

IS IT REASONABLE TO BLOCK UNREASONABLE ADVERTISEMENTS? AN EXAMINATION OF THE LEGALITY OF AD-BLOCKERS[♦]

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INTRODUCTION

An ad-blocker is software that gives users the choice to determine the content displayed on their computer screens when they load a website.¹ Using an ad-blocker is potentially unlawful under several legal theories, including copyright infringement, the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA), and tortious interference to a contractual relationship. This Note will address these potential mechanisms by which using or producing an ad-blocker might be considered unlawful. It will then explore potential ways that the law can evolve to better reflect the rise of ad-blockers.

When using an ad-blocker, users can create their own list or use a pre-made list of unwanted website elements, which are then prevented from displaying while web-surfing.² This software is presented as a browser plug-in, a type of computer program that is incorporated into a web-browser, in contrast to stand-alone software.³ The ad-blocking functionality can be disabled at any time, or users can customize their

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¹ *About Adblock Plus*, ADBLOCK PLUS, <https://adblockplus.org/en/about> (last visited Sept. 24, 2018).

² *Id.*

³ *Plug-in Basics*, MOZILLA FOUND., https://developer.mozilla.org/en-US/docs/Plugins/Guide/Plug-in_Basics (last visited Sept. 24, 2018).

experience as they go.⁴ Ad-blockers do not block all undesired advertisements because ad-blockers cannot detect the content of any given element of a website. While there are several types of ad-blockers, this Note focuses on “Adblock Plus.” These ad-blockers stop all content that derives from specified places, which are chosen by the filter list supplied. By default, Adblock Plus is equipped with “EasyList.” This is an extensive list of website elements that instructs the ad-block software on what to load or block. Users often use the default list, but they are free to add to it, delete from it, or use an entirely different list. This means that some advertisements may still be loaded, and that users can block certain website elements that are not advertisements.⁵

Ad-blockers exist because there is a market for them: people want to regain some control over the advertisements that bombard them on the Internet.⁶ An ever-increasing number of people use ad-blockers to control their Internet browsing experience because advertisements can be obtrusive, malicious, and burdensome. There are many types of online advertisements that annoy users in a variety of ways.⁷ One of the most hated types of ads are “pop-up” ads. These appear “above” the desired content (meaning they block the things underneath them) and may force the user to close them to continue. These advertisements are literally in the way of what you are trying to do. Some advertisements appear as if they were part of the real content of a website. For example, near the “download” button on a website, there might appear an advertisement which is similarly shaped and also features the word “download.”⁸ These advertisements trick users into doing things they do not intend to do, which creates potential security risks. Some advertisements begin playing a video with sound as soon as the page is loaded. This can have the consequence of playing unanticipated sounds or slowing down your computer by both taking up Internet bandwidth to load the video and using your computer’s processing power. Many advertisements also implicate privacy issues by tracking people who access them.⁹ In the absence of regulations, these types of issues and many others plague Internet users. Faced with these unreasonable advertisements, consumers have turned to ad-blockers in ever increasing

⁴ *Adblock Plus Features*, ADBLOCK PLUS, <https://adblockplus.org/en/features#adblocking> (last visited Sept. 24, 2018).

⁵ *About Adblock Plus*, *supra* note 1.

⁶ Matthew Cortland, *2017 Adblock Report*, PAGEFAIR (Feb. 1, 2017), <https://pagefair.com/blog/2017/adblockreport/>.

⁷ Therese Fessenden, *The Most Hated Online Advertising Techniques*, NIELSEN NORMAN GROUP (June 4, 2017), <https://www.nngroup.com/articles/most-hated-advertising-techniques/>.

⁸ *Id.*

⁹ *Online Tracking*, FED. TRADE COMMISSION (June 2016), <https://www.consumer.ftc.gov/articles/0042-online-tracking>.

numbers.

Ad-blocking technology has recently exploded in popularity. Globally, usage has increased by thirty percent in 2016, and ad-blockers can now be found on 615 million devices.¹⁰ This has had a significant impact on the advertising industry. In 2015, ad-blockers cost the advertising industry twenty-two billion dollars.¹¹ Content creators have responded to this trend in various ways. One such method is to create access controls that do not allow ad-blocker users to access a website at all or at least prompts users to disable ad-blockers, even if not requiring them to do so.¹² There are advantages and disadvantages to this tactic. The first advantage, discussed more in depth in section II *infra*, is that the DCMA¹³ specifically prohibits people from circumventing such access controls.¹⁴ This gives website owners strong legal footing to combat users who circumvent these measures and those giving users the means to do that. However, there are economic repercussions for using this strategy. Websites that deny access to ad-blocker users can suffer significant drops in viewership.¹⁵ According to one study, seventy-four percent of users leave a website when they come across one of these ad-block walls.¹⁶ Moreover, websites that abandon this tactic seem to recover previous levels of website traffic.¹⁷

Another method used by the industry is to make users pay directly to access full content (a “pay-wall”).¹⁸ There are several forms of pay-walls. Some require payment to see any content, a ‘hard’ pay-wall, but many are more flexible. A “metered” pay-wall allows users to view a little bit of content for free before requiring payment.¹⁹ The “freemium” model gives unlimited access for free, but an upgraded experience is available for those who pay.²⁰ This often means removing

¹⁰ Cortland, *supra* note 6.

¹¹ Elizabeth Dwoskin, *Ad-Blocking Software Will Cost the Ad Industry \$22 Billion This Year*, WALL STREET J. (Aug. 10, 2015, 6:28 PM), <https://blogs.wsj.com/digits/2015/08/10/ad-blocking-software-will-cost-the-ad-industry-22-billion-this-year/>.

¹² *About BlockAdblock*, BLOCK ADBLOCK, <http://blockadblock.com/adblocking/about-blockadblock/> (last visited Sept. 24, 2017).

¹³ 17 U.S.C.A. § 1201 (West 1999).

¹⁴ *Circumventing Copyright Controls*, DIGITAL MEDIA L. PROJECT (July 23, 2018), <http://www.dmlp.org/legal-guide/circumventing-copyright-controls>.

¹⁵ Martin Anderson, *Sites That Block Adblockers Seem to Be Suffering*, STACK (Apr. 21, 2016, 4:37 PM), <https://thestack.com/world/2016/04/21/sites-that-block-adblockers-seem-to-be-suffering/>.

¹⁶ Cortland, *supra* note 6.

¹⁷ Anderson, *supra* note 15.

¹⁸ *Paywalls Are on The Rise with Many Success Stories*, MEDIUM (Nov. 22, 2016), <https://medium.com/@getdrizzle/paywalls-are-on-the-rise-with-many-success-stories-3a7101f55bea>.

¹⁹ *Id.*

²⁰ *It's No Longer All About Ads – Here's How Publishers, Streaming Sites, and Apps are Using Subscriptions to Boost Revenues*, BUS. INSIDER (Oct. 15, 2015), <http://www.businessinsider.com/subscriptions-as-alternative-to-ads-for-digital-content-and-apps->

advertisements for paying subscribers. It can also mean offering more functionality, better customer support, or more content to subscribers. Different models of pay-walls have had different amounts of success.²¹

Another option website owners have is to use only reasonable advertisements. This is the only option website owners have that addresses the actual problem of obtrusive and malicious advertisements; the other solutions mentioned are merely solutions to the tangential question of how these websites can continue to make money despite the market's demonstrated desire to be free of their advertisements. However, most people are not against all advertisements and only use an ad-blocker because they are inundated with unreasonable advertisements. According to a study, seventy-seven percent of Americans think that some types of Internet advertisements are acceptable.²² Another study shows that 70.9% of people "agree" or "somewhat agree" with allowing certain types of advertisements.²³

This points to the fact that the real problem is not advertisements in general, but certain types of advertisements. Ad-Block Plus, one of the largest ad-blockers, has been operating under the Acceptable Ads Initiative since 2011.²⁴ This is a program whose goal is to sort advertisements into two categories: acceptable and intrusive.²⁵ This initiative studies advertisements and people's feelings towards those advertisements. By learning what types of ads are seen as intrusive and which ads people are happy to view, they create guidelines for acceptable advertisements.

On Ad-Block Plus, acceptable advertisements are allowed by default, although the user can turn this feature off.²⁶ As this software currently functions, it is possible to block even acceptable ads. The company behind Ad-Block Plus transferred control of this program to an independent, non-profit entity to ensure that the research would be

2015-4/.

²¹ Tom Felle, *Are Paywalls Saving Journalism?*, CONVERSATION (Feb. 22, 2016, 5:15 AM), <http://theconversation.com/are-paywalls-saving-journalism-53585>; Rob Tornoe, *Digital Publishing: For Some Publishers, Paywalls Are Gaining Traction*, EDITOR & PUBLISHER (Jan. 20, 2016), <http://www.editorandpublisher.com/columns/digital-publishing-for-some-publishers-paywalls-are-gaining-traction/>; Mathew Ingram, *Here's What the New York Times' 1 Million Subscriber Number Means*, FORTUNE (Aug. 6, 2015), <http://fortune.com/2015/08/06/new-york-times-paywall/>; Mike Masnick, *Lots of Newspapers Discovering That Paywalls Don't Work*, TECHDIRT (Aug. 15, 2016, 4:13 PM), <https://www.techdirt.com/articles/20160815/09353135247/lots-newspapers-discovering-that-paywalls-dont-work.shtml>.

²² Cortland, *supra* note 6.

²³ Wladimir Palant, *Adblock Plus User Survey Results [Part 3]*, ADBLOCK PLUS (Dec. 9, 2011, 3:41 PM), <https://adblockplus.org/blog/adblock-plus-user-survey-results-part-3>.

²⁴ *Allowing Acceptable Ads in Adblock Plus*, ADBLOCK PLUS, <https://adblockplus.org/acceptable-ads> (last visited July 23, 2018).

²⁵ *Id.*

²⁶ *Id.*

conducted by an unbiased group without conflicts of interest.²⁷ Transferring control of this program to an independent agency was crucial because much of Ad-Block Plus's revenue is generated as a function of the Acceptable Ads Initiative.²⁸ To be included on the list of acceptable ads, the advertisement must conform to the Initiative's guidelines. However, large advertisers must also pay to be included on the list of permissible ads.²⁹ For example, a large advertiser that only serves reasonable ads and pays AdBlock Plus will be included on the list of acceptable advertisements. The conflict of interest arises because AdBlock Plus is paid by companies that would like to see the definition of "acceptable" advertisements become as expansive as possible. To make sure that acceptable ads are truly advertisements that research demonstrates people will find reasonable—and to avoid influence from the paying advertisers—the entity determining what ads are reasonable was separated from the ad-blocker itself.

More recently, Google announced that their new ad-blocker would function similarly to AdBlock.³⁰ Google is working with the Coalition for Better Ads, which has extensively studied which types of advertisements users find annoying, on both mobile and desktop devices, to ensure that they fully understand which advertisements people deem undesirable or acceptable.³¹ Both of these programs demonstrate that the ad-blocking industry is moving away from its foundational period, in which all advertisements were blocked, and towards a model where reasonable advertisements are not blocked.

This trend substantially supports an important policy argument regarding ad-blockers; there is a legitimate public interest in blocking *obtrusive*—but not reasonable—Internet advertisements. In the absence of federal regulation, this can only come from private entities. This is demonstrated by indicators, such as the number of people using ad-blockers, the percentage of users who say some advertisements are acceptable, and the consensus of the major players in the advertising industry. In the unregulated Internet advertising industry, advertisers have been free to do whatever they want to, which has been met with resistance from the public.³² Resorting to private ad-blockers has

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Timothy B. Lee, *Google Is the Internet's Largest Ad Company. So Why Is It Building an Ad Blocker?*, VOX (June 5, 2017, 9:50 AM), <https://www.vox.com/new-money/2017/6/5/15729688/google-chrome-ad-blocking>.

³¹ *Improving the Consumer Online Ad Experience*, COALITION FOR BETTER ADS, <https://www.betterads.org/research/> (last visited July 23, 2018).

³² Lauren Nettles, *New Data on Why People Hate Ads: Too Many, Too Intrusive, Too Creepy*, VIEO DESIGN (Sept. 6, 2018), <https://www.vieodesign.com/blog/new-data-why-people-hate-ads>; Mimi An, *Why People Block Ads*, HUBSPOT RES. (July 13, 2016, 8:00 AM), <https://research.hubspot.com/why-people-block-ads-and-what-it-means-for-marketers-and->

become a necessity to enjoy the Internet without being inundated with disruptive advertisements. This “public interest argument” will be relevant to several of the substantive legal questions analyzed in this Note and will also form the basis for suggested regulations.

Ad-blockers have not been legally challenged in the United States yet. Advertisers have resorted to the various non-legal solutions mentioned above so far, but a legal challenge seems likely considering the vast amount of money being lost, the fact that several legal theories could plausibly lead to liability, and the potential liability of deep-pocket defendants. This Note will first analyze three major paths to liability for the use of ad-blockers, including copyright infringement, the DCMA, and tortious interference with a contractual relationship. Then, this Note will discuss the possible solutions to the problem of intrusive Internet advertisements and recommend a solution that would best solve the problem. Whatever the result of a future lawsuit may be, regulatory measures are highly desirable. Other advertisement mediums—such as television, e-mail, and radio—have regulations to prevent obtrusive advertisements from annoying consumers, but those regulations did not happen overnight.³³ As the Internet advertising industry matures, the need for regulations is becoming more readily apparent, to the point that private companies are attempting to do it themselves. The regulatory scheme that this Note proposes will essentially require ad-blockers to only block unreasonable advertisements, while not blocking reasonable ones, something that some of the largest ad-blockers have already elected to do.

I. COPYRIGHT INFRINGEMENT

One legal theory under which blocking advertisements could be considered unlawful is that of copyright infringement. Three separate issues are implicated by this cause of action. First, to find liability, an ad-blocker’s function must amount to copyright infringement.³⁴ Second, any defenses to copyright infringement must be overcome.³⁵ Lastly, as a practical matter, individual ad-blocker users cannot be sued; liability would need to be extended to the companies which produce ad-blocking software so that contributory infringement can be found.³⁶

advertisers; Fessenden, *supra* note 7.

³³ Gerald Hanks, *TV Advertising Rules*, CHRON, <http://smallbusiness.chron.com/tv-advertising-rules-64245.html> (last visited Sept. 24, 2017).

³⁴ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (2017) [hereinafter 4 NIMMER ON COPYRIGHT].

³⁵ *Id.* at § 13.05.

³⁶ 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 (2017) [hereinafter 3 NIMMER ON COPYRIGHT].

A. *Infringement*

Whether copyright infringement is present or not encompasses many smaller questions. What the “work” at issue even is must be determined in order to analyze the issues that comprise copyright infringement. Whether the work is entitled to copyright protection is also fundamental. This requires a look at whether the work was original and copyrightable. The work must also be fixed in a tangible medium of expression.

As a threshold matter, it must be determined what the “work” exactly is. An entire website can be protected “as a compilation or a collective work if there is a sufficient amount of creative expression in the selection, coordination, or arrangement of the content” of the website.³⁷ Additionally, any content found on the website can be individually protected as it could be in any other context. For example, a movie or picture found on a website can be protected by copyright law regardless of its appearance on the website.

Ordinarily, accessing an openly available website is permitted by copyright law due to a license, whether explicit or implicit. An implied license exists where a website is publicly available, indexed by search engines like Google, and appears to openly invite users to access the website.³⁸ However, many websites draft explicit licenses that control the scope of the license given to the public. If a website’s license makes itself contingent on users following certain rules, then users may be copying the website in an unlicensed way if they violate those rules.³⁹ If a website were to include in its license a condition that renders it void if the user has an ad-blocker, then using an ad-blocker would do just that. It follows that if a website does not explicitly condition its license on the non-usage of an ad-blocker, then the license should cover ad-blocking users as well. One important consideration here is the difference between a condition on the license and a covenant in a contract. If the contract containing the copyright license contains a provision requiring that the user not use an ad-blocker, that does not necessarily affect the license. In such a case, breach of contract may exist, but the act of copying is still licensed and would not constitute copyright infringement. The license must be explicitly conditioned on the user refraining from using an ad-blocker; it is not enough if the contract merely grants a license, while extracting a covenant from the user not to use an ad-blocker. If the license does explicitly condition itself on this, it is possible the user would be unlicensed. Thus, the user

³⁷ *Circular 40: Copyright Registration of Websites and Website Content*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ66.pdf> (last updated Sept. 2017); *see also* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 312.1 (3d ed. 2017).

³⁸ *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

³⁹ *Jacobsen v. Katzer*, 609 F. Supp. 2d 925 (N.D. Cal. 2009).

would not automatically be considered a non-infringer.

One further consideration regarding licenses is that many of the largest advertisement companies pay the makers of Adblock Plus to whitelist their ads.⁴⁰ All advertisements on Adblock Plus's acceptable ads list must meet the requirements set out by the Acceptable Ads Initiative.⁴¹ The largest advertisers, like Google, Microsoft, and Amazon, must also pay to have their ads included on this list. While the exact details of such a deal will inevitably vary, there is potentially a license conveyed to the ad-blocker that renders its operation lawful. This only affects some ad-blockers and some advertisers, but this means a license that authorizes the ad-blockers' operation in such a scenario may exist.

The first element that a plaintiff would have to prove in a copyright action is that the website at issue is an original work that she owns.⁴² This itself has many constituent requirements. The most relevant two are that the work must be original and copyrightable. This inquiry will essentially define the scope of the rest of the copyright infringement analysis; so, it is crucial to delineate what exactly is at issue here. Anything that is not original to the plaintiff will not support a copyright infringement claim. This includes things that are not even minimally creative and things that do not originate with the plaintiff, such as facts, or works that owe their origin to others, such as works that have passed into the public domain or protected works that the plaintiff has a license to reproduce. Thus, anything that is not copyrightable cannot be the basis for an infringement action. "Common examples of uncopyrightable material particular to websites include ideas or plans for future websites; functional design elements; domain names or URLs; the layout, format, or 'look and feel' of a web page; or other common, unoriginal material such as names, icons, or familiar symbols."⁴³ The exact extent of copyrightability is, of course, going to depend on the specific website at issue. Some websites undoubtedly are not protectable by copyright law at all. Others might essentially be nothing but a movie, which is protectable as website content. This would not be affected by ad-blockers, except to the extent that using an ad-blocker may affect a user's license to use the website. Some other websites may not have any protectable content, but may be protectable as a compilation in consideration of the originality behind their selection, coordination, and arrangement. It is therefore possible that

⁴⁰ Lara O'Reilly, *Google, Microsoft, and Amazon Are Paying Adblock Plus*, BUS. INSIDER (Feb. 3, 2015), <https://www.businessinsider.com/google-microsoft-amazon-taboola-pay-adblock-plus-to-stop-blocking-their-ads-2015-2>.

⁴¹ *Allowing Acceptable Ads in Adblock Plus*, *supra* note 24.

⁴² 4 NIMMER ON COPYRIGHT, *supra* note 34, at § 13.01.

⁴³ *Circular 40: Copyright Registration of Websites and Website Content 2*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ66.pdf> (last updated Sept. 2017).

some websites could not even be protected by copyright law in the first place, which means nothing an ad-blocker can do would amount to copyright infringement. Fortunately, none of the serious points of contention hinge on the exact nature of what is protected. The inquiry into whether the potentially infringing work is fixed, original, and whether contributory liability is applicable, are mostly consistent regardless of this issue. However, the defense of fair use, discussed *infra*, does hinge on the specific website at issue. The potentially infringing work must also be copied from the plaintiff and amount to substantial similarity or be a derivative work. These elements would likely be met in most cases. There is no real argument that copying in fact is absent and the works are likely substantially similar.

The defendant's work must also be original to constitute infringement. One recitation of this requirement is found in the unequivocal statement by the Seventh Circuit that "'originality' is essential to a derivative work."⁴⁴ Additionally, the U.S. Copyright Office states that "[t]he amount of creativity required for a derivative work is the same as that required for a copyright in any other work."⁴⁵ The webpage a user sees as modified by an ad-blocker does not seem to meet the requirements of originality. One of the elements of originality is that the work be at least minimally creative. However, there is no creativity in what an ad-blocker does. What an ad-blocker creates does not amount to a creative, original work of authorship. When a website is initially arranged, there are countless decisions to be made. This applies equally to both functional elements (e.g., where a search bar is placed) and aesthetic elements (e.g., what color font is used). Deciding how to arrange a website requires creativity to sift through these countless possibilities. It is a testament to this creativity that only some websites are considered well-designed. In contrast, removing an advertisement is entirely different. Letting a webpage load as it was originally designed, but with a blank box instead of an advertisement in one area is not a creative alteration. The program automatically functions, which means there is no human element to this decision. The program merely prevents certain aspects of the website from loading but does not alter the arrangement of the page in an original or creative way.

Since the works created by ad-blocking softwares are not creative, original works, they do not infringe on any copyrights. While this may preclude the possibility of infringement by itself, there are several additional reasons why copyright infringement is not present in an ad-blocking context.

The next such reason to consider is whether ad-blockers create a

⁴⁴ Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997).

⁴⁵ U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 311.2 (3d ed. 2017).

work that is fixed. Fixation is a generally applicable requirement that applies to all types of copyrighted works. And while it is a prerequisite for protection in the first place, the defendant's work must also be fixed for infringement to be possible. The copyright owner has the exclusive right to "reproduce the copyrighted work in copies"46 Additionally, a copy is defined in the Copyright Act as "[a] material object . . . in which a work is fixed"47 Together, these two definitions amount to a requirement that a copy must be fixed in order to infringe the reproduction right. Another recitation of this requirement is that, "the reproduction right is not infringed, even if the defendant embodies the plaintiff's work in a material object, unless such embodiment is of more than transitory duration . . . it must be of some permanence."⁴⁸ Likewise, regarding the derivative work right, "[i]f a derivative work is not fixed . . . it cannot infringe"49

There are several cases which will form the basis of the analysis of whether what an ad-blocker creates is fixed. *Sony v. Universal City Studios* held,⁵⁰ in a somewhat analogous case, that recording a television program with the intent to skip commercials amounted to copyright infringement.⁵¹ In that case, content was viewed by a consumer without the advertisements that originally accompanied it, which is similar to what an ad-blocker does. That case involved the use of a video cassette to record television.⁵² Once the program was saved to the cassette, it could be viewed at a later time. This means that the potentially infringing technology was capable of completely copying the original work and displaying that work in an altered form at a later time, independent of anything the plaintiff had control over.⁵³ The case was decided on other grounds, namely contributory infringement, but can be read to stand for the proposition that stripping advertisements out of a copyrighted work amounts to an infringing use.⁵⁴

*Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*⁵⁵ involved a device that allowed users to alter video games.⁵⁶ Consumers would purchase a Nintendo game system and a video game created by Nintendo. They would then purchase a Game Genie, which was sold by

⁴⁶ 17 U.S.C.A. § 106(1) (West 2002).

⁴⁷ 17 U.S.C.A. § 101 (West 2010).

⁴⁸ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02 [B][2] (2017) [hereinafter 2 NIMMER ON COPYRIGHT].

⁴⁹ *Id.* at § 8.09 [A][2].

⁵⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir.1992).

⁵⁶ *Id.*

the defendant.⁵⁷ This device allowed users to change the way the video game worked; for instance, you could increase the movement speed or amount of lives your character had.⁵⁸ The Game Genie was not capable of reproducing a video game on its own, and it did not save or otherwise copy the video game's source code. It functioned by placing itself in between the source code and the hardware which displayed the game to the user. It would take the source code, change it slightly, and then allow the system to display the audiovisual work created by this changed code. However, this altered code was not saved in any way. It was changed on a temporary basis. If the source code were removed from the equation, the Game Genie would lose all functionality. It read the source code as it existed elsewhere and changed it slightly. The temporary manner of the change, and the fact that the device could not independently reproduce the video game, were critical to the court's holding. Because of the temporary nature of the alteration, this potentially derivative work is not sufficiently permanent. Therefore, there was no infringement.⁵⁹

In contrast, *Midway Manufacturing v. Artic* represents a very similar and yet easily distinguishable case.⁶⁰ There, a third party altered a video game to very similar ends as in *Nintendo*, such as speeding up the game. The critical difference is that in this case, a computer chip was actually permanently installed in the video game system.⁶¹ It did not position itself in between the source code and the outputted display; it became part of the source code itself, thereby altering the source code and not merely altering the way the unchanged source code is displayed. Therefore, the Court held that there was a copyright infringement, as there was no issue regarding permanence.

By analyzing these cases, it is arguable that an ad-blocker does not create a derivative work. One of the fundamental requirements of an infringing work is that it must be fixed in a tangible medium of expression.⁶² If the allegedly infringing work is not fixed in such a medium, it cannot be the basis for an infringement claim.

However, some courts have applied something known as the RAM fixation doctrine, which states that any time something is loaded into a computer's RAM, it is fixed for the purposes of copyright law.⁶³ This doctrine has been roundly rejected by scholars, with "much commentary on the subject . . . criticiz[ing] the holding of *MAI v. Peak*."⁶⁴ A House

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983).

⁶¹ *Id.*

⁶² 2 NIMMER ON COPYRIGHT, *supra* note 48, at § 8.09[A][2].

⁶³ Aaron K. Perzanowski, *Fixing RAM Copies*, 104.3 NW. U.L. REV. 1067 (2010).

⁶⁴ MELVILLE B. NIMMER & DAVID NIMMER, 11 NIMMER ON COPYRIGHT APPENDIX 62

Report stated that “the definition of ‘fixation’ would exclude from the concept purely evanescent or transient reproductions such as those . . . captured momentarily in the ‘memory’ of a computer.”⁶⁵ This doctrine appears to be contrary to the very definition of “fixation”. RAM by its nature is not permanent in any way. One fundamental “attribute of RAM is that it is volatile. That is, when power to the chips, or system, is lost or turned off[,] the contents of RAM memory are lost.”⁶⁶ Additionally, in the ordinary course of using the computer, things saved to RAM are constantly overwritten. RAM is short term storage that is quickly filled. Thus, sites that were saved to RAM while browsing are forgotten soon after leaving that website. While many commentators argue that the RAM copy doctrine should be abandoned, courts generally still apply it.⁶⁷ This means that technically, every time a website is loaded, with or without an ad-blocker, a fixed work is created. If this doctrine is applied in an ad-blocker case, then what the ad-blocker produces would be a fixed work. The altered version of a website that an ad-blocker produces is certainly saved in the computer’s RAM. If being saved in RAM alone is sufficient, as it is under this doctrine, then such a work would be fixed.

If this doctrine is not applied, though, no fixation occurs in a scenario involving the typical operations of an ad-blocker. In *Sony*, the potentially derivative work was permanent and concretely saved. It was a permanent alteration of the original work. Even though users could choose whether or not to skip the commercials each time they watched their recording, a version of the original work, which was capable of skipping advertisements, was fixed permanently. In *Midway*, we see a similar situation. The protected work was altered and then permanently saved. Since the derivative version of the protected work was permanent, the court found liability. In *Nintendo*, no derivative work was created because nothing the Game Genie did rendered the potentially derivative work permanent or concrete. The underlying source code was concretely saved, but none of the changes made to that work were. They existed on an instance-by-instance basis in a purely temporary manner. If one were to disable the Game Genie’s functionality, the altered work could not be re-accessed. Ad-blockers are more like *Nintendo* than either of the other two cases. An ad-blocker acts in a purely temporary manner. A user can disable it and return to a website in its original form. It does not save the protected work in an

[III][C][2][a] (2017).

⁶⁵ H.R. Rep. No. 94-1476, at 53 (1976).

⁶⁶ *Introduction to Computers*, U. HARTFORD, <http://uhaweb.hartford.edu/midaigle/CS110F02/F02FinalExamSG.htm> (last visited Jan. 20, 2019).

⁶⁷ Perzanowski, *supra* note 63.

altered manner, which means it is unable to reproduce the website on its own. It also does not alter the work itself in any way. The source code comes to the user's computer in a completely unaltered form. The ad-blocking software, exactly like the Game Genie, simply alters how that source code is displayed to the user.

Telling a computer how to display a website's unaltered source code in a temporary manner cannot be sufficient to create a fixed work, and many examples demonstrate this. Imagine that a user mutes his or her computer's speakers and accesses a website that has sound elements, perhaps even an advertisement that is comprised solely of audio. Software that controls the sound output is now inserting itself between the website's code and what is displayed to the user. The underlying protected work has not been altered, even though what is displayed to the user has been. The sound-blocking software has not saved the altered code and is not capable of reproducing the website on its own—it is temporary. Thus, if the website is accessed again after changing this setting, the change will be reverted. However, entire elements of the website are blocked from being displayed to the user. A piece of software has told your computer not to display certain aspects of the website, which is exactly what ad-blockers do.

Alternatively, consider the following example. A user takes the source code for a website and removes aspects of the code related to the sounds the website makes. The altered source code is then saved and made directly accessible. The end result would be the website displayed with no sound, just like with the original website displayed through a muted computer. However, this would amount to a fixed work. The change is permanent and capable of reproducing the protected work. While the outcome is identical, the method of arriving at the outcome is different. This is exactly the difference between *Nintendo* and *Midway*. The result is almost the same—i.e., sped-up video game characters. But the technical difference between how those changes are effectuated has material legal ramifications. One saves the work in a concrete and permanent form, while the other does not. This is similar to the difference between printing a copyrighted book with some words removed and reading the original book aloud with the same words removed or covering those words with opaque tape. While the work may impart the same sensory experience on somebody, the method affects whether a fixed work has been made.

The Ninth Circuit further explained its ruling in *Nintendo* several years later in *Micro Star v. Formgen Inc.*⁶⁸ In that case, the derivative work was permanently saved. In distinguishing the two cases, the court further explained its holding from *Nintendo*, stating that, “when the

⁶⁸ *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998).

game was over, they were gone. Of course, they could be reconstructed, but only if the next player chose to reenter the same codes.”⁶⁹ In a footnote, the court then went on to explain an instructive analogy which represents the issue:

A low-tech example might aid understanding. Imagine a product called the Pink Screener, which consists of a big piece of pink cellophane stretched over a frame. When put in front of a television, it makes everything on the screen look pinker. Someone who manages to record the programs with this pink cast (maybe by filming the screen) would have created an infringing derivative work. But the audiovisual display observed by a person watching television through the Pink Screener is not a derivative work because it does not incorporate the modified image in any permanent or concrete form. The Game Genie might be described as a fancy Pink Screener for video games, changing a value of the game as perceived by the current player, but never incorporating the new audiovisual display into a permanent or concrete form.⁷⁰

This example illustrates exactly why an ad-blocker does not create a fixed work—the unchanged source code is altered before reaching the senses of the user in a way that is completely temporary and does not affect the underlying source code. It also informs on an important point, preventing a potential counterargument that could arise from the earlier quoted language regarding “cho[osing] to reenter the same code.”⁷¹ A possible counterargument is that there could be a difference between affirmatively taking steps each time the machine is turned on to achieve the alteration and taking those steps a single time. Thereafter, the machine automatically continues applying that alteration until it is further instructed to stop. The example of the pink screener makes it clear that the relevant inquiry does not hinge on how permanent the intermediary layer is, but whether the resulting alterations are themselves put down in a permanent manner. One can set the pink screener up on a frame in front of a television and leave it there forever, which would not require any further input from the user. An issue only arises when that altered audiovisual work is then incorporated into a new fixed form. Of course, this is possible using ad-blocker software, just as it is possible with the pink screener. Somebody could take the ad-free webpage and save it in that new form, which saves the output of the ad-blocker in a permanent and concrete form. However, the act of displaying the work ad-free is not itself an issue.

In considering applicable case law and the basic statutory

⁶⁹ *Id.* at 1111.

⁷⁰ *Id.* at 1114 n.4.

⁷¹ *Id.* at 1111.

requirements of copyright law, ad-blockers do not create derivative works. Ad-blockers are incapable of fixing what displays in a permanent manner under the traditional understanding of fixation. If a court uses the RAM fixation doctrine, then fixation will be met by the operation of ad-blockers. Additionally, the potentially infringing work is not original. Lastly, licenses cover many situations that potentially involve infringement. Only an unlicensed reproduction can potentially create liability.

B. *Defenses*

As has been demonstrated, it is likely that accessing a website using an ad-blocker does not amount to the creation of a fixed and substantially similar or derivative work. This, then, would be the end of the infringement inquiry, and no liability would be found. However, if an unauthorized work were found to have been created, liability would not necessarily follow. *Arguendo*, it will be assumed that an unauthorized work was created. Two defenses to copyright infringement would then be potentially applicable. The first is fair use.⁷²

Fair use is potentially a defense in this scenario, but it is not guaranteed to succeed. As a threshold matter, this type of use is not contained in the enumerated list of examples provided by 17 U.S.C. § 107.⁷³ However, this list is not exhaustive. While works falling within one of these categories are often found to constitute fair use, works that are not in an enumerated category can also be considered fair use. Factors that cut against a finding of fair use here are primarily § 107 (1) and (3). Subsection (1) looks mostly to whether the copied work is commercial in nature. If the copied work is commercial, many courts consider there to be a presumption of unfair use.⁷⁴ Those courts that do not find a presumption against fair use still find commercial use as a factor that cuts significantly against a finding of fair use. Ad-blockers are free, so there is an argument that their use is not commercial. However, the ad-blocking companies do make money through their software, so even this indirect revenue would probably mean their use is commercial. “One court considered even an unsponsored television broadcast as a ‘commercial’ use, given that a television station may gain at least [an] indirect commercial benefit”⁷⁵ Since even indirect benefits can be sufficient to constitute commercial use, it is likely that this use would be considered commercial. Subsection (3) looks to the “amount and substantiality of the portion used in relation to the

⁷² 4 NIMMER ON COPYRIGHT, *supra* note 34, at § 13.05.

⁷³ 17 U.S.C.A. § 107 (West 2018).

⁷⁴ 4 NIMMER ON COPYRIGHT, *supra* note 34, at § 13.05.

⁷⁵ *Id.*

copyrighted work as a whole.”⁷⁶ Almost all of the original protected work is part of the derivative work, so this factor weighs against fair use.

Subsection (4), the effect upon Plaintiff’s market, has been described as balancing “the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”⁷⁷ When analyzing this factor, “the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain.”⁷⁸ This implicates the public interest argument discussed *supra*. There is a strong argument that such works fall squarely within the public’s interest. The courts, when making determinations concerning this issue, employ a balancing test to determine whether the public interest outweighs the Plaintiff’s effect on the plaintiff’s market. “The less adverse effect that an alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit need be shown to justify the use.”⁷⁹ Here, the adverse effect that the alleged infringing use would have on the copyright owner’s expectation of gain and the benefit the public would derive if the infringing use were permitted are vastly contingent on the specific features of the website and the advertisements precisely at issue. If the website’s sole source of revenue is its advertisements, then the adverse effect is great, whereas if the website has only a single advertisement and has a different primary source of revenue, the adverse effect is potentially very small. Moreover, if the website houses highly obtrusive advertisements, the public’s interest has the potential to be exceedingly high; however, if the website features reasonable advertisements, the benefit the public would derive is possibly very small. Accordingly, from this, it is evident that, in this case, there is no one answer that prevails. Importantly, because “this [factor] emerges as the most important, and indeed, central fair use factor,” this balance may be a key consideration when determining the success or failure of a fair use defense on a case-by-case basis.⁸⁰ However, it is also important to note that some ad-blockers attempt to only block advertisements that are in fact unreasonable. Specifically, where an ad-blocker is successful in only blocking unreasonable advertisements, in such instances of copying, fair use may well be considered an appropriate defense. Therefore, this defense similarly emerges as an area in which a uniform answer remains unattainable, and thus, may also require determinations to be made on a case-by-case basis.

⁷⁶ *Id.*

⁷⁷ *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

⁷⁸ *Id.* at 182.

⁷⁹ *Id.* at 183.

⁸⁰ 4 NIMMER ON COPYRIGHT, *supra* note 34, at § 13.05.

Additionally, when considering a claim for fair use, courts will ask whether a potentially infringing work is transformative. While this element is not explicitly found within the Copyright Act,⁸¹ courts have used the transformative nature of an infringing article as a means of framing and analyzing the four factors enumerated in the fair use doctrine.⁸² While transformativeness is not necessarily dispositive of fair use, it does heavily influence the balancing of the four enumerated factors. Specifically, as the Supreme Court notes, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁸³ If a work amounts to being transformative, it will likely also be a fair use. A work fails to be transformative when “the new work merely ‘supersede[s] the objects of the original creation . . .’”⁸⁴ To be transformative, a work must “instead add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . .”⁸⁵

A court is ultimately unlikely to find the works ad-blockers create transformative. Transformative works arise when they do not merely use the underlying work to create something appealing, but instead add meaning to the original or fulfill a completely different function. For example, hosting tiny thumbnail images as part of a search engine that are copies of another’s photograph is a transformative (and, ultimately, fair) use because it fulfills a separate function than the original.⁸⁶ The original pictures were intended for things like providing entertainment and aesthetic value. The re-hosted thumbnail images were intended to facilitate searching. It is unlikely that a thumbnail will serve as a replacement experience for the full image. If somebody wants to see an image of something, they will likely be unsatisfied with the thumbnail and instead continue to the original image. The thumbnail facilitates searching but does not fulfill the function that the original did. This factored into the rest of the fair use elements, and the thumbnails were ultimately found to be allowed. However, the functions that the ad-blocker altered website and the original website provide are very similar. Whatever the reason for visiting a specific website, the reason will likely be the same whether or not a user has an ad-blocker running. Ad-blockers do serve as a replacement experience. If a user wanted to visit a certain website, they are likely to be satisfied with the ad-blocker altered version of the website, and not continue on to view the original.

⁸¹ 17 U.S.C.A. § 107 (West 2018).

⁸² See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁸³ *Id.* at 579.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146 (9th Cir. 2006).

As such, it seems unlikely that an ad-blocker will create transformative works. While this does not necessarily foreclose the possibility that the use is fair, it does make a successful fair use defense less likely.

Another potentially viable defense is that of estoppel. “A holding out sufficient to raise an estoppel may be accomplished by silence and inaction, particularly if prolonged.”⁸⁷ Since ad-blockers have been around for many years, and copyright holders have not made any attempts to hold them accountable in the United States, it may be the case that the copyright holder would be estopped from bringing a claim of copyright infringement. This defense would, like with fair use, depend on a case-by-case analysis, as the mental states of the particular parties would need to be assessed.⁸⁸ This defense is ultimately not likely to succeed. In one noteworthy case,⁸⁹ the defendant unsuccessfully brought an estoppel defense even though it had sold eighteen million infringing figures at fifty thousand stores over the course of thirteen years.⁹⁰ This defense seems not to be favored by courts, so the defendants in an ad-blocking case would not want to rely heavily on it.

The last defense, that the potentially infringing copy was licensed, has been discussed to some extent *supra*. In short, many websites offer explicit or implicit licenses that allow users to lawfully copy them. If a copy is licensed, it is non-infringing. However, if a specific website conditions the license it gives on the user not using an ad-blocker, then the copy may be unlicensed. Additionally, any advertiser that has contracted with a given ad-blocker may have effectively granted them a license. An advertisement provider could theoretically condition the contract it forms with a given website on the website granting a license to the ad-block producer that the advertiser is itself contracting with. Ultimately, if infringement is found, the defense of fair use, and perhaps the existence of a license, will emerge as an important battleground, as it seems likely that these defenses will apply in some cases but not in others.

C. Contributory Infringement

The last copyright issue presented is that of contributory infringement. While not legally required in any way, it is important as a practical matter. Each person who uses an ad-blocker would only have damaged the website owner in a very minimal way. Individual views of an advertisement generate very little income. Advertisements create revenue because many thousands of people collectively view the advertisement. However, statutory damages are available in copyright

⁸⁷ 4 NIMMER ON COPYRIGHT, *supra* note 34, at § 13.07[A].

⁸⁸ *Id.*

⁸⁹ *Lego A/S v. Best-Lock Const. Toys*, 874 F. Supp. 2d 75 (D. Conn. 2012).

⁹⁰ *Id.*

infringement actions, so while each user causes only negligible damages, she could still potentially be liable for the statutory damages contained in the Copyright Act.⁹¹ While statutory damages allow for the possibility of individually suing users, bringing suit against the millions of ad-blocker users would still be less economically viable than bringing a single action against the company that produced the ad-blocker in question.

Contributory infringement is more likely to be found against ad-blockers. Contributory infringement is proper when one party assists or materially contributes to the infringing conduct of another.⁹² By providing the software that creates the infringing work, and by advertising their product's function, the ad-blocker's creator is contributorily infringing a website. By way of contrast, contributory infringement was not found in *Sony*.⁹³ There, the Betamax players at issue could create derivative works, but were marketed to be used only to time-shift a television show.⁹⁴ Since there were alternative uses that were not infringing, contributory infringement was not found in the producer of the good. Here, however, ad-blockers are marketed towards blocking advertisements, as even their very name suggests. Because of this, contributory infringement is likely to be found.

II. CIRCUMVENTION OF ACCESS CONTROLS

Another potential cause of action for website owners would be under the DMCA's access controls provision found within 17 U.S.C. § 1201.⁹⁵ Part (1) of this statute makes it unlawful to "circumvent a technological measure that effectively controls access to a work protected [by copyright law]".⁹⁶ Circumventing a technological measure simply means to, in any way, bypass, avoid, or impair a technological measure.⁹⁷ A measure effectively controls access when, "in the ordinary course of its operation, [it] requires the application of information, or a process or a treatment . . . to gain access to the work."⁹⁸

The major issue with applying the DMCA to ad-blockers generally is that applying this statute is highly dependent on the facts of any given case. Because of this, no general answer is available. Many websites do not have access control measures in place, and many ad-blockers do not even attempt to circumvent access controls. Whether there is liability will turn on the specific measures employed by the website and the

⁹¹ 17 U.S.C.A. 504(c) (West 2010).

⁹² 3 NIMMER ON COPYRIGHT, *supra* note 36, at § 12.04[A][3].

⁹³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

⁹⁴ *Id.*

⁹⁵ 17 U.S.C.A. § 1201 (West 1999).

⁹⁶ *Id.* at § 1201(a)(2)(B)

⁹⁷ *Id.* at § 1201(a)(3)(A).

⁹⁸ *Id.* at § 1201(a)(3)(B).

ability of the ad-blocker to circumvent those measures. It is clear that if the website does not employ any access control measures, this provision cannot be violated. Likewise, if the ad-blocker does not circumvent those access controls, then there cannot be liability. Liability would only be found if the website in question had an effective access control in place, and the ad-blocker in question actually bypassed said control. For example, some websites are built to detect when an accessing user is running an ad-blocker. These websites do not allow users to access the website until they disable their ad-blocker. If the user's ad-blocker can detect this feature of the website and circumvent it, then a violation would occur. In this example, the protected work is the website as a compilation work. The software used by the website that blocks ad-blocker users from accessing the website would be the effective access control, and the ad-blocker's functionality that disables that control would be the tool that bypasses the effective access control. However, many websites do not have such controls, and many ad-blockers do not employ such measures.

If there is an effective access control and it is circumvented, then liability would likely extend directly to the ad-blocker's producer. Section 1201(b)(2) specifically makes it unlawful to manufacture and offer to the public anything that (i) is primarily designed to, (ii) has only limited commercially significant purpose other than to, or (iii) is marketed to circumvent a technological measure that effectively controls access to a work.⁹⁹ Because of this, the company producing the ad-blocker would be liable and the issues regarding contributory negligence discussed above are not relevant.

III. TORTIOUS INTERFERENCE

The final possible claim for website owners would be one of tortious interference with an economic relationship. This type of claim is a tort that one party to a contract may bring against a third-party who interferes with said contract.¹⁰⁰ This tort is a state-law claim and is not identical in every state. However, tortious interference has substantially the same elements in most states, so a generalized approach will be taken.¹⁰¹ As discussed *infra*, though, courts have materially different interpretations of some of these elements, which could affect the outcome of an ad-blocker case. The required elements are (1) a contract; (2) knowledge of the contract by the defendant; (3) intent by the defendant to interfere with the contract; (4) actual interference; (5) the interference is improper; (6) causation; and (7) damages suffered by the

⁹⁹ *Id.* at § 1201(b)(2).

¹⁰⁰ 2 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 9 (4th ed. 2018).

¹⁰¹ *Id.* at § 9:1.

plaintiff.¹⁰²

As a threshold matter, there must be a third-party defendant who is not a party to the contract at issue.¹⁰³ The parties to the initial contract would be the advertisement provider and the website displaying the advertisement. The third-party interfering with that contract would be the company which produced the ad-blocker or the ad-blocker user. The issue of attributing liability to the producer of the ad-blocker arises here as it does in the other causes of action. There must be, as a practical matter, a mechanism to find liability for the ad-blocker's producer for a claim to be likely to succeed. As discussed previously, it would be inefficient and likely impracticable to sue every ad-blocker user individually. Whereas the other causes of action with this problem were easily surmountable, it may prove to be an issue here.¹⁰⁴

[A] defendant is not liable, even though someone improperly interfered in the plaintiff's affairs on the defendant's behalf, if the defendant did not ask that person to do so. It is not sufficient that the defendant knowingly accepted the proceeds of a tortious interference, without taking an active role in procuring the breach of the contract or relationship. And it is not sufficient that the defendant did nothing to ensure that the plaintiff's contract would not be breached.¹⁰⁵

The issue presented is that presumably, the ad-blocker's creator does not actually direct the user to interfere with a contractual relationship. One court held that because the defendant did not take "any action to persuade or urge" the one interfering, summary judgement for the defendant was proper.¹⁰⁶ While the ad-blocker's producer enables the user to interfere (if interference is found in the first place, which is not certain, as will be discussed *infra*), the producer does not persuade or urge the user to do so. The producer takes no actions to prevent it, even though she knows it will happen. This has been characterized as acceptable by courts.¹⁰⁷ As such, it seems that liability cannot be attributed to the ad-blocker's producer.

If this is the case, then no liability can be found regarding tortious interference on the part of the ad-blocker's producer. Pursuing a tortious interference claim would therefore require suing individual users, a prohibitively inefficient strategy. While it seems unlikely that liability can be attributed to the ad-blocker's producer, it is possible that a court could rule otherwise. For purposes of analysis, therefore, the following

¹⁰² *Id.* at § 9.

¹⁰³ *Id.* at § 9:5.

¹⁰⁴ *Id.* at § 9:9.

¹⁰⁵ *Id.*

¹⁰⁶ *Fine v. Commc'n Trends, Inc.*, 699 S.E.2d 623, 633 (Ga. App. 2010).

¹⁰⁷ *Gundach v. Int'l Bus. Machines Inc.*, 594 Fed. Appx. 8 (2d Cir. 2014) (unpublished).

will assume that the ad-blocker's producer can be held responsible for the actions of individual users. Under this assumption, that this doctrine does *not* bar liability, there is still the question of whether a tortious interference claim would fail or succeed. The following analysis will assume *arguendo* that the ad-blocker's producer is the defendant, and that liability could be attributed to them.

The first element of tortious interference with a contractual relationship is the presence of a contract. Whether the website and advertiser in fact have a contract would technically depend on a case-by-case analysis. However, it is reasonable to assume an actual contract exists. Internet advertising providers are typically sophisticated large companies, which contract with the websites with which they advertise.

The second element is knowledge by the defendant of the contract interfered with, or at least sufficient facts which, if followed by reasonable inquiry, would have revealed such a contract.¹⁰⁸ For the reasons previously mentioned as to why it is reasonable to assume a contract exists, it only makes sense that the ad-blocking company would, after reasonable inquiry, know of such a contract. A contractual relationship is the ordinary way by which advertisements end up on most websites. It is certainly possible that in some instances, websites host advertisements they themselves created, which required no contracts to host. However, this analysis is looking at websites generally, and of course cannot account for every single website's advertisement regime. At least, for the most part, a contract will be present, and reasonable inquiry would reveal such a contract—so these two elements are satisfied.

The third required element is intent.¹⁰⁹ Most courts agree that negligence does not suffice, and that intent is required to support this cause of action.¹¹⁰ Two competing interpretations of what qualifies as intent present some uncertainty as to how this element would be treated in an ad-blocker case. One view, endorsed by courts such as the Seventh Circuit¹¹¹ and the Second Circuit,¹¹² is that “actions undertaken for some other purpose, but which have the unintended result of interfering, will not qualify” to satisfy this requirement.¹¹³ Under this view, no intent would be found in an ad-blocker case. The purpose of the actions undertaken by the ad-blocking companies is to allow people to access the Internet free from disruptive advertisements, and the resulting harm to the website's revenue is only an unintended, if probable or even

¹⁰⁸ ALTMAN & POLLACK, *supra* note 100, at § 9:13.

¹⁰⁹ *Id.* at § 9:14.

¹¹⁰ *Id.*

¹¹¹ *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381 (7th Cir. 1995).

¹¹² *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir. 1995).

¹¹³ ALTMAN & POLLACK, *supra* note 100, at § 9:14.

desirable, consequence of pursuing their goal.¹¹⁴ An ad-blocker's purpose is not tied specifically to decreasing a website's revenue, but to things that sometimes, but not always, affect that revenue. Even if the argument is made that the ad-blockers primary purpose is to generate revenue for the ad-blocker's producer, this is also not tied to the website's revenue. Other courts, such as the Fourth Circuit¹¹⁵ and the Eighth Circuit,¹¹⁶ have a different intent requirement that would likely be found in an ad-blocker context. Under this view, "the defendant must . . . have known that [the interference] was substantially certain to be produced by [their] conduct."¹¹⁷ If this test controls, it is likely that an ad-blocker's producer would be found to have intended the resulting interference. While they do not directly intend to deprive the website of any of its contractual rights (which is why there is no intent under the other test), it is reasonable to assume that they are substantially certain that use of an ad-blocker would have that result. Ad-blocker producers are sophisticated and knowledgeable about the advertising industry. Considering that ad-blockers do in fact cause substantial losses in revenue for website owners, it is likely a court could find substantial certainty as to this fact. In light of these differences, which test that a court chooses to apply is determinative of how the intent element will be decided.

The fourth element is actual interference.¹¹⁸ Merely causing the website owner to realize less revenue than it otherwise would have is not necessarily sufficient. Like with the previous element, there is a material split in authority on this issue, with some courts using a standard that would find interference in an ad-blocker case and others not using such a standard. Some courts hold that "the plaintiff cannot recover on a theory that the agreement was less profitable to him than it would have been without the defendant's interference."¹¹⁹ Under this test, the contract at issue must actually be breached for interference to be found. Take, for example, a contractual right to X amount of money for every Y number of advertisement clicks. No matter how much one reduces the number of clicks the website generates, the contract is not broken by virtue of blocking the advertisements. Contract terms that guarantee a certain number of clicks per month, however, could be

¹¹⁴ For the purposes of this element's analysis, causing a loss of revenue is treated as an actual interference with contractual rights. The discussion regarding the next element of tortious interference will focus on whether causing the website to lose revenue will actually suffice as interfering with contractual rights.

¹¹⁵ *Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204 (4th Cir. 2001).

¹¹⁶ *City Nat. Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308, 1316 (8th Cir. 1991).

¹¹⁷ *Id.*

¹¹⁸ *ALTMAN & POLLACK*, *supra* note 100, at § 9:16.

¹¹⁹ *Egrets Pointe Townhouses Prop. Owners Ass'n, Inc. v. Fairfield Cmty., Inc.*, 870 F. Supp. 110, 116 (D.S.C. 1994); *ALTMAN & POLLACK*, *supra* note 100, at § 9:16.

breached if one prevented the advertisements from loading when users view the website. Under this test, the exact contract at issue would control whether actual breach was present. Another less common test does not look to breach, but to mere impairment.¹²⁰ This test looks to whether “a party’s enjoyment of the contract’s benefits is lessened by the wrongdoers’ actions.”¹²¹ Under this test, the contract need not be breached. Simply interfering with a party by lessening the benefits she receives from the contract is sufficient. Using this, there probably would be interference with most advertisement contracts, and the exact contractual terms would not matter as much. This test is disfavored, however, as there is significant contrary authority which rejects this test, even in New York¹²² (i.e., the home of *Goodall*¹²³). Accordingly, resolution of the actual interference element will likely hinge on the exact contractual term at issue. Because this is entirely dependent on the exact nature of the contract at issue in any given suit, these concerns cannot be analyzed precisely. However, they are a concern that may influence an eventual lawsuit.

The next element is whether the interference is improper. One important factor for determining this is “the social interests in protecting the freedom of action of the actor and the contractual interests in the other.”¹²⁴ This brings the public interest argument expressed *supra* into the tortious interference cause of action. Whether the interference is proper takes into consideration the public’s interest in allowing the defendant to continue her actions. As previously discussed, this appears to be a strong argument. By not charging the public and by carefully tailoring their service to only block obtrusive advertisements, the balance of interests seems to favor the large social interest in allowing ad-blockers. The intent is to essentially replicate what a post-regulation Internet environment might look like. Considering that law often lags behind technology, a stop-gap measure like privately produced and regulated ad-blockers may be the public’s only way to achieve this legitimate end in the short term. The likelihood of success for this type of argument cannot be exactly assessed, considering that no U.S. court has considered such an issue. However, it seems likely to play an important role in the outcome of such an action.

The sixth element is causation. This element implicates the threshold issue discussed above, regarding the finding of liability for the ad-blocker’s producer for actions that another party—the user—takes. As mentioned, the ad-blocker’s producer would need to induce the user

¹²⁰ ALTMAN & POLLACK, *supra* note 100, at § 9:16.

¹²¹ *Goodall v. Columbia Ventures, Inc.*, 374 F. Supp. 1324, 1332 (S.D.N.Y. 1974).

¹²² *Jack L. Inselman & Co., Inc. v. FNB Fin. Co.*, 41 N.Y.2d 1078 (1977).

¹²³ *Goodall*, 374 F. Supp. 1324.

¹²⁴ RESTATEMENT (SECOND) OF TORTS § 767 (1979).

to interfere, not to merely provide the means for them to do so.¹²⁵ This does not seem to be sufficiently met in the case of ad-blockers, for it seems highly unlikely that an ad-blocker would explicitly induce a user to interfere.

The final element is that of damages.¹²⁶ This element does not present much difficulty for the plaintiff, as she does suffer damages from the defendant's conduct if causation is found.

A closely related theory of liability is simple breach of contract in situations where the user and the website are in a contractual relationship. Some websites have Terms of Service that amount to legally binding contracts. This is related to, but distinct from, the copyright licensing issue discussed *supra*. There, the key consideration was whether not using an ad-blocker is a condition of a license. Here, the question is whether not using an ad-blocker is a covenant to a contract.¹²⁷ If the user is in a contractual relationship with the website, and a covenant of the contract is refraining from using an ad-blocker, then the website may be able to bring a breach of contract action against the user if an ad-blocker is used. However, suing for breach of contract is unfavorable for a website in this position compared to suing for copyright infringement. Copyright infringement carries statutory damages with it. Without statutory damages, a website is likely to recover so little from an individual user that it is unable to litigate every claim. Also, injunctive relief is common in copyright infringement cases but very rare in breach of contract cases. This means a website is unable to prevent the user from using an ad-blocker even after winning the breach of contract claim. If a website-plaintiff wins only actual damages without either statutory damages or injunctive relief, the website has little reason to risk litigation.

A powerful defense that either ad-blocking companies or users could raise is contained within 47 U.S.C. § 230(c)(2). This provision provides providers and users of interactive computer services immunity from civil liability for blocking in good-faith material they find, among other things, "objectionable." This immunity does not apply in intellectual property cases, which is why it is inapplicable to the causes of action discussed previously. Nonetheless, with regards to tortious interference or breach of contract, this source of immunity potentially applies. If an ad-blocker were specifically tailored to blocking advertisements that were specifically "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing," then immunity would apply.¹²⁸ For instance, an ad-blocker that was created in good-faith to only do

¹²⁵ ALTMAN & POLLACK, *supra* note 100, at § 9:17.

¹²⁶ *Id.* at § 19:18.

¹²⁷ *Jacobsen v. Katzer*, 609 F. Supp. 2d 925 (N.D. Cal. 2009).

¹²⁸ 47 U.S.C.A. § 230(c)(2) (West 2018).

something such as block pornographic advertisements or advertisements that facilitate hacking would likely be immune from civil liability. However, whether blocking all unreasonable advertisements satisfies the “otherwise objectionable” prong of the statute is an open question of law.

In conclusion, tortious interference seems likely to be an unsuccessful cause of action for website owners. There are substantial reasons to believe that the intent, actual interference, improper interference, and causation elements of this tort cannot be met. Additionally, there is the issue of extending liability to the producers of the ad-blocker: in order to find liability, a court would have to determine that the ad-blocker’s producer effectively ‘urged’ the users to tortiously interfere, which itself seems unlikely. For all of these reasons, tortious interference will ultimately not afford advertisers or website owners protection against ad-blockers.

IV. SOLUTIONS

Considering the preceding analyses, it seems unlikely that website owners would have a valid cause of action against those producing ad-blockers. However, that does not mean that the best solution available for ensuring that the Internet remains a safe place free from obtrusive advertisements is to leave everything up to a handful of private companies. Ad-blockers have provided an invaluable service to the public by giving users some control over their experiences during the infancy of the Internet, but ultimately they are perhaps not best situated to combat these problems. There are several avenues by which Internet advertisement control could proceed. First, private companies could continue to have unrestricted control. Second, private companies could continue to be those responsible for producing things like ad-blockers, but they could be subject to either regulations or the results of any lawsuit that might arise. Third, the government could directly control Internet advertising, much as it controls other forms of advertising (such as magazine, television, and billboard advertising).

The first option is to essentially allow the status quo to continue. Private companies currently produce ad-blocking software with no governmental oversight at all. This system has been in place for years now, and allowing it to continue would work in a sense. However, our current system, without regulation, is not a perfect solution. Different ad-blockers have different requirements for what constitutes an acceptable advertisement, so advertisers do not know exactly what they can and cannot do. This system works well to bridge the gap before a real solution can be reached, but it is too indefinite to last forever. If the inevitable lawsuit regarding ad-blockers results in the courts simply holding that ad-blockers are categorically legal, we will remain here. In

that case, the market will determine how Internet advertising will work in a purely unregulated way. This means that ad-blockers may continue to shape themselves according to what their users want but will not necessarily have to. This does not seem to be the most balanced solution. While ad-blockers have so far voluntarily limited themselves with programs such as the Acceptable Ads Initiative, they would not be legally required to do anything like that under this scenario.¹²⁹ Perhaps these programs are only used to mitigate the chances that advertisers will sue them, and after winning in court, these programs will disappear. Leaving everything in the hands of the companies making ad-blockers does not seem like a satisfactory long-term solution. They seem to be doing everything they can to only block obtrusive advertisements, but not requiring them to do so sounds unsustainable.

On the other extreme, direct government regulation of Internet advertisers might be possible. This is essentially how television and radio advertisements are regulated. The Federal Communications Commission prohibits advertisements “that promote[] certain lotteries; advertise[] cigarettes, little cigars or smokeless tobacco products; or perpetuate[] a fraud,”¹³⁰ as well as those that include “obscene, indecent[,] or profane language.”¹³¹ The Commission not only regulates the content of advertisements, but also their manner of delivery, as their “rules require commercials to have the same average volume as the programs they accompany.”¹³² This same type of regulation could potentially work for the Internet. By regulating content—such as things that are obscene, fraudulent, or misleading—and by regulating the manner in which advertisements are delivered—such as the volume, placement, and number—the Commission could directly regulate Internet advertising. If this were to occur, then some system for users to submit complaints could serve as the mechanism by which this takes place, much like with broadcast advertisement regulations. This seems like it would be much more difficult to implement than broadcast regulations, however. Whereas there are only a few hundred television stations, there are over one billion websites.¹³³ And while television channels and radio stations are licensed by the Commission itself and are within the jurisdiction of U.S. courts,¹³⁴ websites are often not.¹³⁵

¹²⁹ *Allowing Acceptable Ads in Adblock Plus*, *supra* note 24.

¹³⁰ *Complaints About Broadcast Advertising*, FED. COMM. COMMISSION, <https://www.fcc.gov/consumers/guides/complaints-about-broadcast-advertising> (last updated Nov. 17, 2017).

¹³¹ *Id.*

¹³² *Loud Commercials*, FED. COMM. COMMISSION, <https://www.fcc.gov/media/policy/loud-commercials> (last updated Dec. 11, 2015).

¹³³ *Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites/> (last visited Jan. 20, 2019).

¹³⁴ *How to Apply for a Radio or Television Broadcast Station*, FED. COMM. COMMISSION, <https://www.fcc.gov/media/radio/how-to-apply> (last updated July 2, 2018).

Accordingly, it is unclear exactly how the Commission could enforce its regulations on websites that are, for instance, based outside the United States. There are also significant First Amendment concerns with this type of regulation. The government would be heavily constrained by Freedom of Speech concerns under this type of regulatory model.

For these reasons, it seems that a compromise is the best solution. Namely, private ad-blockers that are subject to regulations should provide the mechanism by which Internet's advertisements are policed. This would essentially mean that ad-blockers continue to do what they are doing, according to programs such as the Acceptable Ads Initiative, but that either the content of such initiatives would be subject to certain regulations or else regulations would replace such initiatives. Introducing this type of regulatory scheme would mean that ad-blockers could compete in the market, provided that they adhere to regulations that ensure they are not over-reaching. Such regulations would hopefully look much like these initiatives currently do, as they seem well-tailored to prevent obtrusive advertisements for the benefit of users, while also allowing reasonable advertisements to benefit website owners.

One additional consideration is that in addition to merely creating this new legal framework, at least some existing statutes would need to be amended as well. 47 U.S.C. § 230 (c)(2) effectively immunizes ad-blocker producers from facing civil liability from over-blocking if they do so in good faith and the content blocked is "objectionable." With this statute still in effect, it would be difficult for the government to enforce a requirement that ad-blockers must allow reasonable advertisements. If the ad-block producers decide to block all advertisements, and they are in good faith restricting the availability of material they find objectionable, then they will be immune from civil liability. One way to circumvent this problem would be to simply amend the statute to remove this provision. Without amending the statute, it would be difficult to attribute civil liability to the ad-blocker for creating software that "over-blocks" by blocking reasonable advertisements.

Private ad-blocking companies could alternatively be effectively regulated by the courts. It is possible that a future lawsuit would end with the court holding that there would have been liability but for the way the ad-blocker in question is designed to only block unreasonable advertisements. For instance, a court could find that there is no liability because the public interest argument wins out regarding either fair use or tortious interference. If a finding of no liability is premised on the ad-blockers' attempts to uphold this interest, and that deviating from such a

¹³⁵ See Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the Interwebs*, 100 CORNELL L. REV. 1129 (2015).

standard would see the case resolved differently, then ad-blockers would have reason to maintain those practices. However, this is not as likely or helpful a solution as actual regulations would be. First, the government could do its own research and corroborate what private research suggests regarding the types of advertisements that should and should not be allowed. Second, such a narrowly held court decision seems unlikely considering the other reasons as to why copyright infringement and tortious interference might not be effective causes of action.

For these reasons, the best possible solution would be for private ad-blockers to continue to be used by those who wish to use them and for those ad-blockers to only block certain advertisements according to federal regulations. This means that all unreasonable advertisements could be blocked from appearing, but that no reasonable ones are prevented from generating revenue for advertisers. This would mean that all the legitimate interests at stake would be served. Users would stop being served malicious and unreasonable advertisements, while advertisers and website owners could at the same time generate revenue.

If such a regulatory scheme were implemented, it would likely be imposed by an Act of Congress following congressional findings that corroborate what private research in this area has found. This regulation would empower an executive agency, most likely the Federal Trade Commission, to enforce it. Similar advertising regulations, like the CAN-SPAM Act, were enacted and are enforced in this way.¹³⁶ That Act regulates advertisements contained in emails.¹³⁷ It seems likely that the proposed regulation would follow the same path, because the CAN-SPAM Act is a close analogue to it, as it also seeks to regulate advertisements that reach users through the Internet. Regulating Internet advertising in this way would allow users to continue to block obtrusive and unreasonable advertisements. Instead of relying on ad-blockers to elect to allow reasonable advertisements, though, this regulation would require them to do so and would ensure that determinations about what advertisements are acceptable are consistent and supported by accurate research. Under this type of regulatory scheme, the legitimate interests of everybody involved would be served. Users would have the ability to block advertisements that are unreasonable in either content or form, while advertisers and website owners would be able to raise revenue by advertising reasonably. In this way, the public's legitimate interest in controlling the content that reaches their screens and browsing the Internet free from deceptive advertising practices would flourish.

¹³⁶ 15 U.S.C.A. § 7701 (West 2004).

¹³⁷ *CAN-SPAM Act: A Compliance Guide for Business*, FED. TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business> (last visited Jan. 20, 2019).

CONCLUSION

Ad-blockers likely do not violate the law. Neither copyright law nor tortious interference provide website owners with a viable cause of action. However, this is not necessarily a bad thing. Some popular ad-blockers are very careful to only block unreasonable advertisements, putting substantial research into what the public finds unreasonable. Hopefully, federal regulations will be enacted to ensure that these ad-blockers remain dedicated to that goal and to bring other ad-blockers into line with this philosophy. There is a substantial public interest in blocking certain types of advertisements, but advertising in general cannot be categorically eliminated. Allowing services to block certain advertisements while not blocking others, according to a consistent set of rules that further both the public's and the advertiser's interests, is therefore the best solution for regulating such a diverse and otherwise unregulated place as the Internet.

Andrew Steele