Keyword Advertising and Trademark Infringement
Protecting Brands and Avoiding Liability in Online Advertising

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
Mitchell H. Stabbe, Member, Dow Lohnes, Washington, D.C.
Stephen R. Baird, Shareholder, Winthrop & Weinstine, Minneapolis
Alison M. Tucker, Partner, Morrison & Foerster, San Francisco

Thursday, April 29, 2010
The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
10 am Pacific

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Keyword Advertising and Trademark Infringement: Protecting Brands and Avoiding Liability in Online Advertising

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April 29, 2009
KEYWORD ADVERTISING AND TRADEMARK INFRINGEMENT:
Protecting Brands and Avoiding Liability in Online Advertising

WHO?
Internet Search Engines
  • Google AdWords
  • Yahoo! Search Marketing
  • MSN AdCenter
  • …and more…

Advertisers
Internet Users
KEYWORD ADVERTISING AND TRADEMARK INFRINGEMENT:
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WHAT?
Keyword advertising is paying for ad placement on the results page of a Web search engine.

- If a search request includes a keyword, a “Sponsored Link” (ad) is generated.
- Contrast: Natural Search Results
- Advertisers place bids with search engines on “keywords”
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The advertisements consist of:

• a **title**, which is limited to approximately 25 characters;

• **text**, which appears directly below the title, and consists of two lines, limited to approximately 35 characters each; and

• a **link** to a “landing page,” which is usually a page on the advertiser’s website.
WHERE?
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It’s not just Internet websites anymore .....
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HOW?
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Advertiser options:
• “broad matches”
• “phrase matches”
• “exact matches”
• “negative matches”
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Advertiser options:

• “broad matches” – where a user’s search query contains all the keyword terms (or variations on those terms), in any order, even if the query contains other search terms.
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Advertiser options:
• “phrase matches” – where a user’s search query contains all the keyword terms, in the same order, even if the query contains other search terms.
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Advertiser options:

• “exact matches” – where a user’s search query contains only the specific keyword phrase, in the same order, without any other search terms.
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Advertiser options:
• negative keywords – where advertisers designates certain keywords that will exclude their advertisements from any search results that include the designated terms.
Search engine complaint policies:

• Google AdWords – a trademark owner can block references to its mark in ad text, excluding sponsored links for resellers, sellers of complementary goods and sites providing information about the branded goods.

• Yahoo! Search Marketing and Microsoft adCenter: a trademark owner can also block use of its marks to trigger sponsored links, excluding resellers and product information sites and fair use.
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WHY?
WHY?
WHY?
KEYWORD ADVERTISING AND TRADEMARK INFRINGEMENT: Protecting Brands and Avoiding Liability in Online Advertising

- For **consumers**, keyword advertising provides consumers with information about alternatives or related subjects.
- For **advertisers**, keyword advertising is more effective because targeted marketing is based on an expression of interest in the subject.
- What about the **search engines**….?
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For the sellers (search engines):

$$\text{$$$}$$
Advertising is the fuel that keeps the Internet running

- 2002: $6 Billion
- 2003: $9.6 Billion
- 2004: $9.6 Billion
- 2005: $12.5 Billion
- 2006: $16.8 Billion
- 2007: $21.1 Billion
- 2008: $23.4 Billion
So, who could be against keyword advertising?
And on what basis....?
KEYWORD ADVERTISING AND TRADEMARK INFRINGEMENT

Strategies for Protecting Brands and Avoiding Liability in Online Advertising

Featuring:

Stephen R. Baird
Chair, Trademark & Brand Management Group
Winthrop & Weinstine, P.A.
WWW.DUETSDBLOG.COM
1. Keyword Advertising Cases
2. Meta tags
3. Likelihood of Confusion
4. False Designation of Origin
5. Dilution
KEYWORD ADVERTISING

Keyword Buys

Under arrangements known as keyword buys, Internet search engines sell advertising rights to specific search terms. In other words, when an Internet user conducts a search, the search results can be presented to provide top billing to an advertiser that paid for the right to have its advertisement presented above all other matches. This practice may cause a likelihood of confusion.

*Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004).
The Great Keyword Debate

- **1-800 Contacts v. WhenU**, 414 F.3d 400 (2d Cir. 2005).
The Great Keyword Debate

KEYWORD ADVERTISING

The Great Keyword Debate

- **Site Pro-1, Inc. v. Better Metal, LLC**, 82 U.S.P.Q.2d 1697 (E.D.N.Y. May 9, 2007).
The Great Keyword Debate

The Great Keyword Debate

TRADEMARK ISSUES ON THE INTERNET

Keyword Buys:

Practice Pointers

- Law is Unsettled and Developing, so Risk Exists.
- Decide on Your Strategy and Set Policy.
- Don’t Forget Goose/Gander Rule.
- Avoid Using Keyword Trademark in Google Ad.
- Don’t Lose Sight of Business Issues.
- Consider Agreements with Competitors.
- Take Advantage of Keyword Vendor’s Existing Policies.
Meta tags are HTML code words embedded in a Web site that are not normally visible to the Internet user. Meta tags generally consist of key words and phrases that are descriptive of the Web site’s content and are intended to be read by search engines so that the site can be identified as a relevant site in response to certain search terms.

Web site operators sometimes take advantage of this capability by including other owners’ trademarks in their metadata. The practice has been held to cause initial interest confusion. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999).
TRADEMARK ISSUES ON THE INTERNET

Practice Pointers:
Meta tags

- Probe reason for desire to imbed meta tags.
- Descriptive terms or recognized marks?
- Are they really beneficial?
- Does chosen meta tag directly relate to content on tagged page?
- Avoid repetitive use of others’ trademarks as meta tags even if there is legitimate single use fair use grounds.
- Position content on tagged page as clearly comparative.
- *North American Medical Corp. v. Axiom Worldwide, Inc.* 522 F.3d 1211 (11th Cir. April 7, 2008); see also *Venture Tape Corp. v. McGills Glass Warehouse*, 540 F.3d 56 (1st Cir. August 28, 2008).
Any person who shall, without the consent of the registrant, use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
... apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used in commerce or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive

shall be liable in a civil action by the registrant for the remedies hereinafter provided.
Types of Likely Confusion

1. Traditional Forward Confusion
2. Initial Interest Confusion
3. Post-Sale Confusion
4. Confusion as to “Sponsorship”  
   *(See www.DuetsBlog.com)*
5. Reverse Confusion
6. Non-Confusing Nominative Fair Use
Likelihood of Confusion Factors

1. Traditional Factors
2. Initial Interest Confusion Factors
3. Internet trilogy
FALSE DESIGNATION OF ORIGIN


Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or devise or any combination thereof, any false designation of origin, false or misleading description of fact, which is likely to cause confusion or in commercial advertising or promotion, misrepresents the nature, characteristic, qualities, or geographic origin of [the] goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.
Protection of Famous Marks

- Lanham Act § 43(c); 15 U.S.C. § 1125(c) (2006):
The owner of a famous mark shall be entitled . . . to an injunction against another person’s commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark . . .

Courts may consider the eight enumerated factors when determining whether a mark is famous and distinctive, and the list is not limited to the eight factors.

Injunctive relief is the only remedy available to a damaged party unless the person against whom the injunction is sought willfully intended to trade on the owner’s reputation or to cause dilution of the famous mark.
THANK YOU!

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Keyword Advertising and Trademark Infringement
Direct and Indirect Liability

April 28, 2010
Presented By Alison M. Tucher
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Indirect Liability

- Contributory Infringement
  - *Tiffany (NJ) Inc. v. eBay, Inc.*, __ F.3d __ (2nd Cir. April 1, 2010)
  - *Lockheed Martin v. Network Solutions*, 194 F.3d 980 (9th Cir. 1999)

- Contributory and Vicarious Infringement
  - *Perfect 10 v. VISA*, 494 F.3d 788 (9th Cir. 2007)
  - *Hard Rock Café Licensing v. Concession Servs.*, 955 F.2d 1143 (7th Cir. 1992)
Contributory Infringement

• From principles of enterprise liability and imputed intent
• Requires
  • Intentionally induces primary infringer to infringe or
  • Continues to supply an infringing *product*, knowing or with reason to know that the infringer is mislabeling, or
  • Continues to supply an infringing *service*, knowing or with reason… [while exerting direct control and monitoring of the instrumentality the primary infringer uses to infringe].
Vicarious Infringement

- For joint tortfeasors
- Requires defendant and infringer:
  - Are apparent or actual partners,
  - Have authority to bind one another in transactions with third parties, or
  - Exercise joint ownership or control over the infringing product
- Narrower than copyright law
The Problem

- A “significant portion of the ‘Tiffany’ sterling silver jewelry listed on the eBay website . . . was counterfeit”
- “[A]uthentic Tiffany goods are [also] sold on eBay”
- eBay received customer complaints and knew “some portion of the Tiffany goods sold on its website might be counterfeit”
Tiffany v. eBay (cont.)

Tiffany Sues

- Direct and contributory trademark infringement
- Trademark dilution
- False advertising

Defense judgment following bench trial (Sullivan, J.)
eBay’s Anti-Fraud Efforts

- eBay operated a “notice-and-takedown” system, removing potentially infringing items within 24 hours
- eBay began issuing “special warning messages” to sellers advertising Tiffany items
- eBay suspended tens of thousands of sellers suspected of infringing conduct
- eBay allowed Tiffany to maintain a “Buyer Beware” notice, warning customers and directing them to tiffany.com
eBay’s Efforts to Drive Sales

- Advertised availability of Tiffany merchandise on its site
  - Hyperlinks from “GET THE FINER THINGS,” “GREAT BRANDS, GREAT PRICES,” etc.
  - To “Tiffany & Co. under $50,” etc.
- Purchased Yahoo! sponsored link advertisements
  - Keyword “Tiffany”
- “Tiffany on eBay. Find tiffany items at low prices.” etc.
Tiffany v. eBay (cont.)

No Direct Trademark Infringement

• Nominative Fair Use
  • *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302 (9th Cir. 1992)
  • *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3rd Cir. 2005)
  • Neither adopted nor rejected by 2nd Circuit

• Trademark law does not reach use if:
  • Necessary to describe mark-holder’s product
  • Not falsely implying affiliation or endorsement by mark-holder
No Contributory Trademark Infringement

- Test: “Continues to supply its [service] to one whom it knows or has reason to know is engaging in trademark infringement”
- “Generalized knowledge … that its service is being used to sell counterfeit goods” is not enough
- “[C]ontemporary knowledge of which particular listings are infringing … is necessary”
- eBay’s take-down program shows it does not continue to supply; its anti-fraud efforts show it is not willfully blind
American Airlines v. Yahoo! (N.D. Texas)

This is MoFo. | 53
American Airlines v. Yahoo! (Cont.)

• American Airlines challenged Sponsored Search advertising on “american airlines,” “american eagle,” “AA”

• Claims included
  • Direct infringement
  • Contributory infringement
  • Vicarious infringement
  • Dilution

• Case settled after briefing on summary judgment
American Airlines v. Yahoo! (cont.)

Nominative Fair Use in the Fifth Circuit

- **Scott Fetzer v. House of Vacuums**, 381 F.3d 477 (5th Cir. 2004) (Yellow Pages advertisement may use brand names)
- **Trail Chevrolet v. Gen. Motors**, 381 F.2d 353 (5th Cir. 1967) (dealership may “advertise that they sell Chevrolets, that they repair Chevrolet cars, that they have a number of Chevrolets to choose from, or that they sell used Chevrolets and other fine cars”)
- Digits of confusion must be flexibly applied (very!)
- Ask whether defendant:
  - Uses only so much of the mark as necessary to identify the product/service, or
  - Does nothing to suggest affiliation, sponsorship, or endorsement by markholder
American Airlines v. Yahoo! (cont.)

Nominative Fair Use In Keyword Advertising

- Three favorable decisions
  - *Tiffany v. eBay*

- Contrary authority distinguished (misleading text)
Statutory Fair Use

• Advertiser may use a trademarked term “in its descriptive sense rather than” as a brand name (Sugar Busters v. Brennan, 177 F.3d 258 (5th Cir. 1998))

• Examples:
  • “American Eagle” coins
  • Discount AA Batteries 10% Off  http://www.batteries.com/index.asp?L=142 - Find discount batteries and chargers for your camcorder, PDA, digital camera, cell phone, laptop computer, and more. Free shipping and 10% with code SS10 at checkout.
American Airlines v. Yahoo! (cont.)

No direct infringement
• Consumers not confused between Yahoo!’s search engine and American’s air travel services

No indirect infringement
• Yahoo!’s Sponsored Search advertisers generally non-infringing; most made nominative fair use of trademarks
• Yahoo!’s trademark policy addressed individual instances of infringement
American Airlines v. Yahoo! (cont.)

Innocent infringer not liable for damages

No dilution with nominative fair use
Summary

- Nominative fair use does not infringe, but depends on language and context
- Direct infringement requires defendant’s use of mark likely to cause confusion as to origin or sponsorship of goods
- Contributory infringement requires contemporary knowledge that particular advertisements infringe
- Vicarious infringement requires joint activity
- Appropriate policies to avoid or remove infringing uses can protect from direct or indirect liability
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Strategies to avoid claims
KEYWORD ADVERTISING AND TRADEMARK INFRINGEMENT:
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• Don’t sell grey goods
• Don’t use metatags
KEYWORD ADVERTISING AND TRADEMARK INFRINGEMENT:
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Strategies to protect brands
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• Be careful in picking your fights
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- Pursue keyword advertising activities with “plus” factors (see prior screen!)
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• Don’t bother with “small operators”?
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• Pursue keyword advertising activities with “plus” factors (see prior screen!)
• Don’t bother with “small operators”?
• Get a reputation by being aggressive towards “small operators”?
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• Avoid cases involving the search engines’ safe harbors for keyword advertising
• Pursue keyword advertising activities with “plus” factors (see prior screen!)
• Don’t bother with “small operators”?
• Get a reputation by being aggressive towards “small operators”?
• Don’t play both sides of the street (purchasing trademarks of others as keywords while objecting to use your marks as keywords)
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• Don’t forget to use your resources to market your brand
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- Avoid cases involving the search engines’ safe harbors for keyword advertising
- Pursue keyword advertising activities with “plus” factors (see prior screen!)
- Don’t bother with “small operators”?
- Get a reputation by being aggressive towards “small operators”?  
- Don’t play both sides of the street (purchasing trademarks of others as keywords while objecting to use your marks as keywords)
- Don’t forget to use your resources to market your brand
- **Bind sales agents, franchises, etc. contractually (domain names as well)**
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• Get a reputation by being aggressive towards “small operators”?
• Don’t play both sides of the street (purchasing trademarks of others as keywords while objecting to use your marks as keywords)
• Don’t forget to use your resources to market your brand
• Bind sales agents, franchises, etc. contractually (domain names as well)
• Move to Utah
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