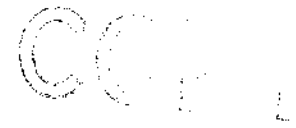


UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division



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 :  
 WASHINGTONPOST.NEWSWEEK :  
 INTERACTIVE COMPANY, LLC, et al., :  
 Plaintiffs, :  
 :  
 -vs- :  
 :  
 THE GATOR CORPORATION, :  
 Defendant. :  
 :  
 ----- :

C.A. No. 02-909-A

HEARING ON MOTIONS

July 12, 2002

Before: Claude M. Hilton, Judge

APPEARANCES:

Terence P. Ross, Hill B. Wellford, III and Claudia Osorio,  
Counsel for the Plaintiffs

Janet L. Cullum, Michael J. Klisch, Thomas J. Friel, Jr.,  
Brian Mitchell and L. Scott Primak, Counsel for the Defendant

1 THE CLERK: Civil action 02-909-A,  
2 Washingtonpost.newsweek Interactive Company, et al. versus  
3 The Gator Corporation.

4 MR. KLISCH: Good morning, Your Honor. Mike Klisch  
5 on behalf of the defendant. And after everyone introduces  
6 themselves, I have just got a couple of very brief  
7 preliminary matters to take up with you, if you don't mind.

8 THE COURT: All right.

9 MS. CULLUM: Good morning, Your Honor. Janet  
10 Cullum, also on behalf of the defendant, The Gator  
11 Corporation.

12 MR. PRIMAK: L. Scott Primak, also on behalf of The  
13 Gator Corporation, general counsel as well.

14 MR. FRIEL: Good morning, Your Honor. Tom Friel,  
15 also from Cooley Godward on behalf of Gator Corporation.

16 THE COURT: Good morning.

17 MR. MITCHELL: Good morning, Your Honor. Brian  
18 Mitchell, also with Cooley Godward for The Gator Corporation.

19 MR. ROSS: Good morning, Your Honor. Terence Ross  
20 with Gibson, Dunn & Crutcher for the plaintiffs.

21 THE COURT: Mr. Ross.

22 MR. WELLFORD: Good morning, Your Honor. Hill  
23 Wellford from Gibson Dunn, also for the plaintiffs.

24 THE COURT: Good morning. There is one more  
25 introduction.

1 MR. KLISCH: Oh, I am sorry.

2 MS. OSORIO: Good morning, Your Honor. Claudia  
3 Osorio from Gibson Dunn, also for plaintiffs.

4 THE COURT: All right. Good morning.

5 MR. KLISCH: Your Honor, just before you, shortly  
6 before you came on the bench this morning we did receive an  
7 order from Judge Poretz on the defendant's oral emergency  
8 motion for a temporary protective order concerning some for-  
9 attorneys-eyes-only designations which the defendant had made  
10 in its brief and which appeared in the reply brief. And  
11 Judge Poretz has issued an order sealing those temporarily.

12 And you have that financial information, Your  
13 Honor. And we see no reason why in court today counsel for  
14 the plaintiffs has to make direct reference to the specific  
15 numbers in making his argument. Certainly if he believes  
16 that he has to do that, we ask that Your Honor take that up  
17 at the bench.

18 THE COURT: All right.

19 MR. ROSS: Your Honor, since it goes to the central  
20 issue, the balance of harms, I don't see how I can't not  
21 address it. And, quite frankly, it would be inappropriate  
22 under the Fourth Circuit, United States Supreme Court  
23 precedent to close the courtroom, which is essentially what  
24 they are asking.

25 The information has already--

1 THE COURT: Well, I am not going to enter a  
2 judgment for anybody this morning, so why do the exact  
3 numbers make any difference at all?

4 MR. ROSS: There actually aren't any exact numbers,  
5 there is only a range.

6 THE COURT: Well then, what could be -- what could  
7 be private or --

8 MR. ROSS: I agree, Your Honor, there is nothing  
9 private at all.

10 THE COURT: -- anything about a range of numbers  
11 that needs to be under seal?

12 Let's go forward and we will see. You can object  
13 if you hear something coming out that you don't like.

14 MR. KLISCH: Thank you, Your Honor.

15 Secondly, Your Honor, I would like to move the  
16 admission of two of my partners, Janet Cullum and Tom Friel,  
17 partners in our California offices, both members in good  
18 standing of the State Bar of California and, as you have seen  
19 from our application, members of several federal courts. And  
20 I fully endorse their admission to this court.

21 THE COURT: All right. Your motion is granted.

22 MR. KLISCH: Thank you, Your Honor.

23 THE COURT: All right. Let me hear why you-all  
24 need a preliminary injunction.

25 MR. ROSS: Yes, Your Honor. Plaintiffs are a group

1 of seven news organizations who also use web sites to  
2 disseminate their news.

3 I would like to not reiterate the arguments in our  
4 case, but I am going to start off by setting the stage by  
5 showing the Court exactly what is going on here.

6 If you had gone on line on Monday, Your Honor,  
7 Monday afternoon and looked at USA Today on line at  
8 usatoday.com, this is exactly what you would have seen. It  
9 is very carefully designed, it is very carefully laid out.  
10 Enormous investment is made in this by USA Today, by Gannett.

11 Now, if you had had The Gator software on your  
12 computer, instead of seeing that, at the exact same moment  
13 that that was being seen by a person without Gator software,  
14 you would have seen this screen.

15 And you note the significant difference, this large  
16 pop-up advertisement in the middle of the screen covering up  
17 the headlines, covering up a portion of an advertiser's  
18 advertisement who actually paid to be there.

19 It is undisputed that this was put here by Gator  
20 Corp. without the permission of the web site or USA Today,  
21 without paying any money. Indeed, they collected money from  
22 this particular advertiser to do that to our web site.

23 That is the factual predicate for this case. We  
24 are asking for a preliminary injunction to stop that from  
25 happening during the pendency of this litigation.

1           The Blackwelder test is quite clear. We start off  
2 with the balance of hardships. And let's look at the balance  
3 of hardships in this case. The Gator Company's harms are  
4 virtually nonexistent. And to the extent they have any  
5 harms, it is monetary harms.

6           Their chairman put out a public press release on  
7 June 27 saying that these sites that are owned by the  
8 plaintiffs constitute less than, and this is a quote, less  
9 than one-third of 1 percent of the revenues of the company.  
10 Less than one-third of 1 percent of their revenues.

11           We are not asking to have this company shut down.  
12 We are not asking to stop them doing these advertisements on  
13 any sites other than 16 sites that we own. They can do this  
14 on the millions of other sites on the web. And as their  
15 chairman said publicly, that is less than one third of 1  
16 percent of our business.

17           Now, in their opposition brief they say, well, it  
18 is going to cause advertiser flight. People will stop  
19 advertising with them.

20           They don't have a lot of evidence of that. What  
21 they have is two e-mails that seem to indicate that two  
22 contracts for advertising were cancelled. But in both of  
23 those e-mails the advertiser said, we are cancelling because  
24 of the bad press about Gator. There is no mention of an  
25 injunction. And they happened last week before the

1 injunction.

2           The case law is quite clear, that sort of harm that  
3 has nothing to do with the injunction does not flow from the  
4 injunction, is not cognizable for the balance of hardships  
5 test.

6           Now, they also have three, a fax and two other  
7 e-mails that say, well, we were sort of thinking about doing  
8 business with you in the future, but we are just going to  
9 suspend those talks. That is too speculative to count as a  
10 harm.

11           But again, it predated the injunction. They don't  
12 mention anything about the injunction. Those are harms that  
13 don't flow from the injunction and, therefore, cannot be  
14 considered by the Court in the balance of hardships test.

15           Anything else, for example, the notion that somehow  
16 this will call into question the viability of Gator as a  
17 company, is just mere speculation and clearly wrong when the  
18 CEO of the company, a man who should know best, says that  
19 this injunction is only going to impact one-third of 1  
20 percent of our revenues.

21           Now, they also put out a second type of harm, First  
22 Amendment. They say this is some sort of prior restraint of  
23 speech.

24           Well, the Supreme Court and every Circuit Court  
25 that has ever considered this has rejected that out of hand.

1 They say the copyright statute has embedded into it the First  
2 Amendment because of the dichotomy between ideas and  
3 expressions. You only copyright expressions, not ideas, and  
4 because of the fair use doctrine. Therefore, there is  
5 absolutely no need for a Court to consider the First  
6 Amendment in a copyright matter. And, therefore, that's not  
7 a cognizable harm to them.

8           So, what are they left with? By their own  
9 admission, they are left with the loss of revenue of one-  
10 third of 1 percent of their revenue, which is not considered  
11 for purposes of this sort of analysis because it is  
12 reconcilable with money.

13           Now, with respect to this notion that they might  
14 lose their business. The courts have said over and over and  
15 over again, if you build a business on infringing activity,  
16 you cannot come in in opposition to a preliminary injunction  
17 and say, we will be put out of business, because you should  
18 have known in building a business on infringing conduct, that  
19 that might happen. And that's the case here.

20           Now, that's that side of the scales, Your Honor,  
21 and it is a virtually-no-harm scale.

22           Now, let's go over to the plaintiffs' harm, the  
23 other side of the scale here. And the very first harm is  
24 damage to intellectual property. These are valuable  
25 trademark and copyright rights. And what do the courts say,

1 including this court? You have to presume that is a harm.

2 So, the scale immediately starts tipping in our  
3 favor.

4 The second type of harm is consumer confusion. Our  
5 survey indicates that there are 66 percent of the consumers,  
6 66 percent think that the plaintiffs have something to do  
7 with those pop-up ads. That's overwhelming. In this circuit  
8 you only need to show 10 percent confusion.

9 Even if you chop that in half to 33 percent, that  
10 would be three times what the Fourth Circuit requires. And  
11 what this court has said over and over again is, consumer  
12 confusion is a grounds for a preliminary injunction.

13 And so, that scale gets even heavier. But that's  
14 not the end of the harms.

15 These are news organizations. They live and die by  
16 their reputation for integrity in reporting the news. And  
17 when they lose control of their sites, as they have here,  
18 their integrity is at risk.

19 What if instead of that being a mortgage ad, it was  
20 an ad for a porno site or a casino site? Or, as we put in  
21 our brief, what happens in connection with an article about  
22 the September 11 tragedy if all of a sudden a pop-up ad for a  
23 flight school appeared?

24 What happens if we are investigating the WorldCom  
25 scandal, we have an article and it pops up an ad for MCI?

1 People will start thinking we are taking money from MCI, our  
2 coverage must be biased.

3 We can't afford to lose control of our site. And  
4 so, that's another harm. And all of a sudden it gets like  
5 this. And that's what the courts call dipping decidedly in  
6 favor of the plaintiffs.

7 And so, that takes us to the merits, likelihood of  
8 success on the merits. We no longer have to, with that sort  
9 of imbalance, show a likelihood of success. We just have to  
10 raise a grave question that goes to the merits. But I think  
11 we have demonstrated in our briefs a likelihood of success on  
12 the merits.

13 And let's start with the trademark claims. They  
14 are registered trademarks. We have submitted them. There  
15 can be no question about them. Their only defense is they  
16 didn't use them in commerce.

17 Let me show you another blowup here, Your Honor.  
18 This is from an advertising brochure that they put out to all  
19 the people they want to advertise.

20 Now, I have circled down here, New York Times, Wall  
21 Street Journal. Those are our trademarks. They are being  
22 used in advertising.

23 If you look at Section 45 of the Lanham Act, which  
24 defines use in commerce, it says, if you use a mark in  
25 advertising, that's a use in commerce.

1           How could that not be a use in commerce? They are  
2 giving this out. And actually if you read this whole page,  
3 page 4, what it says is that it is suggesting to people to go  
4 on our sites.

5           Let me show you one other blowup, Your Honor. They  
6 keep saying that they are not placing and not telling people  
7 that they are placing ads on our sites, they are just  
8 displaying it over. Well, look here-- And if I may, with  
9 the Court's permission, come a little bit closer with this  
10 one. Let me just step around.

11           This is off of their web site, and it is the  
12 portion of the web site that they pitch to advertisers. And  
13 what does it say here, the second bullet point? Delivering  
14 your message on any site on the web.

15           And yet they would say in their brief they don't  
16 deliver it to the web. This is what they are telling the  
17 advertisers, that they can deliver your message on any site  
18 on the web. Their own words, not mine.

19           They also use the marks in commerce by putting them  
20 in close proximity to ours. These are trademarks, USA Today.  
21 How, if you see this, could you not come away thinking that  
22 this is part of the USA Today?

23           The analogy I would give in real life is this, Your  
24 Honor. You go into a store and there is a big blowup, a  
25 full-size figure of Tiger Woods selling his Nike golf balls.

1 And there is a bin of golf balls right there and Tiger Woods  
2 smiling and pointing like this.

3 And then the Titleist people come along and put  
4 their bin of golf balls right in front of the Nike golf  
5 balls. So, as you walk by, you see Tiger Woods pointing to  
6 the Titleist golf balls. So, you scoop up a bunch of  
7 Titleist golf balls and buy them assuming that Tiger Woods  
8 plays with them.

9 That's what is going on here. People are assuming  
10 that that USA Today stamp, that trademark up there, somehow  
11 is affiliated with this and has preapproved and prescreened  
12 it. And that is use in commerce.

13 Finally, in order to get that to our site, they  
14 have to program their computer with our URL. The URL is the  
15 [www.usatoday.com](http://www.usatoday.com), which is trademarked.

16 So, they are using it in commerce. This is like  
17 the metatag cases of a couple years ago. All those cases  
18 said the same thing, you put somebody's trademark in your  
19 metatag, you are using it in commerce.

20 So, this defense of theirs on trademarks is just  
21 gone. It is just not there. And that means we are likely to  
22 succeed. And that was their only defense.

23 On hot news misappropriation, Your Honor. They  
24 simply make a fundamental error about the law. The United  
25 States Supreme Court, something we can't argue with, has said

1 this cause of action exists. And it doesn't exist just in  
2 New York. It says it is a federal cause -- a federal common  
3 law cause of action. This Court does not have the choice to  
4 reject that.

5 And since that was their only defense, we are  
6 likely to prevail on that.

7 Finally, there is the copyright causes of action.  
8 And again, they simply misunderstand the current law of  
9 copyright.

10 Last year the United States Supreme Court in Tasini  
11 said, in analyzing a digital copyrighted work, you have to  
12 start from the perspective of the viewer, how does the viewer  
13 perceive the situation.

14 And let me again put this up. That means the PC  
15 user is the viewer. And what does he perceive? He perceives  
16 an ad right there in the middle. There is no choice in how  
17 to look at this, that's what the Supreme Court says. And  
18 they base that on Section 102 of the Copyright Act, which  
19 indeed says, from which any form of expression can be  
20 perceived.

21 And it is not different from the old cases, Your  
22 Honor, that you have handled in which you applied the  
23 audience test. You know, you have to look at it from the  
24 audience's perspective as to whether a musical work or a  
25 television work are copied.

1           It is really a very traditional point of view. You  
2 just have to take the point view of the viewer. And what the  
3 viewer sees is a modification. The viewer was intended to  
4 see this, but instead he sees this. And what the viewer sees  
5 is a modification. That's a violation of both the display  
6 right and the derivative right.

7           So, therefore, we are likely to succeed on the  
8 merits, Your Honor. And given that combination, this heavy  
9 tilting of the balance in our favor and the likelihood of  
10 success on the merits, under Blackwelder a preliminary  
11 injunction is virtually mandated here, Your Honor.

12           THE COURT: All right.

13           MR. ROSS: Thank you.

14           MS. CULLUM: Good morning, Your Honor. I suppose  
15 what is most striking after the recitation of the plaintiffs'  
16 position here, particularly with respect to the harms that  
17 the plaintiffs are suffering, they are severe and disruptive,  
18 interfering with their ability to present their sites to the  
19 viewers, it is striking to me that the behavior that my  
20 client engaged in, the advertising services that it provides,  
21 didn't begin yesterday or two weeks ago or a month ago. We  
22 have been serving ads in the way we serve them for well over  
23 a year.

24           If there was so much pain and disruption and loss  
25 of business and all of these harms to their reputations, how

1 come they didn't notice it until, by their own admission,  
2 sometime in the spring of this year? And then they had to  
3 take time and go to a survey and build their case before they  
4 came in to this Court asking for the relief that they have  
5 asked for.

6           It is one thing in a trademark infringement case to  
7 not have evidence of actual confusion to support your  
8 position when a product is just launched in the marketplace  
9 or, indeed, as is sometimes the case in trademark situations  
10 where there has just been an announcement that a product is  
11 coming and a mark is going to be used which is alleged to be  
12 infringing. It is another thing, and courts have routinely  
13 recognized, that when there has been coexistence in the  
14 marketplace for an extended period of time without any actual  
15 confusion-- And we have to assume, Your Honor, that there is  
16 none here because there is none, no evidence of it in the  
17 record. That suggests that there is no harm going on  
18 deriving from the confusion.

19           If I might, Your Honor, I wanted to spend the time  
20 that you have given me this morning to just briefly talk  
21 about the reply brief because I think that reply brief that  
22 was filed recently by the plaintiffs speaks very loudly to  
23 some issues here, both in terms of admissions that are made  
24 there as well as omissions that are in those papers that  
25 compel the conclusion that the plaintiffs have not met their

1 burden here in terms of what they need to show for seeking a  
2 preliminary injunction.

3 I just mention one of them, and that is the issue  
4 on the balance of harms, Your Honor. And the omission there  
5 is really the evidence of any actual harm to them.

6 They came out in their papers and indeed began  
7 their argument today by pointing out that there is an  
8 economic consequence to them. In their reply they came back,  
9 desperate to show that there is some irreparable harm, so  
10 they started talking about the harms to their reputation and  
11 there intellectual property.

12 What is striking is that even though they put in  
13 nine more declarations from their plaintiffs, only two of  
14 those mention harm to reputation. So, I don't know if the  
15 other seven weren't experiencing it, but I think we have to  
16 conclude that. And they go no further than that.

17 So, what we have on this record in terms of  
18 irreparable harm to the plaintiffs is the legal fiction that  
19 they derive from the presumption. Which, of course, they are  
20 not entitled to until they actually prove up those claims.  
21 And I submit they can't, Your Honor. And two, these very  
22 conclusory statements of harm to their reputation.

23 Now--

24 THE COURT: You think they are not entitled to the  
25 presumption that there is harm at the preliminary injunction

1 stage of the proceedings?

2 MS. CULLUM: I do think that the law provides for a  
3 presumption of irreparable harm if you are able to state a  
4 claim for intellectual property violations. And that means  
5 more than just say the words, here we have a copyright claim.  
6 It means, provide evidence on a preliminary injunction--

7 THE COURT: Well, those charts that I looked at,  
8 isn't that sufficient that you are using their mark when you  
9 put that up on their--

10 MS. CULLUM: I am sorry, Your Honor?

11 THE COURT: Don't the charts that they just showed  
12 me indicate that your client is using their mark?

13 MS. CULLUM: No, Your Honor, they don't. And  
14 that's actually something that I was going to turn to next.  
15 And that is, what is undisputed in the record before this  
16 Court is the manner in which my client's technology works.

17 We have the declaration of Barbara Fredrickson, and  
18 it is unrefuted, and also it is actually admitted from their  
19 own expert, Mr. Edelman, that says, my client's software is  
20 downloaded onto the user's personal computer. The ads that  
21 my client serves are delivered to the user's personal  
22 computer.

23 Those ads bear our marks. They don't bear any of  
24 the plaintiffs' marks. We are not using any of the  
25 plaintiffs' marks.

1           And actually what is really interesting is that in  
2 their reply brief, they actually point out why this isn't a  
3 trademark infringement because Mr. Edelman in his  
4 declaration, the new one, has an exhibit there, 5, where he  
5 shows MSN Messenger, who also is delivering pop-up windows to  
6 the user's personal computer.

7           And there you have on that page 5, I don't think  
8 Your Honor will be able to see it from here, I don't have the  
9 benefit of a blowup, but it is actually quite misleading  
10 because in order for Mr. Edelman to prepare this exhibit,  
11 what he had to do is alter the computer screen. Which, of  
12 course, we take the position the users have the right to do  
13 that. He had to shrink down the portion of the page that  
14 shows the Washington Post page so he would have a blank  
15 column over here to put the MSN Messenger Instant Message.

16           Well, there you have the MSN Messenger trademark  
17 there, Washington Post trademark there. And what does Mr.  
18 Edelman say about that? He says, and I quote: Because the  
19 MSN Messenger window clearly identifies its source, as do our  
20 pop-up ads, and because computer users ordinarily  
21 specifically and manually download instant messenger programs  
22 directly from their providers, it is my opinion that users  
23 are not likely to be confused regarding the source or  
24 sponsorship.

25           THE COURT: Now, that little diagram you have,

1 maybe you ought to pass it up so I can look at it.

2           You are saying that what they have shown me is a  
3 distortion of what comes up on the screen?

4           MS. CULLUM: Yes, Your Honor, what I am saying is  
5 that in order to have that exhibit, in order for Mr. Edelman  
6 to create that exhibit, he had to modify the screen display  
7 on the computer he was using. Because as we saw from the  
8 exhibits that opposing counsel held up, typically, and the  
9 ones that they have created for their exhibits, they have  
10 their webpage take up the whole screen display.

11           Hear you can see that they have modified it so that  
12 the Washington Post only takes up a portion of the screen  
13 display, leaving a blank column on one side. And in that  
14 blank column they have put the MSN Messenger pop-up window.

15           So, Your Honor, our position is very simply, and it  
16 is the key and pervasive issue I believe in this case, the  
17 user has the right to control his or her own computer screen  
18 display.

19           And if that user wants to download The Gator  
20 software or the MSN Messenger software or any other software  
21 and have that software deliver pop-up windows to it, that is  
22 the user's right.

23           And the fact that the user installs that software  
24 and invites those pop-up windows to occur and that they then  
25 occur temporarily overlaying something else that is there,

1 whether it is a plaintiff's page, whether it is a document  
2 from some other web site, that's the user's choice. And  
3 there is no infringement because the user has the right to  
4 control that screen display.

5 THE COURT: If I am using your software and I am on  
6 my computer and I pull up USA Today, do I get your ad just as  
7 they have it on those posters?

8 MS. CULLUM: You may or you may not.

9 THE COURT: What would-- What would I have to do  
10 in order not to get that?

11 MS. CULLUM: Well, you would have to not have the  
12 Gator software on your computer. And so, you could take it  
13 off.

14 THE COURT: All right. So, if I had the Gator  
15 software on there, any time I pulled up USA Today to look at  
16 it, I would get your ad right in the middle of it just like  
17 the poster shows?

18 MS. CULLUM: Not any time, Your Honor. In fact,  
19 one of the--

20 THE COURT: Do you move it around from time to  
21 time, is that--

22 MS. CULLUM: It doesn't come up-- Certainly it  
23 doesn't come up every time for every user. In fact, one of  
24 the things we have pointed out in our paper, and this goes to  
25 the harm issue, that of all the page views that they have of

1 their various sites, a user viewing one of those pages would  
2 see a Gator served ad less than .02 percent of the time  
3 because the ad isn't triggered by the mere -- by the web site  
4 itself. It is triggered by what the user is doing in terms  
5 of going to various locations on the Internet. That's what  
6 our software does.

7 It is not-- It doesn't care what is on the user's  
8 computer screen. It cares what the behavior is that the user  
9 is engaged in.

10 So, we would actually call your attention, Your  
11 Honor, to a case called Playboy versus Netscape, which is  
12 probably as close to what we are about here as any other case  
13 that is out there. And that's a case where a search engine  
14 also used what the user entered in terms of a search term, a  
15 URL, knowing that a user was going somewhere and thereby  
16 indicating their interest in something, to then show an  
17 advertisement.

18 And the Court in that case in the Central District  
19 of California, said, well, that's not trademark use, that's  
20 not unfair, that's just paying attention to what users are  
21 doing so that you can then target advertising for them.

22 THE COURT: Well, that's a little different than  
23 what you-all are doing though, isn't it? You are not saying  
24 you may go somewhere and look at advertising. What you are  
25 putting up is your ad. And if it doesn't come up all the

1 time, at least part of the time it is coming up under  
2 somebody else's mark.

3 MS. CULLUM: Well, it is coming up on the user's  
4 computer screen overlaying what is on that screen, triggered  
5 by the user having gone to a particular URL.

6 But, for example, Your Honor, one of the things we  
7 point out in our paper is that a user may well put in a URL  
8 that would act as a trigger for us to send an advertisement.  
9 And that user could type that in and then while waiting for  
10 that page to load, could pull up a Word document and start  
11 working on that Word document. And if the ad came up at that  
12 point, the ad wouldn't appear over that webpage that had  
13 loaded. It would appear over the Word document because our  
14 ads don't care what's in the background. They are background  
15 ambivalent.

16 THE COURT: Well, maybe that's the problem. Maybe  
17 your ads have to come up when there is nobody's mark in the  
18 background.

19 MS. CULLUM: Well, Your Honor--

20 THE COURT: That could be done too. I mean, if  
21 somebody wants to pull up USA Today, why you could pop the  
22 USA Today up and then the screen goes blank and then up comes  
23 your ad. And then you go back to USA Today or do a variety  
24 of things. But you wouldn't have your message there under  
25 somebody else's mark.

1 MS. CULLUM: But our message isn't under somebody  
2 else's mark, Your Honor. It is no different than the MSN  
3 Messenger that is sitting there on the screen next to it  
4 because the user knows that they have computer software  
5 loaded that is going to serve ads to that user. And that  
6 window comes up in response to what the user has done and in  
7 response to the user having downloaded this software.

8 So, mere juxtaposition in this context is no  
9 different than juxtaposition in many other contexts where  
10 there would not be confusion.

11 THE COURT: All right. Well, I understand your  
12 position.

13 MS. CULLUM: All right. Can I address just briefly  
14 a couple of claims, the copyright and trademark claims? Just  
15 a couple of points.

16 THE COURT: All right. Give me 30 seconds.

17 MS. CULLUM: 30 seconds, okay. On the copyright  
18 claim, Your Honor, I think it is very significant that there  
19 is no evidence in the record of the copyrighted work. There  
20 is no evidence here that we copy anything. Copying is  
21 fundamental to copyright infringement claims.

22 On the trademark claim, there is no evidence, as I  
23 pointed out, of actual confusion. All they have is their  
24 survey. That survey should be deemed inadmissible. Under  
25 the clear case law, a trademark confusion survey has to

1 replicate the market conditions.

2           They don't cite any authority for that. All they  
3 say is that they couldn't do it. Your Honor, the fact that  
4 they couldn't do it doesn't make an unreliable survey  
5 reliable.

6           THE COURT: All right.

7           MS. CULLUM: Thank you, Your Honor.

8           THE COURT: I understand your position.

9           Do you want to give me 30 seconds now?

10          MR. ROSS: Could I have a minute?

11          THE COURT: No, 30 seconds. I have probably heard  
12 enough already.

13          MR. ROSS: Thank you, Your Honor. Let me just  
14 start with the grand proposition, she says that somehow Gator  
15 and a PC user can agree to violate the copyright laws.  
16 That's like me saying to Mr. Wellford, let's agree there is  
17 no red light on Duke Street. I run the red light. The cop  
18 pulls me over. I go, what are you doing, Officer? Mr.  
19 Wellford and I agreed there is no red light there.

20                 That's their argument, that they can somehow  
21 conspire to agree to violate the copyright laws. And that  
22 simply is nonsense.

23                 As far as use. Your Honor, I want to make it  
24 perfectly clear before you leave the bench. This is an  
25 advertising brochure. They are using our mark.

1           If you look at 15 U.S.C. 1127, the definition in  
2 the Lanham Act, 15 U.S.C. 1127, it says, the use of a mark in  
3 the sale or advertising is use of the mark.

4           This is use of the mark in advertising. Clearly  
5 the mark is being used.

6           THE COURT: All right.

7           MR. ROSS: As to the harm. What can I say--

8           THE COURT: You have already told me about that.

9           MR. ROSS: Thank you, Your Honor.

10          THE COURT: Well, I find that there is a sufficient  
11 showing here that there is a violation of the mark in this  
12 advertising coming up. Irreparable harm is presumed in the  
13 violation of that mark.

14          And I find that the plaintiffs are entitled to the  
15 entry of a preliminary injunction that pending this suit  
16 there will be no violation of the mark.

17          Now, there has been a rather lengthy order  
18 presented to me here, which I really haven't looked over. I  
19 will look over that. I don't know, you will get from me an  
20 order as to what this preliminary injunction covers, and it  
21 is probably going to be Monday before I get that done.

22          MR. ROSS: Thank you, Your Honor.

23          MS. CULLUM: Thank you, Your Honor. If I may, will  
24 we have an opportunity to submit to you affidavits on the  
25 amount of the bond? We could do that by Monday.