Pop-up message : battle won, war not over

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On 5 September 2003, the US Federal District Court of Eastern Virginia released an opinion according to which pop-up messages were a burden for internet users, but not illegal[1]. With this 19-page opinion, the rights of pop-up admakers such as the Gator Corporation[2] and WhenU[3] seem to be recognised... at least for the moment. Considering the European regulatory framework for commercial communications, the use of software for marketing or profiling purposes is subject to the legal requirements imposed by various European Directives.

The Gator and WhenU cases

In the last two years, the so-called online behavioural marketing practises of Gator and WhenU have been challenged several times. Even though both companies do not use identical technology, in return for free software both Gator and WhenU install adware sotfware on the user's terminal equipment[4]. This software enables both companies to collect information on the user's online behaviour and send them personalised ads. In the end, both companies claim that these directed ads generate more effective click-through rates and that they serve the consumer's interest. If, e.g., somebody wants to make an online reservation for a flight from London to New York with British Airways, a pop-up window will appear on his computer screen proposing a cheaper flight offered by a direct competitor.

From the foregoing it is evident that the use of adware software triggers some legal questions.

In the first place, companies affected by this price comparative practise, can claim that such conduct is an unfair business practise and infringes intellectual property rights on their websites. In this regard, Gator setteld its dispute with the Interactive Advertising Bureau[5] in November 2001. In another case, Federal Judge Claude Hilton ordered Gator in his preliminary injunction of 12 July 2002 to stop delivering 'unrequested' pop-up messages to a group of publishers. Nevertheless, both parties reached a confidential settlement in February 2003. In the more recent U-Haul International v WhenU case, Federal Judge G.B. Lee of the U.S. District Court in Alexandria, Virginia, stated in his opinion of 5 September 2003 that the unsolicited pop-up messages did not violate U-Haul's trademarks or copyrighted materials such as its website. According to Lee, the pop-up windows did not violate U-Haul's trademark or copyright, because they appear as separate windows. Furthermore, Lee emphasised that by accepting the WhenU software terms and conditions, the user had given his consent to receive comparative ads. For this reason there was no detour in the user's search.

In the second place, the use of adware software, that may be qualified as spyware, raises some privacy concerns. Although Gator and WhenU claim they adhere to high privacy protecting standards and do not compromise one's privacy[6], its use is subject to some legal constraints. Considering the definition of personal data, as contained in the European Directive 95/46/EC, traffic data, IP addresses, etc. are considered as information relating to an identified or identifiable natural person[7]. For this reason, those data are covered by European data protection legislation.

Although claims in relation to intellectual property rights and unfair business practices, may have a different outcome in Europe, considering the more stringent regulatory framework in the field of comparative advertising, the focus here will be on the European legal framework in relation to the protection of the user's privacy in online networks.

Legality of online behavioural marketing

To assess the legality of online behavioural marketing in Europe, particular attention must be paid to Directive 2002/58/EC on privacy and electronic communications[8]. In the first place, this Directive sets forth some constraints for the use of cookies and spyware. In relation hereto, it must be underscored that the collection and processing of one's online behaviour is subject to the general principles of Directive 95/46/EC concerning the protection of personal data[9]. In the second place, one must also consider whether the, by article 13.1, imposed opt-in regime is applicable to pop-up messages.

The legal constraints on the use of spyware

As Gator announces on its homepage, it is the leader in online behavioural marketing and its free software allows GAIN pop-up adds10 being displayed based upon the interests of the computer user as reflected by their web surfing behavior11.

Such a statement seems to indicate that Gator's adware also contains some technology that allows it to monitor and make a digital profile of the user concerned, e.g., by making an analysis of the visited URL, traffic data, browser settings, IP address, etc.

In this regard, reference must be made to article 5.3 of Directive 2002/58/EC concerning the

confidentiality of electronic communications.

This article states that "Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller.

Although this article does not refer explicitly to spyware or hidden identifies, e.g., stored on a cookie, it relates to any information stored in the user's terminal equipment which is considered as part of the private sphere of the user and therefore requires adequate protection.

Nevertheless, such an explicit reference is contained in recital recital 24 and 25 of Directive 2002/58/EC. It is stated that "so-called spyware, web bugs, hidden identifiers and other similar devices can enter the user's terminal without their knowledge in order to gain access to information, to store hidden information or to trace the activities of the user and may seriously intrude upon the privacy of these users. The use of such devices should be allowed only for legitimate purposes[12], with the knowledge of the users concerned.

However, such devices, for instance cookies, can be a legitimate and useful tool, for example, in analysing the effectiveness of website design and advertising, and in verifying the identity of users engaged in on-line transactions. Where such devices, are intended for a legitimate purpose, their use should be allowed on condition that users are provided with clear and precise information in accordance with Directive 95/46/EC about the purposes to ensure that users are made aware of information being placed on the terminal equipment they are using. Users should have the opportunity to refuse to have a cookie or similar device stored on their terminal equipment."

...electronic mails should be considered any message that is stored in a network or in the recipient's terminal equipment and is collected by the recipient

For these reasons, spyware such as WhenU's SaveNow software[13], may only be used provided that a user has received clear and comprehensive information and is offered the right to refuse such processing activity. The methods for giving information, for offering a right to refuse, e.g., browser settings, or for requesting consent[14] should be made as user-friendly as possible.

Are pop-up messages subject to the opt-in regime?

Although G.B. Lee ruled that pop-up windows did not infringe any intellectual property right or could not be considered as an unfair business practise, he recognised that pop-up windows or other forms of commercial communications can be annoying and intrusive. Nevertheless, he concluded that "computer users must endure pop-up advertising along with her ugly brother unsolicited bulk e-mail, spam, as burden of using the internet."

The connection with article 13 of Directive 2002/58/EC on unsolicited communications can be made.

Article 13.1 states that the use of automated calling systems without human intervention, i.e., automatic calling machines, facsimile machines or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

Even though article 13.2 foresees in an exception, commercial communications[15] may only be sent to the addressee provided that he has agreed to its reception (OPT-IN).

In relation hereto two questions can be raised.

In the first place, can pop-up windows be considered as electronic mail in the meaning of article 13.1 of Directive 2002/58/EC?

In the second place, if pop-up messages are considered as electronic mail, under what circumstances will the requirement of prior consent be met? Although Directive 2002/58/EC does not contain any specific definition of "consent", its article 2 explicit reference is made to the definitions given by Directive 95/46/EC. By virtue of article 2(h) of the later Directive, the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed. This seems to indicate that when a user is downloading the adware or other software, he must be given information on the installation of spyware and the legitimate purposes. Moreover and as indicated before, the clear and precise information must be given in accordance with Directive 95/46/EC. In particular, article 10 of this Directive imposes an obligation to the controller[16] to give the computer user, i.e., a data subject, amongst others information on its identity, the purposes of the data collecting and processing, the persons to who the data will be disclosed and the existence of the right of access to and the right to rectify the data concerning him.

Nevertheless, the more important first question remains open. In relation to this question, one can

make reference to the answer given by the European Commission to the European parliamentary question E-3392/02 concerning unsolicited advertising[17].

According to the European Commission, the definition of electronic mail "only covers messages that can be stored in terminal equipment until they are collected by the addressee. Messages that depend on the addressee being on-line and that disappear when this is not the case, are not covered by the definition of electronic mail". Therefore, pop-up windows are not considered as electronic mail and the prior consent of the subscriber to receive such messages is not required.

Such an interpretation merits consideration for several reasons.

In the first place, it must be underlined that pop-up windows do not necessarily disappear when terminal equipment is no longer connected to a network.

In the second place, one has to keep in mind the technology neutral character of the new regulatory framework for electronic communications[18]. In this regard, one should focus on the effect that such messages have, i.e., to what extent can receivers be annoyed or is there an intrusion of their privacy. In relation hereto, reference can be made to recital 40 of Directive 2002/58/EC. Following this recital, it could be defended that any form of unsolicited commercial communications that is relatively easy and cheap to send and impose a burden or cost on the recipient should be subject to the opt-in regime.

In the third place, article 2(h) of Directive 2002/58/EC states that electronic mail is any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

In other words, as electronic mails should be considered any message that is i) stored in a network or in the recipient's terminal equipment and ii) is collected by the recipient.

As to the first requirement, a pop-up window is not only stored in the network, e.g., on the http server of the pop-up window sender, but is also stored in the terminal equipment of the recipient. In absence of any reference in this regard, all storages on the terminal equipment must be considered, even when only for a few milliseconds. Before a pop-up window can be displayed on one's computer screen, it needs to be stored on the RAM memory of the video card, i.e., a part of the recipient's terminal equipment.

As to the second requirement, one could argue that the recipient, collects a pop-up message merely by connecting his terminal equipment with the server concerned. Indeed, one will have difficulty argiubg that a hotmail address is not considered as an electronic mail address. However, unlike the more traditional inboxes, using the POP, IMAP or SMTP protocol, a hotmail "inbox" must be considered as a private HTTP web page. From a technical point of view, there is not much difference between the functioning of a pop-window and the display of one's "inbox" on www.hotmail.com. One of the only differences is that access to the latter page is subject to giving the corresponding personal login and password, often stored on a cookie or similar device.

Some final remarks

Although is seems that WhenU has won this battle, the war is not over.

In the first place, WhenU is still facing lawsuits from other companies such as Wells Fargo, 1-800-Contacts and Overstock.com.

In the second place, although WhenU commended Lee's decision as a victory for consumer choice, and although consumers have some interest in comparative advertising, the question is what (privacy) price do they want to pay for it.

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1. www.vaed.uscourts.gov
2. www.gator.com
3. www.whenu.com
4. As defined by article 2 (b) of Directive 98/05/EC
5. www.lab.net
6. www.whenu.com/privacy.html
7. Article 2 (a) of Directive 95/46/EC on the processing of personal data. Concerning the notion of identifiable persons see recital 26 of the same Directive.
8. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002.
9. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
10. GAIN stands for Gator Advertising and Information Network.
11. On the WhenU website similar information is given.
12. In this regard reference can be made to chapter II of Directive 95/46/EC concerning the general rules on the lawfulness of the processing of personal data.
13. www.whenu.com/products.html
14. For a definition of consent see article 2(h) of Directive 95/46/EC, infra.
15. A defention of commercial communication is given in article 2(f) of Directive 2000/31/EC on electronic commerce.
16. As defined by article 2 (d) of Directive 95/46/EC.
17. Written question E-3392/02 by Astrid Thors (ELDR) to the Commission (28 November 2002) Subject: Unsolicited advertising in Windows, protection of personal data in telecommunications networks. Answer given by Mr Liikanen on behalf of the Commission, 27 January 2003. www.europarl.eu.int/questions/default_en.html
18. Cf., Recital 18 of Directive 2002/21/EC (Framework Directive)