known as time-shifting, was to point out that plaintiffs had no right to enjoin this activity and prevent other copyright holders from authorizing time-shifting for their programs.<sup>116</sup>

*Grokster*, on the other hand, noted that where an article may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* non-infringing uses rule will not preclude liability.<sup>117</sup> The court reasoned that mere knowledge of infringing potential or of actual infringing uses, such as in *Sony*, would not be enough to subject a distributor to liability.<sup>118</sup> The inducement rule, instead, premises liability on purposeful, culpable action and does nothing to compromise legitimate commerce or innovation.<sup>119</sup>

Because ad-blocking is not authorized by Web site owners as it is in some time-shifting uses in television, Web site owners have a copyright claim more analogous to *Grokster* than to *Sony*. Ad-blocking software does not have other non-infringing uses, such as authorized time-shifting in *Sony*, and software distributors intend to create the ad-free derivative work. There may be possible non-infringing uses such as virus and spyware protection if advertisements automatically download a file to the user's computer. However, this use is not yet substantial and this distinguishing aspect seems to imply that Web site owners would have a successful claim against ad-blocking software distributors because all uses will be infringing. However, the Court in *Sony* went on to find that even unauthorized time-shifting was legitimate fair use.<sup>120</sup> Since advertisers have a copyright infringement claim against ad-blocking software use, its manufactures or users would have to argue an affirmative defense such as fair use to avoid liability.

### C. Fair use defense by consumers

Because ad-blocking software may only block some or part of a Web page's advertisements (only pop-up ads for example), consumers may argue ad-blocking is a fair use of the copyrighted work. The fair use doctrine allows for the reasonable use of copyrighted material without the consent of the copyright owner.<sup>121</sup> To

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educational programming could be legally recorded).

<sup>114</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 659 F.2d 963, 975 (9th Cir. 1981) (reasoning videotape recorders are for reproducing television material, virtually all of which is copyrighted).

<sup>115</sup> See *Sony*, 464 U.S. at 445-47 (supplying equipment that makes copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions).

<sup>116</sup> See *id.* at 446 (reasoning plaintiff does not speak for virtually all copyright holders thereby preventing it from prevailing on its cause of action).

<sup>117</sup> *Grokster*, 75 USPQ2d at 1011.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *Sony*, 464 U.S. at 447 (reasoning unlicensed use of the copyright is not an infringement unless it conflicts with specific exclusive right conferred by the copyright statute).

<sup>121</sup> See 17 U.S.C. § 107 (2000) (allowing an exception for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research").

determine whether a particular use, in this case altering the Web site, is fair, a court examines several factors: (1) the purpose and character of the use, including whether such use is of a commercial character; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for the copyrighted work.<sup>122</sup>

In examining the first factor, purpose and character of use, a court will consider whether the new work is transformative and whether the use has a commercial or noncommercial purpose.<sup>123</sup> “A work is transformative if it adds new expression, meaning, or message to the original work rather than merely superseding or supplanting the original.”<sup>124</sup> In determining if a work is transformative, one might ask whether the new work creates something new, with a further purpose or different character, “altering the first with new expression, meaning, or message.”<sup>125</sup>

Inquiring into the transformative quality of the new work may be less applicable in this context than, for example, “fair-use” in parody.<sup>126</sup> A transformative work adds a new “expression, meaning, [and] message” to the original work.<sup>127</sup> A missing advertisement does not add a new expression, meaning or message to the viewed site, but rather takes one away. The infringing work depends on the original copyrighted Web site to transmit the unauthorized advertisement-free or reduced Web site without adding anything new; therefore, it fails to satisfy the first factor. However, while a finding that the work is transformative, or that it is used for a commercial purpose, weakens the fair use defense, it is not completely dispositive.<sup>128</sup> Examination of the remaining factors is required.<sup>129</sup>

With regards to the commercial aspect, it could be argued that consumers are using the software for their own personal use and most of the ad-blocking software is free software that is not reselling the Web sites or linked to commercial use. However, the ad-blocking software distributors are making a profit in an indirect and quite an ironic manner, Web advertisements. Ad-blocking software distributors place their software on a Web site that is funded by advertisements and by placing links on the toolbar of the browser and use a sponsored search engine. Therefore, Web blocking software creates a derivative work and distributes the work while turning a profit. Web blocking software will not meet the requirements of the first factor because it has a strong tie to commercial use.

Under the second factor, the courts will examine the nature of the copyrighted work.<sup>130</sup> The scope of fair use considerably narrows when applied to unpublished

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<sup>122</sup> *See id.*

<sup>123</sup> Susan Kim, *Selling Spray Paint in Cyberspace: Applying the Fair Use Defense to Inline Note Service Providers*, 34 U.C. DAVIS L. REV. 809, 821 (2001).

<sup>124</sup> *Id.*

<sup>125</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d at 1257, 1269 (11th Cir. 2001) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>126</sup> *See Suntrust Bank*, 268 F.3d at 1269.

<sup>127</sup> *Id.*

<sup>128</sup> *See Kim, supra* note 122, at 822.

<sup>129</sup> *See id.* at 823.

<sup>130</sup> 17 U.S.C. § 107(2).

works.<sup>131</sup> Copyright law provides an author greater control over a work's first public unveiling by generally giving unpublished works greater protection.<sup>132</sup> Also, creative or fictitious works receive greater protection than factual works.<sup>133</sup> Under this factor, a defendant may prevail in certain blocked advertisements actions because the defendants disseminate factual information about a product or service. But this cannot undermine the fact that the work infringed upon is creative in nature as well.

The court will most likely have to draw a line to determine what amount of the work is creative and what amount of the work is factual when determining what is being infringed upon. This should be determined on a case-by-case basis. Because an advertisement may be considered factual, and factual compilations are not granted the same amount of protection as an original work of fiction,<sup>134</sup> courts may look to the advertisement's intended/underlying purpose. Here, that underlying purpose is factual, monetarily motivated information, which in essence is why this factor may be overshadowed by the fourth factor of the fair-use defense.

Under the third factor, the courts will consider the substantiality of the portion used with respect to the copyrighted work.<sup>135</sup> Courts evaluate both the quantity and quality of the copyrighted materials used.<sup>136</sup> However, an insubstantial use does not presumptively render a fair use finding.<sup>137</sup> "In order to be fair, the use also must not appropriate the 'heart' of a work with only minor changes or additions."<sup>138</sup> This is because "[a] use that takes the heart of an original work may be unfair if it fulfills the demand for the original."<sup>139</sup>

It is this last point which causes the greatest problems for ad-blocking software and the fair use defense. Individuals use ad-blocking software on every site they visit and the advertisements are a substantial portion of the Web site. A Web site owner includes the ads to fund the other content. As ad-blocking software proliferates, the demand for advertisement-free or reduced Web pages will continue to increase, while the demand for the original work, the original Web site, including the advertisement, will diminish. The usurping of the demand of the original site will limit the Web blocker's fair use defense.

Under the last factor, the court examines whether the use of a work results in an adverse impact on the potential market of the original work.<sup>140</sup> Generally, a use that diminishes potential sales, interferes with marketability, or usurps the market of an

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<sup>131</sup> See Kim, *supra* note 122, at 823.

<sup>132</sup> See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985) (stating that verbatim quotes from President Ford's unpublished personal memoirs not a fair use).

<sup>133</sup> *Id.* at 563.

<sup>134</sup> See *Nunez v. Caribbean International News Corp.* 235 F.3d 18, 23 (1st Cir. 2000) (newspaper's publication of professional photographer's photographs of a beauty pageant winner is fair use).

<sup>135</sup> 17 U.S.C. § 107(3) (2000).

<sup>136</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (noting commercial reasons for creating a parody to a rap song does not, in and of itself, create a presumption against fair use).

<sup>137</sup> See *id.*

<sup>138</sup> Kim, *supra* note 122, at 825 n.113 (summarizing *Campbell*, 510 U.S. at 586-89; *Harper & Row*, 471 U.S. at 565-66).

<sup>139</sup> *Id.* (summarizing *Campbell*, 510 U.S. at 590-92; *Harper & Row*, 471 U.S. at 566-69).

<sup>140</sup> See 17 U.S.C. § 107(4).

original work constitutes an economic harm to the original.<sup>141</sup> In particular, a market substitute that directly competes for a share of the original work's market cuts against a finding of fair use.<sup>142</sup> Because copyright law seeks to provide incentives to create and disseminate quality works, where a use competes with or supplants the copyrighted work, that use will not be considered fair.

Although the economic harm may not be immediate or imminent, the use can have a future effect on the market, which goes against a finding of fair-use.<sup>143</sup> A copyright owner's heirs are taken into consideration when analyzing this fourth factor.<sup>144</sup> Also, courts must consider the extent of market harm caused by the particular unauthorized advertisement, as well as "whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market."<sup>145</sup> The market harm has not yet been quantified but it will continue to increase as advertisers feed less and less money into the Internet. Because most pages on the Internet depend on advertisement contributions, the expansion of free content will slow and eventually cease.

The fair use defense by consumers ultimately will be unsuccessful. Ad blocking software is predominately used in commercial contexts, the copyrighted work is creative and factual in nature, ads can be a significant portion of the copyrighted work as a whole, and it has a damaging effect on the potential market for the copyrighted work. If the damage is significant enough for Web owners to bring a valid copyright infringement claim, ad-blocking will not be considered a reasonable use of the copyrighted Web pages. Once a successful claim is brought, ad-blocking software will no longer be used by consumers to control distracting advertisements. Consumers will no longer be able to control this unwanted information by using ad-blocking software unless it adapts to a new form as file sharing did after Napster.<sup>146</sup>

The unanswered question, however, is whether litigation, as opposed to a change in the statutory process or technological blocking measures for example, is the most appropriate method for resolving this issue.<sup>147</sup> Technological solutions, such as ad-blocking software versus anti-ad-blocking software, can only lead to "a kind of technological arms race."<sup>148</sup> Failure to resolve this may leave Web site owners to rely on contract law by implementing "Terms and Conditions" statements and "click contracts at sign-on that purport to make it a condition of accessing the site that other sites . . . not [block ads, frame, link, metatag, annotate . . . ] without permission."<sup>149</sup> An amendment to the Copyright Act of 1976, or regulation to address this issue is

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<sup>141</sup> See *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1993).

<sup>142</sup> See *Campbell*, 510 U.S. at 591; *Harper & Row*, 471 U.S. at 568.

<sup>143</sup> See *Campbell*, 510 U.S. at 590.

<sup>144</sup> See *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

<sup>145</sup> *Suntrust Bank*, 268 F.3d at 1274 (internal citations omitted); see also *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

<sup>146</sup> *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>147</sup> See Adam Liptak, *Is Litigation the Best Way To Tame New Technology?*, N.Y. TIMES, Sept. 2, 2000, at A19.

<sup>148</sup> *Id.*

<sup>149</sup> Mary M. Luria, *Controlling Web Advertising: Spamming, Linking, Framing, and Privacy*, THE COMPUTER LAWYER, Nov. 1997, at 10, available at <http://eon.law.harvard.edu/property/metatags/mixed2.html>.

thus needed.

### III. THE NEXT STEP

#### A. The Future of Online Advertising

Despite the threat of ad-blocking software, Internet advertising continues to grow.<sup>150</sup> As more people forsake the old fashioned yellow pages for the online version, small businesses are sending their advertising dollars in the same direction. As technology evolves, new kinds of advertisements will come onto the scene. Earlier this year, several Web sites deployed a new, high quality method for delivering television-quality video advertisement to Web surfers - a method that optimists hope will “herald the start of a new era of Internet advertising.”<sup>151</sup>

At the same time people are becoming less tolerant of aggressive advertising and the marketing clutter it is creating. Advertisers must accept that in the world of hyper-fragmented media and too many marketing messages, consumers will seek to avoid the overload. In response to voter outcry, Congress has passed a bevy of policies restricting intrusive marketing practices. The formation of the “Do Not Call Registry,” the introduction of legislation outlawing spam and prohibiting ads on police cars and voting ballots, and the rejection of plans to place movie logos on baseball bases, show that advertising is bumping up against the limits that consumers will tolerate.<sup>152</sup> Edmond Thomas, Chief of Technology at the Federal Communications Commission, bluntly warned attendees at an American Association of Advertising Agencies breakfast in March of 2004, “Your challenge is to stop being annoying. You’re almost forcing regulators to get involved.”<sup>153</sup>

#### B. Internet Regulation

As the Internet continues to grow as a medium for mass communication, the question of regulation will continue to arise because cyberspace presents so many new legal issues and problems.<sup>154</sup> In order to allow this technology to flourish, the government has, thus far, been reluctant to impose any sort of regulations on the Internet. In the early years of the Internet, President Clinton announced a “hands off” policy for cyberspace, and stated that the government should not “stand in the way” of the Internet, but should, instead, simply enforce “a predictable, minimalist, consistent and simple legal environment for commerce.”<sup>155</sup>

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<sup>150</sup> See *The online ad attack*, ECONOMIST.COM, Apr. 27, 2005, available at

[http://www.economist.com/agenda/displayStory.cfm?story\\_id=3908700](http://www.economist.com/agenda/displayStory.cfm?story_id=3908700) (mentioning popularity of new services such as Google’s AdSense that allows advertisers to pick the specific sites that their ads appear on).

<sup>151</sup> Tessa Wegert, *Video: The Future of Online Advertising?*, CLICKZ EXPERTS, Sept. 4, 2003, [http://www.clickz.com/experts/media/media\\_buy/article.php/3072011](http://www.clickz.com/experts/media/media_buy/article.php/3072011)

<sup>152</sup> Johnnie L. Roberts, *TV’s New Brand of Stars*, NEWSWEEK, Nov. 22, 2004, at 62.

<sup>153</sup> Bruner, *supra* note 16.

<sup>154</sup> Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*, 5 VA. J.L. & TECH. 6, 19 (2000).

<sup>155</sup> White House Press Release, President William J. Clinton, A Framework for Global Electronic Commerce (July 1, 1997) (on file with the White House Office of the Press Secretary), <http://www.dot.gov/ost/m60/eleccomm/presdir.htm>.



The real question is whether advertising over the Internet may be regulated under the traditional methods used to regulate advertising in other mediums such as print, radio, and television.<sup>156</sup> Related to that inquiry is determining which regulations would apply and, in turn, who would be responsible for enforcing these regulations. The responsibility of regulating current advertising is divided among several entities, including the Federal Trade Commission, the Federal Communications Commission, the Food and Drug Administration, the Bureau of Alcohol, Tobacco and Firearms, and the Department of Transportation, as well as state law and industry agencies.<sup>157</sup>

Determining which current advertisement regulations should apply to online advertising is difficult because of the unique nature of the Internet. The Internet does not fall into a single traditional legal category.<sup>158</sup> Similarly, neither radio nor broadcasting was easily classified when introduced into the market.<sup>159</sup> The problem unique to the Internet, though, is that it is not something completely new, but rather, it is a hybrid of known media.<sup>160</sup> Generally, the same rules that apply to other forms of advertising apply to electronic marketing.<sup>161</sup> However, most of the rules that apply to the Internet focus on the content of advertisements as opposed to addressing how they are presented.<sup>162</sup> If intrusive ads are to be controlled, the limits must be set by regulations specifically aimed at Internet advertising.

Congress could step in and determine what level of ad-blocking is acceptable. As Congress did with many music uses,<sup>163</sup> they could provide certain exceptions such as allowing users to block certain ad types such as pop-ups and floating ads but not ads placed throughout a site. On the other hand, changes in public opinion may cause Congress to let the situation and market resolve itself. If television programs were ad-free today, and suddenly a TV station were to start running eight minutes of advertising every half hour right in the middle of programs, people would quite possibly riot. But since we are all familiar with TV ads, they don't bother us much. In fact, during the Super Bowl, the ads are a big part of the show. As people get used to new forms of online ads, they may become more common and accepted. It is also possible that this ad-blocking trend has less to do with advertising avoidance and more to do with consumers' desire for greater control over what content they want and when. Consumers want information instantaneously, and desire to bypass

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<sup>156</sup> Lori A. Lustberg, *Current Advertising Regulations and the Internet*, 1998 COMP. L.REV. & TECH J. 39, 39 (Summer 1998), <http://www.smu.edu/csr/Sum98-2-Lustberg.pdf> (discussing the status of regulations on advertising in various types of media, with a focus on Internet advertisement regulation).

<sup>157</sup> See generally, FEDERAL TRADE COMMISSION, ADVERTISING PRACTICES: FREQUENTLY ASKED QUESTIONS: ANSWERS FOR SMALL BUSINESSES, (April 2001), <http://www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.pdf> (describing which federal agencies are in charge of regulating advertisements).

<sup>158</sup> See Susan Ness, Commissioner, Fed. Comm'n Comm'n, Remarks at the Wall Street Journal Technology Summit: *From Hype to Reality in the Emerging Digital Age* (Oct. 15, 1997), <http://www.fcc.gov/Speeches/Ness/spsn721.html>.

<sup>159</sup> See *id.*

<sup>160</sup> *Id.*

<sup>161</sup> Bureau of Consumer Prot., Fed. Trade Comm'n, *Advertising and Marketing on the Internet: Rules of the Road*, September 2000, <http://www.ftc.gov/bcp/online/pubs/buspubs/ruleroad.htm>.

<sup>162</sup> *Id.*

<sup>163</sup> See 17 U.S.C.A § 114 (2005) (making exceptions for song uses such as allowing cover songs and performing the sound recording within a business establishment. For example, a restaurant does have to pay royalties and is not infringing an artist's copyright when they play a song for their customers).

any delay.

### C. Other Solutions

Each attempt by consumers to block or circumvent marketers simply prompts another clever and stealthy means of delivering the message. The problem with ad-blocking on the Internet is that there does not seem to be a viable adaptation by advertisers. For example, television's response to the VCR and TIVO (popular personal video recorder) devices is product placement, sponsored broadcasts, and digital insertion.<sup>164</sup> Besides mentioning the products in the articles or content being accessed, advertisers will have to find alternatives if ad-blocking software continues.

The fact that users are reluctant to visit sites with too many ads, and the fact that Web sites cannot exist without the income those ads provide, has led some sites to alter their format to offer people a simple solution to the advertisement dilemma, pay to view. If you do not like the advertising, you can subscribe to the site. By subscribing to a site, you pay a small monthly or yearly fee in exchange for advertisement-free content.<sup>165</sup> This option is attractive to those who often use a Web site that is cluttered with advertisements. This solution to the internet advertising dilemma, however, does nothing to ease the plight of the advertiser.

## IV. CONCLUSION

The threat that ad-blocking software poses to the Internet is similar to the fears of the plaintiffs in the *Sony* case when the VCR first appeared. However, unlike the time-shifting ability of the VCR, ad-blocking software may gain widespread use that would produce actual damage, potentially akin to the damage caused by file sharing software in *Grokster*. Without the income from selling advertisement space, Web site owners will not have a way to pay for the content they provide, and will be forced to shut down or switch to a pay-per-view format. The ultimate result of the widespread use of ad-blocking software will be that less information will be freely available to users over the Internet.

If the use of ad-blocking software continues to grow, Web site owners may bring successful copyright claims against the distributors of ad-blocking software, and the resulting ban on using ad-blocking software will eliminate user's only defense in the advertising battle, leaving them helpless in the face of the barrage of unwanted ads and information on the Internet. This will subsequently slow down browsing speed and possibly deter Internet use. The government has been reluctant to make regulations for the Internet in order to allow for the free flow of information and

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<sup>164</sup> Kinney Littlefield, *Insertion of Product Images is Blurring the Line Between Commercials*, ORANGE COUNTY REGISTER, Mar. 25, 2000, available at LEXIS, News Library (noting that virtual video advertising allows "advertisers to digitally insert images of products into program content itself where they never actually existed - instead of segregating them in easily avoidable commercial breaks." The time may come when the ads you see on stadium billboards during televised baseball games are not real. Rather, the ads are generated by computer-imaging equipment that can select different ads to be viewed in different geographic locations. In effect, the product itself becomes the vehicle for the advertisements).

<sup>165</sup> See e.g., HowStuffWorks, <http://computer.howstuffworks.com/speedy-reg2.htm?src=article> (Web site offers the ad-free server for just \$1.00 per month).

prevent any restrictions on the market place of ideas. However, the government's reluctance to act with regard to online advertising is actually hindering the flow of useful information. In order to allow for a more efficient exchange of ideas, regulation may be needed to help resolve this advertising battle.