



The Legal Status of Cookie Stuffing in Europe, Particularly in the UK

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Abstract

Online affiliate marketing is one of the most popular online advertisement mechanisms. Even though often overlooked by online advertisers, it has a significant role in e-commerce development. For instance, the MarketingSherpa's research team estimated that, in 2006, affiliates worldwide earned US\$6.5 billion in bounty and commissions from a variety of sources. However, along with the development of affiliate marketing, problems and disputes in relation to the scheme also start to occur. For instance, many affiliates use unscrupulous methods, such as spam, adware, false advertising and other methods to get conversions unfairly.

Cookie stuffing is one of the most highlighted unscrupulous methods in terms of affiliate marketing. Cookie stuffing is the act of depositing, or causing to be deposited, a cookie containing an affiliate ID onto a user's computer without that user having clicked on an advertisement or link. Affiliate merchants and networks do not pay commission when website visitors merely visit affiliates' sites, but require that visitors click through the affiliate sites' links to affiliate merchants. Consequently, affiliate merchants' tracking systems conclude that a user has clicked through a tracking link even if the user has not actually clicked through any such link.

Cookie stuffing practices may lead to huge financial loss by the affiliate merchant/network. Furthermore, it has a potential to affect the perpetuity and the continuity of the affiliate marketing and need to be taken into account seriously. In the US, on August 2008, a cookie stuffer, which is an affiliate that use cookie stuffing method, was brought to the court by eBay, which is one of the biggest affiliate merchants. Moreover, on September 2010, US Federal Authorities charged a creator of a cookie stuffing program on the basis of enriching himself and others while defrauding eBay along the way.

Affiliate marketing has an important role in the development of the UK's e-commerce. In 2010, the overall percentage of online retail sales driven by affiliate marketing is 8%. Furthermore, with online sales estimated reached £68.2 billion in 2011, UK is Europe's leading e-retail economy. Considering the potential of cookie stuffing practices, which may harm the affiliate merchant/network and may affect the perpetuity of UK's affiliate marketing, the legal status of cookie stuffing needs to be taken into account seriously particularly in terms of affiliate marketing development in the UK. However, since there is no any legal case regarding cookie stuffing in the UK, the assessment of the cookie stuffing case in the US can be a benchmark in order to find the legal status of cookie stuffing in the UK. Moreover, because UK is one of the members of the European Union, legal status of cookie stuffing in the perspective of European legal frameworks also needs to be taken into account, particularly as an anticipation step if UK implements and ratifies the legal frameworks into their national legislation in the future.

List of Abbreviations

- CJ : Commission Junction
- CMA : the Computer Misuse Act 1990
- EPN : eBay Partner Network
- ICO : the Information Commissioner's Office
- PECL : the Principles of European Contract Law
- UK : the United Kingdom
- US : the United States of America
- U.S.C. : The Code of Laws of the United States of America

Chapter 1 – Introduction

1.1. Background

The advancement of the internet enables people around the world to start their own business. Websites, blogs and online forums are part of the internet community nowadays. As the result, we can easily find them in our daily life. Nevertheless, those online portals must be maintained regularly in order to sustain their availability and satisfy their subscribers. Hence, website owners usually put advertisements on their website for funding the maintenance.

Online affiliate marketing is one of the most popular online advertisement mechanisms. Basically, Affiliate marketing is a type of online marketing, whereby a company signs an agreement with another firm (or affiliate) to feature a link for its website, on affiliated sites.¹ The primary objectives of affiliate marketing are to promote and sell products or services through additional distribution outlets, drive web traffic to advertisers and generate transactions from online users in return for a commission.²



Figure 1: Basic Affiliate Marketing Scheme³

¹Anastasia Mariussen, Roberto Daniele, and David Bowie, 'Unintended Consequences in the Evolution of Affiliate Marketing Networks: A Complexity Approach', *The Service Industries Journal*, 30 (2010), p. 1709.

² *Ibid.*

However, with the exponent development of the internet, the complexity of the online affiliate marketing has been increasing. For instance, intermediary parties may be involved, acting as an intermediary between the seller and the affiliate, usually called an affiliate network.⁴ An example of such an affiliate marketing scheme is shown in the figure below:

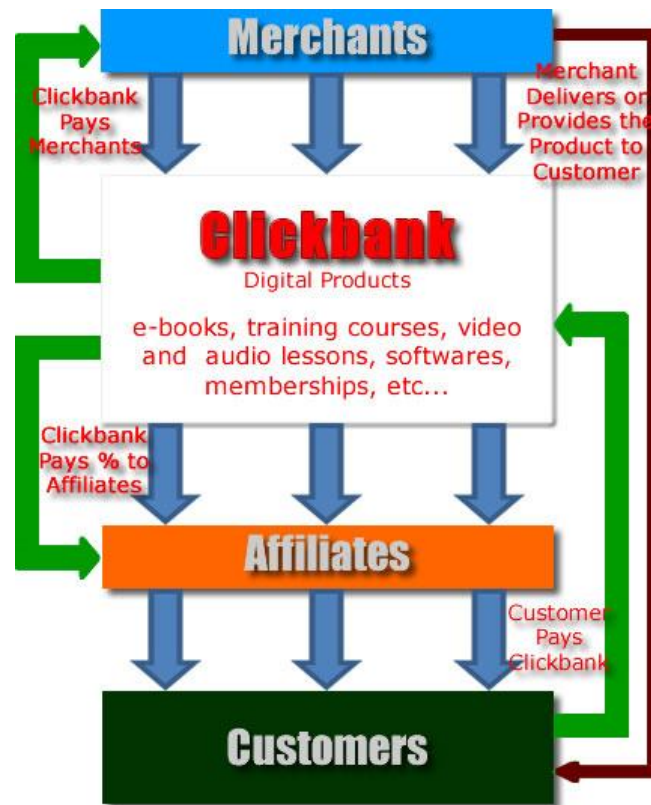


Figure 2: Clickbank Affiliate Marketing Scheme⁵

Moreover, the development also affects the type of the affiliate program model, which leads to the variation of payment conditions to the affiliates.⁶ Therefore, there are a number of affiliate advertisement program models. For instance, in pay-per-sale programs, the commission is based on the number of purchases generated by affiliates.⁷ In pay-per-lead or new customer programs, advertisers reward affiliates for the sign-ups or for new customers

³The Picture is taken from Dave Englert, 'What Is Affiliate Marketing for Online Home Businesses?', davidenglert.com, (2012) <<http://davidenglert.com/affiliate-marketingwhat-affiliate-marketing/>> [Accessed 24 May 2012].

⁴ See Anastasia Mariussen, et al. (2010). P. 1709.

⁵The Picture is taken from Julio Magallanes, 'Understanding Clickbank', iwbuilder.com, (2009) <<http://www.iwbuilder.com/blog/2009/10/10/understanding-clickbank/>> [Accessed 25 May 2012].

⁶ See Anastasia Mariussen, et al. (2010). P. 1709.

⁷ *Ibid.*

acquired.⁸ Pay-per-click or click-through models require pre-determined flat fees regardless of the number of generated sales; and cost-per-thousand impressions imply that the commission is paid to affiliates for every 1000 times (impressions) online users view advertising.⁹

Online affiliate marketing, even though often overlooked by online advertisers, has a significant role in e-commerce development.¹⁰ For instance, in 2006, it is estimated that the total sales amount generated through affiliate networks was £2.16 billion in the United Kingdom alone.¹¹ Furthermore, the MarketingSherpa's research team estimated that, in 2006, affiliates worldwide earned US\$6.5 billion in bounty and commissions from a variety of sources.¹² These statistics indicate that the affiliate marketing has an important role in terms of online advertising.

However, along with the development of affiliate marketing, problems and disputes in relation to the scheme also start to occur. One of the biggest problems with affiliate marketing is the affiliate activity control, where there is only minimal supervision from the affiliate network or merchant to the affiliates in terms of the latter's conduct in order to promote the former's products. As the result, many affiliates use unscrupulous methods, such as spam, adware, false advertising and other methods to get conversions unfairly.¹³

Notably, Cookie stuffing is one of the most highlighted unscrupulous methods in terms of affiliate marketing. Affiliate merchants and networks do not pay commission when website visitors merely visit affiliates' sites, but require that visitors click through the affiliate sites' links to affiliate merchants.¹⁴ Cookie stuffing is the act of depositing, or causing to be

⁸ *Ibid.*

⁹ Dennis L. Duffy, 'Affiliate Marketing and Its Impact on E-Commerce', *Journal of Consumer Marketing*, 22 (2005), 161 - 63.

¹⁰ Evgenii Prussakov, *A Practical Guide to Affiliate Marketing: Quick Reference for Affiliate Managers & Merchants* (Wilmington, DE, U.S.A.: AM Navigator LL, 2007), p. 16-17.

¹¹ 'Affiliate Marketing Networks Buyer's Guide (2006)', *econsultancy.com*, (2007) <<http://econsultancy.com/uk/reports>> [Accessed 1 February 2012].

¹² Anne Holland, 'Affiliate Summit 2006 Wrap-up Report -- Commissions to Reach \$6.5 Billion in 2006', *marketing sherpa*, (2006) <<https://www.marketingsherpa.com/barrier.php?contentID=3157>> [Accessed 1 February 2012].

¹³ Ryan Singel, 'Shady Web of Affiliate Marketing', *wired.com*, (2005) <<http://www.wired.com/politics/security/news/2005/02/66556>> [Accessed 4 February 2012].

¹⁴ Benjamin Edelman, 'Cookie-Stuffing Targeting Major Affiliate Merchants', *benedelman.com*, (2011) <<http://www.benedelman.org/cookiestuffing/#effects>> [Accessed 15 March 2012].

deposited, a cookie containing an affiliate ID onto a user's computer without that user having clicked on an advertisement or link.¹⁵ Consequently, affiliate merchants' tracking systems¹⁶ conclude that a user has clicked through a tracking link even if the user has not actually clicked through any such link.¹⁷ If the website visitors subsequently make a purchase from that merchant or network within the "return days"¹⁸ period specified by the merchant's affiliate program, the affiliate then receives a commission on the user's purchase.¹⁹

Cookie stuffing practices may lead to huge financial loss by the affiliate merchant/network.²⁰ For instance, Shawn Hogan, which was one of the largest affiliate in eBay's affiliate program in 2006-2007, collecting more than \$15 million over 18 months, mostly, using a cookie stuffing scheme.²¹ Moreover, it was reported that an individual in the US gained \$4000 only within a month since he used a cookie stuffing program.²² These facts indicate that the conduct has a potential to affect the perpetuity and the continuity of the affiliate marketing and need to be taken into account seriously.

In the US, a cookie stuffer and a developer of a cookie stuffing program has been brought to the court. On August 2008, eBay filed a lawsuit against Digital Point Solution et. al., concerning cookie stuffing practices, which were conducted by the defendant.²³ Moreover, on 24 June 2010, the defendant also became the subject of a criminal proceeding.²⁴ Furthermore, on September 2010, Federal authorities charged a creator of a cookie stuffing program, which

¹⁵ Joseph P. Russoniello, 'Las Vegas Man Pleads Guilty to Creating and Selling Cookie-Stuffing Program', ed. by Department of Justice (San Francisco, California, 2010).

¹⁶ Affiliate tracking system is a method or programs used by the Affiliate Merchants or Affiliate Network in order to track their affiliate's conversions and determine the amount of the commission. The further discussion regarding affiliate tracking system will be discussed at the Chapter 2.

¹⁷ See Benjamin Edelman (2011).

¹⁸ Return day's period, or often called cookie expiration period, is the time length from the user got the cookie implanted on their browser, until the cookie become expired. Usually the period set by the affiliate merchant or affiliate network.

¹⁹ See Benjamin Edelman (2011).

²⁰ Not only affiliate merchant/network which may suffer from cookie stuffing, but also other legitimate affiliate. The further analysis will be discussed at the chapter 2.

²¹ 'Indictment: United States of America V. Shawn D. Hogan', California Northern District Court, (2010) <<http://ia700507.us.archive.org/6/items/gov.uscourts.cand.229021/gov.uscourts.cand.229021.1.0.pdf>> [Accessed 7 March 2012].

²² See Joseph P. Russoniello (2010).

²³ 'Complaint: Ebay, Inc., Vs. Digital Point Solutions., et. al.', Northern District of California, (2008) <<http://docs.justia.com/cases/federal/district-courts/california/candce/5:2008cv04052/206526/1/>> [Accessed 7 March 2012].

²⁴ See 'Indictment: United States of America V. Shawn D. Hogan' (2010).

was called 'saucekit', on the basis of enriching himself and others while defrauding eBay along the way.²⁵

In the UK, affiliate marketing also has an important role in the development of the UK's e-commerce. In 2010, the overall percentage of online retail sales driven by affiliate marketing is 8%.²⁶ With online sales estimated reached £68.2 billion in 2011, UK is Europe's leading e-retail economy.²⁷ Since the affiliate marketing has a significant portion in the UK's e-commerce development, unscrupulous methods conducted by affiliates need to be dealt with firmly. Ironically, there has not been any legal case regarding cookie stuffing in the UK. As the result, the status of the cookie stuffing in the UK is still vague and unclear. Considering the potential of the conduct, which may harm the affiliate merchant/network and may affect the perpetuity of UK's affiliate marketing, the legal status of cookie stuffing needs to be taken into account seriously particularly in terms of affiliate marketing development in the UK.

Since there is no any case regarding cookie stuffing in the UK, the assessment of the cookie stuffing case in the US can be a benchmark in order to find the legal status of cookie stuffing in the UK. The claims of the defendant in both cases mainly accused the defendant of committing fraudulent acts. Thus, the focus of the discussion will be on the examinations of criminal laws in the US and in the UK in order to find the legal status of cookie stuffing. Moreover, despites of their reputation as one of the biggest affiliate merchants, eBay were involved in both US cookie stuffing cases. Therefore, in order to find the legal status of cookies stuffing, both in the US and in the UK, it is important to discuss the cases altogether with the relationship between eBay and their affiliates. Furthermore, since major affiliate merchants usually require their affiliates to agree to a contract, before the affiliates can join the merchants' affiliate programs, it is essential to involve contract law in the discussion.

²⁵ 'Felony Information: United States of America V. Christopher Kennedy', Northern District of California, (2010) <https://ecf.cand.uscourts.gov/cgi-bin/DktRpt.pl?702922614596247-L_1_0-1> [Accessed 7 March 2012].

²⁶ Geno Prussakov, '2010 Stats and Trends: Uk Affiliate Marketing', amnavigator.com, (2010) <<http://www.amnavigator.com/blog/2010/09/09/2010-stats-and-trends-uk-affiliate-marketing/>> [Accessed 4 February 2012].

²⁷ 'Uk of Great Britain and Northern Ireland ', imrg, (2011) <<http://www.imrg.org/ImrgWebsite/User/Pages/UKInternational.aspx?pageID=149&isHomePage=false&isDetailData=false&itemID=0&pageTemplate=14&isAllRecords=true&specificPageType=0&isArchiveData=False&parentPageID=158>> [Accessed 4 February 2012].

In addition, since UK is a member of the European Union, European legislative products, such as directives, also has an important role in the UK legal system. Therefore, the legal status of cookie stuffing in the perspective of European legal frameworks also needs to be taken into account, particularly as an anticipation step if UK implements and ratifies the legal frameworks in the future. Moreover, the characteristic of the internet enables affiliates from certain countries to join affiliate programs on different countries. For instance, German affiliate may join the eBay.co.uk affiliate program and conversely. Therefore, European Legal Frameworks can be an alternative for both parties to settle the dispute that may happen between them. Similar to the discussion with the US and UK legal framework, the examination of European legal frameworks will also be focused on contract law and criminal law.

1.2. Research Question

Based on the description of the problem, the main research question that will be analyzed in this thesis is:

What is the Legal Status of Cookie Stuffing in Europe, particularly in the UK?

In order to support the main question, the following supportive sub-questions are also will be analyzed in this thesis:

- What is cookie stuffing?
- What is the basic mechanism of cookie stuffing schemes?
- Why do e-commerce companies prohibit cookie stuffing techniques?
- What is the legal status of cookie stuffing in the US?
- What are the relevant European Legal Frameworks to cookie stuffing practices?
- What are the relevant UK Legal Frameworks to cookie stuffing practices?
- What is the most suitable way to address cookie stuffing practices?

1.3. Methodology

In this thesis, literatures review and examinations of case law are the main sources in order to answer the main question and supportive sub-questions mentioned above. Based on the examination of the case law in the US, I will discuss the relevant legal frameworks of the US, Europe and the UK. After having examined the case law, I will discuss the legal status of cookie stuffing in the perspective of US, Europe and the UK. The discussion will mainly be

focusing on the criminal law and contract law. In addition, the contractual provision between affiliates and affiliate merchants/networks will also be reviewed. Finally, I will analyze literatures and case law that similar to cookie stuffing scheme as a supportive measure.

1.4. Structure

This thesis will be divided into six chapters in order to answer the main research question systematically. First, Chapter 2 will provide a brief description of cookie stuffing, how it works, together with a quick overview of traditional cookie stuffing methods. Furthermore, the effect of cookie stuffing and the parties that are affected will be discussed in this chapter. Chapter 3 will describe the current status of the case regarding cookie stuffing in the US. After analyzing the case, the legal status of cookie stuffing in the US will be discussed in this chapter. Chapter 4 will discuss the European legal framework that may be relevant to cookie stuffing activities. Chapter 5 will examine the UK legal frameworks that may be applicable to cookie stuffing practices and, based on the discussion, will discuss the legal status of cookie stuffing in the UK. Finally, Chapter 6 will provide the answers to the research question and draw the conclusions.

Chapter 2: Overview of Cookie Stuffing and Parties that are affected

In this chapter, I discuss the technical aspects of cookie stuffing in order to give a good understanding of the main issue of this thesis. A brief overview of tracking methods that affiliate merchants/networks usually use to track the affiliate conversion will begin the discussion in this chapter. After having described the tracking method, I will describe how cookie stuffing works and what the basic types of cookie stuffing are. Finally, this chapter will conclude with a description of the parties that are affected by cookie stuffing activities.

2.1. Affiliate Merchant Tracking Methods

In order to determine the commissions that will be sent to affiliates, affiliate merchants need to track affiliates' activities. Therefore, the latter has to apply a system and method for accurately tracking user activity and transactions on public and private networks (hereinafter "tracking method"). The tracking method has to be able to track, not only the transaction identification (hereinafter "tracking conversion"), but also other additional information, such as the relevant affiliate id. The main purpose of this tracking method is to determine whether an affiliate has referred a user to a particular web site. The tracking method is an essential part in every affiliate marketing program. Without a proper tracking method, the calculation of the affiliate's commissions will be unorganized and inaccurate. The fact that a tracking method is patented indicates its' importance.²⁸

There are various types of tracking method, whereby each type may affect the performance of the affiliate program. Therefore, there are several things that have to be taken into account by affiliate merchants when choosing which tracking method they will use, such as:²⁹

- a. The flexibility of the tracking method;
- b. How easy is the tracking method to administer;
- c. The reliability of the tracking method;

²⁸ Herman Burema and Yoshia Makino, inventor, System and method for tracking affiliates and merchants. United States of America patent 922953. 7 August 2001.

²⁹ 'How Do Affiliate Marketing Software Programs Track Sales, Leads and Clicks? ', adcomplete.com, <<http://www.affiliatewiz.com/Affiliate-Marketing-Resources/affiliate-tracking-software-basics.asp>> [Accessed 19 February 2012].

- d. How easily can an affiliate defeat and deceive the tracking method;
- e. The burden of the tracking method on the web server.

There are several common tracking methods, and each of them has its' advantages and drawbacks, which are:³⁰

1. Simple Direct URL Links

This method is the most basic tracking affiliate method. This method involves a code placed on the affiliate's website and with this code, another similar code is constructed on the website that identifies which traffic is coming from which particular affiliate site.³¹ One of the disadvantages is that this method only able to track conversions that happen right away after the visitor clicks the link. Furthermore, this method only tracks one sale and cannot track sales that made after the visit.³²

2. URL Query String Tracking

This method is an effective yet complicated tracking method.³³ The advantages of this method are the affiliate ID is passed throughout the merchant's entire site and follows the web visitors throughout the merchant's web site by being passed from one page to the next in the URL query string.³⁴ On the other hand, in order to use this method, the merchant's site needs to be dynamic, easily modified, and must be programmed to capture each and every page and pass the affiliate ID in the query string.³⁵

For example: <http://www.affiliatemerchantdomain.com?AffiliateID=12432>. The "affiliatemerchantdomain" is the domain owned by the affiliate merchant and the "12432" is the id of the affiliate. The affiliates only need to refer the user to that URL and if the user makes a purchase, the affiliate will get some commissions.

³⁰ *Ibid.*

³¹ Krish Purnawarman, 'Affiliate Marketing', krishp.com, (2008) <http://www.krishp.com/protected/affiliate_marketing.htm> [Accessed 7 February 2012].

³² *Ibid.*

³³ This method, though fairly effective, is a bit fragile, as it requires careful design of the website and maintenance of every link within the merchant's site. Furthermore, if there is any problem with the script, the merchant's site will fail.

³⁴ See adcomplete.com (2007).

3. Self-Replicated Pages

Self-Replicated pages enable affiliates to use the replicated copy of the merchant's site, either a simple one page or the entire site. Using this tracking method, the affiliates redirect web visitors to use these pages exclusively. The replicated pages are attributed to the merchant server, thus the tracking to conversions is not complicated. Nevertheless, this method is currently frowned upon by the affiliate merchants. One of the reasons is the penalty by search engine.³⁶ Popular search engines tend to suspect sites that have identical content whether the owner of the site used black hat SEO³⁷ method to raise the position of the sites on the search engine pages. It may result to rank drop in search engine or, even worse, de-indexed by search engines. As the result, affiliate merchants' sites may lose their rank in search engines top page. This reason alone has greatly diminished the usage of this method.³⁸

4. Sub Domain Tracking

This method is very similar to self-replicated pages. The customers can be redirected to the full URL from the affiliate merchants. The difference is only in terms of sub domains. Unlike Self Replicated Pages, this method gives affiliates an actual sub domain at the merchant's site.³⁹

5. Database Record Matching

This method is the most difficult and complicated tracking method. Not only it is hard to operate and maintain, this method need conjunctions with other methods and cannot stand alone. Database record matching rewards affiliates for returning customers, not the new customers. When the same customer buys something from the

³⁶ From Google webmaster tools, it is described that in the rare cases in which Google perceives that duplicate content may be shown with intent to manipulate our rankings and deceive our users, they will make appropriate adjustments in the indexing and ranking of the sites involved. As a result, the ranking of the site may suffer, or the site might be removed entirely from the Google index, in which case it will no longer appear in search results.

³⁷ Search Engine Optimization (SEO) is the process of improving the visibility of a website or a web page in search engines' search results.

³⁸See adcomplete.com (2007).

³⁹ *Ibid.*

merchant again in the future, the customer database can be searched to track the affiliates who were referring him in the past.⁴⁰

6. Cookie Tracking

Cookie tracking is the most popular tracking method.⁴¹ It can track website visitors from the first time they clicked a link until they made a conversion. It is simple to implement and use, requires no significant web design considerations, and rarely does it impact the performance of the web server.⁴²

Basically, when web visitors visit the affiliate merchant's site from the affiliate's website, the affiliate merchant's site will place a small text (cookie) to the visitor's web browser. This cookie stores the Affiliate ID and may also store information such as the date/time for purposes of tracking how much time elapsed between the click and the conversion.⁴³ It may track the specific banner or link that the web visitor clicked as well. The cookie is also assigned a date as to when it should expire and get deleted.⁴⁴

The other advantage of this method is the cookie remains untouched as the web visitor traverses the merchant's site. The cookie is retained for the "cookie expiration period" as defined in the merchant's affiliate tracking software. Thus, depending on the expiration date, affiliate merchant can still track a conversion even if it happens days or weeks after the first visit and can also track repeat sales from the web visitor.⁴⁵

In summary, although each of the tracking methods has its own advantages and disadvantages. The cookie tracking is the most popular and the most effective tracking method. The main reason of the method's popularity is because it doesn't need complicated programming skill and doesn't put a big burden to the affiliate merchant server. Furthermore, this method can be used in conjunction with other methods. In addition, Amazon and eBay, as two of the biggest affiliate networks nowadays, use it as their main tracking method.

⁴⁰*Ibid.*

⁴¹ See Krish Purnawarman (2008).

⁴² See adcomplete.com (2007).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

2.2. How Cookie Stuffing Works

Cookie stuffing is a method that occurs because of the popularity of cookie tracking among the affiliate merchants/networks in order to track affiliate conversions and commissions. Since the big players in affiliate marketing, such as eBay and Amazon, use cookie tracking method, wicked affiliates have been using cookie stuffing methods in order to help them gain conversion unfairly.

The affiliate merchants/networks intend to pay commissions to the affiliates when users click through the advertisement links from the affiliate's sites to affiliate merchants; not merely when users merely visit affiliates' sites.⁴⁶ Instead, commissions only become payable in the event that a user 1) visits an affiliate's site, 2) clicks through an affiliate link to a merchant, and 3) makes a purchase from that merchant.⁴⁷ Therefore, the proper procedure is that before the tracking cookie is placed to the web visitors' browser, the visitors must click an advertising link on the affiliates' sites. A proper procedure of the placement of a cookie tracking onto website visitors' browsers is shown in Figure 3:

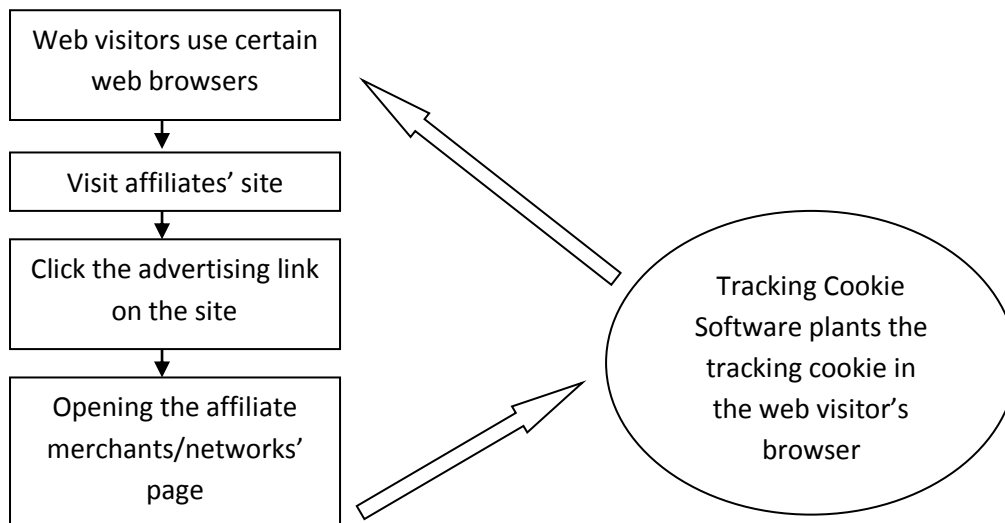


Figure 3: How the tracking cookie is supposed to be placed

However, in the case of cookie stuffing, the cookie is being planted to the web visitor's browser without the users click the advertising links. The page of the advertising links

⁴⁶ Benjamin Edelman, 'Cookie-Stuffing Targeting Major Affiliate Merchants', benedelman.com, (2011) <<http://www.benedelman.org/cookiestuffing/#effects>> [Accessed 15 March 2012].

⁴⁷ *Ibid.*

automatically loads and the cookie will be planted since the tracking software counts the mere visit as “clicking” from the web visitor. An example of how cookie stuffing works can be seen in Figure 4:

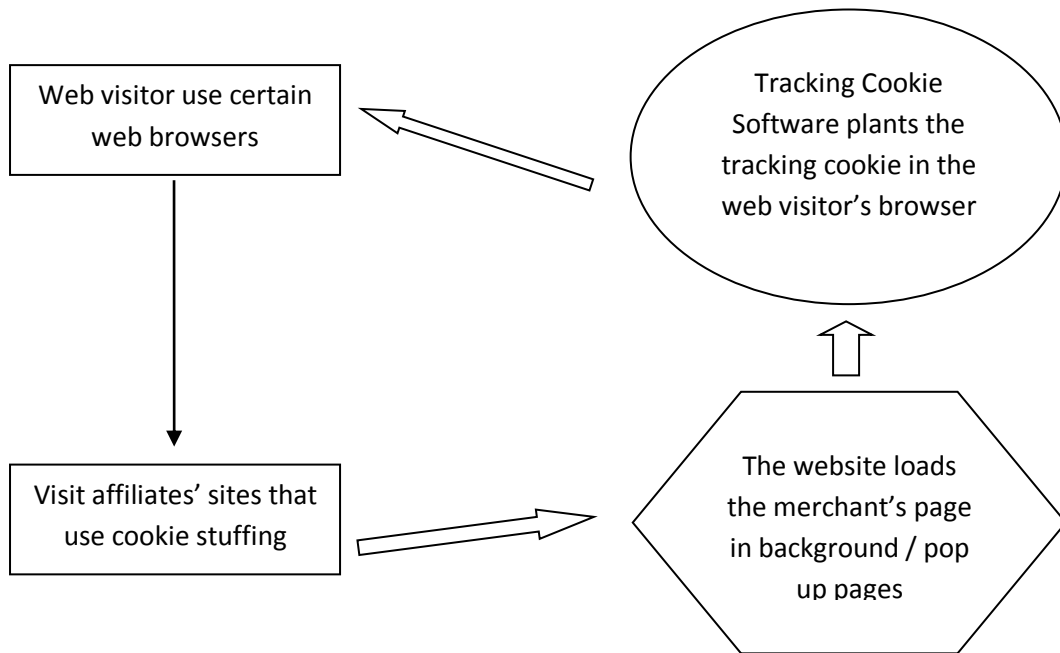


Figure 4: how the tracking cookie is placed using cookie stuffing method

2.3. Basic Types of Cookie Stuffing

The cookie stuffing technique can be conducted in several ways. From using simple pop up pages to complex soft wares. Affiliates with enough knowledge of computer and web languages, such as html or css, may create a cookie stuffing script themselves. On the other hand, affiliates without proper understanding of those codes may buy cookie stuffing programs or rent the scripts. For instance, before the ‘saucekit’ was taken down by the Federal Authorities, it offered \$200 subscription for various types of cookie stuffing, such as

image and flash cookie stuffing.⁴⁸ Basically, there are several basic types of cookie stuffing that are common in cookie stuffing practices, such as:

1. "Pop-ups
Pop-ups are one of the most popular cookie stuffing techniques. When a web visitor opens a certain website, it is often that advertising campaigns in the form of pop up page suddenly appear without the user's consent. If the page of the pop ups is the page of the advertising link, then the cookie will be planted to the web visitor's browser automatically.
2. Frames and Iframes
Using iframes, the page of the advertising link is embedded in the affiliate's site. Thus when a visitor opening the website, the affiliate merchant/network's page will load in the background of the affiliate's site and the tracking software will plant the cookie to the web browser of the web visitor unconsciously.
3. Images
If a web browser opens a page with "IMG" HTML tag, it will attempt to retrieve the image from its source. This glitch is being exploited by cookie stuffers to put URL in the tag destination instead of real images. Therefore, the browser, instead of opening the intended image, will retrieve the affiliate merchant/network's page. As the result, the cookie tracking software will track it as a visit and plant cookie to the web browser.
4. JavaScript
Basically, JavaScript is often embedded in the HTML pages in order to enhance the browsing experience. For instance it may be used to add animation of page elements or audio on a website. Nevertheless, JavaScript can run locally in user's browsers and it can be manipulated as if the web visitors have visited certain pages.
5. Flash
Adobe Flash is commonly used to create interactive media on the web, and contains functionality which allows developers to force a website user to visit an affiliate link while removing or spoofing the referrer information so that the affiliate network won't know where the traffic came from. A common tactic is to have the spoofed referring site be a legitimate or white hat affiliate sites to mask the fact that cookie stuffing is being carried out."^{49 50}

Despite the many types of cookie stuffing, the main purpose is still the same, which is forcing tracking cookies of certain affiliate merchants to the web visitor's browsers automatically and unconsciously. This way, the cookie stuffers have higher probability to make conversions because they, technically, have the control over the tracking cookie and have the option to place the cookie instead of waiting for the visitor click through the advertising link.

⁴⁸ 'Felony Information: United States of America V. Christopher Kennedy', Northern District of California, (2010) <https://ecf.cand.uscourts.gov/cgi-bin/DktRpt.pl?702922614596247-L_1_0-1> [Accessed 7 March 2012].

⁴⁹ Pratap Prabhu, 'Cookie Stuffing: Internet Fraud', Columbia.edu, (2009) <http://www.psl.cs.columbia.edu/classes/cs6125-s11/presentations/2009/Presentation_Pratap_Prabhu.pdf> [Accessed 20 February 2012].

⁵⁰ 'Basics of Cookie Stuffing', Wordpress Black Hat, (2011) <<http://www.scribd.com/doc/70758245/csbasics>> [Accessed 21 February 2012].

2.4. Parties that are affected

Even though it seems that cookie stuffing is harmless to the web visitors, there are parties that are affected by the cookie stuffing practice. Basically, there are three parties that are directly affected by cookie stuffing activities.⁵¹

1. Affiliate merchants/networks⁵² suffer from cookie-stuffing

It is inevitable that cookie stuffing practices will result to affiliate merchants' loss. By doing so, the cookie stuffer will gain commissions unfairly since affiliate merchants/networks, basically, do not intend to pay commissions to affiliates when users merely visit the affiliates' sites.⁵³ Moreover, it can cause affiliate merchants pay commissions falsely since the cookie that being placed to the web visitor's web browser by the cookie stuffers may overwrite the previous cookie that may be placed earlier by other legitimate affiliates.⁵⁴

In a long run, the practices of cookie stuffing may harm the affiliate merchants' reputation. Unfair competition is one of the reasons why legitimate affiliates abandon certain affiliate merchants.⁵⁵ Sooner or later, legitimate affiliates will discover regarding drop of their commission and will think adversely of the affiliate merchants who failed to prevent unscrupulous practices.

2. Cookie-stuffers⁵⁶ profit from cookie-stuffing

When legitimate affiliates put advertising links on their websites or pages, it depends on the web visitors, whether the visitors want to click the link or just merely visit the

⁵¹ See Benjamin Edelman (2011).

⁵² See chapter 1, section 1.1.

⁵³ Depend on the terms and conditions of each affiliate merchant. Nevertheless, most major affiliate merchant (ebay and amazon for instance) require the web visitor click the advertising link from their affiliate's web pages.

⁵⁴ Last cookie count rule: A transaction that occurs after an end user has clicked on several Links (and thus, multiple cookies have been placed on his or her computer) will be counted as a Qualifying Transaction only for the Affiliate whose Link has been the last one clicked, and the cookie was placed, before the transaction occurs and the cookie has not been overwritten by another cookie that was placed by eBay's own promotional activities. (from eBay Partner Network Terms and Conditions),

⁵⁵'2011 Affiliate Summit Affstat Report', affstat, (2011) <<http://affstat.com/2011-affiliate-summit-affstat-report/>> [Accessed 3 March 2012].

⁵⁶ Cookie stuffers are affiliates who use cookie stuffing as their main advertising strategy.

pages. Thus, the actual control over the cookie is on the visitors themselves. On the other hand, the cookie stuffer has the control over the cookie. Using cookie stuffing method, not only they can control the ratio of the stuffing, but also able to targeting web visitor based on the later geographical location.⁵⁷

3. Legitimate affiliates⁵⁸ suffer from cookie-stuffing

Major affiliate merchants, such as eBay or Amazon, have a rule about “last cookie count,” which is if a customer has more than one cookie placed on his browser, only the latest cookie that will be counted as qualified referrer.⁵⁹ The problem is the cookie that was placed to certain web visitors by cookie stuffers, may overwrite the previous cookie that the visitors may receive from clicking advertising links from earlier legitimate affiliates’ websites. Thus, the commissions, that are supposed to be entitled to the affiliates, are unfairly taken by the cookie stuffers.

⁵⁷‘Geo-Targeted Image Based Cookie Stuffing’, digeratimarketing.co.uk, (2009) <<http://www.digeratimarketing.co.uk/2009/07/16/geo-targeted-image-based-cookie-stuffing/>> [Accessed 20 February 2012].

⁵⁸ Other Legitimate Affiliates, in this case, are other affiliates in the relevant affiliate program, which use allowed and ethical techniques for their advertising scheme.

⁵⁹‘Ebay and Half.Com Advertiser Terms and Conditions’, eBay, (2012) <https://ebaypartnernetwork.com/PublisherRegTc?advertiser_id=2> [Accessed 3 February 2012].

Chapter 3: Assessing the US Legal Framework that Applicable to Cookie Stuffing Practices

In this chapter, the US regulatory frameworks that may be applicable to cookie stuffing will be discussed based on the case number 5:10-cr-00082-EJD-1 (USA V. Christopher Kennedy) and number 5:08-cv-04052 (eBay Inc. v. Digital Point Solutions, Inc. et. al.). The facts of the cases and the claims of the plaintiff will be elaborated in order to analyze each element of the regulatory frameworks that may be breached by cookie stuffing. Finally, the legal status of cookie stuffing in the US will conclude this chapter.

The main intention of the discussion in this chapter is to reach the conclusion whether the cookie stuffing practices is assumed as a crime, as a breach of contract, or as both in the perspective of US legal system. Therefore, besides providing a better of insight into the legal status of the cookie stuffing phenomenon, the discussion in this chapter may become a benchmark in order to find the legal status of cookie stuffing, not only in the US but also in the UK.

Since the claims of the plaintiff in both cases accused the defendant was committing a crime, the discussion in this chapter will be focusing in light of criminal law. Furthermore, contract law also has an important role in order to find the legal status of cookie stuffing in the US and in the UK since there was a contract between the plaintiff and the defendant before the defendant joined the plaintiff's affiliate program. In addition, the contract applies not only in the US, but also in the UK.⁶⁰ Thus, besides discussion of criminal law, I will also elaborate the contractual provision of the agreement in order to find if cookie stuffing practices are a breach of contract.

3.1. Discussion of the Case eBay Inc. v. Digital Point Solutions, Inc. et. al.

Back in August 2008, eBay took legal action against Shawn Hogan, who was eBay's top affiliate between 2006 and 2007.⁶¹ The allegation was that Hogan was using cookie stuffing as a part of his marketing scheme in order to increase the affiliate commission from eBay

⁶⁰ 'Apply to the Ebay Partner Network! (Step 1 of 3)', eBay, (2012) <<https://publisher.ebaypartnernetwork.com/PublisherReg?js=true&lang=en-US>> [Accessed 14 June 2012].

⁶¹ 'Indictment: United States of America V. Shawn D. Hogan', California Northern District Court, (2010) <<http://ia700507.us.archive.org/6/items/gov.uscourts.cand.229021/gov.uscourts.cand.229021.1.0.pdf>> [Accessed 7 March 2012].

fraudulently. Furthermore, eBay alleges that he was particularly generating hidden forced clicks of the eBay affiliate links.⁶² Moreover, he used various forms of technology and/or coding in order to hide the merchant's site from the user. On the 24th June 2010, a California grand jury handed down indictments against Hogan and an (alleged) partner in crime, Brian Dunning. Both have been charged with wire fraud and criminal forfeiture.⁶³

3.1.1. The Allegations and the Status of the Case

There are several key elements that were outlined in the indictment against Hogan. These key elements and facts will be elaborated later in order to find the true nature of cookie stuffing activity. The allegations which are important, in my opinion, in the indictment are:

1. "eBay affiliates such as Digital Point Solutions agreed to certain terms and conditions required by eBay in order to participate in the Affiliate Program. These terms and conditions provided that the affiliate would not deliver any eBay-related cookies or other tracking tags to the computers of the affiliate's user when the user was merely viewing the affiliate's advertisements or while the affiliate's applications were merely active or open on the affiliate's user's computer;
2. the defendant disseminated on a large number of web pages computer code that, when those web pages were viewed by a computer user, was designed to cause that user's computer to make a request to eBay's home page merely for the purpose of prompting eBay's servers to serve up a cookie, which would then be 'stuffed' onto the user's computer. These cookies contained information that identified an Affiliate ID of Digital Point Solutions. In such situations, the human user never actually clicked on an eBay advertisement or link on Hogan's affiliate websites;
3. The computer code prevented eBay's home page from actually "loading" on the user's computer screen. Accordingly, the human user never actually viewed eBay's home page when an eBay cookie identifying Digital Point Solutions was stuffed onto the user's computer. Indeed, the human user never knew that the user's computer had made a request to the website (i.e., eBay.com) that had served up the cookie to be stuffed onto the computer;
4. The defendant attempted to place this computer code on a large number of web pages, including web pages that were not directly affiliated with Digital Point Solutions, all for the purpose of increasing the number of computers onto which cookies containing information identifying the Affiliate IDs of Digital Point Solutions would be stuffed;
5. The defendant caused these users' computers to transmit misrepresentations of material facts to eBay, in that these users' computers transmitted information contained in cookies stuffed onto those users' computers that falsely represented to eBay that the defendant's affiliate had originally directed the users to eBay.com and that, by implication, the affiliate was entitled to compensation from eBay if the users engaged in revenue actions within the specified time periods. In fact, the affiliate was not entitled to compensation from eBay with respect to the vast majority of revenue actions;

⁶²*Ibid.*

⁶³Indictment is the formal written accusation of a crime made by a grand jury and presented to a court for prosecution against the accused person.

6. The defendant took certain actions in order to prevent eBay and CS from detecting his fraudulent scheme. These actions included, but were not necessarily limited to avoiding stuffing cookies on computers that appeared to be located in San Jose, California (the location of eBay's headquarters) or in Santa Barbara, California (the location of CJ headquarters).
7. The defendant made misrepresentations and omissions of material facts to Way and/or Commission Junction with respect to his activities. For example, in or about September 2005, when questioned about possible cookie stuffing by a CJ employee, the defendant falsely attributed the suspicious activity to coding errors;
8. The defendant did knowingly transmit and cause to be transmitted, in interstate and foreign commerce, by means of a wire communication, certain writings, signs, and signals, that is, transmissions of cookies from an eBay computer server in San Jose, CA, to computers and computer servers in other states and countries where in each instance the individual did not click on an eBay advertisement or link.”⁶⁴

Based on the allegations, a grand jury indicted Hogan on charges of Violations of 18 USC. § 1343 (Wire Fraud). However, the criminal cases against defendants Shawn Hogan and Brian Dunning are still ongoing. On November 7, 2011, the Court set trial dates for *United States v. Dunning* and *United States v. Hogan* on October 23, 2012 and January 15, 2013, respectively.⁶⁵

3.1.2. Discussion of the Legal Framework

3.1.2.1. Wire Fraud

Mail and wire fraud is a federal crime in the United States since 1872.⁶⁶ It is regulated in 18 United States Code (hereinafter “U.S.C.”) § 1343 which provides:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.”⁶⁷

In relation to the case, based on the facts and allegations mentioned above, we can inspect the elements of the text and discuss whether the conduct of the defendant fulfilled each element of the statute.

⁶⁴See Indictment: eBay Inc. v. Digital Point Solutions, Inc. et al.(2012).

⁶⁵“Stipulation and Order Continuing Case Management Conference', California Northern District Court, (2012) <<http://ia600200.us.archive.org/%201/items/gov.uscourts.cand.206526/gov.uscourts.cand.206526.238.0.pdf>> [Accessed 27 February 2012].

⁶⁶ Jed S. Rakoff, 'The Federal Mail Fraud Statute (Part I)', *Duq. L. Rev.*, 18 (1980).

⁶⁷'Fraud by Wire, Radio, or Television', in 18 U.S.C. § 1343 (US, 2006).

- a. “Intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”

Based on the indictment, the scheme of the defendant was:

1. “It was part of the scheme and artifice that, through various means, the defendant disseminated on a large number of web pages computer code that, when those web pages were viewed by a computer user, was designed to cause that user's computer to make a request to eBay's home page merely for the purpose of prompting eBay's servers to serve up a cookie, which would then be 'stuffed' onto the user's computer. These cookies contained information that identified an Affiliate ID of Digital Point Solutions. In such situations, the human user never actually clicked on an eBay advertisement or link on Hogan's affiliate websites;
2. It was further part of the scheme and artifice that, in such situations, the computer code prevented eBay's home page from actually "loading" on the user's computer screen. Accordingly, the human user never actually viewed eBay's home page when an eBay cookie identifying Digital Point Solutions was stuffed onto the user's computer. Indeed, the human user never knew that the user's computer had made a request to the website (i.e., eBay.com) that had served up the cookie to be stuffed onto the computer;
3. It was further part of the scheme and artifice that the defendant attempted to place this computer code on a large number of web pages, including web pages that were not directly affiliated with Digital Point Solutions, all for the purpose of increasing the number of computers onto which cookies containing information identifying the Affiliate IDs of Digital Point Solutions would be stuffed;
4. It was further part of the scheme and artifice that the defendant had the expectation and intention that many of the users whose computers had had cookies stuffed on them would thereafter visit eBay.com and engage in revenue actions. If these revenue actions were within the time periods specified in the Affiliate Program, Digital Point Solutions would receive compensation from eBay with respect to those events, The defendant had the expectation and intention that these visits to eBay.com would be of each user's own accord, and would be separate and apart from any actions taken by the defendant to "drive" those users to eBay.com;
5. It was further part of the scheme and artifice that, in the situations described in the previous paragraph, the defendant caused these users' computers to transmit misrepresentations of material facts to eBay, in that these users' computers transmitted information contained in cookies stuffed onto those users' computers that falsely represented to eBay that the defendant's affiliate had originally directed the users to eBay.com and that, by implication, the affiliate was entitled to compensation from eBay if the users engaged in revenue actions within the specified time periods. In fact, the affiliate was not entitled to compensation from eBay with respect to the vast majority of revenue actions;
6. It was further part of the scheme and artifice that the defendant took certain actions in order to prevent eBay and CS from detecting his fraudulent scheme. These actions included, but were not necessarily limited to avoiding stuffing cookies on computers that appeared to be located in San Jose, California (the location of eBay's headquarters) or in Santa Barbara, California (the location of CJ headquarters).
7. It was further part of the scheme and artifice that the defendant made misrepresentations and omissions of material facts to Way and/or Commission Junction with respect to his activities. For example, in or about September 2005, when questioned about possible cookie stuffing by a CJ employee, the defendant falsely attributed the suspicious activity to "coding errors."⁶⁸

⁶⁸ See 'Indictment: United States of America V. Shawn D. Hogan' (2010).

The point number 4 indicates that the defendant utilized cookie stuffing scheme in order to gain commission from the plaintiff (obtaining money), and at the same time, the point number 5, 6 and 7 resulting to misrepresentations to eBay. Therefore, in my opinion, the defendant used a method which leads to fraud representation in order to obtain money.

- b. “Transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.”

The defendant did knowingly transmit and cause to be transmitted the transmissions of cookies from an eBay computer server in San Jose, CA, to computers and computer servers in other states and countries where in each instance, the individual did not click on an eBay advertisement or link.⁶⁹ A wire fraud sentence can be enhanced when the fraud is committed through Internet advertising that will be considered mass-marketing under the U.S. Sentencing Guidelines Manual, thanks to a decision by the United States Courts of Appeals for the 9th Circuit (*United States v. Pirello*, 255 F.3d 728 (Ct. App. 9th, 2001)).^{70 71}

Therefore, the statute fit very well to the defendant’s conduct since all the requirements has been satisfied. As the result, cookie stuffing may subject under the 'Fraud by Wire, Radio, or Television', title 18 U.S.C. § 1343.

3.1.2.2. Breach of Contract

Although it is not outlined either in the complaint or the indictment, breach of contract, in my opinion, is the most prominent legal aspect of cookie stuffing. The defendant, in their capacities of an eBay affiliate, agreed to the terms and conditions required by eBay which provided that: “the affiliate would not deliver any eBay-related cookies or other tracking tags to the computers of the affiliate's user when the user was merely viewing the affiliate's

⁶⁹*Ibid.*

⁷⁰ Martha L. Arias, 'Internet Law - Internet Advertising Is Mass-Marketing for Purposes of Sentence Enhancement in Wire Fraud Cases', ibls, (2009) <http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2208> [Accessed 27 May 2012].

⁷¹ 'Federal Sentencing Guidelines Manual', §2B1.1. (US, 2010), *Application Notes* 4 (A).

advertisements or while the affiliate's applications were merely active or open on the affiliate's user's computer.”⁷² The restatement⁷³ (second) of contract (hereinafter “the restatement”), chapter 10 § 235 concerning Effect of Performance as Discharge and of Non-Performance as Breach, provides that “when performance of a duty under a contract is due any non-performance is a breach.”⁷⁴ The defendant failed to perform properly based on the agreement, which has been agreed upon by the defendant before he entered the plaintiff’s affiliate program, since he conducted an advertising scheme that was prohibited on the agreement (cookie stuffing).

Therefore, eBay may claim for remedies for the breach of contract by the defendant since they suffered some damages because of the non-performance. The chapter 16 § 344 of the restatement provide the main purposes of remedies, which states:

“Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:

- (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
- (b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
- (c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.”⁷⁵

In relation to the case, in 2006-2007, approximately 18 months, the defendant unfairly secured more than US\$ 15 million commissions from eBay Partnership Network. It means that the benefit of the plaintiffs was conferred to the defendant although the defendant did not perform properly. Therefore, the point (c) fits very well to the case.

Furthermore, the restatement also regulates regarding the measurement of damages in chapter 16 § 347, which provides:

⁷²See Indictment: eBay Inc. v. Digital Point Solutions, Inc. et al.(2012).

⁷³ From Black’s Law Dictionary: “Restatement is one of several influential treatises published by the American Law Institute describing the law in a given area and guiding its development. The Restatements use a distinctive format of black-letter rules, official comments, illustrations, and reporter's notes. Although the Restatements are frequently cited in cases and commentary, a Restatement provision is not binding on a court unless it has been officially adopted as the law by that jurisdiction's highest court. Restatements have been published in the following areas of law: Agency, Conflict of Laws, Contracts, Foreign Relations Law of the United States, Judgments, Law Governing Lawyers, Property, Restitution, Security, Suretyship and Guaranty, Torts, Trusts, and Unfair Competition.”

⁷⁴ 'Restatement (Second) of Contracts', (US, 1981), chapter 10 § 235.

⁷⁵ *Ibid.*, chapter 16 § 344.

“Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by

- (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
- (b) any other loss, including incidental or consequential loss, caused by the breach, less
- (c) any cost or other loss that he has avoided by not having to perform.”⁷⁶

In my opinion, since the defendant failed to act according to the contract, the point (a) can be applied to the conduct of the defendant. Therefore, eBay has the right to damages based on their expectations, particularly regarding the commissions that had been paid to the defendant. However, in my opinion, the damages caused by the defendant must be calculated from the date when the defendant started using cookie stuffing method as part of the defendant’s marketing scheme. Or in other words, the damage must be measured from the time when the non-performing party breached the contract.

3.2. Discussion of the Case USA V. Kennedy

In 2010, US federal authorities brought conspiracy to commit wire fraud charges against Christopher Kennedy, creator of a popular cookie stuffing program called ‘saucekit’. He actively promoted his program from January 2009 to the following November on several black hat websites and hacking forums. In addition, he used to discuss cookie stuffing technique and ways to choose affiliate programs to be stuffed.⁷⁷

Even though, in March 2009, eBay lawyers had demanded Kennedy to stop selling the program, on the grounds of it would enable other affiliates to use cookie stuffing, he ignored the request and kept selling the program. Finally, more than a year after eBay filed a civil complaint against business partners of carrying out similar cookie-stuffing schemes, he was charged for conspiracy to commit wire fraud.⁷⁸

3.2.1. The Allegations and the Status of the Case

There are several key elements that were outlined in the criminal charge against Kennedy. These key elements and facts will be elaborated later in order to find the true nature of cookie

⁷⁶ *Ibid.*, chapter 16 § 347.

⁷⁷ Dan Goodin, 'Feds Say Dev's 'Cookie-Stuffer' App Fleeced Ebay', [theregister.co.uk](http://www.theregister.co.uk), (2010) <http://www.theregister.co.uk/2010/02/09/ebay_cookie_stuffer_charges/> [Accessed 10 March 2012].

⁷⁸ *Ibid*

stuffing activity. The allegations which are important, in my opinion, in the criminal charge are:

1. “The object of the conspiracy to defraud was that defendant sold the ‘saucekit’ program to, particularly EPN, affiliates who used the program to obtain advertising compensation from Affiliate Networks/Merchants, mainly eBay, to which they were not entitled.
2. The defendant created and sold the ‘saucekit’ program through his website, www.saucekit.com.
3. The ‘saucekit’ program operated by directing the browser of a visitor to the affiliate website to defendant's servers in Nevada to retrieve the affiliate website's EPN ID. The visitor's browser is then redirected to eBay servers in California or Arizona, which subsequently generated and placed a cookie with the affiliate website's EPN ID onto the visitor's computer.
4. If those visitors engaged in a revenue action on the eBay website, the eBay website identified the presence of the cookie with the affiliate's EPN ID and credited the affiliate with referring a visitor to the eBay website despite the fact that no eBay advertisement or link on the affiliate website or webpage had actually been clicked. The affiliate then received referral fees to which it was not entitled.”⁷⁹

Based on the allegations mentioned before, the prosecutor charged Kennedy by

“Did knowingly and intentionally, combine, conspire and agree with individuals known to the United States to defraud eBay as to a material matter, to obtain money by means of materially false or misleading pretenses, representations, omissions and promises, in violation of Title 18, United States Code Section 1343.”⁸⁰

On 14 May 2010, United States Attorney Joseph P. Russoniello announced that the defendant, Christopher Kennedy, pleaded guilty to one count of conspiracy to commit wire fraud.⁸¹ In pleading guilty, the defendant admitted to creating and selling through his Web site, www.saucekit.com, a cookie-stuffing program, known as “saucekit,” from January 2009 to November 2009.⁸²

⁷⁹Felony Information: United States of America V. Christopher Kennedy', Northern District of California, (2010) <https://ecf.cand.uscourts.gov/cgi-bin/DktRpt.pl?702922614596247-L_1_0-1> [Accessed 7 March 2012].

⁸⁰*Ibid.*

⁸¹Jack Gillund, 'Las Vegas Man Pleads Guilty to Creating and Selling Cookie-Stuffing Program', Department of Justice, (2010) <<http://www.justice.gov/criminal/cybercrime/press-releases/2010/kennedyPlea.pdf>> [Accessed 12 March 2012].

⁸²*Ibid.*

3.2.2. Discussion of the Applicable Legal Framework

The prosecutor charges Kennedy with conspiracy to create wire fraud, which is the violation to title 18 United States Code Section 371 in conjunction with Title 18 United States Code Section 1343 (Fraud by Wire, Radio, or Television).

It is stated in title 18 United States Code Section 371 that:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”⁸³

While Title 18 United States Code section 1343 states:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.”⁸⁴

Conspiracy is an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose. Conspiracy is a separate offense from the crime that is the object of the conspiracy. Conspiracy requires overt act, which is an outward act, however innocent in itself, done in furtherance of a conspiracy, treason, or criminal attempt.⁸⁵

In relation to the statute, the title 18 U.S.C. section 371 is generally applicable to any conspiracy where the goal is to "commit any offense against the United States, or to defraud the

⁸³'Conspiracy to Commit Offense or to Defraud United States', in 18 USC Sec. 371 (US, 2006).

⁸⁴'Fraud by Wire, Radio, or Television', in 18 U.S.C. § 1343 (US, 2006).

⁸⁵Bryan A. Garner (Editor), Black's Law Dictionary Eighth Edition (St. Paul, Minnesota: West Group, 2004), p. 933-934.

United States" and proscribes any agreement to violate a civil or criminal federal law.⁸⁶ The "offense" clause of § 371 is not limited to offenses committed against the United States or its agents, a conspiracy that aims to violate a federal law also fall within the clause.⁸⁷ In addition, to fall within the offense clause, the object of the conspiracy must be the violation of a specific federal statute.⁸⁸ As the result, 18 U.S.C. 371 may applies to the conduct of the defendant, which is a violation against the Title 18 United States Code section 1343. Thus, the defendant's act can be categorized as a conspiracy to commit an offense against the United States.

Furthermore, as required by the statute, it is stated in the criminal charge against Kennedy that:

1. "The object of the conspiracy to defraud was that defendant sold the 'saucekit' program to EPN affiliates who used the program to obtain advertising compensation from eBay to which they were not entitled.
2. It was part of the conspiracy to defraud that defendant created and sold the 'saucekit' program through his website, www.saucekit.com.
3. It was also part of the conspiracy to defraud that individuals known to the United States, who were all EPN affiliates, purchased the 'saucekit' program and used it to generate code to be placed on their websites and webpages. Once the code was in place, cookies with the affiliate's EPN ID would be placed onto the computers of anyone who visited the affiliate websites or webpages even if those visitors never clicked on an eBay advertisement or link.
4. It was further part of the conspiracy that if those visitors engaged in a revenue action on the eBay website, the eBay website identified the presence of the cookie with the affiliate's EPN ID and credited the affiliate with referring a visitor to the eBay website despite the fact that no eBay advertisement or link on the affiliate website or webpage had actually been clicked. The affiliate then received referral fees to which it was not entitled."⁸⁹

The parties which were engaged in the conspiracy are Kennedy and other EPN affiliates, who purchased the 'saucekit' and used to generate code to be placed on their websites and webpages. On the other hand, the objective of the agreement was to defraud eBay by conducting a fraudulent act using the software. Therefore, the defendant altogether with the relevant EPN affiliates, may be punished by the statute.

⁸⁶ Todd R. Russell and Snead O. Carter, 'Federal Criminal Conspiracy', *American Criminal Law Review*, 35 (1998), p. 618-619.

⁸⁷ *Ibid.*, p. 623.

⁸⁸ *Ibid.*, p. 624.

⁸⁹ See 'Felony Information: United States of America V. Christopher Kennedy' (2010).

In addition, as required by the statute, the overt act⁹⁰ of the defendant was:

1. “On or about March 18, 2009, eBay sent a cease and desist letter to the defendant. On or about March 25, 2009, defendant posted a comment on the www.blackhatworld.com Internet forum, mocking the cease and desist letter that had been sent to him;
2. On or about October 8, 2008, an individual known to the United States stated on the www.blackhatworld.com forum that he had been using the ‘saucekit’ program as a beta tester for a month and is currently up to \$4,000 in his eBay account which is a credit to ‘saucekit’;
3. On or about November 22, 2008, defendant submitted a posting on the www.blackhatworld.com forum stating that he had a client make almost \$10,000 in one month and the \$7,000 in the prior month;
4. On or about February 6, 2009, a web browser accessed an eBay auction for a Western Digital hard drive. The browser was directed to defendant's server in Nevada, which then redirected the browser to an eBay server in either California or Arizona. An eBay cookie with EPN ID xxxxxx2002 was then placed on computer from which the browser originated. The individual using the browser did not click upon an eBay advertisement or link;
5. On or about February 9, 2009, a web browser accessed an eBay auction for a Sony Play Station. The browser was directed to defendant's server in Nevada, which then redirected the browser to an eBay server in either California or Arizona. An eBay cookie with EPN ID xxxxxx0765 was then placed on computer from which the browser originated. The individual using the browser did not click upon an eBay advertisement or link;
6. On or about February 10, 2009, a web browser accessed an eBay auction for a T-Mobile cellphone. The browser was directed to defendant's server in Nevada, which then redirected the browser to an eBay server in either California or Arizona. An eBay cookie with EPN ID xxxxxx0204 was then placed on computer from which the browser originated. The individual using the browser did not click upon an eBay advertisement or link;
7. On or about March 12, 2009, defendant posted an advertisement on the www.blackhatworld.com forum, stating that the ‘saucekit’ program was one of the most effective cookie stuffing methods available on the Internet and providing information and instructions on who to purchase and utilize the ‘saucekit’ program;
8. On or about August 12, 2009, an individual known to the United States sent an e-mail to defendant inquiring whether the ‘saucekit’ program was still available for purchase. That same day, defendant responded in an e-mail, stating that the ‘saucekit’ program was still available;
9. On or about August 13, 2009, defendant provided a promotional code and website link from which the ‘saucekit’ program could be purchased to an individual known to the Grand Jury. That same day, this individual purchased access to the ‘saucekit’ program.”⁹¹

Therefore, the requirement of the statute was satisfied by the conduct of Kennedy and the relevant EPN affiliates. As the result, it is warranted to conclude that creating and selling cookie stuffing software, or other product related to cookie stuffing, can be categorized as a crime,

⁹⁰ From Black’s Law Dictionary 8th Edition: overt act is an outward act, however innocent in itself, done in furtherance of a conspiracy, treason, or criminal attempt. An overt act is usually a required element of these crimes.

⁹¹See 'Felony Information: United States of America V. Christopher Kennedy' (2010).

which is a violation of Title 18, United States Code Section 371 in conjunction with Title 18, United States Code Section 1343 (conspiracy to commit wire fraud).

3.3. The Legal Status of Cookie Stuffing in the US

Cookie Stuffing is controversial in the world of affiliate marketing. The true nature of a click by the web visitor was a long unsolved problem that used to be discussed between the affiliate and affiliate merchants. Since affiliate merchants prohibit cookie stuffing practices explicitly, black hat affiliates used to avoid cookie stuffing discussion from public domain.⁹²

Indictment to Hogan and charge to Kennedy indicate that cookie stuffing is a criminal activity in nature. An indictment is a formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.⁹³ It is the grand jury's determination that there is enough evidence that the defendant committed the crime, or performed an act of which the legal status will be determined later, to justify having a trial voted by a grand jury. Moreover, The Fifth Amendment to the Constitution of the US states in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger."⁹⁴ Therefore, even though the trial is still ongoing, cookie stuffing practices, in my opinion nevertheless, is a crime in nature.

In accordance with the Kennedy Case, the defendant has pled guilty back in 2010. A guilty plea ordinarily has the same effect as a guilty verdict and conviction after a trial on the merits.⁹⁵ Moreover, by doing so, it means that the defendant was giving up his right to process a trial. As a result, the defendant only puts his stake at the mercy of the court to decide his fate. Despite of the fact that the defendant has not been sentenced yet, he has admitted that he has done a conduct which may be categorized as a crime.

In conclusions, cookie stuffing practice, despite the ongoing trial of Hogan Case, in my opinion, is deemed as a crime in the US, particularly from the discussion above. For people

⁹²Kellie Stevens, 'Affiliates Indicted for Cookie Stuffing', renews.com, (2010) <<http://www.renews.com/affiliate-marketing/affiliates-indicted-for-cookie-stuffing/>> [Accessed 14 March 2012].

⁹³See Bryan A. Garner (2004), p. 2259

⁹⁴'United States Constitution - Bill of Rights (Fifth Amendment)', (United States of America, 1791).

⁹⁵See Bryan A. Garner (2004), p. 3654.

who conduct cookie stuffing, they may be subject under the 18 U.S.C. § 1343 (Fraud by Wire, Radio, or Television). While for the creators of the cookie stuffing program may be penalized with the title 18 United States Code Section 371 in conjunction with Title 18 United States Code Section 1343 (conspiracy to create wire fraud).

Chapter 4: European Legal Frameworks that Relevant to Cookie Stuffing Practices

In chapter 3, the assessment of the US Legal Framework for cookie stuffing practices has been discussed. From the discussion, we can find that cookie stuffing is a criminal activity in nature in accordance with the US Legal Framework. Therefore, this chapter will discuss the European Legal Framework, including Directives and Regulations, which might be applicable in terms of cookie stuffing practices. Each element of the Legal Framework will be analyzed in order to conclude the true nature of cookie stuffing activity in the perspective of the European Legal Framework.

The main intention of the discussion in this chapter is to reach the conclusion whether the cookie stuffing practices is assumed as a crime, as a breach of contract, or as both in the perspective of European legal system. European legislation has an important role in the UK legal system because UK has joined the European Union. Therefore, the legal status of cookie stuffing in the perspective of European legal frameworks also needs to be taken into account, particularly as an anticipation step if UK ratifies the legal frameworks in the future.

Similar to the discussion in the perspective of US legal frameworks, the discussion in this chapter will be focusing on US cookie stuffing cases. Furthermore, the assessment in this chapter not only will be focused on criminal law, but also will involve contract law due to the extent validity of the contract between eBay and their affiliate that also bound affiliates from several countries in the Europe. Thus, I will elaborate the contractual provision of the agreement in order to find whether cookie stuffing practices are a breach of contract or not.

4.1. The Discussion of the Relevant European Legal Frameworks

4.1.1. The Principles of European Contract Law

The most apparent aspect that is being violated by cookie stuffing practices is breach of contracts. While most of the affiliate merchants have outlined their aversion in regards such conduct in their terms and condition, still, there are affiliates who breach the agreement even though they have accepted and agreed with it from the beginning. Therefore, it seems appropriate to conclude that those affiliates don't have any right for the commissions because the agreement, between the affiliates with the affiliate merchants/networks, was breached.

In regard to European Contract Law, we may discuss the Principles of European Contract Law (hereinafter “PECL”). The Principles of European Contract Law are a set of model rules, which was drawn up by the "Lando Commission". The Principles are intended to be applied as general rules of contract law in the European Communities.⁹⁶ The Commission was composed of academics and practitioners in their personal capacity, which the membership of it was intentionally restricted to lawyers from member States of the former European Community, now the European Union.⁹⁷

The primary objective of the Principles of European Contract Law is to serve as a basis for a European Code of Contracts.⁹⁸ However, the principles are also intended to provide a uniform interpretation a common legal environment in order to support national authorities (legislators, administration, and courts) interpret the unified law.⁹⁹ Furthermore, the principles may be useful in areas, which the communities will not legislate; the principles may be a guideline for national legislators who consider changing the contract law of their countries.¹⁰⁰ In summary, the Principles of European Contract Law are a “set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law.”¹⁰¹

These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.¹⁰² Furthermore, it may also be applied when the parties: (a) have agreed that their contract is to be governed by "general principles of law", the "Lex Mercatoria" or the like; or (b) have not chosen any system or rules of law to govern their contract.¹⁰³

⁹⁶The Commission on European Contract Law, 'The Principles of European Contract Law - Parts I and Ii Revised' (hereinafter “The Principles of European Contract Law”), (EU, 1998), art. 1:101 paragraph (1).

⁹⁷ Michael Joachim Bonell, 'The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?', *Uniform Law Review*, 1 (1996), p. 232.

⁹⁸ Ole Lando, 'Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?', *American Journal of Comparative Law*, 40 (1992), p. 577.

⁹⁹*Ibid.*

¹⁰⁰*Ibid.*

¹⁰¹ Ole Lando, *Principles of European Contract Law (Pt. I and Ii)* (The Hague: Kluwer Law International, 2000), p. XXVII.

¹⁰² See *The Principles of European Contract Law*, art. 1:101, paragraph (2).

¹⁰³*Ibid.*, art. 1:101, paragraph (3).

The characteristic of the internet enables affiliates from certain countries to join affiliate programs on different countries. For instance, German affiliate may join the eBay.co.uk affiliate program and conversely. Therefore, the PECL may be an alternative for both parties to settle the dispute that may happen between them. Furthermore, if there is any incompatibility of interpretation of the contract on each perspective of national legislation, the Principles also may be used as an intermediary instrument.

Regarding breaches of contract, we may refer to the article 8:103 of the Principles concerning Fundamental Non-Performance, which states:

“A non-performance of an obligation is fundamental to the contract if:
(a) strict compliance with the obligation is of the essence of the contract; or
(b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
(c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.”¹⁰⁴

We may inspect each element of the aforesaid statute in order to draw the argument, whether cookie stuffing practice is categorized as non-performance by this regulation, or if it is any consideration regarding such conduct.

1. “Strict compliance with the obligation is of the essence of the contract.”

In accordance with eBay Partnership Network, it is stated in the first line of the EPN terms and conditions that it will govern all the affiliate's participation in all Programs for websites that are operated either by eBay Inc. or eBay International AG.¹⁰⁵ In addition, it also states several prohibited promotional methods, including cookie stuffing. Furthermore, in the EPN Network Agreement, it is stated that in order to participate in one of the Programs in the Network, the affiliates must comply with that Program's list of approved Promotional Methods in the Program Terms.¹⁰⁶ Therefore, if there is any violation against it, the affiliate concerned will be excluded from the affiliate program.

¹⁰⁴*Ibid.*, art. 8:103.

¹⁰⁵'Ebay and Half.Com Advertiser Terms and Conditions', eBay, (2012) <https://ebaypartnernetwork.com/PublisherRegTc?advertiser_id=2> [Accessed 3 February 2012].

¹⁰⁶'Network Agreement', eBay, (2012) <<https://www.ebaypartnernetwork.com/PublisherRegPSA>> [Accessed 22 March 2012].

2. “The non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result.”

Most of the affiliate merchants do not intend to pay commission when users merely visit affiliates' sites.¹⁰⁷ They are willing to give the commission for every legitimate transaction, which complies with their terms and conditions. For instance, it is outlined in the EPN Network Agreement that the affiliates will be compensated for each Qualifying Transaction in accordance with the then-current payment schedule under the applicable Program Terms.¹⁰⁸

Furthermore, still in relation with EPN, in the network agreement, qualifying transaction described as transactions which comply with the Code of Conduct which prohibits cookie stuffing strategy in the promotional method. Therefore, by violating the agreement, it means that the cookie stuffers deprive eBay of what it was entitled to expect under the contract, which are qualified transactions, referred by the affiliates, itself.

3. “The non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.”

It is prominent and has been discussed before that cookie stuffers use cookie stuffing methods in order to increase the probability of getting conversions and resulting to increase in commissions. Therefore, most likely the perpetrator will do so intentionally. In addition, we may put the fact that cookie stuffers usually try to avoid surveillance from affiliate merchants by giving certain measures to the cookie stuffing code and the visitors who was being referred as a form of deliberate action. For Instance, in the case eBay Inc. v. Digital Point Solutions, Inc. et. al., the defendant was avoiding stuffing cookies on computers that appeared to be located in San Jose,

¹⁰⁷Benjamin Edelman, 'Cookie-Stuffing Targeting Major Affiliate Merchants', benedelman.com, (2011) <<http://www.benedelman.org/cookiestuffing/#effects>> [Accessed 15 March 2012].

¹⁰⁸See Network Agreement (2012).

California (the location of eBay's headquarters) or in Santa Barbara, California (the location of CJ headquarters).¹⁰⁹

As the result, coupled with the fact that cookie stuffing may harm the affiliate merchants, it is very likely that they will not believe to rely on the non-performing party's future performance anymore.

Therefore, the affiliates who use cookie stuffing scheme is categorized as a fundamental non-performance according to the Principles. Because of the breach of contract by the cookie stuffers, according to article 9:301, paragraph (1) PECL, eBay has the right to terminate the contract between them, notably, since the other party's non-performance is fundamental.¹¹⁰ Furthermore, the affiliate merchants may ask for remedies from the cookie stuffers, as regulated by the article 8:101 of the Principle, which states:

- (1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.
- (2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.
- (3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.

However, since there is an exception regarding the non-performance, first we may look into the article 8:108 concerning Excuse Due to an Impediment which states:

- “(1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
- (2) Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such.
- (3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice”¹¹¹

The cookie stuffers, who intentionally breach the contract, prominently cannot be excused by the provision. This provision only may apply for the affiliates that get an impediment beyond

¹⁰⁹ 'Indictment: United States of America V. Shawn D. Hogan', California Northern District Court, (2010) <<http://ia700507.us.archive.org/6/items/gov.uscourts.cand.229021/gov.uscourts.cand.229021.1.0.pdf>> [Accessed 7 March 2012].

¹¹⁰ Article 9:301, paragraph (1) of PECL states that “A party may terminate the contract if the other party's non-performance is fundamental.”

¹¹¹ *Ibid.*, art. 8:108.

their control when performing the obligation. However, they must prove to the affiliate merchant that the impediment was inevitably and actually beyond their control. Furthermore, it should not have been expected from the beginning, hence some measures are needed in order to prevent any future expected trouble. Therefore, without any evidence about the actual problems and the measures, it is unlikely to the affiliates to avoid contract termination.

Since each element of the article 8:108 of the Principles has been satisfied, if both parties agreed to use the PECL, the affiliate merchants may request remedies from the affiliates, who breach the contract. The remedies are particularly regulated by the article 9:101 concerning Monetary Obligation and article 9:102 concerning Non-monetary Obligations. The article 9:101 states that:

- “(1) The creditor is entitled to recover money which is due.
- (2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:
 - (a) it could have made a reasonable substitute transaction without significant effort or expense; or
 - (b) performance would be unreasonable in the circumstances.”¹¹²

Therefore, the aggrieved party may ask remedies from the creditor, particularly regarding the debtor’s financial loss caused by the breach of contract. Moreover, according to paragraph (2), the non-performing party has the obligation to recover any sum due, unless the performance would be unreasonable. In relation to the case of eBay Inc. v. Digital Point Solutions, Inc. et. al., the defendant was profiting more than US\$ 15 million from eBay unfairly. Since the defendant breached the contract, the plaintiff has the right to ask for financial remedies, mainly for losses which were obtained by the perpetrator unjustly.

However, the aggrieved party not only has the right for monetary remedies. The Principles also regulate regarding non-monetary remedies on article 9:102, which states:

- “(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
- (2) Specific performance cannot, however, be obtained where:
 - (a) performance would be unlawful or impossible; or
 - (b) performance would cause the debtor unreasonable effort or expense; or
 - (c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or
 - (d) the aggrieved party may reasonably obtain performance from another source.
- (3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.”¹¹³

¹¹² *Ibid.*, art. 9:101.

As the result, the aggrieved party not only has the right of monetary remedies, but also may ask the non-performing party to finish their performance. However, in the case of cookie stuffing, it is very unlikely for affiliate merchants to request the cookie stuffer to finish their obligation since the creditor will no longer need any future performance from the creditor. In fact, in my opinion, the harmed affiliate merchants will no longer allow the relevant affiliate to participate in their affiliate program.

In summary, cookie stuffing practices, in relation to the contract between the affiliate merchant and the affiliates, according to the PECL, are a fundamental non-performance. Therefore, the aggrieved party may terminate the contract and ask for remedies. Furthermore, in regard to remedies, although the creditor has the options to ask for both monetary and non-monetary remedy, it is very unlikely that the creditor will ask for non-monetary redress.

4.1.2. Convention on Cybercrime

In the US, cookie stuffing activity is deemed a crime.¹¹⁴ Moreover, cookie stuffing is an activity which needs the presence of computer. Hence I give special attention to the Convention on Cybercrime. The Convention is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security.¹¹⁵ Its main objective, set out in the preamble, is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international cooperation.¹¹⁶ The Convention is the

¹¹³ *Ibid.*, art 9:102.

¹¹⁴ See the discussion from the Chapter 3.

¹¹⁵ 'Summary of Convention on Cybercrime ', Council of Europe, (2012) <<http://conventions.coe.int/Treaty/en/Summaries/Html/185.htm>> [Accessed 16 June 2012].

¹¹⁶ *Ibid.*

product of four years of work by Council of Europe¹¹⁷ experts, but also by the United States, Canada, Japan and other countries which are not members of the Organization.¹¹⁸

The Convention is particularly addressed to the Member States and in itself has no direct effect. Therefore, in order to prosecute cookie stuffers, national legislations of member states are determinative. Nevertheless, the discussion of the Convention plays an important role in the English legal system since it has been ratified by the UK.

There are three articles in the Convention on Cybercrime that, in my opinion, are relevant to cookie stuffing practices, which are:

1. Article 8 – Computer-related fraud

In the US, cookie stuffing activities on a large scale are subject to the ground of wire-fraud. In the Convention on Cybercrime, computer related fraud section is outlined in article 8, which states:

“Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the causing of a loss of property to another person by:

- a. any input, alteration, deletion or suppression of computer data;
- b. any interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person.”¹¹⁹

We can inspect the elements of the text and discuss whether cookie stuffing activities fulfilled each element of the statute.

- a. “When committed intentionally and without right.”

In the previous chapter, it has been discussed that cookie stuffing is a violation of contract between affiliates and most affiliate merchants. It is no longer about prior consent from the affiliate merchant, since they have already prohibited cookie stuffing method in their agreement. In case of eBay, they have stated explicitly, in

¹¹⁷ The Council of Europe, based in Strasbourg (France), now covers virtually the entire European continent, with its 47 member countries. Founded on 5 May 1949 by 10 countries, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. This organization is not a part of European Union, but independent organization.

¹¹⁸ See Council of Europe (2012).

¹¹⁹ Council of Europe, 'Convention on Cybercrime', in CETS No.: 185 (Budapest, 2001), art. 8

order to join their affiliate program (EPN), in their terms of condition that the affiliate would not deliver any eBay-related cookies or other tracking tags to the computers of the affiliate's user when the user was merely viewing the affiliate's advertisements or while the affiliate's applications were merely active or open on the affiliate's user's computer.¹²⁰ Therefore, the cookie stuffers committed the conduct without right.

- b. "The causing of a loss of property to another person by any interference with the functioning of a computer system."

Cookie stuffing may cause the loss of property (revenue) of the affiliate merchants and other legitimate affiliates. The conduct will cause the affiliate merchants give commissions to wrong affiliate, while other legitimate affiliates may lose their commission if their cookies overlapped with cookies that implanted by the cookie stuffer. This practice also caused the tracking software of the affiliate merchant miscalculate the entitlement and the amount of the commission for the affiliate.

For instance, in the discussion of the Case *eBay Inc. v. Digital Point Solutions, Inc. et. al.*, the defendant caused these users' computers to transmit misrepresentations of material facts to eBay, in that these users' computers transmitted information contained in cookies stuffed onto those users' computers that falsely represented to eBay that the defendant's affiliate had originally directed the users to eBay.com and that, by implication, the affiliate was entitled to compensation from eBay if the users engaged in revenue actions within the specified time periods.¹²¹

- c. "With fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person."

Affiliates use cookie stuffer strategy in order to increase the probability of conversion. Moreover, usually they took certain actions in order to prevent

¹²⁰Indictment: United States of America V. Shawn D. Hogan', California Northern District Court, (2010) <<http://ia700507.us.archive.org/6/items/gov.uscourts.cand.229021/gov.uscourts.cand.229021.1.0.pdf>> [Accessed 7 March 2012].

¹²¹ *Ibid.*

affiliate merchants from detecting their fraudulent scheme. For instance, in the discussion of the Case *eBay Inc. v. Digital Point Solutions, Inc. et. al.*, the defendant was avoiding stuffing cookies on computers that appeared to be located in San Jose, California (the location of eBay's headquarters) or in Santa Barbara, California (the location of CJ headquarters). Therefore, the cookie stuffers know that their conduct is a breach of contract, but they try to stay under the radar (dishonest intent).¹²²

In addition, according to the black law dictionary, fraud means a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.¹²³ Furthermore, fraudulent act is outlined as a conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude.¹²⁴ By trying to hide the code or the referrer or by avoiding stuffing cookies to computers where the affiliate merchant's computers located, therefore, satisfy the requirements.

2. Article 4 – Data interference

It is stated in the article 4 that:

“Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the damaging, deletion, deterioration, alteration or suppression of computer data without right.”¹²⁵

In the context of cookie stuffing activities, the conduct by the cookie stuffers often replace legitimate cookies that were planted previously by legitimate affiliates. Moreover, when a page stuffed the visitor's web browser, the cookie is being planted automatically and unconsciously. Based on the black law dictionary, alteration means an act done with an instrument, after its execution, whereby its meaning or language is changed. Therefore, the change must be substantial, not simply a trifling

¹²² *Ibid.*

¹²³ Bryan A. Garner (Editor), *Black's Law Dictionary Eighth Edition* (St. Paul, Minnesota: West Group, 2004), p.1950.

¹²⁴ *Ibid*, p.1954.

¹²⁵ See *Convention on Cybercrime* (2001), art. 11.

modification.¹²⁶ In terms of cookie stuffing, the alteration happens when the cookie is being planted to the visitor's web browser. As a result, the affiliate merchant tracking system detects the wrong affiliates to be compensated. Consequently, after the execution, the meaning of the cookie and the tracking system are changed. Thus, cookie stuffing practices satisfy the requirements of the provision.

3. Article 6(1) – Misuse of devices

Creators and distributors of cookie stuffing products may be subject to article 6(1)a, which states:

“Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right:

- a. the production, sale, procurement for use, import, distribution or otherwise making available of:
 - ia device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with the above Articles 2 through 5;
 - ii computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed, with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5”¹²⁷

As mentioned above, cookie stuffing is unauthorized data alteration. Therefore, the production (creator), distribution, or making available (distributor) of product that may enable cookie stuffing activities is violation against this article. In relation with discussion of the Case USA V. Kennedy, the defendant sold the ‘saucekit’ program to EPN affiliates who used the program for the purpose of prompting eBay's servers to serve up a cookie, which would then be 'stuffed" onto the user's computer.¹²⁸

Even though there are several methods of cookie stuffing, from using simple code (such as IMG tag) to utilizing software that loads automatically in the background, nevertheless those codes and software, in my opinion, can be categorized as programs since they are a sequence of instructions written to perform a specified task with a

¹²⁶ See Bryan A. Garner (2004), p.242.

¹²⁷ See Convention on Cybercrime (2001), art.6(1).

¹²⁸ Felony Information: United States of America V. Christopher Kennedy', Northern District of California, (2010) <https://ecf.cand.uscourts.gov/cgi-bin/DktRpt.pl?702922614596247-L_1_0-1> [Accessed 7 March 2012].

computer.¹²⁹ Therefore, the parties that enable others to conduct cookie stuffing are subject under this provision.

Furthermore, article 6(1)b of the Convention regulates even broader scopes. It states that:

“the possession of an item referred to in paragraphs a. i or ii above, with intent that it be used for the purpose of committing any of the offences established in Articles 2 through 5. A Party may require by law that a number of such items be possessed before criminal liability attaches.”

Possession means the fact of having or holding property in one's power, or the exercise of dominion over property.¹³⁰ Even when the data and files are located in remote server or hosting, as long as the person has the ability to access the data and files, it still can be categorized as possessing. Furthermore, if there is knowledge, capability and volition on the part of the defendant, it can be categorized as an intentional possession.¹³¹ Therefore, mere possessions of such files may subject to this article although anyone has not ever used it before.

Another thing to be taken into account is the *mens rea* element of intention. Intention is the purpose or design with which an act is done.¹³² It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, in as much as they fulfill themselves through the operation of the will.¹³³ An act is intentional if, and in so far as, it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied there is intentional possession in case there is knowledge, capability and volition on the part of the defendant.¹³⁴

In relation to cookie stuffing, it is not easy to find a reliable cookie stuffing codes or programs. Furthermore, a proper cookie stuffing software is often costly. For instance,

¹²⁹Ralph Stair, *Principles of Information Systems, Sixth Edition (Mis)* (Stamford: Course Technology, 2003), p. 132.

¹³⁰See Bryan A. Garner (2004), p. 3690-3691.

¹³¹Bert-Jaap Koops, 'Cybercrime V: Procedural Law (2)', (Tilburg: TILT, 2011), p.21.

¹³² J. A. G. Griffith, *The Modern Law Review* Vol. 10 (Hoboken, NJ: Blackwell Publishing, 1947), p. 487 and 488.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

before the ‘saucekit’ was taken down by the Federal Authorities, it cost \$200 monthly subscription.¹³⁵ Therefore, it is unlikely if the affiliates buy the software without having knowledge or intention regarding cookie stuffing. Therefore, this provision may apply for affiliates who possess cookie stuffing code, since their conduct can be categorized as an intentional possession. As the result, the owner of cookie stuffing programs and the cookie stuffer may be penalized by the provision.

4.2. Legal Status of Cookie Stuffing in the Perspective of European Legal Frameworks

There are, at least, two legal frameworks that may apply to the conduct, which are the Principles of European Contract Law and the Convention on Cybercrime. While most of the affiliate merchants have outlined their aversion in regards such conduct in their terms and condition, still, there are affiliates who breach the agreement even though they have accepted and agreed with it. The conduct breaches the contract, particularly according to the Principles of European Contract Law article 8:103 concerning Fundamental Nonperformance.

On the other hand, the conduct may also be regarded as a crime, particularly according to the Convention on Cybercrime. Cookie stuffing practices notably breach the article 4 concerning data interference, article 8 concerning computer-related fraud, and article 6 (1) concerning misuse of devices. The first and second articles apply for the perpetrator who uses cookie stuffing method for gaining conversion. While the last one applies to the creator, the distributor, and to other parties that enable the conduct. Furthermore, it also valid for the owner of cookie stuffing programs.

As the result, in the perspective of the European Legal Framework, similar to the viewpoint of the US Legal Framework, the conduct may be regarded as a breach of contract and crime as well. Therefore, if there is any dispute regarding such conduct in the future, the settlement may be carried out through the court or through private settlement.

¹³⁵ See chapter 2, section 2.3.

Chapter 5: Relevant UK Legal Frameworks to Cookie Stuffing

In the previous chapter, the relevant European Legal Framework for cookie stuffing practices has been discussed. The conclusion of the discussion is that both contract law and criminal law are applicable to such conduct. Therefore, there are several alternatives for the parties, which were harmed by the perpetrator, to settle the dispute.

This chapter will examine the UK legal framework that may be applicable for cookie stuffing practices. I have already discussed the European legal framework that should be implemented in the UK legal system, therefore I will particularly focus on the English legal system, which is the legal system that applies to the jurisdiction of England and Wales, and is the root of common law legal systems used in most Commonwealth countries.¹³⁶

The main intention of the discussion in this chapter is to reach the conclusion whether the cookie stuffing practice is assumed as a crime, as a breach of contract, or as both in the perspective of English legal frameworks. In addition, the examination of this chapter aims to provide a better of insight into the legal status of the cookie stuffing phenomenon.

5.1. The Computer Misuse Act 1990

In the UK, criminal activities regarding computers are particularly regulated by the Computer Misuse Act¹³⁷ (hereinafter “CMA”) that has implemented the Council of Europe’s Convention on Cybercrime.¹³⁸

¹³⁶ 'Jurisdiction of Courts in England and Wales and Their Recognition of Foreign Insolvency Proceedings', UK National Archive, (2008) [Accessed 8 May 2012].

¹³⁷Bert-JaapKoops, 'Substantive Law (1)', Study Material for Cybercrime Course Tilburg University (Tilburg: TILT, 2011).

¹³⁸John Leyden, 'Uk Finally Ratifies Cybercrime Convention During Obama Visit', The Register UK, (2011) <http://www.theregister.co.uk/2011/05/25/uk_ratifies_cybercrime_convention/> [Accessed 9 May 2012].

However, the computer misuse act cannot be applied for cookie stuffing activities since the first and second section of the CMA limit the scope of the Act to unauthorized access to computers.¹³⁹ These sections, in my opinion, are mainly aimed for conducts with intent to secure access to any program or data held in any computer.¹⁴⁰ Therefore, these sections are not relevant to cookie stuffing. Section 3 of CMA, which regulates the “unauthorized acts with intent to impair operation of computer”,¹⁴¹ seems relevant to the cookie stuffing practices, but the section 3 (6) of the statute states that any modification or alteration cannot be regarded as impairing any computer or computer storage medium unless its effect on that computer or computer storage medium impairs its physical condition.¹⁴²

In relation to cookie stuffing, although the conduct of the cookie stuffers, which is placing cookie to the user’s browsers unconsciously, caused the users’ computers to transmit misrepresentations of material facts to the affiliate merchants’ tracking program, but it doesn’t impair the physical condition of the affiliate merchants’ computers. Therefore, the Computer Misuse Act 1990 does not apply for cookie stuffing activities.

5.2. The Fraud Act 2006

The Fraud Act 2006 (hereinafter “Fraud Act”) came into effect on 15 January 2007 and largely replaced offenses that were broadly classified as fraud, but were defined in terms of deception, which were regulated by the Theft Act 1968 and 1978.¹⁴³ Those offenses include a dishonestly obtainment of:¹⁴⁴

- Property belonging to another by deception with intention permanently to deprive the other of it;
- A money transfer by deception;
- A pecuniary advantage by deception;
- A valuable security by deception;

¹³⁹An Act to make provision for securing computer material against unauthorised access or modification; and for connected purposes’ (hereinafter “Computer Misuse Act 1990”), 1990 c 18, 1990, s. 1 and s. 2.

¹⁴⁰*Ibid.*, s. 1 sub. 1 (a) and s. 2 sub. (1).

¹⁴¹*Ibid.*, s. 3.

¹⁴²*Ibid.* s.3 (6).

¹⁴³ Rebecca Huxley-Binns, *Criminal Law Concentrate, Law Revision and Study Guide* (Oxford: Oxford University Press, 2011), p. 145.

¹⁴⁴ *Ibid.*

- Services by deception;
- The evasion of a liability by deception (three offenses).

The Fraud Act defines fraud into three divisions, which are fraud by false representation, fraud by failing to disclose information, and fraud by abuse of position.¹⁴⁵ Fraud by abuse of position, in my opinion, is irrelevant to cookie stuffing practice. It mainly aims for conducts that involving a position in which a person is expected to safeguard, or not to act against, the financial interests of another person.¹⁴⁶ Therefore, In order to associate the discussion to cookie stuffing, the analysis of the statute will be focusing on the subsection of fraud by false representation and fraud by failing to disclose information.

5.2.1. Fraud by False Representation

Before entering the objective element of the crime, it is worth to discuss the definition regarding certain terms in the statute. Section 2 (3) of the Fraud Act states that:¹⁴⁷

- (3) “Representation” means any representation as to fact or law, including a representation as to the state of mind of—
- (a) the person making the representation, or
 - (b) any other person.

The definition gives a broad perspective regarding the terms of representation itself. Any representation, including the one aiming for the state of mind of the victims or the perpetrator, is subject under this statute. Consequently, the terms may be used in any circumstances where the victim’s mind is influenced by any form of perpetrator’s representation. However, the fifth section allows broad interpretation regarding types of representation. It states that:

- “(5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).”

The terms “in *any form*” give room for very expansive analysis and interpretation and, as the result, may apply to most of communication forms, including gestures. However, it also

¹⁴⁵ 'An Act to Make Provision for, and in Connection with, Criminal Liability for Fraud and Obtaining Services Dishonestly.' (hereinafter “Fraud Act 2006”), 2006 c 35, 2006. s.1 (2).

¹⁴⁶ *Ibid.*, s. 4 (1) (a).

¹⁴⁷ *Ibid.*, s.2(3).

requires that the representation must be “submitted to any system or device”. Therefore, direct, person-to-person, representation is not included in this section. Furthermore, the term “system or device designed to receive, convey or respond to communications” leaves the door open in pursuit of advancement of technology.

Nonetheless, on the other hand, in terms of cookie stuffing practices, extensive analysis is still needed, particularly with the term “system designed to receive communications.” According to Black’s Law Dictionary, communication defined as “the process of bringing an idea to another's perception.”¹⁴⁸ Moreover, in the case of *R (Holmes) v Brixton Prison Governor*¹⁴⁹, where the defendant faced extradition for his conduct when, as an official in a German bank he had dishonestly used a co-worker’s password to credit an account under his control in a Dutch bank would amount to a false representation. Thus, according to the statute, fraud can be committed against a machine.¹⁵⁰ Therefore, in my opinion, it covers not only for traditional ways of exchanging ideas, but also for new forms of information trading. For instance, in regard to aforementioned conduct, the cookie, which contains the information of a certain affiliate, may be considered as a form of communication since it gives certain perception of the affiliate merchant’s tracking system. Thus, cookie stuffing activities also may be covered by the provision.

Moreover, section 5(2) of the Fraud Act defines the terms of gain and loss, which is limited only to money or other property.¹⁵¹ Additionally, it also determines the terms of “property”. It states that “property” means any property whether real or personal (including things in action and other intangible property).¹⁵² The key element of the definition is the “intangible property” terms, which leaves door open for broader interpretation. Furthermore, the statute determines the scope of the gain and loss, which is including the temporary or permanent state.¹⁵³ In my opinion, the most important part of the definition is the terms of loss itself, which is defined by the section 5(4) of the statute. It states that “‘Loss’ includes a loss by not

¹⁴⁸ Bryan A. Garner, p. 840.

¹⁴⁹ *R (Holmes) v Brixton Prison Governor* [2004] EWHC 2020.

¹⁵⁰ Rebecca Huxley-Binns, p. 146.

¹⁵¹ *Ibid.*, s.5(2)(a).

¹⁵² *Ibid.*, s.5(2).

¹⁵³ *Ibid.*, s.5(2)(b).

getting what one might get, as well as a loss by parting with what one has.”¹⁵⁴ As the result, particularly with the terms “not getting one might get”, the statute shall apply to the conduct, although the damage has not been occurred yet. In conclusions, due to the definition of the Fraud Act, the statute may be interpreted broadly, especially in terms of defining the terms “loss” and “representation”.

On the other hand, regarding the *mens rea* element, The Section (2)(1) of Fraud Act regulates the requirements concerning violation of the statute by the perpetrator. In order to deem a person breach the provision, he must meet certain conditions, which are:

- a) dishonestly makes a false representation, and
- b) intends, by making the representation—
 - 1) to make a gain for himself or another, or
 - 2) to cause loss to another or to expose another to a risk of loss.¹⁵⁵

The main requirement of the statute is the true intention of the perpetrator when doing their conduct. In addition, the representation has to be done with the intention of making gains for the actor *or* causing loss to another. It is questionable, in my opinion, whether the act, which resulting to certain gain for the perpetrator while not causing any loss for the victim, may be subject to the provision or not. Another interesting point is the term “to expose another to risk of loss,” which, if interpreted broadly, may apply to any conduct that may cause certain loss to the victim, even though the damage has not occurred. Consequently, the notion of the provision may be applicable to very broad scope of the consequences of the conduct. It applies for conduct which lead to hazard and for act by the culprit that *might* lead to loss.

In relation to cookie stuffing, the true intention of the actor is prominent. Cookie stuffers’ main intentions are to obtain certain gains for themselves. On the contrary, the affiliate merchant suffers loss by giving the former certain commissions, which they should not be entitled to. Therefore, the conduct of the cookie stuffers satisfies the requirements of the provisions and is subject to the statute.

¹⁵⁴ *Ibid.*, s.5(4).

¹⁵⁵ *Ibid.*, s.2(1).

According to Levi and Burrows, there is a distinction for the victim-centric approach in regards to loss caused by fraudulent acts, which is:

1. Primary victims: the natural or legal persons, individual or business or public body, who initially suffer the harm of fraud; and
2. Secondary victims: those who ultimately pay for the economic component of fraud losses. In some instances, these will be the primary victims; in others, they may be financial institutions, insurers or industry/professional compensation schemes who, by contract or following regulatory interventions, agree to reimburse some or all costs to primary fraud victims (though not the time spent putting things right or the psychological costs of the ‘ theft ’ or, more accurately, the duplication and ‘ borrowing ’ of identity); plus taxpayers and/or those who are deprived of services which they would otherwise have received.¹⁵⁶

Cookie stuffing activities will directly cause financial loss to affiliate merchant, which means they are the primary victim in this matter. In some conditions, the conduct may also replace the cookie, which was placed previously by legitimate affiliate, and causing the affiliate loss the commissions, which they should obtain¹⁵⁷. Thus, the primary victims of the cookie stuffing practices are the affiliate merchant and other legitimate affiliates.

Regarding the secondary victims, it has been discussed in the second chapter that, in the long run, cookie stuffing practices may harm the continuity of certain affiliate programs since legitimate affiliates will lose their faith to the former and abandon them for other more reliable programs.¹⁵⁸ If the aforementioned affiliate program having financial difficulties, or bankruptcy, because of such conduct, in my opinion, there are several parties, which is likely becoming the secondary victims:

1. Other legitimate affiliates that still have pending commissions will suffer since their right will be very unlikely to be paid.¹⁵⁹ In some instances, the affiliate will lose their source of income if the affiliate program decides to shut down;

¹⁵⁶ M. Levi, and J. Burrows, 'Measuring the Impact of Fraud in the UK: A Conceptual and Empirical Journey', *British Journal of Criminology*, 48 (2007), 293-318.

¹⁵⁷ See chapter 2, section 2.4. If the cookie stuffer did not replace the cookie, which was implanted previously, of the legitimate affiliate, the latter would receive commissions if the relevant visitor conducted some transactions.

¹⁵⁸ See chapter 2, section 2.4.

¹⁵⁹ Affiliate program, such as amazon and eBay, has policies regarding pending commissions. The commissions usually be paid the following month or two months after the recapitulation every end of the month.

2. Internet users and online consumers will lose their online marketplace. On several occasions, the online marketplace has advantages compared to traditional stores, such as lower price and convenience in the pre order certain product. Therefore, it would be a huge disadvantage if the affiliate program were forced to be closed due to the practices of such conduct;
3. Other relevant parties, for instances insurance company (if the affiliate programs insured their capital or property) and the government (since the affiliate program also has the obligation to pay taxes).

Meanwhile, the *actus reus* elements of the statute are regulated by the section 2 (2) of the Fraud Act. It states that:

“A representation is false if—
(a) it is untrue or misleading, and
(b) the person making it knows that it is, or might be, untrue or misleading.”¹⁶⁰

Misleading means “calculated to be misunderstood.”¹⁶¹ The terms “calculated” indicate that the perpetrator has estimated that the representation will deceive the victims. However, the point (b) declares that under certain circumstance, where the perpetrator knows his conduct might be misleading, the provisions also may be applicable. Therefore, even though the culprit is unsure whether his representation is misleading or not, as long as he has the knowledge that it has the risk to be misleading, the provision will be applicable.

In regard to cookie stuffing, particularly in terms of cookie stuffer - affiliate merchant relation, the cookie stuffers place the cookie, which contains the affiliate data, dishonestly. The perpetrator knows that his conduct will affect the affiliate merchant’s tracking program and count the visit from the visitor as if they are referred by the cookie stuffer.¹⁶² Therefore, it may be categorized as false representation since the program is “manipulated” by the act of the culprit and, as the result, give false results to the affiliate merchant. Therefore, this section also fits very well in regards to cookie stuffing activities.

¹⁶⁰ Fraud Act 2006, s.2(2).

¹⁶¹ See Bryan A. Garner, p. 3168

¹⁶² See chapter 1, the affiliate merchant intend to pay the commission for the affiliate, if the visitor actually click the advertising link, which is provide by the later. After the visit is recorded by the program, if the relevant visitor make any transaction, the affiliate will be rewarded some commissions.

5.2.2. Fraud by failing to disclose information

On 26th of May 2012, the new cookie rule went into effect in the UK.¹⁶³ The statute requires website owners to ask for permission before installing certain kinds of cookies on users' machines.¹⁶⁴ The UK Information Commissioner's Office (hereinafter "ICO") moreover states that:

"Cookies or similar devices must not be used unless the subscriber or user of the relevant terminal equipment:

(a) is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and

(b) has given his or her consent."¹⁶⁵

The ICO construct their statement based on the section 6 of the Privacy and Electronic Communications Regulations 2003, which states:

a person shall not store or gain access to information stored, in the terminal equipment of a subscriber or user unless the requirements of paragraph (2) are met.

(2) The requirements are that the subscriber or user of that terminal equipment-

(a) is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and

(b) has given his or her consent.¹⁶⁶

Although there are exemptions for cookies that are used for resource planning, capacity planning and the operation of the website, advertising and marketing cookies cannot be included in the exemption.¹⁶⁷ As the result, website's owners that use the advertising cookie must tell the internet user's that the cookies are there, explain what the cookies are doing, and obtain consent before plant the cookie into the user's browsers.¹⁶⁸

¹⁶³ Chloe Albanesius, 'U.K. Cookie Tracking Law Goes into Effect', PC Mag, (2012) <<http://www.pcmag.com/article2/0,2817,2404979,00.asp>> [Accessed 5 June 2012].

¹⁶⁴ *Ibid.*

¹⁶⁵ 'New Eu Cookie Law (E-Privacy Directive)', Information Commissioner's Office (ICO), (2012) <http://www.ico.gov.uk/for_organisations/privacy_and_electronic_communications/the_guide/cookies.aspx> [Accessed 5 June 2012].

¹⁶⁶ 'The Privacy and Electronic Communications (Ec Directive) Regulations', (UK, 2003), s. 6 (1) and (2).

¹⁶⁷ Information Commissioner's Office, 'Guidance on the Rules on Use of Cookies and Similar Technologies', (UK: ICO, 2012).

¹⁶⁸ *Ibid.*

In relation to the Fraud Act 2006, section 3 of the statute states that:

A person is in breach of this section if he—

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

(b) intends, by failing to disclose the information—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

The *mens rea* element of the statute is the intention of the perpetrator. In relation to cookie stuffing, the cookie stuffers use the method in order to gain commissions easily and unfairly from the affiliate merchant. Therefore, it is unlikely that their conduct was done “unintentionally” because they have aimed to enrich themselves with the method. For example, in the case *eBay Inc. v. Digital Point Solutions, Inc. et. al.*, the defendant attempted to plant the cookie, using cookie stuffing method, on a large number of web pages for the purpose of prompting eBay's servers to serve up a cookie, which would then be 'stuffed' onto the user's computer. As the result, the affiliate was entitled to compensation from eBay if the users engaged in revenue actions within the specified time periods.¹⁶⁹

The *actus reus* elements of the provision are “fails to disclose to another person information which he is under a legal duty to disclose” and “make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss.” Since the new cookie rule went into effect, the website's owners have the obligation to disclose the information regarding cookies that will be installed onto the user's browsers. Therefore, they are “under legal duty” to explain concerning cookies to their website's visitors. In regard to cookie stuffing, using this method, the cookie is imposed on the internet user's browser unconsciously and automatically. For instance, in the case *eBay Inc. v. Digital Point Solutions, Inc. et. al.*, the defendant disseminated on a large number of web pages computer code that, when those web pages were viewed by a computer user, was designed to cause that user's computer to make a request to eBay's home page merely for the purpose of prompting eBay's servers to serve up a cookie, which would then be ‘stuffed’ onto the user's computer.¹⁷⁰

¹⁶⁹ 'Indictment: United States of America V. Shawn D. Hogan', California Northern District Court, (2010) <<http://ia700507.us.archive.org/6/items/gov.uscourts.cand.229021/gov.uscourts.cand.229021.1.0.pdf>> [Accessed 7 March 2012].

¹⁷⁰ *Ibid.*

Furthermore, the conducts of the cookie stuffers cause affiliate merchants suffer financial losses by giving them certain commissions, which they should not be entitled to. On the other hand, the conduct may also replace the cookie, which was planted previously by legitimate affiliate, and causing the affiliate loss the commissions, which they should obtain.¹⁷¹ For example, in the case of eBay Inc. v. Digital Point Solutions, Inc. et. al., the defendant used cookie stuffing method in order to gain compensation from eBay, which in fact, he was not entitled to. Therefore, since the elements of the statute are satisfied by the conduct, the provisions are applicable to cookie stuffing practices.

In summary, although extensive interpretation is needed, cookie stuffing activities satisfy all of the requirements of the Fraud Act, mainly the section of fraud by false representation and Fraud by failing to disclose information. Therefore, it is rather safe to categorize the conduct as a part of fraudulent act. As a result, according to the provision, cookie stuffing practices is a crime in nature.

5.3. English Contract Law

The English contract law has developed over hundreds of years, and is made up of thousands of cases and many Acts of Parliament.¹⁷² Since the birth of the Law, in the medieval age, there have been several factors that affected modern contract law, such as the Consumer Protection act and Human Right Act 1998.¹⁷³

A contract, according to English Law, needs to fulfill the requirements of: offer and acceptance, consideration and intention to create legal relations.¹⁷⁴ The requirements are needed in order to answer the question “is there a contract?” in regards to English Law. The first condition, offer and acceptance, which are an essential part of the contract, requires the true intention from both parties agree on certain agreements.¹⁷⁵ The consideration means the

¹⁷¹ See chapter 2, section 2.4. If the cookie stuffer did not replace the cookie, which was implanted previously, of the legitimate affiliate, the latter would receive commissions if the relevant visitor conducted some transactions.

¹⁷² Michael H. Whincup, *Contract Law and Practice : The English System and Continental Comparison* (Deventer: Kluwer Law and Taxation, 1992). p. 13.

¹⁷³ Michael Furmston, *Law of Contract, Fifteenth Edition* (Oxford: Oxford University Press, 2007), p. 19.

¹⁷⁴ *Ibid.* p. 36.

¹⁷⁵ *Ibid.* p. 47.

reason, motive, or inducement, by which a man is moved to bind himself by an agreement.¹⁷⁶ And the last requirements, bind particularly commercial contract, where the intentions of the parties are presumed.¹⁷⁷

In relation with cookie stuffing activities, mainly in terms of affiliate merchant-cookie stuffer relation, both parties have made an agreement regarding the offer and acceptance of the contract. For instance, in the case of eBay Inc. v. Digital Point Solutions, Inc. et. al.,¹⁷⁸ the defendant agreed to certain terms and conditions required by the plaintiff in order to participate in the Affiliate Program. The consideration of the contract is on one hand the former intended to increase the sales of their auction, while on the other hand the latter's main purpose was to gain commission from the sales. The third requirement applied automatically since the contract was a commercial contract. Therefore, it can be proven that there is a contract between both parties, particularly in the perspective of English Law.

After the contract has been settled, both parties then have the obligation to perform according to the terms written in the contract. The performance is due without demand unless the contract or legislations otherwise provide or unless the party required to perform cannot without demand reasonably be expected to know that performance is due.¹⁷⁹ In relation to aforementioned case, the defendant has the obligation to assist the sales of the plaintiff, with certain prohibition for the advertisement method, and the plaintiff need to pay certain amounts of commissions based on the amount of goods that the other parties sold from the plaintiffs' auction site as their performance duty.

If a party, after performance from him has become due, fails or refuses to render it or incapacities himself from rendering it, he has committed a breach of contract.¹⁸⁰ There are several types of breach, which are:

¹⁷⁶ *Ibid.* p. 94.

¹⁷⁷ *Ibid.* p. 148.

¹⁷⁸ See Chapter 2 section 2.1.

¹⁷⁹ Andrew Burrows, English Private Law, Second Edition (Oxford: Oxford University Press, 2007), p. 753.

¹⁸⁰ *Ibid.*, p. 769.

1. Failure or refusal to perform;

This type of breach is only applicable where an obligation to perform has been undertaken.¹⁸¹ No such obligation is undertaken by the promise under a unilateral contract, who therefore commits no breach by failing to do the stipulated act.¹⁸²

2. Defective Performance;

A serious defective performance can be regarded as non-performance. Furthermore, if a performance is of the same kind as that promised and differs from it in point of time, quantity and quality, it is also regarded as a breach.¹⁸³

3. Incapacitating one self.

A person may break a contract by incapacitating himself from performing it, for instance, having chartered his ship to x, he then sells and delivers it to y.¹⁸⁴

In relation with cookie stuffing, particularly in the case of eBay Inc. v. Digital Point Solutions, Inc. et. al., the defendant breached the contract since he used the method which is prohibited in the contract. This kind of breach, in my opinion, is categorized to the second type. The service, which the culprit provided, was defective, since it differed in terms of quality of the performance. Therefore, it is convincing to categorize the defendant's actions as a breach of contract.

Breach contract may lead to contract termination, withhold performance or remedies.¹⁸⁵ If the performance is essential for the victim, they may ask the non-performing party to finish their obligations. On the other hand, the other parties may terminate the contract if the performance is not substantial. However, if the non-performance parties cause substantial damages to the opposite parties, the latter may ask for remedies.

In regard to remedies, the evaluation of damage must be based solely upon the legal obligations of the defendant.¹⁸⁶ The non-performance party may not be held liable for damages for not doing what he is not bound to do.¹⁸⁷ Furthermore, the measure of damages should be such as may fairly and reasonably be considered either arising naturally from such

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*, p. 770.

¹⁸⁴ *Ibid.*

¹⁸⁵ See Michael Furmston (2007), p. 750.

¹⁸⁶ *Ibid.*, p. 756.

¹⁸⁷ *Ibid.*

breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties as the probable result of the breach of it.¹⁸⁸

In relation to the aforementioned case, eBay has the right to ask remedies to the defendant since the defendant's conduct was a defective performance and caused eBay to suffer substantial loss. The plaintiff paid certain amount of commissions to the non-performing party, which the latter should not have. Therefore, eBay may ask for remedies, at least, amounting to the commissions that were paid.

5.4. Legal Status of Cookie Stuffing in the Perspective of English Legal System

In summary, cookie stuffing activities are both breach of contract and criminal activity. The affiliates that use cookie stuffing methods as part of their advertising scheme prominently breach the contract between them and the affiliate merchants, which has been agreed before they joined the affiliate program. The non-performance of the actors, particularly, can be regarded as defective performance due to the differed quality of the service. Therefore, the affiliate merchants may terminate the contract or/and ask for remedies based solely upon the legal obligations of the defendant.

On the other hand, the conduct of the perpetrator, which is placing the cookies onto the users' computers and cause the users' computers to transmit misrepresentations of material facts to the affiliate merchant's tracking software, notably violates the Fraud Act section (2). In addition, since the new cookie rule went into effect in the UK, which requires website owners to ask for permission before installing certain kinds of cookies on users' machines, the conduct of the perpetrator, which is placing the cookies to the users' computer unconsciously and automatically, may be penalized by the Fraud Act Section (3).

¹⁸⁸ *Ibid.*

Chapter 6: Concluding Remarks

After the whole discussion in the previous chapters, this chapter will conclude the analysis and comprise the recommendations. The conclusions particularly will answer the main and sub questions based on the result of the discussions of the previous chapters. On the other hand, the recommendations part will give suggestions regarding drawbacks and solutions regarding the current circumstances related to the conclusions.

6.1. Conclusion

1. What is Cookie Stuffing?

Cookie Stuffing is a method that occurred due to the popularity of cookie tracking among the affiliate merchants in order to track affiliate conversions and commissions. Moreover, it is one of unscrupulous methods, conducted by the affiliate, in order to get conversions unfairly. Technically, cookie stuffing is the act of depositing, or causing to be deposited, a cookie containing an Affiliate ID onto a user's computer without that user having clicked on an advertisement or link. The conduct caused the user's computers to transmit misrepresentations of material facts to affiliate merchants, in that the user's computers transmitted information contained in cookies stuffed onto those user's computers that falsely represented to affiliate merchants that the cookie stuffers had originally directed the users to affiliate merchants. Therefore, the affiliate was entitled to compensation unfairly from affiliate merchants if the users engaged in revenue actions within the specified time periods.

2. What is the basic mechanism of cookie stuffing schemes?

There are several basic types of cookie stuffing that is most common in cookie stuffing practices, such as:¹⁸⁹

1. Pop-ups;
2. Frames and Iframes;
3. Images;

¹⁸⁹ For further explanation, see chapter 2, section 2.3.

4. JavaScript;
5. Flash;

However, despite many types of cookie stuffing, the main purpose of the conduct is still the same, which is forcing tracking cookies of certain affiliate merchants to the web visitor's browsers unconsciously.

3. Why do E-commerce Companies Prohibit Cookie Stuffing Technique?

E-commerce companies forbid cookie stuffing method as one of the affiliate's advertisement methods because in order to pay commissions to the affiliates, the affiliate marketing programs require the internet visitors to click through certain advertisement links of affiliate merchants, which are provided by the latter.¹⁹⁰ In addition, the former do not intend to pay commission when users merely visit affiliates' sites.¹⁹¹ Moreover, Even though it seems that cookie stuffing is harmless to the web visitors, there are parties that affected by the cookie stuffing practice, directly or indirectly, which are:¹⁹²

1. Affiliate Merchants Suffer from Cookie-Stuffing;

Affiliate merchants' don't intend to pay commission to affiliates if the internet users merely visit the affiliates' site. However, using cookie stuffing method, the affiliates transmitted false representation to affiliate merchants that as if the users had clicked advertisement links on the affiliates' sites, thus, as if the cookie stuffer had originally directed the users to affiliate merchants. Therefore, the cookie stuffer will gain commissions unfairly from the affiliate merchants.

2. Cookie-Stuffers Profit from Cookie-Stuffing; and

When legitimate affiliates put advertising links on their websites, it depends on the internet users, whether the users have the intention to click the link or just merely visit the pages. Thus, the actual control over the cookie is on the users themselves. On the other hand, the cookie stuffer has the control over the cookie. They can place the cookie to the users' computers as needed.

¹⁹⁰ Benjamin Edelman, 'Cookie-Stuffing Targeting Major Affiliate Merchants, 2011, <http://www.benedelman.org/cookiestuffing/#effects>, Accessed 15 March 2012.

¹⁹¹ *Ibid.*

¹⁹² For further explanation, see chapter 2, section 2.4.

3. Legitimate Affiliates Suffer from Cookie-Stuffing.

Major affiliate merchants usually have a rule about “last cookie count,” which is if a customer has more than one cookie implanted on his browser, only the latest cookie that will be counted as qualified conversion. The cookie that was implanted to certain user computers by cookie stuffers, may overwrite the previous cookie that the users may have received from clicking advertising links from earlier legitimate affiliates’ websites. Thus, the commissions, that are supposed to be entitled to the affiliates, are taken by the cookie stuffers unfairly.

4. What is the Legal Status of Cookie Stuffing in the US?

The main intention of the discussion in this chapter is to reach the conclusion whether the cookie stuffing practice is assumed as a crime, as a breach of contract, or as both in the perspective of US legal system. Therefore, besides providing a better of insight into the legal status of the cookie stuffing phenomenon, the discussion in this chapter may become a benchmark in order to find the legal status of cookie stuffing, not only in the US but also in the UK.

In the US, there are two cases concerning cookie stuffing. The first case is between eBay Inc. v. Digital Point Solutions, Inc. et. al. The former filed a lawsuit against the defendant regarding cookie stuffing practices conducted by the latter. Both parties had made an agreement before the perpetrator joined the victims’ affiliate programs, which contain prohibitions regarding certain advertisement method including cookie stuffing. Moreover, the case didn’t stop there and also became a criminal proceeding. On the 24th June 2010, a California grand jury handed down indictments again Hogan and an (alleged) partner in crime, Brian Dunning. Both have been charged with wire fraud and criminal forfeiture.¹⁹³

The second case is between USA V. Kennedy, where US federal authorities brought conspiracy to commit wire fraud charges against Christopher Kennedy, creator of a popular cookie stuffing program called ‘saucekit’. On 14 May 2010, United States Attorney Joseph P. Russoniello announced that the defendant, Christopher Kennedy, pleaded guilty to one count

¹⁹³“Indictment: eBay Inc. v. Digital Point Solutions, Inc. et al.”, <http://archive.recapthelaw.org/cand/206526/>, accessed 7 March 2012.

of conspiracy to commit wire fraud.¹⁹⁴ In pleading guilty, the defendant admitted to creating and selling through his Web site, www.saucekit.com, a cookie-stuffing program, known as “saucekit,” from January 2009 to November 2009.¹⁹⁵

Easily spotted, cookie stuffing practice is a breach of contract between the affiliate and affiliate merchant. However, although there has not been any verdict regarding the cases, but the criminal proceeding of the both cases indicates that such conduct regarded as a serious crime in the perspective of The US Legal Framework.

5. What are the Relevant European Legal Frameworks for Cookie Stuffing Practices?

In the perspective of European legal frameworks, there are at least two legal frameworks that may apply to the conduct, which are the Principles of European Contract Law and the Convention on Cybercrime. While most of the affiliate merchants have outlined their aversion in regards such conduct in their terms and condition, still, there are affiliates who breach the agreement even though they have accepted and agreed with it. The conduct breaches the PECL, particularly the article 8:103 concerning Fundamental Nonperformance. Based on the discussion in the chapter 4, cookie stuffing practices satisfy the requirements of the provisions, which are:

- a) Strict compliance with the obligation is of the essence of the contract;
- b) The non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; and
- c) The non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

On the other hand, the conduct may also be regarded as a crime, particularly in regard to the Convention on Cybercrime. Cookie stuffing practices notably breach the article 4 concerning data interference, article 8 concerning computer-related fraud, and article 6 (1) concerning

¹⁹⁴Jack Gillund, 'Las Vegas Man Pleads Guilty to Creating and Selling Cookie-Stuffing Program', Department of Justice, (2010) <<http://www.justice.gov/criminal/cybercrime/press-releases/2010/kennedyPlea.pdf>> [Accessed 12 March 2012].

¹⁹⁵*Ibid.*

misuse of devices. The first and the second articles apply for the perpetrator who uses cookie stuffing method for gaining conversion. While the last one applies to the creator, the distributor, and to other parties that enable the conduct. Furthermore, it also valid for the owner of cookie stuffing programs.

As the result, in the perspective of the European Legal Framework, similar to the viewpoint of the US Legal Framework, the conduct may be regarded as a breach of contract and as a crime as well. Therefore, if there is any dispute regarding such conduct, the settlement may be carried out through criminal proceeding, civil court or through private settlement.

6. What are the relevant UK Legal Frameworks to Cookie Stuffing practices?

In the perspective of UK legal frameworks, the conduct of the actor may be regarded as a breach of contract or a crime. The discussions in the chapter 5 demonstrate the true nature of cookie stuffing activities, particularly in the perspective of the Fraud Act and the English Contract Law. Regarding the Fraud Act, cookie stuffing activities satisfy most of the requirements provide by the statute. While, on the other hand, several conditions have to be analyzed more deeply in order to cover the conduct entirely. Nevertheless, the provisions fit very well in terms of penalizing such conducts. As the result, the conduct is a crime in the perspective of the provision.

The conduct also meets the requirements of the English contract law. It requires certain condition to conclude that there is a contract and when someone is deemed to breach it. The conduct particularly is a defective performance, since it differed in terms of quality of the promised performance. Such performance, if it is of the same kind as that promised and differs from it in point of time, quantity and quality, is also regarded as a breach.¹⁹⁶ Therefore, the victim has the options, either to terminate the contract, withhold the performance, or ask for remedies. However, In regard to remedies, the evaluation of damage must be based solely upon the legal obligations of the defendant.¹⁹⁷

¹⁹⁶ Andrew Burrows, *English Private Law*, Second Edition (Oxford: Oxford University Press, 2007), p. 770.

¹⁹⁷ Michael Furmston, *Law of Contract*, Fifteenth Edition (Oxford: Oxford University Press, 2007), p. 756.

7. What is the Most Suitable Way to Address Cookie Stuffing Practices?

In the perspective of all of the aforementioned legal frameworks, which are the US, the Europe and the UK, cookie stuffing practices are categorized as both breach of contract and serious crime. Nevertheless, the affiliate merchants/networks, which suffer loss because of the conduct, should be wise when taking actions towards the infringement. Several factors need to be taken into account before filling a lawsuit regarding the conduct by the cookie stuffers.

In my opinion, if the cookie stuffing activities are conducted by affiliates on a small scale, they should merely terminate the contract that was made between them and the relevant cookie stuffers. As the result, the relevant affiliates will be excluded from the affiliate program of the affiliate merchants/networks. In addition, the affiliate merchants may put certain measures against the cookie stuffers, such as block their I.P. Address or put them on the blacklist, in order to hinder the wicked affiliate rejoin the affiliate program. This is the most efficient way in addressing cookie stuffing activities on a small scale. Not only it doesn't take too much time, it also doesn't require the affiliate merchants to pay large fee compared to other dispute resolution process.

However, since there is no binding settlement between the affiliate merchants/networks and the relevant affiliates, the affiliates may join other affiliate merchants/networks' affiliate program in the future and still use cookie stuffing. In addition, the merchants/networks still have to put some surveillance to other affiliates in order to prevent other affiliates use cookie stuffing method. Therefore, this process will only be efficient for individual settlement and has no scare effect to other affiliates.

On the other hand, if the cookie stuffing practices are conducted on a large scale, a court proceeding may be a proper way to address it. For instance, in the case *eBay Inc. v. Digital Point Solutions, Inc. et. al.*, the defendant obtained approximately US\$15 Million in a mere 18 months.¹⁹⁸ In addition, in the case *USA V. Kennedy*, the defendant created a cookie stuffing program that enabled other affiliate to utilize cookie stuffing. As the result, the affiliate merchants/networks may suffer a huge loss because of the accumulation of affiliates, which use cookie stuffing as their advertising scheme.

¹⁹⁸ For further explanation, see chapter 3, section 3.1.3.2.

Although there are disadvantages in the court proceeding process, such as:

- a) Duration before entering the proceeding and on the proceeding itself;
- b) The large cost of attorney and court fee;
- c) Less confidentiality in court that may damage the reputation of both parties;
- d) Complexity and formality of the proceeding;
- e) May harm the relationship between the parties.¹⁹⁹

Nevertheless, the court proceeding is the most proper way to address huge scales cookie stuffing activities. Besides the directly binding advantages, the verdict of the court may deter future crimes by those apprehended, or it must surely have some preventive effect since those who are apprehended and punished by some form of detention are prevented, at least temporarily, from committing further crimes.²⁰⁰ Furthermore, it also may provide a “scare effect” for other parties which either has used cookie stuffing or just about to start using it.

Therefore, before filling a lawsuit, the affiliate merchants/networks should calculate and compare the cost of taking legal action and the remedies that they will get. In addition, they should take into account the amount of time that will be taken when they undergo the proceeding. If there are more advantages than the drawbacks, legal actions may be a good solution to combat cookie stuffing.

6.2. Recommendations

-Affiliate marketing program has become one of the biggest commerce in terms of e-business. Therefore, besides in the field of economy and technology, laws and regulations also need to pursue this phenomenon in order to give certainty regarding the protection of affiliate marketing. Toward this goal, legal study and analysis regarding the new system and phenomenon in the field of e-commerce is necessary. Furthermore, the e-commerce regulations should introduce and regulate regarding online intermediary parties, including affiliate merchants/networks.

-Unscrupulous methods, used by the affiliates, are often underestimated. There are still not many legal cases regarding it. However, such conduct has the potential to harm the affiliate merchants/networks and may lead a huge financial, or at least a reputation loss of the affiliate

¹⁹⁹ P.G. van der Putt, 'Contracts and ICT: IT Disputes', (Tilburg: TILT, 2011), p. 9.

²⁰⁰ Isaac Ehrlich, 'The Deterrent Effect of Criminal Law Enforcement', *Journal of Legal Studies* 1(1972), 260.

merchants/networks. Therefore, in order to prevent these conducts, studies regarding unscrupulous behavior of affiliates and the development of unethical techniques are substantial. Furthermore, if the unscrupulous methods can be obtained and conducted easily by affiliates on a large scale, affiliate merchants/networks should bring the relevant affiliates to the court in order to cease the further usage and development of the methods by other parties.

-Since the globalization is one of the internet's characteristics, it is also essential for the international community and organizations to create certain principles or regulations, which may apply internationally, in order to create harmonization regarding the affiliate marketing. Thus, even the country which has not had a regulation regarding affiliate marketing may follow the precedents.

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