In the first two articles of this short series, we looked at scumware, the name some people use for software that modifies the appearance of Web pages without permission from the people who created those Web pages. In this article, I will review some of the ethical and legal issues underlying the trouble over scumware. In particular, the question comes down to who owns the image of a Web page when it’s in a browser window?

In an interview with Stephanie Olsen in September 2001, Gator chief Jeff McFadden discussed his view of the ad overlays. First of all, said McFadden, Gator ads can be moved away from the ad they overlay and they are clearly labeled as coming from Gator. They are no different from any other window that might obscure part of another window. Asked about a popup ad for a credit card that overlay an identically-sized ad for a competing credit card, McFadden assured the interviewer that the overlay was popped up because the product deduced that the viewer might be interested in credit cards; the product does not “know” that its ad is overlaying the banner from a competing product.

Why did McFadden launch a lawsuit against the Interactive Advertising Bureau (IAB) in August 2001? McFadden told Olsen that, “Some IAB representatives made some egregious statements about the company--a little bit of name calling, but mainly telling people that they thought that our ad model was illegal. I spoke to the IAB and they said they weren't interested in retracting those statements. And that can have a pretty substantial impact on our business. We have 200 advertisers, many of them Fortune 500 and Fortune 50 companies, and I just can't have them saying that what they're buying from us is illegal. So we filed the action (last) Monday.”

But how is what scumware does any different from, say, having a user put a Post-It (TM) note on her monitor that obscures part of a Web page? Surely users can do what they want with Web pages that have been copied to their own cache?

Well, no, not really.

A look at the IAB’s 28 August 2001 press release shows an uncompromising title (caps are in the original): INTERACTIVE ADVERTISING BUREAU (IAB) ASSERTS GATOR.COM'S BUSINESS PRACTICES VIOLATE THE CONTRACT, TRADEMARK AND COPYRIGHT INTERESTS OF WEB PUBLISHERS AND ADVERTISERS: UNFAIR COMPETITION AND DECEPTIVE PRACTICES IN VIOLATION OF FEDERAL LAWS.”

Before we go any further, let me warn readers using the mandatory disclosure that I am not a lawyer and this is not legal advice. For legal advice, consult an attorney experienced in these areas of intellectual property and contract law.

From my point of view as a lay observer, the arguments presented by the IAB and other
opponents of scumware boil down to the following (and I am using the generic “scumware” instead of focusing only on Gator’s products):

* Scumware makes unauthorized changes in the appearance and content of Web pages that affect more than a single user.

* The changes imposed by scumware interfere with contractual relationships between Web content providers and advertisers.

* The introduced advertisements and links may convey a false impression implying relationships and possibly endorsements that do not exist.

* The modifications may be creating an unauthorized derivative work.

From an international perspective, European laws are more restrictive than US laws in defining what are called the _moral rights_ of not only a copyright holder but also the rights of the creators of intellectual property. Scumware, under this doctrine, may violate the content-creator’s rights of integrity, disclosure, retraction, and replies to criticism. Unauthorized modification of what users see on a Web page may violate all of these rights.

Those opposing scumware will have to articulate why they don’t also go after firewalls and ad-blockers that speed up Web access by reducing the amount of graphical data transmitted to a browser. Perhaps one factor reducing the outrage over _blocking_ ads is that no one is going to be offended by _not_ seeing an ad; although the advertisers may not like the idea, at least there is no chance of casting the Web site in a false light (an important element of the concept of defamation in US jurisprudence).

From a purely ethical (as opposed to narrowly legal) standpoint, it seems to me that scumware is a bad idea on several grounds:

* The people who benefit from the introduced materials (links and ads) are not the people who invested time and money in creating the underlying content; this situation seems unfair.

* If everyone engaged in such behavior, Web pages could become cluttered with extraneous matter and obscure the underlying content entirely – just imagine running several different scumware programs at once to see what might result.

* Obscuring other people’s messages and adding unauthorized linkages seems disrespectful of the human beings who created the original Web page; such behavior seems to me to be disregarding the Web designers’ feelings and intentions.

In the final installment of this series, we’ll look at avoiding and getting rid of scumware.

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For further reading:

Good reviews of the situation from Al Fasoldt:
  http://twcny.rr.com/technofile/texts/bit100301.html
  http://twcny.rr.com/technofile/texts/bit101001.html
  http://twcny.rr.com/technofile/texts/bit101701.html

IAB press release about Gator:
  http://www.iab.net/news/content/08_28_01.html (dead link in 2005)

Copyright law:
  http://www.eff.org/legal/CyberLaw_Course/

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