



Ad Blocking | Legality and state of play under EU law

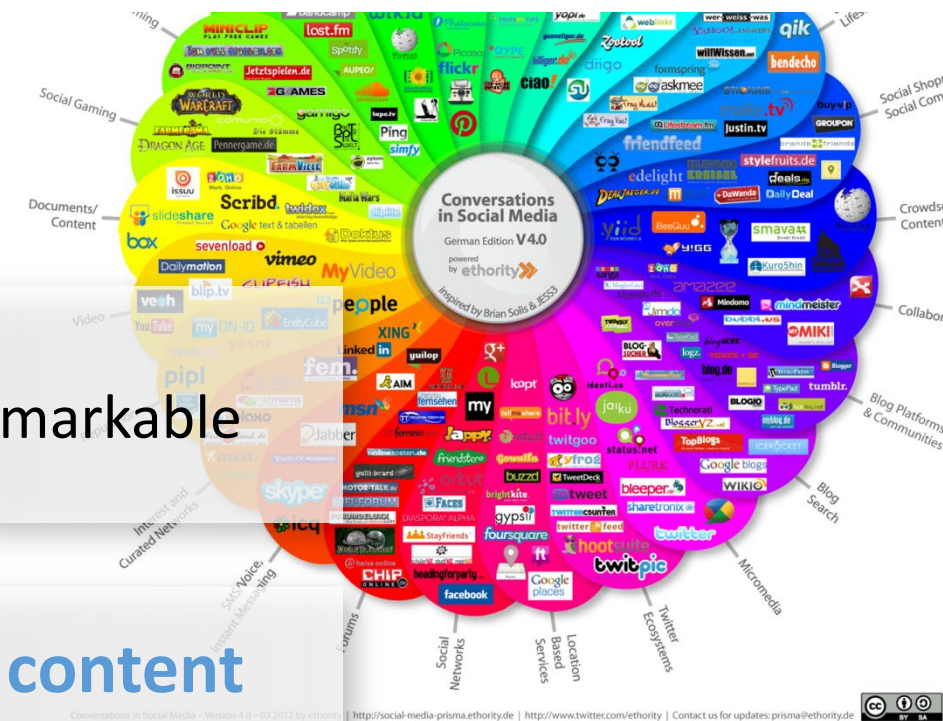
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6 October 2015 | IBA Workshop 9.30h-12.30h | Austria Center Vienna
Product Law and Advertising Committee (Lead)*

AD BLOCKING – STATE OF PLAY?

Internet = THE advertising medium

Analysing user behaviours > targeted advertising > remarkable economic success

“FREEMIUM model” or advertising-financed content
users accept to pay (in a certain way) for content

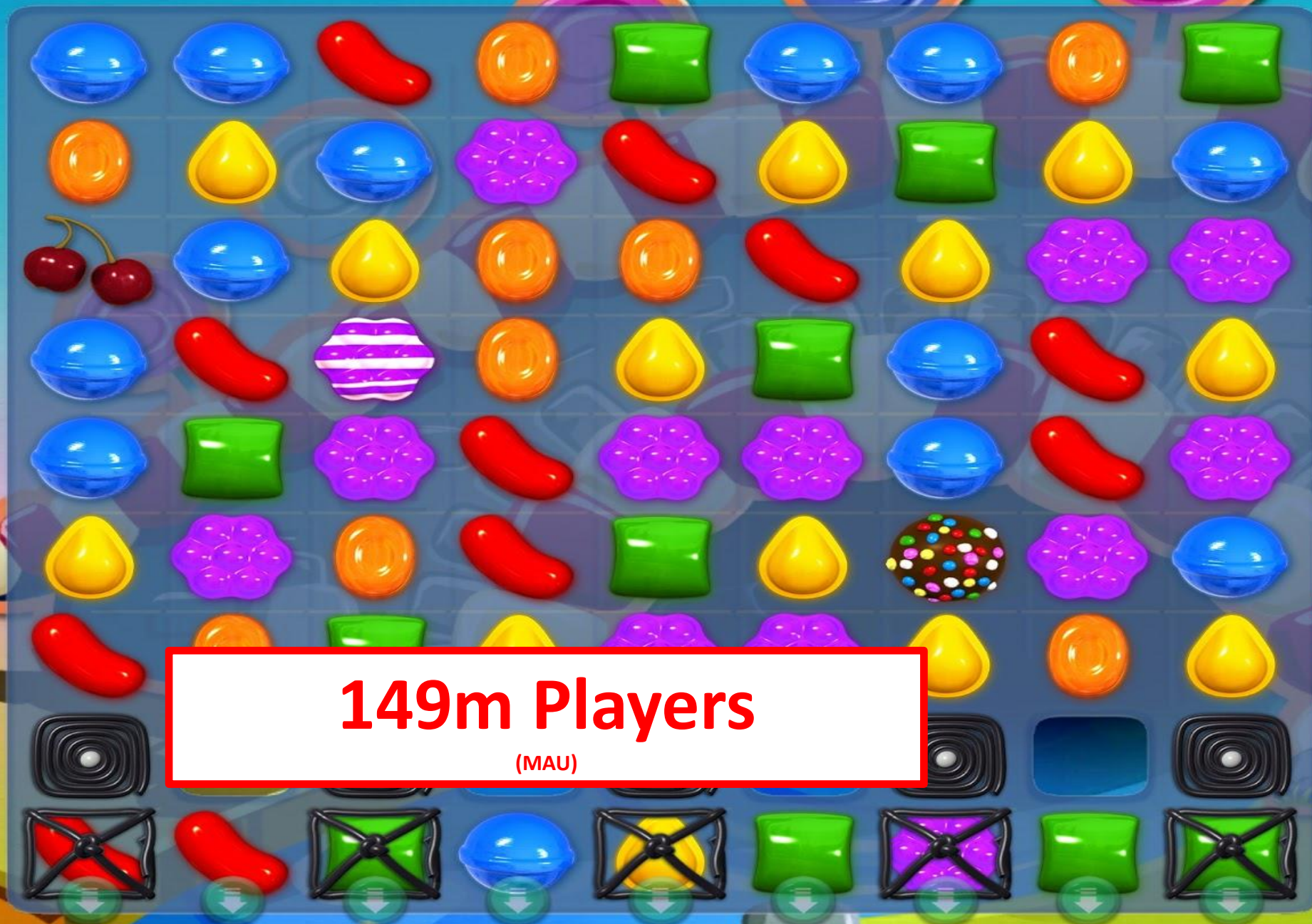


Gameplay icons and progress:

- Paintbrush icon
- +5 icon
- Bomb icon
- Apple icon 0/1
- Cherry icon 0/2

Gameplay statistics and progress:

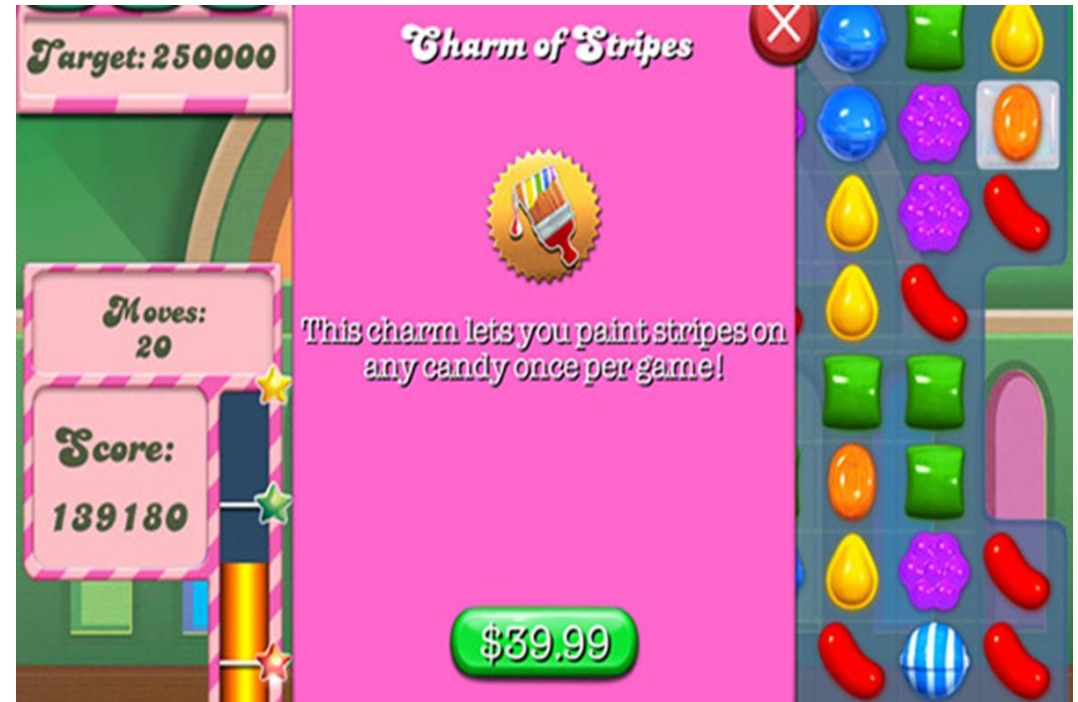
- Moves: 33
- Score: 4520
- Progress bar with 3 stars (yellow, green, red)



149m Players
(MAU)

- "basic features" = free
- "premium content" or enhanced playing features cost **real money**





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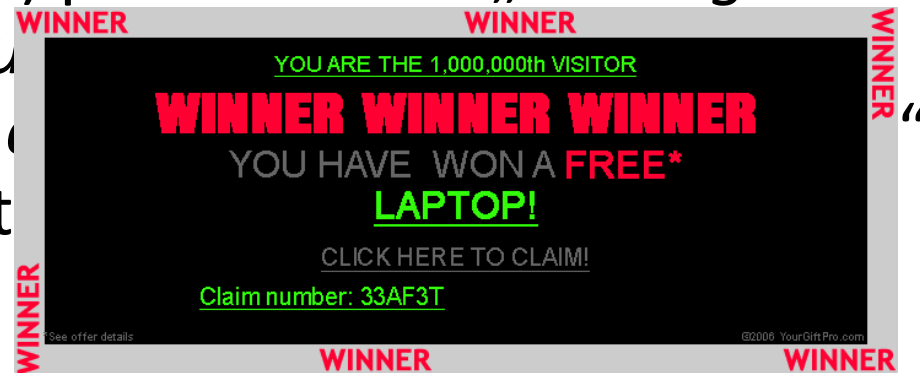
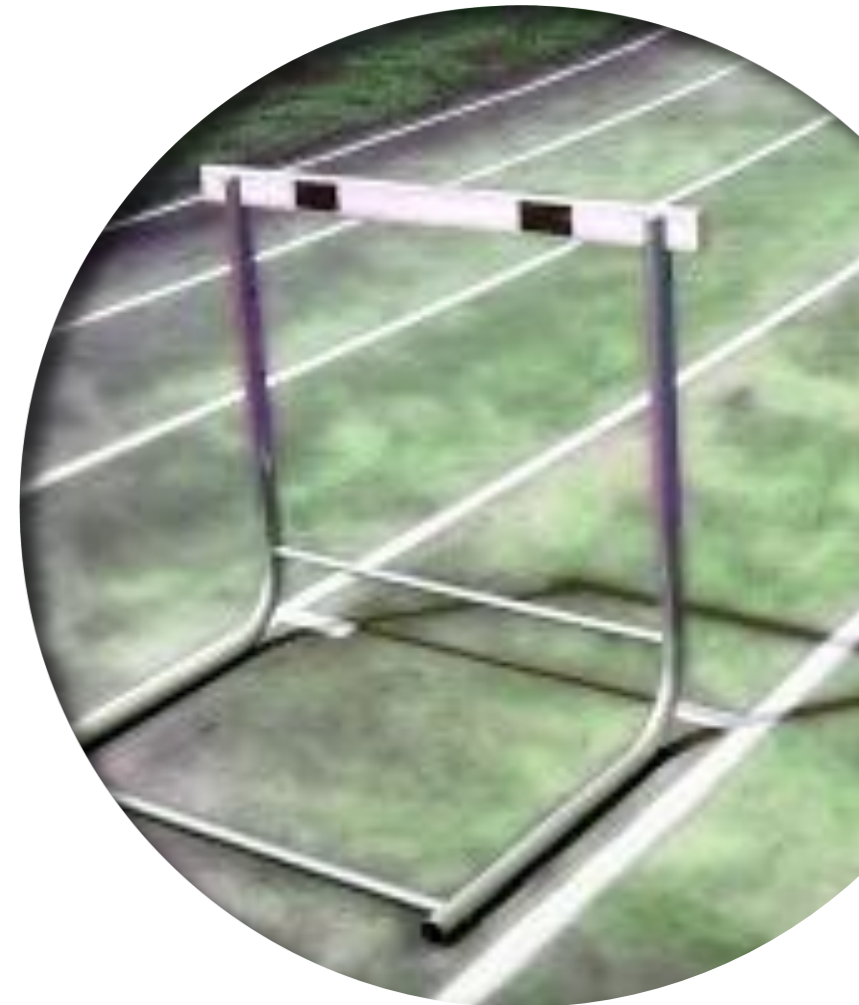
Users do not accept obtrusive advertising

Legal challenges of ad blocker

ILLICIT ADVERTISING...

EU Directive 2005/29/EC concerning unfair B2C commercial practices in the internal market

- Prohibition of „intolerable nuisances“
- EU-wide (per se) prohibition of „making persistent and u
telephone, fax, o
(see UCP-Direct



WHO BLAMES WHOM FOR ANNOYING ADS?

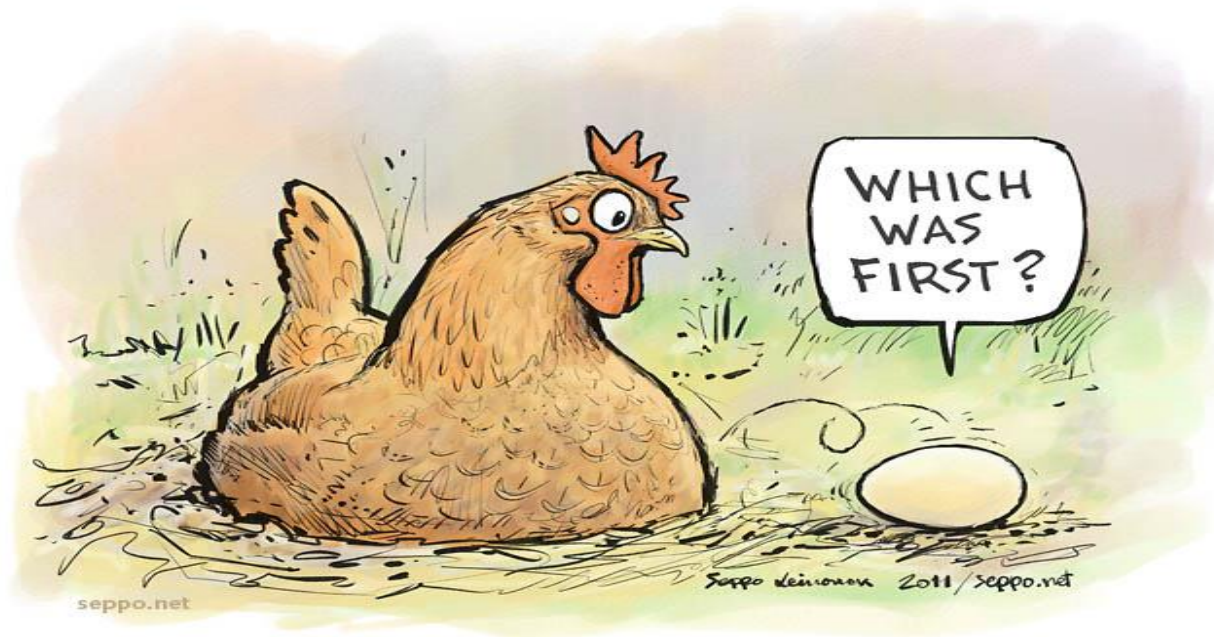
Excessive advertising



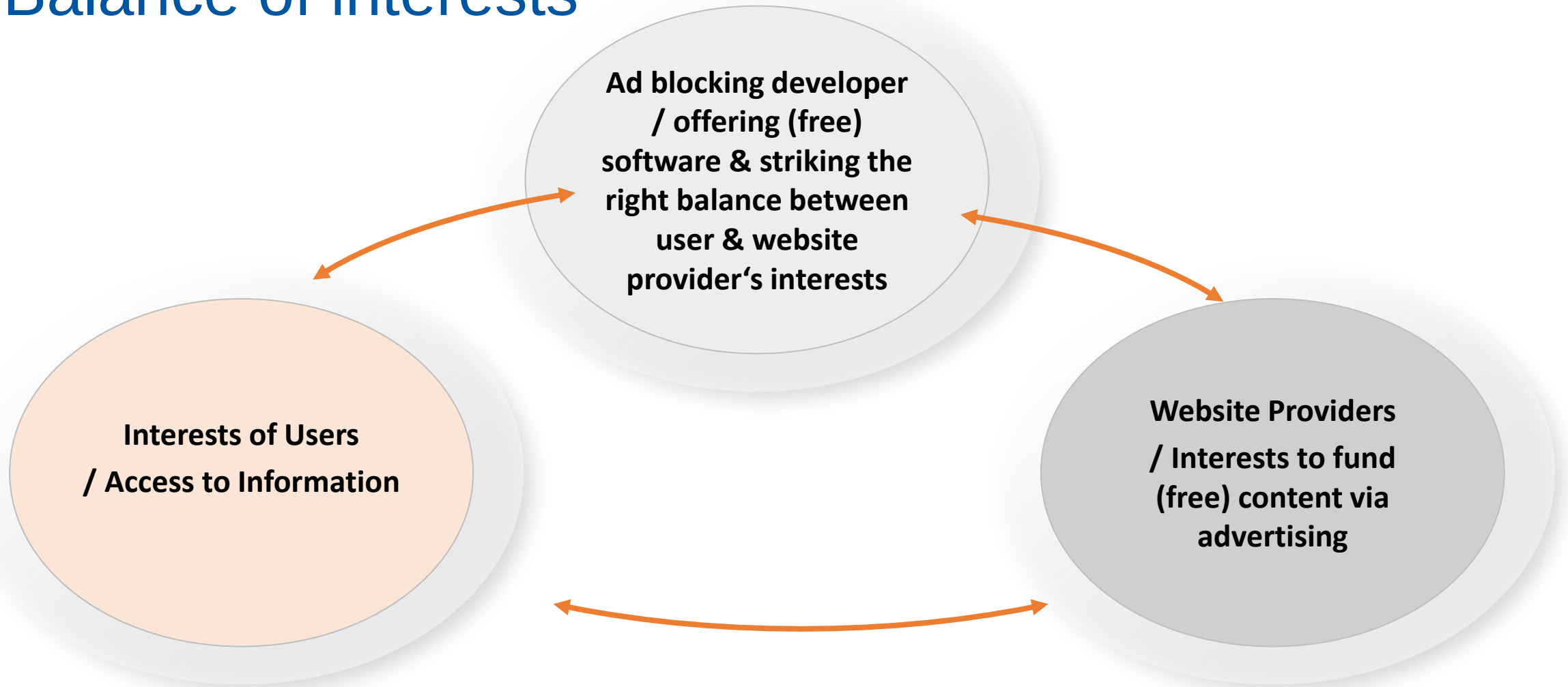
Annoyed users



Ad blocking software



Balance of interests





Legality ad blockers (free of charge)

- Competition Law
- Copyright Law



Legality of ad blockers (offered for a fee or applying a whitelisting)

- Court rulings referencing to early days of TV ad-blockers
- Whitelisting Model of "acceptable" ads
- Antitrust Law



BUNDESGERICHTSHOF

Federal Supreme Court [BGH] (BGH, 24 June 2004, Az. I ZR 26/02)

In essence, the BGH ruled that offering TV ad-blockers may not be considered an unfair commercial practice provided that the ad-blocker is an instrument controlled by the user in deciding which (type of) TV advertisement the user is willing to watch.



Legality of ad blockers (offered for a fee or applying a whitelisting)

Court rulings referencing to early days of TV ad-blockers

- Whitelisting Model of "acceptable" ads
- Antitrust Law

Violation of “*established and operating commercial business*”?

- ▶ The infringement must be „business-related“: i.e. it must (i) threaten the formation of the business, (ii) prevent operating resources from functioning for an extended time period or (ii) call into question the operator’s activities as such.
- ▶ Ad blocker would only constitute an infringement **if the software is aimed at overcoming one of the operator’s technological safeguards designed to prevent users from accessing the site**. This is, according to legal literature, not the case with ad blocking that „only“ suppresses „annoying“ ads and allows „acceptable“ ads.
- ▶ Ad blockers factually **cause a decline in advertising revenues** for the operator.

Intentional unethical damage?

- ▶ „**unethical**“: if the act violates the public sense of decency
- ▶ If the act cannot be reconciled with the **fundamental values of legal and moral order**.
- ▶ E.g. if the party offering an ad blocker aims at *making it fully impossible to operate an advertiser-funded website*, plus with a deliberate interest to destroy!

Major view in legal literature:

- ▶ An ad blocker which „only“ suppresses „annoying“ ads and allows „acceptable“ ads = aligns with user's legal interests (i.e. protecting the general public from annoying ads)
- ▶ The interference into the commercial business of the operator is not excessive & is less intrusive than to fully blocking all ads.

Inappropriate, unprofessional influence?

- ▶ For such infringement the provider of an ad blocker would have to **unfairly influence the operator's decision to accept the paid whitelisting offer**.
- ▶ E.g. inhibiting the companies' freedom of choice by pressuring them or influencing them in an inappropriate, unprofessional way.
- ▶ In particular German literature (*Hoeren*) does not regard this provision as applicable as the Unfair Competition Practice Directive mainly relates to a B2C and not to a B2B relationship.
- ▶ Economic power -> antitrust law: **abuse of dominant or at least relatively powerful market position** (see Article 102 of the Treaty on the Functioning of the European Union (TFEU)).
 - difficulty in determining the relevant market
 - question whether a differentiating ad blocker actually has a dominant market position

COMPETITION LAW COURT CASES

- Strengthening the user's "free choice" if ad-blockers are (a) predominantly user-controlled and (b) at user's request, e.g. allowing a broad range of setting options



- Ad-blockers tend to not infringing upon advertising-funded website operator's rights of commercial business. In particular, if the ad-blocker does not block „acceptable ads“, but merely „annoying ads“ (no „intentional unethical damage“).

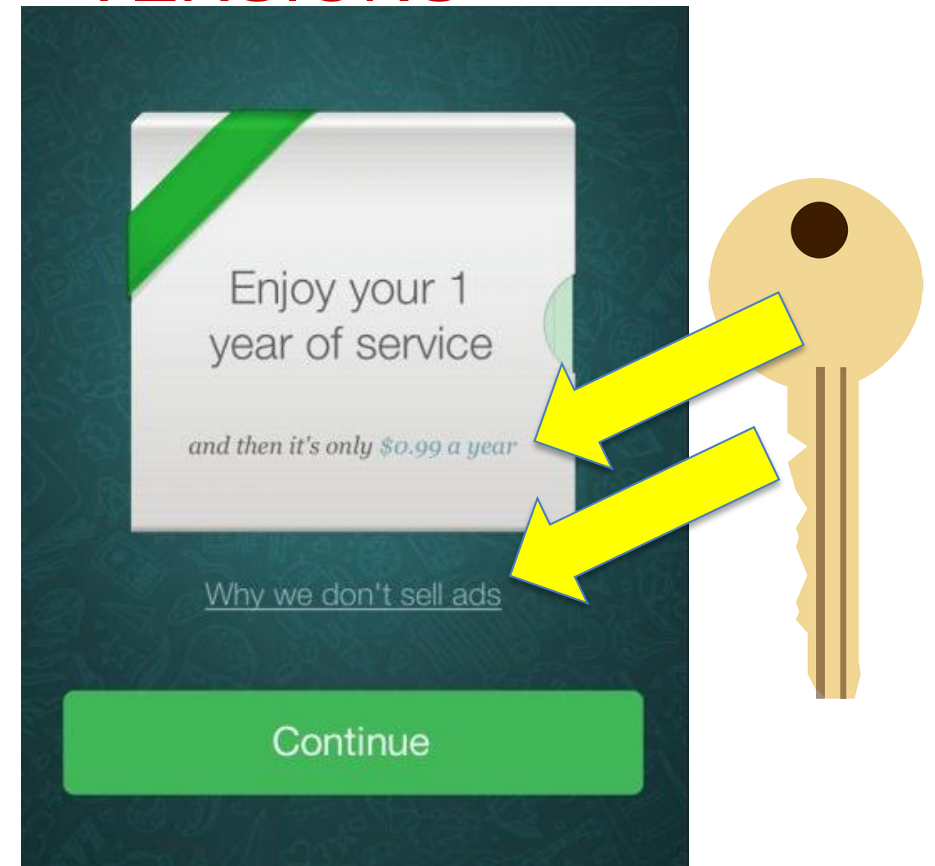


WHAT REMAINS TO BE DISCUSSED?

End of advertising-financed content?



PAID
VERSIONS



ADVERTISING-BASED PLATFORMS

CLOSED

“it’s free and always will be...”

“it’s free and anyone can join...”

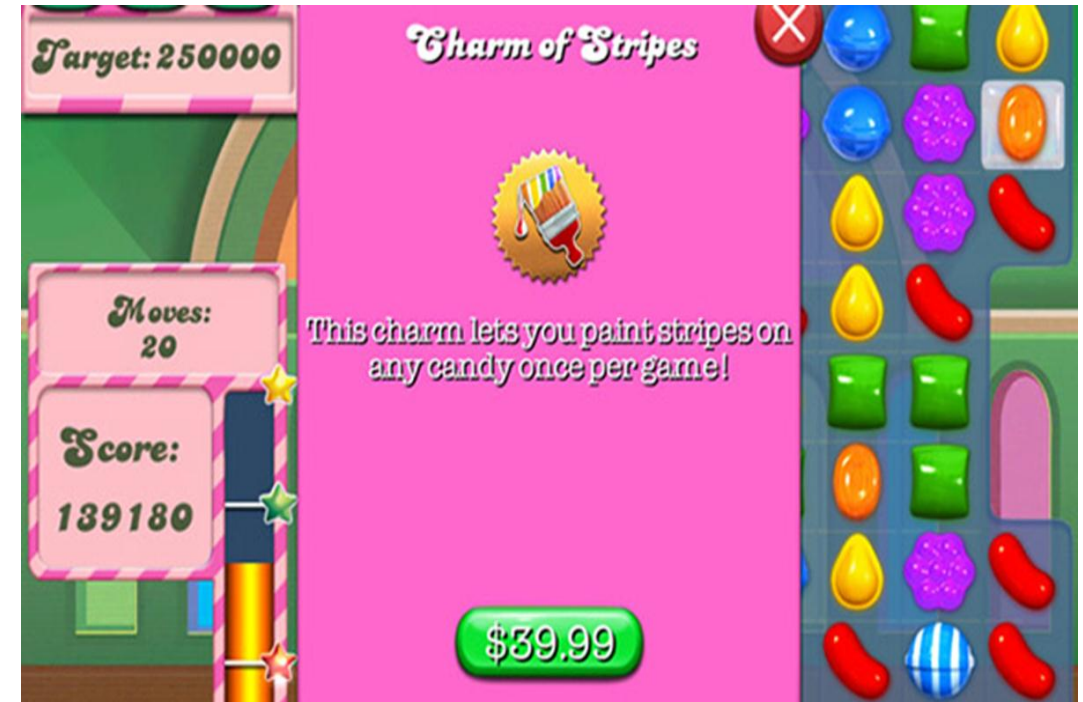


The screenshot shows the Facebook sign-up page. At the top, the Facebook logo is on the left, and login fields for 'Email' and 'Password' are on the right. Below the logo, a message says 'Facebook helps you connect and share with the people in your life.' To the right of this is the 'Sign Up' section with the tagline 'It's free, and always will be...'. The form includes fields for 'First Name', 'Last Name', 'New Email', 'No other email', and 'New Password'. Below these are dropdown menus for 'I am' (Gender) and 'Birthday' (Month, Day, Year). A green 'Sign Up' button is at the bottom of the form. At the very bottom, there is a link that says 'Create a Page for a celebrity, band or business.'



The screenshot shows a generic sign-up page. The title is 'Sign Up' with the tagline 'It's free and anyone can join'. The form includes fields for 'First Name' (filled with 'Jerry'), 'Last Name' (filled with 'Monti'), 'Your Email' (filled with 'kdmc.jerry@me.com'), and 'New Password' (filled with '*****'). Below these are dropdown menus for 'I am' (Gender, set to 'Male') and 'Birthday' (Month, Day, Year, set to 'Jan', '29', '1950'). A green 'Sign Up' button is at the bottom of the form. At the very bottom, there is a link that says 'Create a Page for a celebrity, band or business.'

Ad blocker: is it aimed at overcoming one of the operator's technological safeguards designed to prevent users from accessing the site?



FREEMIUM model >
"basic features" = free
"premium content" = for real money

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