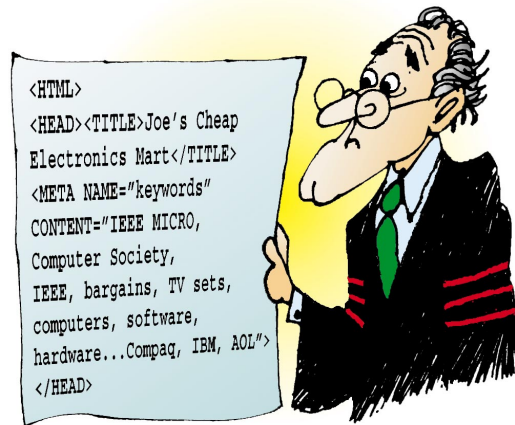




Web concerns

RICHARD H. STERN
r.stern@computer.org



..... Recently, misuse of the Web seems to be cropping up everywhere. Here, I discuss three cases of misuse causing concern to many Web users: spamming, meta tagging, and keying advertising to searching.

Spamming along

A federal court in Alexandria, Virginia, has held that spammer LGCM, Inc. was liable to America Online (AOL) for fraud. LGCM thwarted AOL's anti-spam software, the court found, and sent out over AOL's system millions of unsolicited e-mails that solicited business for pornographic Web sites. The court's November 1998 order of summary judgment required LGCM to cease abusing AOL's system and to pay AOL damages to be assessed subsequently.

AOL claimed that LGCM sent more than 92 million e-mails over a six-month period to AOL members. LGCM entered AOL chat rooms to harvest AOL member e-mail addresses, by means of extractor programs adapted to evade AOL's anti-spam filters. LGCM then sent out its spam using an "aol.com" header to make AOL's name appear in the "from:" line at the top of messages. As a result AOL members thought that AOL was sending the spam inviting them to patronize porno sites, or at least was endorsing the promotion.

According to AOL, LGCM injured AOL in several ways. First, AOL server capacity was consumed in transmitting the spam. This forced AOL to upgrade its com-

puter facilities to handle the rest of AOL's load without excessive delays. It also antagonized AOL's members in various ways. For one thing, delay did occur, and customers blamed AOL for degraded service. Some customers quit, and AOL lost their business. Customers associated AOL with pornographic spamming, which also hurt AOL. In all, over just part of the spamming period, 450,000 customers complained to AOL about LGCM's spam.

The facts concerning LGCM's conduct established at least a half-dozen violations of state and federal law according to the court. First, LGCM's sending e-mails under AOL's name (the aol.com URL) was a false designation of origin under the federal trademark act. In effect, LGCM was masquerading under AOL's trademark. The same conduct "diluted" and "tarnished" AOL's distinctive AOL name by associating it with pornography.

Second, the conduct violated the federal Computer Fraud and Abuse Act (18 U.S.C. § 1030). That law prohibits anyone from accessing a computer without authorization and thereby obtaining information from a protected computer. The court held that LGCM's use of extractor programs to harvest e-mail addresses from AOL chat rooms amounted to unauthorized accessing of AOL computers to gain e-mail address information.

Third, the same law prohibits anyone from accessing a computer without authorization and thereby causing damage. The laundry list of damages that AOL

suffered established a violation of this provision of the federal Computer Fraud and Abuse Act, as well.

Virginia has its own Computer Crimes Act, which makes it a crime to use a computer or computer network without authority and with the intent of converting the property of another person. The same law creates a damages action for victims. The court found that LGCM obtained services under false pretenses and thereby converted (stole) AOL's property. The converted property was the cost to AOL of transmitting the spam.

The next violation arose under the common law of Virginia. The common law covers ancient, traditional violations of another person's rights in the absence of any specific statute. For example, trespass on someone else's property violates the common law, as does breach of contract. Here, trespass to chattels means intentionally using or intermeddling with personal property belonging to another person. Say, I filch your pen or smash your car's window. That would be trespass to your chattels (the pen or car). Any impairment of the "conditions, quality, or value" of personal property is trespass to chattel under Virginia law.

The court observed,

To the extent that defendants' multitudinous [92 million] electronic mailings demand the disk space and drain the processing power of plaintiff's computer

equipment, those resources are not available to serve plaintiff's subscribers. Therefore, the value of that equipment to plaintiff is diminished even though it is not physically damaged by defendants' conduct.

The court thought that some physical contact was necessary, however, to constitute a trespass. This element was supplied by "the transmission of electrical signals through a computer network." That was "sufficiently physical contact" to satisfy the court, it said.

Meta tagging along

In another November 1998 federal court decision, a federal court in Boston condemned use of meta tags in HTML code that deceived Web users into thinking that the defendant's Web site was the plaintiff's. Niton Corp. and Radiation Monitoring Devices, Inc. (RMD) are competitors in the sale of instruments for detecting whether paint contains toxic amounts of lead. Both companies have Web sites with URLs that clearly identify them as who they are, niton.com and rmdinc.com. However, RMD placed meta tags in the code for its Web site that said such things as "Home Page of Niton Corp." When Niton found out, it charged into court demanding that the practice be quashed at once.

What's a meta tag? Go to <http://computer.org>. Using the toolbar of your browser, say Netscape 4, click on View/Page Source. This will cause the HTML code for this Web page to appear. Go down about six lines to `<META NAME="keywords" CONTENT= ...`. Keep reading, and you will see "computer, computing, computers, Internet, IEEE ..." and dozens more words, ending finally with "... fuzzy, database, logic" `>`. Other meta tags describe such things as the content of the Web page and how it was generated.

Why did someone put those keywords into the code? Search engines and spider programs look for meta tags to help them find Web sites relevant to users' queries. Thus, if a user tries a Boolean search such as "computer & IEEE," the user might

.....

"Is buying and selling links to somebody else's name trademark infringement or the equivalent?"

.....

well find the www.computer.org IEEE Computer Society Web site. When RMD put "Home Page of Niton Corp." into its page's meta tag, users looking for Niton with a search engine might well find not—Niton's Web site—but RMD's. Or if I run *Cheapo Discount Cosmetics, Inc.*, and put "Lancome" and "Elizabeth Arden" into my meta tags, what happens when Web shoppers look for those brands? And what do you suppose Lancôme and Elizabeth Arden think about that.

When Niton's MIS tried searching for "Home Page of Niton Corp.," the browser made eight "hits" (matches). Five were to RMD, and three were to Niton. After considering this evidence, the court entered a preliminary injunction against RMD, requiring it to stop misleading Web users as it had.

Searching along the Web

Estée Lauder and Playboy have sued Web search site Excite for abusing their trademarks. They complain that Excite has been selling advertising keyed to the marks. Say, a Web user types "Estée Lauder" or "Playboy" in the search box on Excite's page. Normally, a user would expect to get hits on Web pages that mention Estée Lauder or Playboy, especially those firms' own Web pages.

But Excite collects approximately 4 cents per hit for selling keyed banner advertising, which often comes up on screen before the genuine hits. The 1998 Internet advertising of this type accounted for some \$500 million, which was about one fourth of all online advertising revenue. (Apparently this kind of advertising is

regarded as more highly targeted to receptive viewers than other advertising, and it is therefore considered more effective.)

For Estée Lauder searchers, the banner advertisement is for Fragrance Counter, an online retailer of cosmetics. For Playboy seekers, Excite (and also Netscape, another defendant) provide advertisements for hard-core pornography sites. Estée Lauder is incensed at the suggestion that it is associated with or sponsors Fragrance Counter. Estée Lauder terms Excite's and Fragrance Counter's conduct trademark infringement, bait-and-switch advertising, false statements about goods, and unfair competition. Playboy says the search engine Web sites and their porno clients have "highjacked and usurped" Playboy's good name by linking it with sites that vastly exceed the good taste limits honored by the Playmate of the Month centerfolds.

Observers say that these cases could set new legal precedents in cyberspace law. Is buying and selling links to somebody else's name trademark infringement or the equivalent? Do Estée Lauder and Playboy have a legally protected interest in not having their trademarks blurred or tarnished by whoever pays a search engine Web site its fee for invisible linking? Is there any separate interest of the public at stake? For example, are Internet users gullible enough, or conversely too sophisticated, to be deceived into sensing sponsorship of some kind here? Are these banner advertisements so annoying that they should be suppressed on the basis of any excuse that anyone can find?

Here's a thought about a next-generation case. A friend of mine says he can write a program to hijack the hits for which Excite is getting 4 cents apiece, and he can divert them to material for someone else who would pay him. Assume that Estée Lauder and Playboy don't sue him too for riding on their trademarks. (Or maybe he can get them to pay him to put up their banner advertising instead, with links to send the hits to their own Web sites). Do you suppose that Excite and whoever is paying it to "highjack and usurp" Playboy's and Estée Lauder's names would sue my friend for his counter highjack?