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Expect Lawsuits Against Ad Blockers

Law360, New York (November 13, 2015, 10:58 AM ET) -- Ad blocking has long been a concern of agencies, marketers and publishers. Technology allowing users to block or obscure online advertisements has been around for years, traditionally as a desktop browser extension. But recently, a number of developments have significantly broadened the potential for ad-blocking technology to become a game-changer in the advertising industry. Lawsuits will almost certainly follow as the movement toward ad blocking accelerates.

The Rise of Ad Blocking

The use of ad blockers is on the rise, especially among millennials. It is estimated that close to two-thirds of all millennials are actively using ad blocking software. The increasing usage of ad blockers is enormously costly for the advertising industry — according to some sources, close to $22 billion worth of advertising has been blocked in 2015 so far.

Perhaps even more critically, ad blocking has also moved beyond the desktop. Apple Inc.'s most recent version of the iOS operating system for the first time allows developers to create third-party ad blockers for the Apple App Store, and a number of ad blockers immediately rose to the top of the store's paid apps, illustrating the popularity of this technology.

Publishers React

Publishers and industry groups, finally realizing the extent to which ad-blocking software is affecting advertising revenue, are starting to push back with new approaches to fighting ad blockers and engaging users. For one, publishers are trying out various practical and technological means to discourage the use of ad blockers. The Washington Post recently tested new technology that prevents users who are running ad blockers from accessing their content without signing up for a newsletter or paying a fee. Many publishers are also beginning to offer paid subscriptions for ad-free content. YouTube, for example, just launched Red Tube, in the hope that users will pay for the privilege to watch the same videos without ads. This hope is not completely unfounded, as recent research indicates that users are increasingly willing to pay to avoid seeing ads.

This trend among users may be a direct response to the increasing intrusiveness of online ads. As the sheer volume and intrusiveness of online ads increases, users are becoming increasingly averse to slow sites and the risk of malware. The New York Times recently highlighted the extent to which online display ads affect loading times of major publishers, and found that content blocked by ad blockers accounted for more than half of all data utilized to load the top 50 news websites online. Even the Interactive Advertising Bureau recently acknowledged the dangers of increasingly intrusive online advertisements that disregard user experience, leading to a digital environment in which publishers are on their heels, trying out various practical solutions to get around ad blockers and re-engage users.

Legal Options

Practical solutions will get publishers only so far, however. So in addition to attempting to influence user behavior, publishers and industry groups are considering legal actions against ad blockers.

Copyright Infringement

One legal theory publishers may pursue against ad blockers is copyright infringement. In fact, this theory has been used in the past against ad blockers and adware companies. The primary argument is that the software in question infringes 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.

The essence of this argument has already been raised — and struck down — in some U.S. courts. In 2005 the Second Circuit Court of Appeals rejected a derivative work argument by the website 1-800 Contacts when it sued WhenU.com, an adware company, for running competing pop-up advertisements on their website without permission. The Second Circuit reasoned that 1-800 Contacts had failed to show that WhenU had "recast, transformed, or adapted" the 1-800 Contacts web site. The court found that 1-800's site remained intact, and the WhenU software merely obscured or covered a portion of the site but did not "change" it.

A similar argument was also recently rejected in a German court. Two German publishers sued Adblock Plus, a leading ad-blocking technology company, but a German court found that Adblock's program did not violate German copyright laws. The court emphasized that users are legally allowed to control what happens on their screens and on their computers while they browse the Web.

However, fighting ad blocking with a copyright claim is not dead in the water. These cases leave room for a derivative-work argument to succeed where, for example, an ad blocker does more than just mask or obscure certain parts of a publisher's site. To the extent a publisher can argue that an ad blocker is "changing" a publisher's protected content (or more directly copying that content), they may have a case.

Terms of Use Claims

The way battle lines are emerging, the focus of litigation in the near future may be on publishers' terms of use. Publishers have already begun to add language to their terms of use, stating users are prohibited from masking or obscuring the ads that appear on their sites. For example, the Chicago Sun-Times' terms of use states "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."

These terms may be clear, but what is less clear is how enforceable they are, and the consequences of violating them. Litigation will almost certainly result, but it could be in the form of publishers suing users for a breach of their terms, users suing publishers seeking to invalidate such terms, or publishers suing ad blockers for tortious interference with agreements between them and their users (or, depending upon how the ad blocker works, suing the ad blocker as a "user" of the site).

Enforceability of Terms of Use

One issue that arises in this area is the enforceability of the terms themselves. To make the argument that the use of an ad blocker is a violation of a site's terms of use, publishers will need to show that their terms constitute an enforceable contract between them and their users. The kind of language that sites like the Chicago Sun-Times and Hulu are beginning to implement is more likely to be found enforceable if included in a click-wrap agreement, where users are required to affirmatively agree to the terms, rather than in the more widely seen "browsewrap" agreements that sit at the bottom of publishers' pages. Publishers that require users to log-in or expressly agree to a prompt including a terms of use, for example, will be on firmer ground to enforce such language.

Tortious Interference With Contract

However, publishers likely will not want to sue their users, so it will be necessary for them to direct a terms-based argument to the ad blockers. The most logical way to do this is through a claim of tortious interference with contract (or a similar business tort claim). The argument, in essence, would be that (1) there is an enforceable contract between the publisher and the user, and that (2) the ad blocker is wrongfully interfering with that contract.

Even if an enforceable contract exists between the user and publisher, publishers will have to show that the ad blocker committed some action that rises to the level of a business tort. In other words, publishers would have to show that the ad blocker acted with at least some improper motive or improper means. Tortious interference claims and similar business torts generally require proof that the defendant acted (1) maliciously and (2) knowingly.

The relationship between ad blockers and publishers is on its face quite tenuous. Ad blockers don't target specific websites, and therefore aren't interfering with any specific publishers' terms of use. Without more, it will be very difficult for publishers to argue that ad blockers are knowingly and maliciously interfering with the contracts with their users.

However, the rise of software that detects the presence of ad blockers, the same software that publishers like the Washington Post have begun to implement, creates an avenue for this claim to move forward. Publishers may, upon detecting the presence of a specific ad blocker, put that ad blocker on notice that they are interfering with their terms of service, and must cease operating on their website. (Given the relatively limited number of current ad blockers that have a significant user base, publishers could also consider sending letters to key ad blockers whether or not they have been directly operating on a publisher's site.) Once on notice, the ad blockers will have a weaker argument that they were not knowingly or maliciously interfering with the contract between the publisher and their users, particularly since many have the capability to readily "unblock" any site.

There is no doubt that there is a high burden to succeed on a tortious interference with contract claim. However, the fact that publishers are including anti-ad blocking language in their terms of use indicates that the claim (or a similar business tort claim) will likely be made. It is also the case that by detecting and putting specific ad blockers on notice, publishers increase their odds of succeeding on this type of claim.

Conclusion

It will take some time for the outcome of potential litigation against ad blockers to come to fruition. Indeed, even the legal theories that will be brought to bear are still just taking shape — don't be surprised to see novel arguments not discussed above emerge and be tested in these lawsuits (perhaps attempts by users or publishers to invoke the Computer Fraud and Abuse Act). However, publishers are clearly setting themselves up for the fight, both in their technological attempts to circumvent ad blockers as well as in their revised terms of use. The ad blockers are already on notice, too: It was recently revealed that one major ad blocker had set up a meeting with major agencies and publishers in New York, presumably to discuss some kind of mutually acceptable resolution to the issues in play. In the meantime, we can expect publishers to be more active in their attempts to engage users to view ads (or have users pay to avoid them), and to find other practical means of lessening the effect of ad blocking.

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