Presented:
20th Annual Technology and Computer Law Conference

May 24-25, 2007
Austin, Texas

Click Fraud

Eric Goldman

Author contact information:
Eric Goldman
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053

egoldman@gmail.com
408-554-4369

Google AdWords Contract Upheld (Again)--Feldman v. Google
April 5, 2007

By Eric Goldman

Feldman v. Google, Inc., 2007 WL 966011 (E.D. Pa. March 29, 2007)

Yet another click fraud lawsuit, this time involving one of the 556 plaintiffs that opted out of the Google click fraud settlement. In my prior post, I predicted a lot of chicken-scratch litigation from those opt-outs. Here's one!

In this case, a law firm advertised via Google AdWords and allegedly was click frauded. The lawyer then sued (on behalf of his law firm) Google for click fraud in Pennsylvania. Google defended based on its AdWords contract, which has a mandatory venue provision specifying that all lawsuits shall be brought in California. We saw virtually identical facts in the initial Person v. Google case, which also involved the AdWords contract (though that lawsuit was brought in NY). The result was the same in both cases--each time, the court upheld the AdWords contract's mandatory venue clause and transferred the case to California.

Mechanically, Google's contract formation process is bullet-proof. As the court describes:

> To open an AdWords account, an advertiser had to have gone through a series of steps in an online sign-up process. (Hsu Decl. ¶ 3.) To activate the AdWords account, the advertiser had to have visited his account page, where he was shown the AdWords contract. (Hsu Decl. ¶ 4.)
>
> Toward the top of the page displaying the AdWords contract, a notice in bold print appeared and stated, “Carefully read the following terms and conditions. If you agree with these terms, indicate your assent below.” (Hsu Decl. ¶ 4.) The terms and conditions were offered in a window, with a scroll bar that allowed the advertiser to scroll down and read the entire contract. The contract itself included the pre-amble and seven paragraphs, in twelve-point font. The contract's pre-amble, the first paragraph, and part of the second paragraph were clearly visible before scrolling down to read the rest of the contract. The preamble, visible at first impression, stated that consent to the terms listed in the Agreement constituted a binding agreement with Google. A link to a printer-friendly version of the contract was offered at the top of the contract window for the advertiser who would rather read the contract printed on paper or view it on a full-screen instead of scrolling down the window. (Hsu Decl. ¶ 5.)
>
> At the bottom of the webpage, viewable without scrolling down, was a box and the words, “Yes, I agree to the above terms and conditions.” (Hsu Decl. ¶ 4.) The advertiser had to have clicked on this box in order to proceed to the next step. (Hsu Decl. ¶ 6.) If the advertiser did not click on “Yes, I agree ...” and instead tried to click the “Continue” button at the bottom of the webpage, the advertiser would have been returned to the same page and could not advance to the next step. If the advertiser did not agree to the AdWords contract, he could not activate

> his account, place any ads, or incur any charges. Plaintiff had an account activated. He placed ads and charges were incurred.

As I teach in my Cyberspace Law class, the very best online contracts are "mandatory non-leaky clickthrough" agreements. Like this one.

To get around this, the lawyer claims he was ignorant of the mandatory venue clause because he didn't read the contract. Hmm...a lawyer entering into a contract that he didn't read. Even if the contracting party weren't a lawyer, this is a pathetic argument. Every lawyer learns very, very early in their first year Contracts course that a party is bound to contract terms they assent to, even if they chose not to read the terms.

The court also slams down the plaintiff's other attacks on the contract:
* the contract didn't contain a definite price. However, the contract contained the exact formula for computing the price.
* procedural unconscionability. The court rejects this because the "Plaintiff was a sophisticated purchaser, was not in any way pressured to agree to the AdWords Agreement, was capable of understanding the Agreement's terms, consented to them, and could have rejected the Agreement with impunity."
* substantive unconscionability. The court finds many of the contract terms reasonable.

This case is a nice win for Google for two reasons. First, by upholding the mandatory venue clause, it should inhibit AdWords advertisers from suing Google all over the country. Therefore, all lawsuits will have to be in Google's home court, which raises the costs of lawsuits for most plaintiffs and gives Google some other home-court advantages. Second, by holding that this plaintiff is bound by the AdWords contract and those terms aren't substantively unconscionable, Google can now invoke its risk management clauses (like the warranty disclaimers, limits of liability, etc.) to cut the economic heart out of the click fraud claim.

Miva Securities Litigation Rejects Most Click Fraud/Syndication Fraud Claims
March 25, 2007

By Eric Goldman

In re Miva, Inc. Securities Litigation, 2007 WL 809686 (M.D. Fla. Mar. 15, 2007)

Stockholders of Miva (formerly FindWhat) sued Miva, alleging that Miva had inflated its stock price by making false public statements. In this ruling, Miva successfully dismisses most of the allegations, substantially narrowing the lawsuit. While Miva would have liked to dismiss the complaint entirely, Miva can still find some solace in the fact that the court clearly was underwhelmed by the overreaching nature of the plaintiffs' claims.

The Allegations

The court reports the plaintiffs' allegations at the center of the lawsuit:

> two of FindWhat's main revenue generating distribution partners (Saveli Kossenko and Dmitri l/n/u), who represented 36% of FindWhat's revenues, were using illegal means to inflate revenues. This included the use of spyware, browser hijacking software, and “non-human traffic.” The use of such illicit methods of creating internet traffic, commonly referred to as “click-fraud,” meant that advertisers were not forwarded legitimate leads of consumers interested in acquiring their products. This resulted in advertisers refusing to place high bids with FindWhat, causing FindWhat's revenue shortfall to worsen…

Based on this, the plaintiffs introduced eleven public statements to show that Miva was painting a rosier picture than reality, including the following statements:

1) 9/3/03 press release: "Through FindWhat.com, online marketers are able to cost-effectively promote their websites and **find highly qualified prospects** who have already expressed an interest in their product or service." The court says that the plaintiffs did not allege that the defendants knew its two distributors were sketchy in September 2003.

2) 9/19/03 press release: "The FindWhat.com Network includes hundreds of distribution partners, such as CNET's Search.com, Excite, Webcrawler, MetaCrawler, Dogpile, and Microsoft Internet Explorer Autosearch." The implication is that the defendants had a high quality distribution network when they didn't. The court soundly rejects this contention, saying:

> Stating that the FindWhat network “includes hundreds of distribution partners” and identifying seven of the well-known distribution partners says and implies nothing about the Saveli and Dmitri traffic. The press release did not claim these distribution partners were representative of the others, and made no assertion as to the traffic attributed to any of them.

3) 10/20/03 press release: "FindWhat.com's services are a source of revenue and **relevant keyword-targeted listings for its partners**, while providing its managed advertisers with exposure to potential customers across the Internet. **As with the Yellow Pages in the offline**

world, FindWhat.com's managed advertisers get their message in front of prospects at the exact time they are looking for the advertisers' products and services. Unlike the Yellow Pages, advertisers only pay for those visitors that “walk” into their virtual stores." The court says that this quote does not address the quality of FindWhat's network.

4) 12/10/03 press release: "FindWhat.com operates online marketplaces that connect the consumers and businesses that are most likely to purchase specific goods and services with the advertisers that provide those goods and services....This cost-effective, pay-for-performance model allows Web advertisers to pay only for those prospects which click-through to their sites, and increase their potential for exposure through the millions of advertisements distributed throughout the network per day." The court says this press release predates Miva's alleged knowledge of click fraud in its network, which (as alleged by plaintiffs) started June 2004.

5) 3/5/04 10-K: "We expect that our consultants, agents, resellers, distributors, subcontractors, and other **business partners will adhere to lawful and ethical business practices**. It is important to our company's reputation that we avoid doing business with companies which violate applicable laws or have reputations which could harm our business. **Our policy prohibits engaging agents or other third parties to do indirectly what we as a company should not do under our own policies outlined in this code.**...The FindWhat.com Network is dedicated to delivering high-quality keyword ads as a result of an Internet user's search query. As such, we have written and strictly enforce advertising guidelines to try to ensure high relevancy standards....We are dedicated to delivering high-quality traffic to our advertisers' websites. We employ an integrated system of numerous automated and human processes that continually monitor traffic quality, often eliminating any charges for low quality traffic proactively from the advertisers' accounts. We enforce strict guidelines with our Network partners to ensure the quality of traffic on the system....We purchase Internet traffic from our distribution partners. Expressed as a percentage of revenue, Internet traffic purchases from one distribution partner represented over 10% of total revenue for each of fiscal 2003 and 2001 and Internet purchases from two individual distribution partners represented over 10% of total revenue for fiscal 2002....During the years ending December 31, 2003, 2002, and 2001, no advertiser represented more than 10% of the Company's total revenue. The Company purchases Internet traffic from distribution partners. Expressed as a percentage of revenues for the year ending December 31, 2003, Internet traffic purchases from one distribution partner represented over 10% of total revenue, for the year ending December 31, 2002, Internet traffic purchases from two distribution partners each represented over 10% of total revenue, and in the year ending December 31, 2001, Internet traffic purchases from one distribution partner represented over 10% of total revenue. However, none of these distribution partners represented more than 15% of total revenue during the three-year period ended December 31, 2003."

Plaintiffs take several swipes at this language, including (a) its 2 distribution partners had acted unethically, (b) the math doesn't add up when 2 distribution partners were about 1/3 of total revenues, and (c) Miva had failed to strictly enforce its policies against the distribution partners.

The court says that there was no promise that all business partners were ethical; dedication to a high-quality network isn't inconsistent with having some bad apples in the network, Miva properly disclosed that 2 distributors represented over 10% of revenue, and these statements were mostly protected forward-looking statements tempered with appropriate cautionary statements.

6) 7/6/04 conference call statements about revenue growth. The court says these statements weren't alleged to be untrue. Also, the plaintiffs alleged that Miva had an obligation to disclose bid deflation, but the court says that this wasn't required in a between-reporting-period conference call.

7) 11/1/04 conference call: an analyst asked about Miva's traffic sources, Although the Miva execs gave a garbled and ambiguous response, the court says that both execs' responses were the equivalent of "no comment."

8) 12/16/04 Jeffries research report. The court says that statements in that report don't bind Miva because they were made by an independent analyst.

9) 2/23/05 press release: Miva made some projections for 2005 revenue, which plaintiffs say were tainted by the fact that they included revenue from the questionable distributors. The court says that these projections were protected forward looking statements.

10) 2/23/05 conference call: Miva claimed that it has terminated specific rogue distributors, but plaintiffs introduced evidence that in fact Miva hadn't terminated those distributors. The court said that this was adequately pled.

11) 3/16/05 10-K. "Plaintiffs allege that statements made in the Form, "[w]e do not rely on 'spyware' for any purpose and it is not part of our product offering," were false and misleading because the two largest distribution partners did in fact rely upon spyware. (¶¶ 89-90.) Additionally, statements made in the Form assuring that FindWhat was implementing screening policies and procedures to minimize fraudulent clicks were allegedly false and misleading because Defendants knew or should have known that the majority of their distribution network relied on click fraud, (¶¶ 91-92); statements made that "none of the traffic purchased from any of these distribution partners represented over 10% of consolidated revenue in 2004" were false and misleading because the percentage of revenue generated by two distribution partners exceeded the threshold without disclosure, (¶¶ 93-94); and statements that distribution partners were taken off line in the fourth quarter of 2004 were untrue. (¶ 96.)" The court said that these were adequately pled.

Implications

All told, the court dismissed the lawsuit for 9 of the 11 statements identified by the plaintiffs, leaving only statements #10 and 11 for further proceedings. Miva would have loved to see the entire lawsuit dismissed, but the lawsuit's narrowing still represents good news for them.

This lawsuit also illustrates how hard it will be for the plaintiffs to succeed in the "syndication fraud" lawsuit against Yahoo from last year. Although Yahoo used different language, the court's ruling regarding statements #2 and 3 pertain directly to the gist of the Yahoo plaintiffs' allegations. That lawsuit is currently on hold while the parties try mediation and settlement discussions, but as part of those discussions I suspect Yahoo will be pointing this opinion out to the plaintiffs.

Click Fraud Lawsuit Survives Motion to Dismiss--Payday Advance v. FindWhat
March 19, 2007

By Eric Goldman

Payday Advance Plus, Inc. v. Findwhat.com, Inc., 2007 WL 760437 (S.D.N.Y. Mar. 12, 2007)

The high-profile click fraud lawsuits against Google and Yahoo settled last summer, but other lesser-known lawsuits appear to be in the pipeline, such as this lawsuit against FindWhat (now Miva). In this ruling, the defendants attempt to shut down the lawsuit and they met with some success; the defendants eliminated 5 out of the plaintiff's 6 claims (at least temporarily). However, the most dangerous claim--breach of contract--survived the motion to dismiss. This case is a long way away from final resolution, but I'm sure FindWhat would have loved to have squashed the case entirely without incurring more litigation costs.

Introduction

The plaintiffs initially filed this lawsuit in 2005 in California, but it was dismissed for improper venue. The plaintiffs refiled the lawsuit in NY claiming 6 causes of action: breach of contract, unjust enrichment, negligence, civil conspiracy, "joint venture" and a violation of NY GBL Sec. 249 (a consumer protection statute). The plaintiffs voluntarily capitulated on the last 2 causes of action. In this ruling, the defendants moved to dismiss the remaining four causes of action per 12(b)(6).

The plaintiffs allege that FindWhat entered into an affiliate arrangement with Advertising.com where Advertising.com would drive traffic to FindWhat's search listings in exchange for a cut of the revenue. The plaintiffs allege that Advertising.com boosted the plaintiffs' costs by competitively bidding on the same keywords (thus raising keyword prices) and by engaging in both manual and automated click fraud.

The Court's Analysis

It sounds relatively simple--KEEP A COPY OF YOUR SIGNED CONTRACTS. But, the plaintiff can't find its copy. FindWhat introduced what it thinks is the governing contract, but the plaintiff disagreed that FindWhat's version is the contract it signed. On this basis alone, the court can't dismiss the contract claims because the parties don't even agree on the contract terms. Unless the plaintiff magically finds its signed contract, the judge ultimately may need to choose between various possible contracts.

The court also discusses the language that the plaintiffs would pay FindWhat for "actual clicks." I've said before that I hate the word "actual" in this phrase, which introduces unnecessary ambiguity. The right way to draft this language would be to say that advertisers pay for all clicks except those that FindWhat determines are illegitimate, or to define "actual clicks" that way.

Either way, the determination of clicks is governed by the "implied covenant of good faith and fair dealing." Courts apply this implied covenant inconsistently, so in many cases it has no effect so long as the parties engage in profit-maximizing behavior. In other cases, the covenant allows the judge to opine on the business ethics of the parties and declare some behavior out-of-bounds.

For example, even if the contract said unambiguously that advertisers pay for each and every click, many courts nevertheless would use the implied covenant to dishonor any clicks by the search engine's employees done for illegitimate purposes. Thus, the court says:

> The facts alleged in the Complaint, if taken to be true, suggest that **Findwhat could have violated its implied covenant by inflating the bidding prices for search terms and by directing Advertising to generate “clicks” on Payday's website by people or “bots” who had no purpose for visiting the site other than to generate revenues for Findwhat and Advertising**. Because this tactic would allow Findwhat to increase its profits solely at its discretion and with no benefit to Payday, it is plausible that it could be found to “destroy[ ] or injur[e]” Payday's rights under the contract. Dalton, 663 N.E.2d at 291. It is furthermore **likely that a reasonable advertiser entering into such a contract would expect that, whatever the external risks of unproductive “clicks,” it would not be subjected to unbounded increases in its prices at the hands of its promisor or at its promisor's direction**. (emphasis added)

This leaves open several inquiries, including (1) does outright click fraud engineered by the search engine constitute a breach of the good faith covenant, and (2) can the plaintiffs introduce evidence showing that FindWhat, in fact, engaged in such condemnable behavior? Therefore, the plaintiffs still have a lot of work to reach a payday here (sorry for the pun). But, they live another day to try to make that showing.

The court spent a lot less time dismissing the other claims. The unjust enrichment claim is dismissed because it is subsumed by the breach of contract claim. The negligence claim is dismissed because, under NY law, a contract relationship does not give rise to a duty to avoid tortious negligent behavior. The civil conspiracy claim is dismissed because there needs to be an underlying tort advanced by the conspiracy, and the plaintiffs didn't allege any. The plaintiffs want to allege that FindWhat engaged in fraudulent concealment but failed to make strong enough statements to support that. The judge gave them another chance to amend the complaint.

Conclusion

Due to the successful motion to dismiss, Advertising.com is now out of the lawsuit, leaving FindWhat/Miva as the only remaining defendant. It's too early to assess FindWhat/Miva's ultimate risk exposure, but presumably the plaintiffs will use this opportunity to do some hard-hitting discovery to see if they can get some juicy facts.

Google Wins Publisher's Lawsuit over AdSense Termination--Bradley v. Google
December 30, 2006

By Eric Goldman

Bradley v. Google, Inc., 2006 WL 3798134 (N.D. Cal. Dec. 22, 2006)

In this case, Theresa Bradley was a website publisher who signed up for AdSense. She also has a JD (don't get me started on the unique problems posed by lawyers as plaintiffs) and is a habitual plaintiff, with 35+ lawsuits under her belt. Ever curious, she clicked on the AdSense-served ads displayed on her website to see who was advertising there. She investigated the ads often enough that Google kicked her out of the AdSense program. Although the opinion doesn't use the term "click fraud," that's what many people would call this behavior. The opinion implies that her AdSense account had $5 in it at the time of termination.

She fought back in court, bringing the equivalent of a wrongful termination lawsuit. She also claims that Google wiped out incriminating evidence from her Gmail account. The court rejected almost all of her claims with limited ability to amend; but her claim that Google destroyed her personal property by deleting emails survives even if she doesn't amend. It could be a significant development if email deletion qualifies as the destruction of personal property, but based on the early stage in this case, the court hasn't reached that conclusion yet (although it may be consistent with Ninth Circuit precedent).

Despite the fact that Bradley's suit wasn't thrown out entirely, the lesson is clear--AdSense publishers will not have legal recourse if they get kicked out of AdSense. Then again, every AdSense publisher knows not to click on their own ads...

Yahoo Click Fraud Settlement Preliminary Approval
July 25, 2006

By Eric Goldman

Checkmate Strategic Group, Inc. v. Yahoo, Inc., No. 2:05-CV-04588-CAS-FMO (C.D. Cal. preliminary settlement approved June 28, 2006)

Yahoo has gotten preliminary approval to settle its click fraud lawsuits. The basic deal is that Yahoo pays the lawyers $4.95M and gives 100% credits to advertisers for any click fraud they can find back through Jan. 2004. According to Yahoo's press release, the other settlement terms include:

* hiring a Dedicated Traffic Quality Advocate "dedicated entirely to addressing advertiser concerns about click fraud and traffic quality issues."
* an annual meeting at Yahoo's facilities with some advertisers to discuss click fraud
* an effort to coordinate an industry-wide response to click fraud
* some additional web disclosures and tools to help advertisers monitor traffic quality

This seems like a very good deal for Yahoo--even compared to Google's sweet deal to settle its lawsuits. Yahoo is paying 1/6 the out-of-pocket legal fees that Google will pay, and I'm pretty sure Yahoo hasn't made only 1/6 of Google's revenue. Admittedly, Yahoo hasn't capped its credit liability (which Google capped at $60M), but I don't think it's a big "give" to credit advertisers for actual click fraud whenever it's discovered (even years later). Yahoo should credit away click fraud as a matter of good advertiser relations and corporate ethics regardless of the settlement.

In any case, it remains to be seen what happens to the Google and Yahoo click fraud settlements given the rising advertiser furor over the settlements. The Google settlement hearings are continuing today, so we may know more very soon.

Google Click Fraud Report
July 21, 2006

By Eric Goldman

In preparation for the court's final approval of the settlement in the Lane's Gifts v. Google click fraud case, the parties hired an expert to assess Google's click fraud control mechanisms. The report is a good but dryly written primer on CPC advertising, click fraud and the operational challenges detecting and correcting for it. The money line: "I conclude that Google's efforts to combat click fraud are reasonable." A few observations:

The Report Reached the Only Conclusion It Could Reach

This report's finding is hardly surprising. Both the plaintiff's counsel and Google wanted/needed this report to bless Google's practices. The report's principal audience is the judge who is approving the settlement. If this report said that Google was doing a lousy job, then the report might derail the settlement. But plaintiff's counsel wants its $30M payoff, and Google wants to wipe the click fraud liability off its books for $90M (or less). Plus, if the report said that Google's practices were unreasonable, the advertiser response would be deafening. So this report *had* to come out in support of Google's practices--there really wasn't any other option. I want to be 100% clear--I'm not saying the expert was biased or that plaintiff's counsel or Google distorted the process. But I'm sure the expert was selected with this outcome in mind, and I would not ignore this document's role as a sales document.

The Expert's Engineer-Centric Bias

The expert makes a big point about how he thinks that only engineers should decide how to set the parameters for the click fraud detection algorithms, free from any influence of the finance or business departments (presumably, such as marketing).

Obviously, this is a very engineer-centric view of the world. From my perspective, I think this engineer-centric priority is misguided for three reasons. First, all of the employees are in the same boat. Engineers are not dumb; they know that their decisions can increase or decrease the value of their stock options. There's no reason why engineers are less susceptible to this financial pressure than anyone else in the company.

Second, insulating the decision from marketing or finance does reduce the influence of their biases, but engineers have their own biases. In a sense, insulating the parameter-setting decision substitutes engineer biases for company-wide biases. Only another engineer would think this is a good idea (or not even recognize these latent biases in the first place).

Finally, other company constituents may have expertise that isn't available to the engineering department. There may be revenue recognition implications from the parameter setting. Or, there may be legal implications of how the parameters are set. For example, a contract may promise an advertiser a certain level of protection, and if the engineers are unilaterally tinkering with the parameters, that contract may not be fulfilled. Or, the executives may have obligations under Sarbanes-Oxley to ensure the vitality of the algorithms, but if these decisions are being made without their influence, the executives can't fulfill their legal duties.

Indeed, one of my biggest frustrations as in-house counsel occurred when I realized that engineers were constantly taking legally significant actions with every coding decision they made. I realized the only way for me to properly perform my job was to clone myself, look over the shoulder of each and every engineer, and ask them with every keystroke--"what are you doing? what assumptions are you making? are those good assumptions? and how do those assumptions comport with commitments we have elsewhere?"

This expert seems to assume that engineers will make all of those decisions correctly so long as they remain free from influence from the rest of the company. I can assure him and you, based on first hand experience--they don't.

The Doubleclick Problem

The report criticizes Google for counting doubleclicks (two clicks on the same ad by the same person in a short period of time) but praises Google for filtering those out starting March 2005, even though that decision hit Google's bottom line hard. I'm glad Google fixed the problem then, but what about the pre-March 2005 doubleclicks? There's no way for advertisers to identify those clicks based on the reports from Google, so the chances of these clicks being fixed through the settlement process are low. As a result, in my opinion, Google should recheck its logs (to the extent it still has them) to identify impermissible doubleclicks and immediately and unilaterally offer credits to affected advertisers outside of the $90M settlement. I think doing anything less is unethically profiting on clicks that its own expert has declared to be invalid.

Yahoo "Syndication Fraud" Lawsuits—
Crafts by Veronica v. Yahoo and Draucker Development v. Yahoo
May 8, 2006

By Eric Goldman

Crafts by Veronica v. Yahoo, Inc., No. 2:06-cv-01985-JCL-MF (D. N.J. complaint filed May 1, 2006)
Draucker Development v. Yahoo, Inc., No. CV06-2737 (C.D. Cal. complaint filed May 4, 2006)

Two companion lawsuits against Yahoo for what the plaintiffs characterize as "syndication fraud." These complaints allege that Yahoo made false promises about where it would put advertisers' pay-per-click (PPC) ads. Specifically, Yahoo ran the plaintiffs' ads via adware and on typosquatting pages when advertisers believed that their ads would not appear in such formats (and presumably paid a premium to avoid such placement).

However, despite the serious-sounding use of the term "fraud," this is actually a fairly garden-variety breach of contract action, and a weak one at that.

The Complaint and Its Deficiencies

The complaint levels three principal charges against Yahoo: Yahoo promised that (1) advertisements would be "highly targeted," (2) Yahoo would run ads on "popular" and "high-quality" sites, and (3) the ads would appear along with "relevant articles [and] product reviews." Yahoo purported violated these promises by placing advertisers' ads in adware and on typosquatted pages.

Let's look more closely at these allegations.

Highly Targeted

The complaint repeatedly says that Yahoo promised that the ads would be highly targeted. But there's a big problem: Yahoo didn't say this, according to the plaintiffs' own evidence. The complaint points to the following language from one of Yahoo's marketing pages:

> You already know how Yahoo!'s flagship product Sponsored Search delivers **highly targeted customer leads** to your business by allowing you to control placement within sponsored search results across the Web.

Notice the bolded language—Yahoo says it delivers highly targeted *customer leads*, not highly targeted *ads*. If Yahoo promised highly targeted ads, arguably it was promising a certain type of placement--but it didn't promise this. Thus, the difference between targeted ads and targeted leads could be fatal to the complaint—the plaintiffs never allege that they got poorly targeted customer leads, so the plaintiffs' allegations don't make a prima facie case of a breach.

This raises an interesting question—plaintiffs clearly know what Yahoo said, so why do the plaintiffs repeatedly mischaracterize Yahoo's statement throughout the complaint? At best, this is sloppy work by the plaintiffs. At worst, the plaintiffs are blatantly and intentionally misleading the court. Either way, there's a certain irony when plaintiffs in a misrepresentation case misrepresent the facts to the court, isn't there? (Maybe Yahoo should bring an action against the plaintiffs for "complaint fraud"?).

My hypothesis is that the plaintiffs don't want to litigate over lead quality because doing so would destroy the class. To determine lead quality, the court would have to look at each individual plaintiff's situation to see what leads they got and how they converted, and thus there may not be enough commonality of interests to support a class action. To avoid this pitfall, perhaps the plaintiffs decided that the only way to keep a class action would be to misrepresent what Yahoo said. Other explanations could account for the misrepresentation, but I'm skeptical that it was mere sloppiness.

Let's put aside the plaintiffs' misdirection and assume that somewhere Yahoo has actually promised that the ads would be highly targeted. The words "highly targeted" are capable of multiple meanings. For example, the ads were targeted by keyword rather than by category or demographics, so arguably the ads were highly targeted regardless of where they were displayed.

However, the plaintiffs offer no basis to suggest why their interpretation is better than any other interpretation—they don't cite to any evidence of the term's meanings (such as private definitions created by the parties, or course of conduct, or industry convention). Instead, the plaintiffs only cite their subjective definition of the term. I'm not sure if this is enough to survive a motion to dismiss.

Popular and High-Quality Websites

Yahoo's marketing page also says:

> The Content Match distribution network consists of **popular, high-quality sites** such as Yahoo! and MSN.com, providing you with better leads that are more likely to convert to sales.

Below this statement, the page gives some more examples that the complaint cites, including sites like Microsoft, CNN and the Wall Street Journal. I'll stipulate that these sites should fulfill anyone's definition of popular and high-quality. However, intermixed with these examples, Yahoo gave more examples of what it meant by "popular" and "high-quality," including sites that I've never heard of, such as Away Network and Go2Net. By selectively cutting and pasting only the most prominent sites, the complaint tries to overstate Yahoo's promise. Instead, plaintiffs who read this page should have gotten the impression that Yahoo's network included a range of sites, some well-branded and others relatively obscure.

Articles and Product Reviews

Yahoo also says that:

> Content Match™ complements your Sponsored Search campaign by displaying your existing listings along with **relevant articles, product reviews and more**, thereby providing an additional source of targeted leads.

Yahoo uses this same language in other places, such as the very lengthy Yahoo! Search Marketing Advertiser Workbook (see the glossary on page 97—referenced as page 98 in the complaint and labeled as page 109 in the file).

Notice what Yahoo actually said: "and more." The complaint repeatedly omits those two words because it prefers to focus on the other words. But what do the words "and more" mean? They seem to contemplate that Yahoo would put ads in other contexts, and this negates the claim of a breach.

What Did the <u>Contract</u> Say?

The complaint works hard to pull in language from various marketing collateral, but interestingly it does not mention (not even once!) the centerpiece document in any breach of contract action: the contract that Yahoo and the advertisers actually entered into. I've not seen Yahoo's contract, but I'm assuming it has standard provisions such as a disclaimer of warranty and an entire agreement clause that may squash these extra-contract statements. Also, I wouldn't be a bit surprised if it specifically disclaims promises about where the ads would go or the likelihood of conversion. Either way, plaintiffs will have an uphill battle getting traction from language outside of the contract when the language in the actual contract may shut down these arguments pretty squarely.

Did the Plaintiffs Monitor Their Campaigns?

Let's assume that plaintiffs read Yahoo's marketing collateral and didn't read their contract. Did the plaintiffs monitor their campaigns? There was lots of opportunity for plaintiffs to realize what Yahoo was doing if they monitored their campaign, and their resulting choices would be very telling. When plaintiffs learned of the purported deception, did the plaintiffs terminate the campaign or complain to Yahoo? Or did they keep on buying new ads despite their new-found knowledge? Recall the irony when a click fraud plaintiff (Click Defense) claimed that Google engaged in click fraud while it kept on advertising via Google.

Two Other Observations

(1) The plaintiffs had a massive mound of material to mine for misstatements by Yahoo—Yahoo's website, securities filings, press releases, press quotes, etc. While not required, typically plaintiffs put the most egregious, most shocking misstatements by the defendant right into the complaint. Yet, given the universe of Yahoo's public statements, I think it's telling that the plaintiffs could marshal up language that, I think, is pretty feeble overall. To make the prima facie case, the plaintiffs pulled a few minor statements from some secondary marketing collateral and then heavily manipulate those statements (such as leaving out the "and more," omitting some of the obscure syndication partners that Yahoo expressly enumerated, repeatedly mischaracterizing the "highly targeted" reference) to try to establish some basis for arguing breach. If this is the worst language that Yahoo communicated, I think they did pretty well (a lot better than I could do when I was an in-house counsel at Epinions!).

(2) Under standard contract law, "puffery" isn't actionable. For example, if a car salesperson says "this is a wonderful car" in the sales process, the buyer can't sue later if the buyer thinks the

car wasn’t wonderful. The language cited by the plaintiff looks a lot like puffery, especially statements like “popular” or “high quality.”

Conclusion

Let’s be clear what this complaint *isn’t* about—it’s not about protecting consumers. Consumers may hate adware or typosquatting but this lawsuit doesn’t protect consumers from either. Instead, this is a dispute between Yahoo and advertisers over how much advertisers should pay for the advertising they got. And on that front, there’s little evidence that advertisers didn’t get exactly what they bargained for. They wanted advertising; they got advertising. There’s not even an assertion that the advertising performed poorly. I’m struggling to see a real problem here.

As a result, I think these lawsuits are nothing more than a money grab. Even unmeritorious class action lawsuits are expensive to defend, so the plaintiffs’ lawyers can exploit those defense costs for their personal largesse. They can make this argument to defendants: settle with me for a fraction of your total expected defense costs, and we’re both better off (defendants save some defense costs, plaintiffs’ lawyers grab some personal loot).

Lane's Gifts Click Fraud Lawsuit Near Settlement
March 8, 2006

By Eric Goldman

Google announced that it is near a settlement in the Lane's Gifts class action lawsuit over click fraud. The way I read the announcement, the parties have agreed to the terms, so the settlement just needs the judge's approval.

As for the substantive terms, Google will allow any advertiser to claim credit for click fraud, an expansion of its normal policy that such credit requests must be made in 60 days. Google then will give "makegoods" to advertisers who experienced click fraud. Google's total exposure (makegoods plus attorneys' fees) is $90M.

From my perspective, this sounds like an outstanding outcome for Google. Because this was a class action lawsuit, the settlement will bind all advertisers (except those advertisers who opt-out, which I doubt many will do). So with the settlement, Google effectively eliminates its entire legacy liability for click fraud for $90M, only a portion of which is out-of-pocket cash. Given that the click fraud has been estimated in the billions, a $90M settlement sounds like an excellent deal.

Unfortunately, the settlement doesn't appear to resolve the basic question of what constitutes click fraud and when search engines are on the hook for it. On that front, Google still will have an advertiser relations issue that needs further attention.

UPDATE: John Battelle says that the "settlement is a major victory for Google....I think the folks at Google are pleased as punch with the deal."

UPDATE: Google's FAQ on click fraud says, "Some invalid clicks do make it through our filters, but we believe the amount is very small." The post also deconstructs the report claiming that click fraud is 30% of clicks.

UPDATE: The AIT lawyers say they are going to continue pressing their litigation. We need to see the settlement terms before we can fully understand the interaction between the two suits. I know it's obvious, but I should also point out that the judge might not approve the settlement, so the case isn't done until it's done.

UPDATE: The Arkansas judge approved the settlement in the Lane's Gifts and Collectibles v. Google case. For reasons I've explained before, this is a Big Win for Google (and, not a bad payday for plaintiffs' counsel, either). However, according to the ruling, 556 advertisers opted out of the class, which is not a trivial number of remaining plaintiffs. It will be interesting to see if any of these advertisers bring their own standalone suits. If so, Google still could be facing a lot of chicken-scratch litigation. Despite this, overall, I have to imagine that the champagne corks are popping this morning at the Googleplex.

Lane's Gift Click Fraud Complaint
July 15, 2005

By Eric Goldman

Lane's Gifts and Collectibles LLC v. Yahoo! Inc., Case No. CV-2005-52-1 (Ark. Cir. Ct. complaint filed Feb. 17, 2005).

This particular version of the complaint alleges three causes of action:

* breach of contract
* unjust enrichment (and various related theories)
* civil conspiracy

I have no idea what the "civil conspiracy" cause of action means. This is an odd cause of action; maybe there's something very specific in Arkansas law. It reads almost like an antitrust claim: "This is an industry wide conspiracy in which all search engines have worked together to develop and/or create a market which allows for over billing and/or overcharging of businesses and/or entities which purchase online PPC advertising." (Para. 47)

An antitrust angle to the click fraud lawsuits would be an interesting development and would potentially raise the stakes significantly for Google and Yahoo. On that front, I had a telephone conversation today with Click Defense's counsel and he used a lot of rhetoric that implied monopolistic practices. I asked him point blank if Click Defense was planning to amend its complaint to add an antitrust complaint and I got a non-committal response, but it seems like a logical move.

As I mentioned in my analysis of the Click Defense complaint, the unjust enrichment claim will likely stand or fall with the other causes of action.

That leaves the breach of contract action. This particular complaint is thinner in describing the basis of the breach of contract than the Click Defense complaint. As I mentioned there, a plaintiff is not required to show all of its cards in the complaint, although this one might be too thin. I could see a judge requiring clearer allegations of exactly how the defendants breached a contract than the very high level allegation made here: "Defendants either expressly and/or implicitly, contractually agreed to provide Internet PPC advertising and/or services to Plaintiffs and only charge for the actual click through advertising from actual customers. Defendants breached that contract by collecting revenues for services which were not provided." (Para. 44)

Click Fraud Lawsuit--Click Defense v. Google
July 4, 2005

By Eric Goldman

Click Defense Inc. v. Google, Inc., No. 5:05-cv-02579-RMW (N.D. Cal. complaint filed June 24, 2005). This is the second major lawsuit again Google for click fraud, following on the Lane's Gift case filed a few months ago. I have yet to see the Lane's Gift complaint, but fortunately, we can evaluate this complaint.

What is Click Fraud? (and some possible solutions)

Defining click fraud has always been tough. The Click Defense complaint defines click fraud as "when someone clicks on a search advertisement with an ill intent and with no intention of doing business with the advertiser….purposeful clicks on advertisements for some kind of improper purpose." (Para. 21). The complaint gives the two typical examples—competitors clicking to burn up an ad spend (Para. 21(a)), and webmasters clicking to boost AdSense earnings (Para. 21(b)).

While I can't quibble with this definition, it creates problems from a litigation standpoint. How, exactly, is Google supposed to divine clicker intent/purpose? Google knows a little about each click—the ad clicked on, which site delivered the ad, the IP address of the clicker, time of the click—but with respect to any individual click, this information is insufficient to determine intent.

Thus, the plaintiffs expect Google to infer intent through clicker repetition. This isn't wholly unprecedented; Google uses repetition (among other considerations) to screen out robotic behavior. However, clicker repetition isn't a good proxy for intent, as evidenced by the statistics on interrupted searches and returns to abandoned shopping carts.

Thus, a "click-series" analysis cannot accurately reveal clicker intent. It will never catch the bad-intent clicker who engages in low volume clicking, and any threshold has to be set high enough not to catch the shopper who uses interrupted search strategies. As a result, Google simply cannot eliminate click fraud when fraud is based on the clicker's intent. Accordingly, the plaintiffs' definition creates a legal conundrum—assuming that Google has no practical way to detect every instance of click fraud, when does the volume of click fraud (as defined by the complaint) reach the point that it warrants legal consequences? Without rigorous boundaries around this magic moment, many judges will be reluctant to fashion legal relief.

Having said this, Google could do more with the data it has. First, Google could not charge for any highly-repetitive clicking (robotic or otherwise). Maybe Google is already doing this, but I can't recall a public statement by Google to this effect. I understand that Google may not want to publicize specific thresholds to maintain security, but at the moment my inference is that it counts highly repetitive clicking in some cases. Google can do better than that.

Second, Google could give advertisers a credit across-the-board based on Google's system-wide estimates of click fraud. For example, if Google thinks that click fraud cannot be determined on a click-by-click basis, but click fraud comprises 10% of clicks across the network, Google could reduce every advertiser's monthly bill [billed clicks x advertiser's average bidded CPC for the month] by 10%.

I don't think this would immediately lop off 10% of Google's revenues; I would expect many advertisers would keep spending the same by increasing CPCs, bidding on new keywords, etc. Nevertheless, I would not expect Google to acknowledge the click fraud problem so openly unless the problem was truly out of control or advertisers banded together to force Google to act.

On that front, I remain surprised that advertisers have not attempted to coordinate their actions to date. In my world, the people with the money dictate terms to those who want that money, and a group of large Google advertisers should be able to produce results.

In any case, these musings about possible solutions do not directly affect the lawsuit. However, they highlight the definitional problems and the uncomfortable line-drawing exercises that a judge will have to consider. On this basis alone, a judge may think that this problem is better resolved by negotiation between the parties than through judicial intervention.

The Causes of Action

The complaint alleges four causes of action:

· breach of contract
· negligence
· unjust enrichment
· violation of California's Business & Professions Code Sec. 17200

I think the last two causes of action are "fluffy." They are alleged in virtually every case involving some type of allegedly unfair business practices but they rarely affect the outcome. Usually, fluffy claims stand or fall with other, more substantive claims. If the plaintiffs lose the breach of contract and negligence claims, I think the other two claims will fail as well.

The Negligence Claim

Negligence is a tort claim. Every tort requires, as a precondition, that the defendant (Google) owes a legal "duty" to the plaintiffs. Although there are exceptions, parties in a contract generally don't have tort duties to each other solely due to the contract.

The complaint does not explain why Google owes a duty to its AdWord customers. A cryptic complaint is not unusual; complaints do not need to spell out the underlying legal theories.

The complaint alludes to some duties (Paras. 31-33) that Google should track click fraud, warn advertisers about click fraud, and notify advertisers after click fraud occurs. However, these duties do not currently exist (i.e., there's no precedent imposing these duties on Google), so a court would have to create them from scratch.

Making new law in this context may give many judges pause because there's a contract between the parties, so the parties had a chance to spell out their duties to each other (rather than relying on default/unstated duties). As a result, it's possible that a judge will say that Google only has contractual obligations to the plaintiffs and no tort duties, in which case the negligence claim will fail.

The Breach of Contract Claim

From my perspective, the contract breach claim is the substantive heart of the complaint. Historically, my position has been that there is no “fraud” in click fraud cases because the plaintiffs get what they pay for. Advertisers buy clicks, Google delivers clicks—in my book, end of the story. If advertisers want to change the definition of clicks, they can negotiate with Google for a different definition.

The plaintiffs address this by alleging that Google won’t negotiate its contract (Para. 39). This is probably true in Click Defense’s case but not true across all advertisers. I am sure Google will negotiate special deals for top advertisers, so the “take it or leave it” offering simply reflects that Click Defense is a Long Tail advertiser. Plus, a party’s unwillingness to negotiate is rarely important in business-to-business contract cases.

Based on the contract the parties entered into, the complaint claims that Google charges for clicks that weren’t appropriately chargeable under the contract’s terms. The contract says that advertisers pay based on “actual clicks.” The complaint alleges (Paras. 36 and 42) that “actual clicks” do not include fraudulent clicks.

This raises a pure contract interpretation question: what do the words “actual click” mean? Although the word “click” has a pretty well-accepted meaning, I think the phrase “actual clicks” is susceptible of multiple meanings. If I were drafting this provision, I would define “clicks” to reflect how my client’s system technically records them. I would also say that “clicks” exclude any clicks that my client, in its sole discretion, considers to be fraudulent based on the client’s fraud detection systems.

Google’s contract doesn’t provide any clarification of “clicks” or “actual clicks.” Without such a definition, the plaintiffs can try to define it favorably to them. Because Google already reduces its raw number of clicks to reflect robot activity, the judge could decide that “actual clicks” includes other reductions as well. Personally, I think it’s a stretch to convert “actual” to mean “non-fraudulent” (especially using an intent-driven definition) but that’s for the court to decide.

In addition to the breach of contract based on “actual clicks,” the complaint alleges that Google breached an implied covenant of good faith and fair dealing. Although all contracts contain this implied covenant, judges often interpret this covenant narrowly. However, some judges would consider self-dealing (as alleged in Para. 34) to violate such an implied covenant. As with the interpretation of the words “actual click,” it is difficult to predict in advance what a judge will do with this allegation.

Summary

To recap: I think that the plaintiff will get zero traction with its unjust enrichment and 17200 claims, and I think the negligence claim will probably fail because Google does not owe a tort duty to the plaintiffs. I personally think the contract claim should fail as well, but much depends on the way the judge interprets the words "actual click" and the scope of the implied covenant, so neither of these interpretations are easily predictable in advance.

What's Not Alleged

Despite the fact that the plaintiffs tried to bolster their legal attack through 2 fluffy claims (unjust enrichment and 17200) and one weak claim (negligence), I found it noteworthy what the plaintiff might have claimed but didn't.

Notably, the plaintiffs did not allege that Google committed fraud in inducing advertisers into its contract, nor did the plaintiffs allege that Google made a misrepresentation in its marketing or breach any warranty that might have arisen in the marketing or sales process. Any fraud/misrepresentation/warranty would have come from statements outside of the contract, such as Google's marketing materials, press releases, publicity statements or securities filings. The complaint does reference some of these extra-contract statements (e.g., Paras. 27-29) but does not use these statements to support additional causes of actions. (Note that the contract disclaims many of these extra-contract statements in Sec. 4, but plaintiffs can overcome these disclaimers in some situations).

Although the complaint references statements in Google's securities filings, the complaint also does not allege that Google committed any securities law violations. While this complaint would not be an appropriate place to do so (the identity of plaintiffs would not overlap between the two actions), most plaintiffs' attorneys would happily sink their teeth into a rich defendant for every possible claim it can. Perhaps a securities fraud lawsuit is coming from these attorneys, but I doubt it.

I don't want to overinterpret the absence of these causes of action, but typically plaintiffs' attorneys allege everything they can. So my inference is that either the plaintiffs didn't research these topics (which would reflect either sloppiness or a hope for a get-rich-quick settlement), or they did research the topics and found nothing legally useful. Either way, the fact that the plaintiffs base their principal claim (the contract breach) on a contract that is highly Google-favorable does hint at the legal weakness of the plaintiffs' action.

Conclusion

I vacillate between two competing perceptions about click fraud lawsuits. Sometimes I think that Google deserves some legal heat for its blasé attitude towards click fraud. Other times, I think click fraud plaintiffs are merely media grandstanders and get-rich-quick schemers. Unquestionably Google can do more to address click fraud, but advertisers—especially Click Defense (given its specialty in click fraud topics)—know about click fraud and yet voluntarily decide to enter into a contract with Google and voluntarily choose the keywords and pick the CPCs they think are profitable knowing that click fraud exists.

I think Click Defense's complaint is legally weak but not frivolous. Perhaps with sufficient legal sophistry, Click Defense can find a way to convince a judge to give it legal redress. Nevertheless, I remain convinced that click fraud should and will be solved through business dealings rather than in a court of law.

UPDATE: I've noticed that Click Defense continues to advertise on Google, occupying a top spot for the keyword "click fraud." It's really, really hard for plaintiffs to convince a judge of the merits of their case when the plaintiffs keep placing new orders with the defendants under the same terms. I think Click Defense's advertising tips the balance in this case towards publicity stunt instead of serious lawsuit.

Search Engine "Impression Spam"

February 24, 2005

By Eric Goldman

Click fraud has been well-discussed among SEMs/SEOs, but Rob McGann runs a good article in ClickZ calling attention to “impression spam.” This occurs because Google considers click-through rate in its sorting algorithm for paid ads. If an ad gets a low click-through rate, Google degrades placement. Thus, someone trying to game the system can generate lots of “fake” impressions, increasing the number of impressions without an increase in click-throughs, and drive down the ranking of that ad. The gamer could then take advantage of this by getting top positioning by paying a lower CPC. Google has taken some heat for its approach to click fraud; ultimately, it will need to build more game-proof systems if it wants to keep advertisers happy.