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CLICKING AWAY THE COMPETITION: THE LEGAL RAMIFICATIONS OF CLICK FRAUD FOR COMPANIES THAT OFFER PAY PER CLICK ADVERTISING SERVICES

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Abstract

Two businesses that advertise online, Lane's Gifts and Collectibles and Advanced Internet Technologies, recently filed lawsuits against Google, and other intermediaries that offer sponsored advertising services. The companies allege that these intermediaries failed to adequately protect them against "click fraud." Click fraud refers to the practice whereby competitors and other persons may click to view an online ad with no intention of buying, learning about the advertiser's services, or engaging in any other action that the ad aims to achieve. Plaintiffs allege that the intermediaries breached their contractual duties by charging the companies whose ads they hosted for fraudulent clicks, and by failing to take adequate detection and prevention measures. This Article examines the basic contract law claims underlying these cases and concludes that while contracts may grant the search engines discretion to define chargeable clicks, such discretion might be constrained by the terms of extrinsic writings.

Table of Contents

[Introduction](#)

[Understanding Click Fraud](#)

[Recent Pay-Per-Click Litigation](#)

[Breach of Contract Actions: Defining "Actual Clicks" and Detection Duties](#)

[Elements of a PPC Breach of Contract Claim](#)

[A Representative Case Study: Lane's Gifts](#)

[Defense Against a PPC Breach of Contract Claim](#)

Conclusion

Practice Pointers

INTRODUCTION

<1> Pay-per-click ("PPC) advertising is a lucrative online service, accounting for nearly all of the revenue of many popular search sites such as Google and Yahoo.² A new phenomenon, referred to as "click fraud," however, is currently cutting into this revenue model. Click fraud occurs when a person or program clicks on a company's PPC advertisement with no intention of viewing the advertiser's webpage or making a purchase.

<2> Two companies that use PPC advertising recently filed lawsuits against Google, Yahoo, and a number of other major intermediaries, alleging that these entities breached both the substantive terms of their contracts, as well as the implied duty of good faith.³ Advanced Internet Technologies ("AIT") and Lane's Gifts and Collectibles ("Lane's Gifts") claim that the intermediaries that hosted/published their online advertisements improperly charged them for fraudulent clicks. The plaintiffs assert that such clicks are not fairly chargeable within the terms of the PPC contracts. The advertisers also claim that the search engines failed to take adequate steps to detect and prevent click fraud. These suits raise two central questions: (1) how should a chargeable click be defined within the context of a standard PPC advertising contract; and (2) whether search engines have any duty to protect advertisers from fraudulent clicks. This Article begins by providing an overview of click fraud. The Article then addresses the breach of contract claims and uses AIT and Lane's Gifts as cases illustrative of the types of disputes that have arisen regarding click fraud.⁴ However, this Article is not meant to be a detailed analysis of any specific company's current practices.

UNDERSTANDING CLICK FRAUD

<3> PPC advertising is an interactive form of online advertising where visitors to a website can click on displayed ads (usually in the margins of the page), routing the visitor to a company's website.⁵ These ads are usually keyed to specific search terms entered by the user into an intermediary's search engine. Businesses ("advertisers") pay an intermediary website ("search engines," such as Google or Yahoo) that publishes their advertisement at an agreed-upon fee for each time the advertisement is "clicked" by a website visitor. PPC advertising appeals to businesses because it offers the opportunity to reach potential consumers across the world, while also narrowing the scope of the ad to those who have expressed a particular

interest in a related subject.

<4> There are two types of click fraud perpetrators: competitors and affiliates. Competitor click fraud occurs when a business's competitor clicks on a PPC ad in order to run up charges to a competitor. This not only damages a company financially, but may also result in a more favorable position for the competitor's ad.⁶ Affiliate click fraud is perpetrated by a third party (the "affiliate") who agrees to host the ad in exchange for a share of the click stream revenue. The affiliate then uses fraudulent clicks to drive up click fees and its share of that revenue. This type of fraud is generally committed manually and by using software programs called "bots."⁷

<5> According to the Interactive Advertising Bureau, in the first six months of 2005 advertisers spent \$2.3 billion on search-related PPC advertising — an increase of 27% from the same period in 2004.⁸ This makes PPC advertising one of the largest and fastest growing areas of online advertising.⁹ Analysts expect continued growth, with PPC advertising reaching nearly \$20 billion by 2010.¹⁰ However, some commentators estimate that as many as 20% of all clicks are fraudulent, and there are concerns about the industry's continued vitality.¹¹ Businesses may choose to spend their advertising dollars elsewhere as they become more aware of the problems posed by click fraud.¹²

RECENT PAY-PER-CLICK LITIGATION

<6> In several recent cases, companies that use PPC advertising sued Google and other intermediaries for their failure to prevent click fraud. Companies who advertise online filed three of these cases alleging that the search engines breached their contracts by charging for fraudulent clicks.¹³ Google filed a fourth important case seeking damages from an affiliate allegedly engaging in click fraud.¹⁴

<7> In *Advanced Internet Technologies v. Google*¹⁵ ("AIT") and *Lane's Gifts and Collectibles v. Yahoo*,¹⁶ the plaintiff PPC advertisers allege that the defendant PPC advertising search engines charged the plaintiffs for fraudulent clicks in violation of the terms of their contracts.¹⁷ AIT entered into a contract with Google to publish AIT's PPC ads through its Adwords program.¹⁸ The AIT contract calls for Google to charge AIT three dollars for every "actual click" on the advertisement when displayed to users of Google's search engine who had entered the search term "click fraud."¹⁹ AIT and other PPC advertiser's bid on a

price they are willing to pay for each click in order to have their ad displayed in association with the desired search terms.²⁰ The highest bidder is then generally displayed in the most prominent position on the search engine's results page, with each lower bid taking a less desirable space according to its rank.²¹

<8> AIT asserts that Google breached its Adwords agreement by knowingly charging advertisers for fraudulent clicks, which, according to AIT, are not "actual" clicks within either the meaning of the Adwords agreement or industry practices.²² AIT further alleges that such a practice is a breach of contract because it violates the duty of good faith implied in every contract by injuring advertisers' right to receive the benefits of the contract – namely, the potential for sales to those users who click on the advertisement.²³ In the *Lane's Gifts* lawsuit, a plaintiff PPC advertiser alleged that the defendants (a number of the largest Internet Service Providers and search engines) similarly breached their contracts by charging advertisers for clicks that were not from actual customers.²⁴

<9> The outcome of this and any similar cases may hinge on what constitutes an "actual click." A settlement has been approved between Google and the plaintiffs in *Lane's Gifts*.²⁵ The settlement would require Google to pay up to \$90 million (including attorney's fees) to advertisers who have been victimized by click fraud.²⁶ All advertisers who have ever participated in Adwords are eligible to make a claim for a rebate, but each claim is subject to verification by Google.²⁷ The AIT case is subject to a stay pending the outcome of that negotiation.²⁸ However this settlement fails to resolve the primary question addressed by this article and any such lawsuit: what constitutes an "actual click" under a PPC contract for purposes of calculating the fees owed to an intermediary that publishes/hosts an ad.²⁹ As noted previously, the instance of fraudulent clicks has led to companies paying exorbitant fees to ad hosts without corresponding benefits for each click.

<10> The plaintiff advertiser in *Go2Net, Inc. v. C.I. Host, Inc.*³⁰ alleged that it was charged for invalid "impressions" under its contract with the defendant search engine. Impressions are another method of charging online advertisers, similar to pay-per-click. The most significant difference between PPC and impressions is that impression counts are based on the number of viewers the ad might have had (how many times an ad was sent to a user's web-browser), rather than how many times the ad is clicked. C.I. Host claimed that it was charged for impressions resulting from search engines and other artificial

intelligence agents, as well as actual people, and argued that this was inconsistent with the industry definition of impressions.³²

<11> *Go2Net* represents that at least one court has given effect to a contract granting search engines broad authority to define chargeable actions. Under the terms of the PPC agreement, Go2Net was to charge C.I. Host based on the number of impressions recorded by Go2Net's ad engine.³³ The key contractual terms also stated that all impressions billed would be based on Go2Net's count. In the event of a conflict between Go2Net's count and another count, Go2Net's count would control.³⁴ The court found that these terms required Go2Net's method of counting impressions to prevail and that any argument over the definition of impressions was preempted.³⁵

<12> In *Google, Inc. v. Auctions Expert L.L.C.*, Google brought suit against a participant in its AdSense³⁶ program, alleging that the participant generated revenue for itself by engaged in click fraud.³⁷ Google's AdSense agreement strictly prohibits participants in the AdSense program from "artificially and/or fraudulently generating clicks in any manner."³⁸ This prohibition includes participants manually clicking on the ads or doing so through the use of automated tools.³⁹ This case is different from the others because it involves a click fraud action by an ad search engine against a third party host that arises from a contract between the two parties. Google claimed that Auctions Expert had knowingly clicked on PPC advertisements on its own site, supplied through the AdSense program, with the intent to fraudulently generate revenue for itself.⁴⁰ The fraudulent clicks generated by Auctions Expert caused Google to issue refunds to advertisers for all clicks on ads displayed at the Auctions Expert website.⁴¹ Google claimed that Auctions Expert's click fraud violated the terms of the contract governing the relationship between the two parties. The court granted Google a \$75,000 judgment against Auctions Expert.⁴²

<13> These four cases represent the early framework for evaluating the risks, duties, and obligations taken on by PPC advertisers and search engines. They not only show that click fraud can be an actionable offense, but also that PPC ad search engines may use contracts to set expectations related to click fraud and to minimize their liability.

BREACH OF CONTRACT ACTIONS: DEFINING "ACTUAL CLICKS" AND DETECTION DUTIES

<14> Two of the recent click fraud lawsuits allege that search engines breach PPC contracts by counting fraudulent clicks as "actual clicks" under a PPC advertising agreement. Google and others attempt to preserve the sole right to define actual clicks in their contracts. However, extrinsic evidence — including information pages, industry custom and trade usage, and statements made by Google and other advertising hosts in court documents — might be sufficient to place limitations on a search engine's authority to define the term.⁴³ Under such an analysis, a search engine could be in breach of contract by charging an advertiser for such clicks.

Elements of a PPC Breach of Contract Claim

<15> A breach of contract occurs when one party fails to perform a contractual duty at the time performance is due.⁴⁴ Whether there was a breach is generally a question of fact.⁴⁵ Any breach of contract gives rise to a cause of action⁴⁶ and entitles the non-breaching party to damages.⁴⁷ However, only a material breach suspends the non-breaching party's obligations under the contract.⁴⁸ In determining the materiality of a breach a court looks to the injured party and asks to what extent the party will be deprived of the benefit it reasonably expected.⁴⁹ The party alleging a breach has the burden of proof on all of its breach of contract claims.⁵⁰

<16> Determining the existence of a breach requires that the fact finder first determine the obligations of the parties under the contract.⁵¹ As a general rule, the Parol Evidence Rule excludes all evidence of contractual obligations that is inconsistent with the meaning of an integrated writing.⁵² An agreement is integrated when the parties have mutually consented to a certain writing or writings as the final statement of the agreement or contract between them.⁵³ However, when a contractual term is ambiguous it is up to the fact finder to elucidate the intended meaning of the term. The ambiguous term must be interpreted in light of the apparent purpose of the contract as a whole, using the rules of contract construction and extrinsic evidence of intent and meaning.⁵⁴

<17> Advertisers claiming breach of contract, such as the ones in *AIT* and *Lane's Gifts*, will likely base their claims on the theory that a search engine violates the terms of the contract if it charges the advertiser for fraudulent clicks. In many cases, this theory will rest on two separate assertions: 1) fraudulent clicks are not the same as clicks that the advertiser has agreed to pay

for within the terms of the contract; and 2) the search engine failed to employ adequate detection and prevention measures against fraudulent clicks.

<18> The contracts used by many of the major search engines do not allow for every click to be chargeable. The standardized contractual agreements used by many major search engines, which PPC advertisers must agree to, generally have some term that modifies the "clicks" for which advertisers are charged. Not all search engines use the same modifier — some say only "actual clicks" are chargeable,⁵⁵ others only charge for "valid clicks"⁵⁶ — but the message is the same: not every click is a chargeable click. Unfortunately, none of the major search engine's agreements define the chargeable click terms. Assuming that such contracts are integrated, a finder of fact will be left with the task of interpreting the meaning of "actual" or "valid" clicks based on the contract and extrinsic evidence of the parties' intent.

<19> It is common practice amongst major search engines in the PPC industry not to charge advertisers for fraudulent clicks and to actively seek to detect and prevent fraudulent clicks.⁵⁷ Therefore, while the validity of any click will depend in part on the terms of the agreement and the expectations of the parties, it appears from the analysis above that there are two primary elements that must be satisfied for a click to be one which the industry would consider valid. These elements are: (1) the person or entity clicking on the ad must have the capacity to engage in the behavior desired by the advertiser, whether that behavior be making a purchase or merely gathering information;⁵⁸ and (2) the person or entity must not have clicked on the ad solely with a fraudulent intent of creating a charge to the advertiser.⁵⁹ These criteria preclude artificial hits from bots, malicious competitors, and even accidental clicks by users with bad mouse dexterity.

<20> Under this analysis a PPC advertiser claiming breach of contract based on charges for fraudulent clicks should demonstrate three separate elements. First, that the contract governing the relationship between the advertiser and the search engine precludes detected fraudulent clicks from being included in chargeable clicks. Second, the advertiser must show that it was charged for fraudulent or invalid clicks. Third, the advertiser must show that the search engine had a duty to make efforts at detection and prevention consistent with the reasonable expectations of the parties at the time of contracting, and that the search engine failed to meet that duty.

A REPRESENTATIVE CASE STUDY: LANE'S GIFTS⁶⁰

<21> An example of a case in which the issue of what constitutes an actual click is the Lanes' Gifts lawsuit. In order to participate in Google's Adwords program, an advertiser must agree to a standardized set of terms that governs the relationship between the two parties.⁶¹ The agreement states that customers shall be charged based on "actual clicks."⁶² The term "actual clicks" is not defined within the Adwords agreement. Evaluating the breach of contract claims therefore requires that a court determine what constitutes an "actual click" within the terms of the agreement.

<22> The Google Adwords agreement (and some of the other relevant agreements regarding click through advertising) are governed by California law. In California⁶³, a court is not limited to the four corners of the contract when interpreting "actual click" within the Adwords agreement. A significant amount of case law gives clear guidelines for the interpretation of contract terms⁶⁴ in California and the Ninth Circuit.⁶⁵ These cases indicate a court should not confine itself to the written terms of an agreement, but rather should examine all available evidence to aid in interpreting terms in a contract.⁶⁶ A court applying California law would first admit all credible parol evidence to determine if the language of the contract is susceptible to multiple interpretations.⁶⁷ Parties may introduce evidence to clarify the terms of the contract if such susceptibility is found.⁶⁸ The extrinsic evidence may not be used to add or vary the terms.⁶⁹ The test for admitting extrinsic evidence is not whether the terms appear to the court to be plain and unambiguous on their face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.⁷⁰ If certain words have a special meaning within a trade or industry, parties may introduce evidence of custom or trade usage so that the court may interpret it consistent with its usage in that sector.⁷¹ Therefore, interpretation of Google's Adwords agreement will likely include consideration of various documents and materials that may clarify the meaning of "actual clicks."

<23> At the time the Lane's lawsuit was filed, Google provided additional material to advertisers indicating that not all clicks are chargeable. In light of California's extrinsic evidence rules, a court might consider all these materials in defining "actual clicks." Google's standard Adwords agreement, much like the agreement in *Go2Net*, states "charges are solely based on Google's click measurements."⁷² However, Google also supplies

advertisers with a significant amount of informational material that discusses when an advertiser will be charged. The Adwords website states that some clicks are invalid, and gave two illustrative examples: manual clicks intended to increase advertiser costs or website owner profits, and clicks executed by software and robots.⁷³

<24> Google has stated that it employs a variety of advanced (and constantly upgraded) methods for detecting and preventing invalid clicks to protect customers from click fraud.⁷⁴ The site indicates that when Google detects such clicks, customers will not be charged, or if they are charged a refund will be issued.⁷⁵ Google invites advertisers to help fight click fraud by reporting any incidents of suspected click fraud.⁷⁶ If Google's anti-fraud team verifies that such clicks were likely fraudulent, a refund will be issued to the advertiser.⁷⁷ These informational materials give the clear impression that Google does not consider all clicks to be "actual clicks" within the meaning of the Adwords agreement.

<25> Google's complaint in the *Auctions Expert* case may also be relevant in determining the meaning of the term "actual clicks." The Auctions Expert complaint states that fraudulent clicks include, but are not limited to "website authors themselves manually clicking on advertisements, the use of automated tools to generate clicks, and web sites paying others to generate clicks."⁷⁸ According to the complaint, Google considers clicks by an affiliate to test an ad's functionality to be invalid.⁷⁹

<26> The company further acknowledges that any of the above-mentioned clicks create no value for advertisers, and that advertisers typically do not want to pay for clicks that have no economic benefit.⁸⁰ The complaint later describes a legitimate click as one executed by a user who desired to access the site being advertised.⁸¹ A click by a user without such a desire is not considered legitimate.⁸² This language, when taken in combination with the information on the Adwords page, may indicate that fraudulent clicks do not constitute "actual clicks."

<27> The *Lane's Gifts* case has now settled and Google has changed some of its policies since the filing of the suit.⁸³ Therefore, this case is more hypothetical and should be viewed as an illustration rather than a substantive analysis of Google's PPC billing practices.

<28> Search engines and other PPC intermediaries facing breach of contract actions must demonstrate that their actions or inactions did not violate the terms of the PPC advertising agreement. As discussed above, an argument that all clicks are chargeable at a search engine's discretion is unlikely to succeed. The most likely defense against a breach claim therefore relates to the expectations the search engine creates based on a contract and relevant external documentation. The realities of fraudulent click detection currently prevent complete detection of invalid clicks, and therefore the removal of every illegitimate click from an advertiser's charge sheet.

<29> It is rare that a click can positively be identified as fraudulent because such a conclusion requires knowing both the identity and intent of the person or program executing the click. Clicks that are determined to be fraudulent or illegitimate are more often identified through analyzing patterns that tend to be indicative of such behavior.⁸⁴ In their most simple form, these patterns may be a series of clicks from the same IP address in a relatively short period of time, or a click rate that is grossly out of character for the ad.⁸⁵ However, many other criteria and complex algorithms are also employed to detect illegitimate clicks.⁸⁶ Many search engines claim to employ a large number of detection techniques, which they refuse to disclose citing protection concerns.⁸⁷ Given these problems, it is not surprising that search engines invite advertisers to take an active role in click fraud detection by independently analyzing click traffic on their ad.⁸⁸

<30> Given the assurance of protection offered by search engines and the PPC industry this duty likely requires an intermediary to actively use and develop methods for detecting illegitimate clicks. However, the degree of detection effort required will depend upon the reasonable expectations created by the intermediary in the advertiser. A search engine or other intermediary should demonstrate that its detection and protection efforts are diligent and reasonable in light of the contractual terms and expectations. Whether or not a given intermediary has actually breached its contractual duty to protect advertisers is fact specific and likely requires significant amounts of discovery.

CONCLUSION

<31> Click fraud is a growing concern for businesses that advertise on the Internet. The current cases alleging that Google has breached its contractual obligations may likely to provide an important measure of the construction that courts will give PPC

agreements. Despite efforts to reserve complete dominion over defining a chargeable click, many of the largest PPC search engines may have given up much of that freedom through the claims and assurances offered to advertisers in the form of informational materials. Those materials, as well as industry custom and terminology play an important role in defining a chargeable click within the PPC industry.

<32> As the problem of pay-per-click grows, new companies and technologies are also emerging to meet the demands of advertisers. Given the uncertainty in the success of legal actions against search engines, advertisers may want to consider these third party solutions. Various companies are emerging that specialize in detecting, documenting, and preventing click fraud for advertisers. Other companies have produced software aimed at helping advertisers fight click fraud. These companies use a variety of techniques, including analysis of a company's weblogs for suspicious patterns, and placement of small files such as cookies on an ad visitor's computer that provides useful information for identifying suspicious clicks.⁸⁹

<33> Finally, it should be noted that at the time of this article's publication, two ad industry groups were beginning work on defining how a click should be measured and when it should be considered fraudulent.⁹⁰ These groups (the Interactive Advertising Bureau and the Media Rating Council) are working with various industry participants, including Microsoft, Google and Yahoo, to create a set of click measurement guidelines that would define a "click" for PPC purposes. The group will also outline a recommendation for a third party auditing and certification plan. Such a plan, if embraced by the industry as a whole, could be useful in clearing up much of the litigation surrounding click fraud measurement.

PRACTICE POINTERS

- Search engines should always seek to have a clause in their standard contracts that grants them sole authority in determining the click count. While this discretion is likely limited by the duty of good faith, search engines will enjoy a great degree of flexibility without acting in bad faith.
- In addition to seeking sole discretion in defining a click, search engines should define key terms such as "actual clicks" in the contract. After defining the key terms, search engines should be careful to make sure that any informational/promotional materials are

consistent with that definition. If the definition a search engine chooses is inconsistent with trade or custom usage, the search engine should note this within the definition.

- Search engines should recognize that their informational/promotional materials ("Frequently Asked Questions" webpages, for example) which are distributed to advertisers likely play a role in developing both evidence for defining terms within the contract, and the reasonable expectations of advertisers with respect to click fraud. Search engines should therefore carefully consider the statements made on such pages, and be aware of striking a balance between reassuring advertisers and creating unusually high expectations of click fraud protection.
- When considering which search engine or PPC service to use, advertisers should take the time to examine and document each search engine's informational materials in order to understand what can reasonably be expected of the search engine. Keeping a record of these materials as they existed at the time of contracting will allow the advertiser to show the basis for its expectations in the event of litigation.
- An advertiser who believes that it has been the victim of click fraud and is having difficulty in dealing with the search engine should document any evidence of click fraud, as well as all correspondence with the search engine regarding that click fraud.
- Advertisers should negotiate custom contracts with search engines that define what counts as a click.

[<< Top](#)

Footnotes

1. Dan Hadjinian, University of Washington School of Law, Class of 2007. Thank you to all of the outstanding members of the Shidler staff. Special thanks to Larry Rozsnyai for his insights and attention to detail in his duties as my editor, Professor Anita Ramasastry for tireless efforts at preserving the Article's focus, and Professor Joel Ngugi for willingness to help in any way possible.
2. Google, Google Annual Report, 45 (2005), http://investor.google.com/pdf/2005_Google_AnnualReport.pdf

(last visited October 15, 2006). Yahoo!, Yahoo Annual Report, 38 (2005),

<http://www.shareholder.com/shared/dynamicdoc/YHOO/1183/YHOO>.

(last visited October 15, 2006).

3. Advanced Internet Technologies v. Google, Nos. C-05-02579 RMW, C-05-02885 RMW, 2006 WL 889477 (N.D. Cal. Apr. 5, 2006). Note that this case was originally brought by a company called Click Defense, who has subsequently withdrawn and been replaced by Advanced Internet Technologies. See http://blog.ericgoldman.org/archives/2005/12/click_defense_1.htm. See also Complaint, Click Defense v. Google, No. C05 02579, 2005 WL 1687517 (N.D.CA. June 24, 2005). Complaint, Lane's Gifts and Collectibles, et al. v. Yahoo, et al, CV-2005-52-1 (W.D.Ark., Feb. 17, 2005), <http://blog.ericgoldman.org/archives/lanegiftsac.pdf>. At the time of publication it remained undetermined whether the case would be decided by state or federal court. The complaint names America Online, Netscape, Ask Geeves, Go.com, Lycos, Looksmart, and Findwhat.com as defendants, in addition to Yahoo and Google. A third case against Yahoo is nearing settlement at the time of this Article's publication. This settlement, between Yahoo and Checkmate Strategic Group, would allow all advertisers on Yahoo a one time extended period for submission of click fraud claims. The advertisers will be reimbursed for any clicks that a Yahoo investigation determines to be fraudulent. See Joe Shaulis, *Yahoo! 'Click Fraud' Settlement Wins Preliminary Approval From Federal Judges*, The Jurist, June 29, 2006, http://jurist.law.pitt.edu/paperchase/2006/06/yahoo-click_fraud-settlement-wins.php; see also Yahoo!, *Yahoo! and Click Fraud: Our Commitment to Protecting Advertisers*, <http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=202354> (last visited October 15, 2006).
4. The plaintiffs also claimed unjust enrichment, negligence, and unfair business practices. The unjust enrichment and negligence claims were dismissed, while the unfair business practice claims — an issue beyond the scope of this article — are still being considered. Order on Motion to Dismiss, Click Defense v. Google, No. 5:05-cv-02579, 2005 WL 1687517 (N.D. CA. Sept. 14, 2005).

5. Krysten Crawford, *Google CFO: Fraud a Big Threat*, CNN Money (Dec. 2, 2004), http://money.cnn.com/2004/12/02/technology/google_fraud.
6. Google allow advertisers to set a daily spending cap. If the cap is reached in any day, the advertisement is removed. When this happens, all of the ads that have a lower display priority (largely because of the per-click bid price, but also because of the ad's effectiveness) are moved up one spot for the day, resulting in a more prominent, and hopefully profitable, position.
7. Bots are software programs that are written and trained to repeatedly click on an advertisement. They can run hundreds of clicks in minutes, quickly exhausting an advertiser's daily or total budget and generating large amounts of revenue for an affiliate. Jesse Stricchiola, *Lost Per Click: Search Advertising and Click Fraud* (July 29, 2004), <http://searchenginewatch.com/searchday/article.php/3387581>. See Stefanie Olson, *Exposing Click Fraud*, CNET News.com (July 19, 2004), http://news.com.com/Exposing+click+fraud/2100-1024_3-5273078.html.
8. *Online Advertising: Pay Per Sale*, The Economist, Issue 950 (Oct. 1, 2005), available at 2005 WLNR 15443150.
9. *Id.*
10. *Id.*
11. Crawford, *supra* note 5.
12. There is anecdotal evidence of declining advertiser confidence (See Crawford, *supra* note 5; See also Brad Stone, *When Mice Attack: Internet Scammers Steal Money With Click Fraud*, Newsweek (Jan. 24, 2005), <http://www.msnbc.msn.com/id/6830802/site/newsweek/> (last visited October 15, 2006); See also Amanda Bronstad, *Internet Advertising Fraud Places Google, Yahoo on Defensive*, Los Angeles Business Journal, Volume 27, Issue 35 (Aug. 29, 2005), available at 2005 WLNR 14835504.) The industry's concerns are best highlighted by Google CFO George Reyes' characterization of click fraud as the biggest threat to the Internet economy (Crawford, *supra* note 5).

13. See Complaint, Click Defense v. Google, No. C05 02579, 2005 WL 1687517 (N.D.CA. June 24, 2005); Complaint, Lane's Gifts and Collectibles, et al. v. Yahoo, et al, CV-2005-52-1 (W.D.Ark., Feb. 17, 2005) available at <http://blog.ericgoldman.org/archives/lanegiftsac.pdf>. See also Go2Net, Inc. v. C I Host, Inc., 60 P.3d 1245, 115 Wn.App. 73 (Wash. Ct. App., 2003).
14. Complaint, Google, Inc. v. Auctions Expert International L.L.C., No. 104 CV 030560, 2004 WL 2826489 (Cal.Superior 2005).
15. Complaint, Click Defense v. Google, No. C05 02579, 2005 WL 1687517 (N.D.CA. June 24, 2005). Note that AIT has replaced Click Defense as lead plaintiff in this case.
16. Complaint, Lane's Gifts and Collectibles, et al. v. Yahoo, et al, CV-2005-52-1 (W.D.Ark. Feb. 17, 2005) available at <http://blog.ericgoldman.org/archives/lanegiftsac.pdf>.
17. Plaintiffs also made claims for negligence, unjust enrichment, unfair business practices, and civil conspiracy. Some of these other claims have been dismissed and all of them are beyond the scope of this Article.
18. Adwords is Google's search based, PPC advertisement program.
19. Complaint, Click Defense, No. C05 02579, slip op. at 12.
20. *Id.*, slip op. at 16-17.
21. *Id.*
22. *Id.*, slip op. at 11-2.
23. *Id.*, slip op. at 12.
24. Complaint at 10, Lane's Gifts and Collectibles, et al. v. Yahoo, et al, *supra* note 16. Note that the complaint in this case is noticeably lacking any detail as to the nature and background of the substantive claims. For this reason, this article will primarily use AIT as the representative example, but the analysis should be applicable to the broader click fraud issue, including *Lane's Gifts*.
25. The case is still pending against the other

- defendants. See Judge Approves Google Settlement, <http://www.webpronews.com/topnews/topnews/wpn-60-20060727JudgeApprovesGoogleSettlement.html> (last visited Nov. 4, 2006).
26. See Wendy Davis, *Judge Approves \$90 Million Click Fraud Settlement*, Online Media Daily (July 28, 2006), <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=46148&Nid=22044&p=373759> (last visited Nov. 4, 2006).
27. See Eric Goldman, *Lane's Gifts Click Fraud Lawsuit Near Settlement*, March 8, 2006, http://blog.ericgoldman.org/archives/2006/03/lanes_gifts_cli_1.htm (last visited October 15, 2006).
28. See Eric Goldman, *AIT Click Lawsuit Stayed*, April 10, 2006, http://blog.ericgoldman.org/archives/2006/04/ait_click_fraud.htm (last visited October 15, 2006).
29. See *Id.*
30. *Go2Net, Inc. v. C I Host, Inc.*, 60 P.3d 1245, 115 Wn.App. 73 (Wash. Ct. App., 2003).
31. *Id.* at 1247.
32. *Id.* at 1249.
33. *Id.* at 1247.
34. *Id.* at 1251.
35. *Id.*
36. AdSense is Google's affiliate program through which third parties host Adwords PPC advertisements in exchange for a share of the revenue generated by those ads.
37. Complaint, Auctions Expert International L.L.C., No. 104 CV 030560, ¶ 17.
38. *Id.* at ¶ 15.
39. *Id.*
40. *Id.* at ¶¶ 17 and 24-5.
41. *Id.* at ¶ 18.
42. Crawford, *supra* note 5.
43. As discussed in footnote 24, the complaint in *Lane's Gifts* offers little insight into the substantive claims.

For this reason, the Article primarily uses *AIT* as a representative example. The analysis should be applicable to the broader click fraud issue, including *Lane's Gifts*.

44. Richard A. Lord, *Williston on Contracts* §63.1 (4th edition, 1990).
45. *Williston on Contracts* §63.15 (4th edition, 1990).
46. *Id.* at §63.8.
47. *Id.* at §63.8.
48. *Id.* at §63.3.
49. *Id.*
50. *Id.* at §63.14.
51. *Id.* at §30.7.
52. *Id.* at §§ 31.1; 33.14.
53. *Id.* at §33.14.
54. *Id.* at §30.7
55. Google, *Google Inc. AdWords Program Terms*, April 19, 2005, <https://adwords.google.com/select/TCUSbilling.html> [hereinafter AdWords agreement].
56. Yahoo! Search Marketing, *Frequently Asked Questions: Sponsored Search #21*, <http://help.yahoo.com/help/us/performance/customer/dtc/policies/> (last visited October 15, 2006).
57. Google claims that it employs great resources in order to detect and prevent fraudulent clicks, and that advertisers will not be charged for detected fraudulent clicks. (See the section *infra* "*Lane's Gifts: A Representative Example*"). Yahoo indicates that "advertisers are charged only for valid clicks or those clicks that are from users who have actively chosen the advertiser's listing out of a set of search results where a detailed title and, usually, a description are provided." (See *Yahoo Frequently Asked Questions* <http://help.yahoo.com/help/us/performance/customer/dtc/policies/> (see #21)). Yahoo also claims to employ a "click protection system" so that advertisers are not charged for invalid clicks and that there are many situations that would create an invalid click. (See *Yahoo Frequently Asked Questions*

<http://help.yahoo.com/help/us/performance/customer/dtc/policies/> (see #14 and 17)). Kanoodle, a provider of sponsored links to many of the web's largest sites, considers the use of repeated manual clicks, robots, automated clicking tools, or other deceptive software to generate clicks to be abusive and unacceptable (see

http://www.kanoodle.com/ctpub_ba_prereg_faq.cool (see "How Do I Stop Fraudulent Clicks?").

Findwhat.com (now known as MIVA.com) is another major search engine that states it will not tolerate fraudulent behavior, and that advertisers may receive refunds for fraudulent clicks (see

http://www.miva.com/us/content/advertiser/miva_advertiser_tools.a; scroll down to "Statement & Policy on Questionable Traffic").

58. This criterion aligns with Google's statement that each click should be generated by a user legitimately interested in accessing the site because advertisers generally only want to pay for clicks that could result in some benefit. Complaint, Auctions Expert International L.L.C., No. 104 CV 030560, ¶ 15.

59. This criterion speaks to the same end as the first, namely that a valid click should only exist where there is the potential for a benefit to the advertiser. However, whereas the first criteria is a presents a threshold (is the entity responsible for the click able to follow through on creating the benefit), the second criteria rests on a determination of intent. Complaint, Auctions Expert International L.L.C., No. 104 CV 030560, ¶ ¶ 15, 17, and 45; Marketing, *Frequently Asked Questions: Sponsored Search #21*, <http://help.yahoo.com/help/us/performance/customer/dtc/policies/> (last visited October 15, 2006); Jesse Stricchiola, *Lost Per Click: Search Advertising and Click Fraud* (July 29, 2004), <http://searchenginewatch.com/searchday/article.php/3387581>.

60. The *Lane's Gifts* case has recently settled. This case is simply used as an example of the type of claims a PPC advertiser might make against a search engine in light of this Article's analysis. Google has changed some of its practices since the beginning of the *Lane's Gifts* case, and this example is not intended as a commentary on Google or any other search engine's PPC billing practices, nor of any breach of contract action's success against Google or any other

search engine.

61. AdWords agreement, *supra* note 55.
62. *Id.*
63. *Id.* The Adwords agreement dictates that is governed by California law and subject to adjudication in Santa Clara County.
64. Kock v. Quaker Oats Co., 681 F.2d 649, 657-8 (9th Cir. 1982); Zenger-Miller, Inc v. Training Team GmbH, 757 F.Supp. 1062, 1067 (N.D. Cal. 1991) (quoting Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 38-9 (1968)); Morey v. Vannucci, 64 Cal.App. 4th 904, 75 Cal. Rptr.2d 573, 579 (Cal. 1998); Masterson v. Sine, 68 Cal.2d 222, 225 (1968); O'Neill v. United States, 50 F.3d 677, 685 (9th Cir. 1995).
65. AdWords agreement, 7, *supra* note 55. The Adwords agreement requires that the agreement be governed by California law and adjudicated in Santa Clara County. The *AIT* case was filed in the U.S. District Court for the Northern District of California.
66. Kock, 681 F.2d at 657-8; Zenger-Miller, Inc., 757 F.Supp. at 1067 (quoting Pacific Gas & Elec. Co., 69 Cal.2d at 38-9).
67. In re Felton, 197 B.R. 881, 887-8 (N.D. Cal. 1996) (citing Winet v. Price, 4 Cal.App.4th 1159, 6 Cal.Rptr.2d 554 (1992)).
68. *Id.*
69. Zenger-Miller, 757 F.Supp. at 1067 (citing Pacific Gas & Elec. Co., 69 Cal.2d at 39-40); .Morey, 75 Cal. Rptr.2d at 579; Masterson, 68 Cal.2d at 225; O'Neill, 50 F.3d at 685.
70. Pacific Gas & Elec. Co., 69 Cal.2d at 37; Morey, 75 Cal. Rptr.2d at 579. A court may seek to determine the parties' objective — rather than subjective — intent as evidenced by the words of the contract. In re Bennett, 298 F.3d 1059, 1064 (9th Cir. 2002) (quoting Shaw v. Regents of Univ. Of Cal., 58 Cal.App.4th 44, 67 (1997)).
71. AmJur.2d §361; See *also* L.K. Comstock & Co., v. United Eng. and Contractors, 880 F.2d 219, 223 (9th Cir. 1989); Corbin on Contracts, Revised Ed., Vol. 5 §24.13 (1998); Restatement (Second) of Contracts

§202(3) (b) and (5).

72. AdWords agreement, 5, *supra* note 55.
73. Google AdWords, *What Kind of Clicks Does Google Consider Invalid*,
<https://adwords.google.com/support/bin/answer.py?answer=6423&topic=35> (last visited October 15, 2006).
74. Google AdWords, *How Does Google Detect Invalid Clicks*,
<https://adwords.google.com/support/bin/answer.py?answer=6114&topic=35> (last visited October 15, 2006).
75. Google AdWords, *What Does Google Do When Invalid Clicks are Detected*,
<https://adwords.google.com/support/bin/answer.py?answer=6422&topic=35> (last visited October 15, 2006).
76. Google AdWords, *What Can I do to Monitor or Prevent Fraudulent Clicks on My Ad?*
<https://adwords.google.com/support/bin/answer.py?answer=6429&topic=35> (last visited October 15, 2006); *See also* Google AdWords, *How Do I Report Suspected Invalid Clicks*,
<https://adwords.google.com/support/bin/answer.py?answer=6432&topic=35> (last visited October 15, 2006).
77. Google AdWords, *How Will Google Credit My Account for Invalid Clicks*,
<https://adwords.google.com/support/bin/answer.py?answer=6426&topic=35> (last visited October 15, 2006).
78. Complaint, Auctions Expert International L.L.C., No. 104 CV 030560, ¶ 15; *see also* ¶ 51 stating that fraudulent clicks include, but are not limited to "repeated manual clicks, the use of robots or other automated query tools and/or computer generated search requests, and/or the fraudulent use of other search engine optimization services and/or software," as well as authorizing or encouraging others to engage in such conduct.
79. *Id.* at ¶ 15
80. *Id.* at ¶ 15 and 17.

81. *Id.* at ¶ 45.
82. *Id.* at ¶ 46.
83. See Wendy Davis, *supra* note 26.
84. Jesse Stricchiola, *Lost Per Click: Search Advertising and Click Fraud* (July 29, 2004), <http://searchenginewatch.com/searchday/article.php/3387581> (last visited October 16, 2006).
85. *Id.*
86. *Id.*
87. *How Does Google Detect Invalid Clicks*, <https://adwords.google.com/support/bin/answer.py?answer=6114&topic=35> (last visited November 22, 2006).
88. *What Can I do to Monitor or Prevent Invalid Clicks on My Ad?*, <https://adwords.google.com/support/bin/answer.py?answer=6429&topic=35> (last visited November 22, 2006); see also *How do I report Suspected Invalid Clicks*, <https://adwords.google.com/support/bin/answer.py?answer=6432&topic=35> (last visited November 22, 2006).
89. The technical aspects of such solutions are beyond the scope of this paper. However, interested companies can find abundant information on the Internet. One such source can be found at: MordCom, Inc., *PPC Management and Monitoring Tools*, <http://ppcuniverse.com/pay-per-click-search-engines-tools-services.php?type=PPC> (last visited October 15, 2006). This particular site has an extensive list of companies and tools that advertisers could use to fight click fraud. See also Kevin J. Delaney, *Web Startups Vie to Detect 'Click Fraud'*, *Startup Journal*, The Wall Street Journal Center for Entrepreneurs (June 10, 2005), <http://startup.wsj.com/ecommerce/ecommerce/20050610-delaney.html>.
90. Kevin Newcomb, *IAB Begins Process of Defining Clicks*, *Clickz.com* (August 3, 2006), <http://www.clickz.com/showPage.html?page=3623056>.