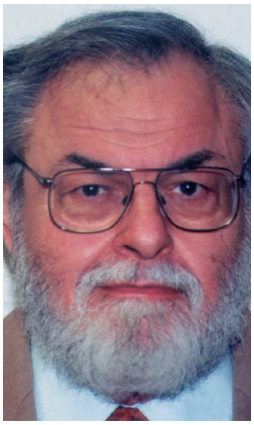

Is gatoring unfair or illegal?

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In my last column, I discussed whether mousetrapping viewers at a Web site was unfair according to section 5 of the US Federal Trade Commission (FTC) Act. The answer is that the practice is unfair only if

- it causes, or is likely to cause, substantial injury to members of the public;
- the public cannot reasonably avoid that injury; and
- substantial countervailing benefits to competition or consumers do not outweigh the injury.

The column also briefly mentioned contextual advertising, and I promised to elaborate on that topic in a subsequent Micro Law column. In this issue's column, I do that.

What is contextual advertising?

There are many forms of contextual advertising. A newspaper, say *The Washington Post*, might run a story on its electronic Web page about how Monica Lewinsky gave Bill Clinton such and such an expensive necktie as a present. *The Post* might provide (for pay) a link to the Web site of R.H. Macy & Co., which offers the same necktie for sale. Probably, no one considers this advertising to be competitively wrongful or otherwise illegal.

Toward the other end of the spectrum, however, we have the companies eZula and Gator, which Web site proprietors have challenged for using unfair marketing practices. The Federal Deposit Insurance Corp. (FDIC) published a notice in the *Federal Register*, asking for comments on whether links that connect a viewer at a federally insured bank's Internet site to another entity's Web site could create customer confusion over which products are offered or sponsored by the federally insured institution. The FDIC also asked whether it should regulate such linking. America's Community Bankers (ACB), a trade association of banks that claims its members have over $1 trillion in assets, filed a comment in September 2001:

> ACB does not believe that legitimate Internet links established by an insured depository institution require the attention of the FDIC at this time, however, ACB has significant concerns over the emerging practice of "contextual advertising." This new advertising model, and other similar models allow a firm to buy certain key words or phrases that pertain to their business. The words then become a hyperlink to the advertiser's web site when the particular word/phrase is displayed through an Internet browser with special advertising software loaded.

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Consumers may unwittingly be installing this advertising software when downloading unrelated programs such as music sharing software. The disclosure that this software is included in a download is often buried in a lengthy disclosure statement that may be overlooked by the consumer. The result is that a consumer could call up a legitimate bank web site and find that a disclosure statement includes a contextual advertising word such as "mortgage" that will be highlighted as an Internet link. Clicking on this link will direct the consumer to another firm's site, perhaps a predatory or high-cost lender, or even a potentially fraudulent Internet site. ACB believes that such practices are more than just deceptive advertising, they effectively interfere with the ability of a federally insured depository institutions [sic] to provide legally required disclosures, and could potentially steer consumers to higher cost services. ACB urges the FDIC to study this practice and its impact on a financial institution's ability to provide disclosures to customers and take whatever action necessary to combat this practice.

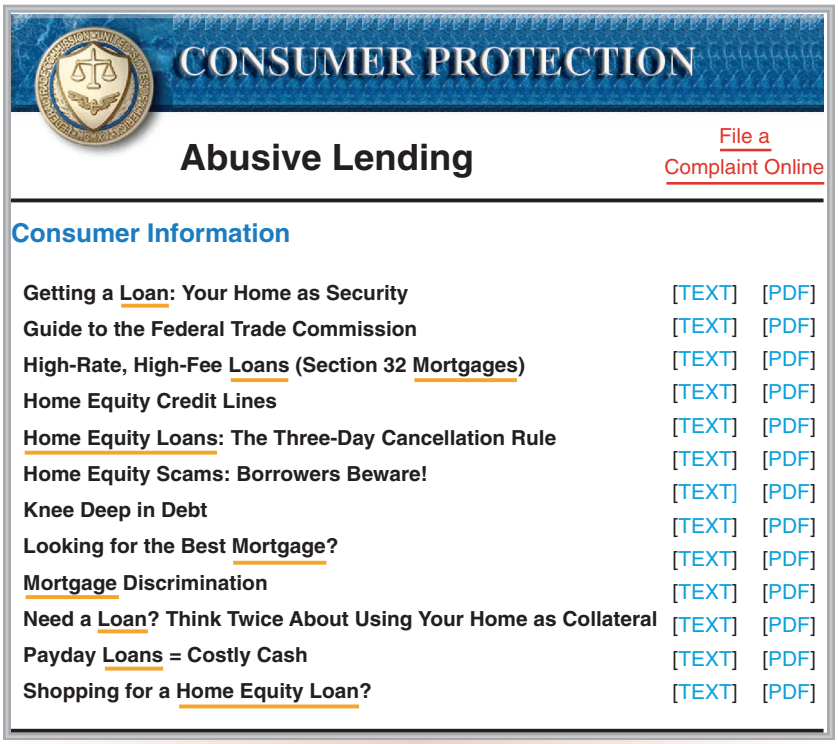

Figure 1. US Federal Trade Commission abusive-lending-practices site, as viewed on a PC with ContextPro. The underlined words are links to Premier Equity's Web page.

The eZula model

The eZula advertising model is what ACB is complaining about. EZula distributed millions of copies of its ContextPro software as part of a package given away "free" as Kazaa, a Napster substitute. When users installed Kazaa, they unknowingly installed ContextPro at the same time.

For each word that an eZula client has paid eZula to give such treatment, ContextPro creates a link on any Web page that appears on the screen of a PC system with ContextPro installed. For example, eZula client Premier Equity bought the words "loan," "mortgage," and "financing," among others, from eZula. So on any Web page displayed on a PC with ContextPro installed, those words appeared as links underlined in orange. Figure 1 shows an FTC Web site, as viewed on a PC with ContextPro. ContextPro established similar links on all banks' Web sites. A user passing the cursor over an eZula link would highlight the word in yellow and cause a small pop-up window to appear, saying, "Apply today for a Premier Equity loan." If the user clicked on the link, the browser moved to a Premier Equity Web page that offered the loan.

The Gator model

Another, even more reviled contextual-advertising program is that of Gator. Instead of just plastering links on Web pages that its users visit, Gator delivers pop-up windows containing advertising material and links. For example, a PC user might decide to research digital cameras using a search engine such as Google or Yahoo, or by looking up *Consumer Reports* product reviews. Or the user could be viewing digital camera manufacturer Hitachi's Web page. Now let's say Gator has sold the phrase "digital camera" to its fictional client Digicamera. The PC user has installed Gator, and the program recognizes the phrase "digital camera" on the user's currently browsed page. A window pops up on the user's screen, carrying a message such as: "Get the BEST prices and selection on digital cameras at Digicamera! Click here to get a $10 discount on any purchase over $50."

Gator distributes its software in much the same way as does eZula: It bundles the engine for the pop-up windows as part of a multifunction package that performs tasks such as remembering passwords and storing information for filling out order forms. Downloading and installing the package provides the pop-up engine along with the other programs. Gator claims to have distributed 8 million copies of its program to consumers in this way.

Who thinks gatoring is unfair?

Gator has attracted even more wrath than eZula. Curiously, the most vocal complainers are not the competitors of Gator's clients. Those most incensed are independent proprietors of Web pages that provide

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users with free content. These pages are subsidized by third-party advertising, which Gator covers over with its own third-party advertising. These independent businesses identify contextual advertising as "scumware" and "thiefware," and they've established scumware.com and thiefware.com sites. Jim Wilson, Webmaster of the scumware.com page and a leading contextual-advertising detractor, puts it this way:

> When someone comes to [my Web site] JimWorld and the banner is replaced by one sold by Gator, then I have just been cheated out of the revenue that comes from that advertising. Why pay to advertise on my Web site when you can pay these bozos to hack into my content and send you some cheap, stolen traffic?

Wilson's point is illustrated in Figure 2, which shows a before- and after-Gator view of a fictional Web site, Jimmy's World. The site provides users with free information about digital cameras. A banner advertisement touting Hitachi digital cameras subsidizes the operation.

Figure 2 illustrates why Gator bothers Wilson and other independent Web page proprietors so much. They argue that gatoring will decrease their revenues enough to drive them out of business. Gatoring will thus deprive the public of the benefit of their sites' free content. (Intellectual-property rights proponents generally make much the same argument about free goods.) You could argue that Web sites should charge a fee for the public's use of their content, but that is unrealistic. For the most part, the fee-for-use business model has not been successful on the Internet. Hence, at least some free-content sites will likely become so unprofitable as a result of gatoring or similar expedients that they will exit the marketplace. Those that do not exit the market will operate at somewhat reduced income levels. This fact incenses the affected businesses.

Does gatoring violate section 5?

But Jim Wilson and the other gatored Webmasters are not the only stakeholders, and theirs are not the only interests. Other interested stakeholders are the client advertisers (including both Wilson's clients and those of eZula and Gator, which are overlapping sets), the scumware firms themselves (eZula and Gator), and consumers who view these Web sites and advertisements. Although eZula and Gator clearly sabotage and adversely affect Webmasters' business models, they do not appear to cause the kind of substantial, unavoidable injury to consumers that must be present to constitute unfairness under the current interpretation of section 5 of the FTC Act.

Moreover, it is at least conceivable that offsetting competitive benefits or improvements in *allocative efficiency* (efficiency in allocating economic resources) could result from gatoring. Contextual advertising delivers information to consumers about product availability and prices more efficiently than other advertising. It largely targets consumers interested in the subject matter of that advertising and passes by those who haven't shown overt signs of interest. This benefits both advertisers and information-seeking consumers. At the very least, contextual advertising is not bad per se. A Playboy Enterprises case supports this

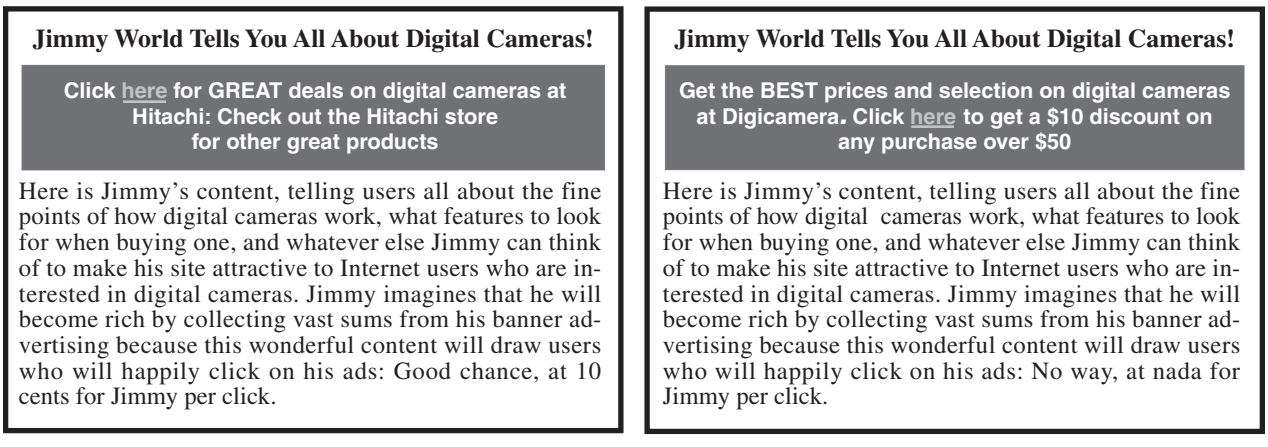

Figure 2. Fictional Web site advertising digital cameras before (a) and after (b) a user inadvertently installs Gator on her PC. The Hitachi banner ad pays Jimmy 10 cents every time a viewer clicks on the Hitachi link. The banner ad for Gator's client, on the other hand, pays Jimmy nada when a viewer clicks on the Digicamera link. In a worst-case scenario, Gator's Digicamera banner ad completely covers up Jimmy's Hitachi banner ad.

argument, because the court refused to consider only the litigants' interests. Playboy complained (essentially on trademark grounds) about the Excite and Netscape search engines, because they displayed sexually oriented banner ads on their pages when users typed "playboy" as a keyword in a search. The court likened this contextual-advertising practice (known as *keying*) to standing across the street from a McDonald's outlet and asserting (say, by billboard advertising) that cheaper and better burgers are available down the block at Burger King. Of course, that case would be distinguishable from this situation on multiple grounds. Nonetheless, it indicates that other values could be important here besides protecting Webmasters' business models. The public interest might best be served by the court not resolving the merits of this controversy and instead leaving it to the marketplace to resolve—at least when considering FTC Act section 5's balance-of-interests test for determining unfairness. Probably, the lack of severe consumer harm and possible consumer benefit would cause a court to hold that gatoring does not violate section 5.

Is there a copyright violation?

But what about copyright? Is that a property right that makes the case different? Copyright law's major prohibitions are against unauthorized reproduction of copies and distribution of copies of copyright-protected works [see sections 106(1) and 106(3) of the copyright law]. But eZula and Gator do not reproduce or distribute copies of Web pages. Only PC users do that, and arguably they do it under implied licenses from the Web page proprietors. However, section 106(2) of the copyright law prohibits unauthorized preparation of derivative works based on a copyrighted work. For example, compare Figures 2a and 2b of the fictional Jimmy World page. The Gator-modified version in Figure 2b differs substantially enough from the original version in Figure 2a to make the Figure 2b version a derivative work. Furthermore, Jimmy would never authorize preparation of such a derivative work; he would vehemently object to it.

However, the fact that something is a derivative work is only the beginning of the legal inquiry, not the end. The real question is whether fair use or some other privilege excuses the unauthorized preparation of the derivative work. Thus, when the band 2 Live Crew prepared the song *Big Hairy Woman* as a derivative work version of Roy Orbison's *Pretty Woman*, the real issue wasn't whether it was a derivative work but whether 2 Live Crew was excused from liability because it had a right to mock *Pretty Woman* that way. The US Supreme Court said that it did have that right. Similarly, it is clear that *The Wind Done Gone* is a derivative work based on *Gone With the Wind*, but the issue being litigated is whether the later author has the right to criticize *Gone With the Wind* by turning it into *The Wind Done Gone*.

This is a very fluid, unsettled area of law at this time. Little precedent exists, and some of even this small amount is contradictory. There is no generally accepted legal theory as to whether, or in what circumstances, to excuse an unauthorized derivative work from liability in business contexts generally comparable to the fictional Jimmy's World controversy.

Now what?

In late August 2000, a judicial resolution of the legality of gatoring appeared to be forthcoming. The Interactive Advertising Bureau, an Internet advertising trade association, began publicly stating that gatoring was unethical and illegal, and said it planned to ask the FTC to investigate the practice under section 5. In response, Gator filed a declaratory judgment action seeking a ruling declaring that gatoring was not illegal. Gator also complained that the IAB was damaging it by defaming it and wrongfully interfering with its business expectations. This could have led to a judicial determination of the legality of gatoring.

Unfortunately, cooler heads prevailed. In late November, the parties "agreed to extend various deadlines relating to the lawsuit; thereby enabling ongoing discussions to focus on the positive ways Gator, the IAB and publishers can work together." Furthermore, "as a gesture of good faith in our ongoing discussions," IAB agreed to stop bad-mouthing Gator, and Gator agreed not to accept further contracts for its present form of contextual advertising. Apparently, the goal of the discussions was "to co-develop a new version [of the Gator popups] that is more [Web site] friendly, designed to create a revenue stream for them by monetizing unused banner inventory." It is unclear what that language means, but it seems to suggest a sharing of revenue or a license fee for gatoring a site.

Perhaps, these agreements are the controversy's most practical resolution. But reaching agreement on its implementation could prove so difficult that negotiations will break down, and litigation will resume. In any event, sooner or later, litigants will force some courts to resolve the competing claims of the gatorers and the gatored—not to mention the public.

Mousetrapping, gatoring, and similar conduct reflect still early ideas of Web marketers about how to commercially exploit the ability to devise code that refracts the content of other people's Web pages, regardless of the others' lack of express consent (or even their explicit statements to the contrary). The imaginativeness of Internet marketers will surely lead to further, as yet unimagined, expedients of this kind, which of course will lead to interesting litigation and grist for law professors' mills. Web page proprietors whose content is exploited this way will complain of property rights' theft and other wrongful, unwarranted interferences. Litigation in this area has been too inconclusive to tell how the courts will respond to such claims. In part, this inconclusiveness is due to the defendants being underfunded start-ups and therefore unable to afford expensive litigation. This situation will likely change, however, if the stakes become greater.