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AS AD BLOCKING GROWS, WHAT LEGAL RECOURSE DO PUBLISHERS AND MARKETERS HAVE?

by Richard S. Eisert

Ad-blocking software has long been a concern of agencies, marketers and publishers, but recent developments have pushed the issue to the forefront. Now both marketers and publishers are beginning to fight back.

Some publishers have resorted to erecting paywalls, while others, such as The Washington Post, are beginning to test technology that prevents users who are running ad blockers from viewing certain content. It remains to be seen how successful these approaches will be among consumers who are increasingly accustomed to accessing content for free.

Instead of going after users, some are considering direct legal action against the licensors of ad blocking software and tools themselves. The IAB, for example, recently said it is actively looking into the possibility of litigation against ad blockers. Litigation based on copyright laws has been the most common legal theory mentioned in connection with fighting ad blockers to date, the primary argument being that ad blockers infringe publishers' copyrights by impermissibly changing publishers' pages. Changing how a website's page appears to users, publishers argue, constitutes the making of a derivative work of the page without permission, which is a form of infringement.

While it is too early to say whether this theory will prevail, the essence of this argument has already been struck down by a federal appeals court, which ruled in favor of an adware company by stating that its technology merely obscured or covered portions of a publisher's site, but did not "change" it.

As a result, litigation may be more likely to emerge around publishers' terms of use. Prominent publishers have already begun to add language to their terms of use stating that users are prohibited from masking or obscuring the ads that appear on their sites.

For example, the Chicago Sun-Times' terms of use ask that "you agree that you will not … cover or obscure any banner or other advertisement" on its website. Similarly, Hulu's terms of use state that "you will not use [Hulu] in a way that … removes, modifies, disables, blocks obscures or otherwise impairs any advertising."

On their face, these terms may seem clear, but what is less clear is how enforceable they are, whether they go far enough and what recourse publishers may or may not have against violators. Litigation will almost certainly result, in a few potential scenarios. Publishers may sue users for a breach of their terms, users may sue

publishers seeking to invalidate the terms, publishers could sue ad-block software makers for tortious interference with agreements between them and their users or, depending upon how the ad-blocking technology works, publishers may sue the companies behind ad-block software as "users" of their sites.

Outside the specific context of ad blocking, precedent exists for this: It is not unusual for website publishers, including Facebook, Amazon and Register.com, for example, to enforce their terms of use against end users in court.

It will take time for this legal landscape to further develop, but as it does, it's a safe bet that the key parties involved will be watching closely. As ad-blocking technologies continue to evolve at ever-increasing speed, purely legal solutions will have trouble keeping pace.

In the meantime, marketers and their agencies have begun to focus more on content and environments less likely to be blocked. This has contributed, for instance, to the prevalence of native advertising, as well as increased reliance on branded content and in-feed advertising on social platforms. In the short term, these sorts of practical solutions that seek to lessen the impact of ad blocking are likely to play a key role.

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