

Brand Protection Services Update

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Keywords - Are your competitors 'redirecting' potential customers away from you?

Internet search engines are the first port of call for many consumers searching for your product or researching goods and services on the Internet. As a result, it is essential that you are aware of whether your potential customers are being 'redirected' to a competitor through internet search engines.

What are keywords? Keywords are words that an online advertiser can purchase from a search engine so that when a customer searches a particular word, advertisements for that advertiser's business appear as a "sponsored link" to the search results. For example, a search for the well known brand "Mazda" could return sponsored links (at the top and to the side of the "organic" search results) to competitors' websites, such as Toyota and Holden, or to sites that sell this brand, such as Carsales.com.au, as demonstrated below. This would be as a result of these businesses purchasing the keyword "new car" from that search engine.

The screenshot shows a search engine interface with a search box containing 'Mazda' and a 'Search' button. Below the search box, there are two columns of results. The left column is labeled 'Sponsored links' and contains a link for 'Mazda' with the URL 'www.mazda.com.au' and the text 'Browse the New Mazda Range and Zoom into a Dealer Today.' Below this, there is a note in brackets: '[Organic search results appear here]'. The right column is also labeled 'Sponsored links' and contains two links: 'Mazda Dealer NSW Number 1 Selling Mazda Dealer' with the URL 'www.westendmazda.com.au' and 'Toyota Means Business' with the text 'Thousands of dollars of extras' and the URL 'www.toyota.com.au/great offers'. A large, semi-transparent watermark 'example only' is overlaid on the entire screenshot.

Keyword or sponsored search advertising is offered by search engine operators such as Google (known as Adwords) and Yahoo! (known as sponsored search advertising), and generate billions of dollars annually in revenue for the search engine operators.

Perhaps unsurprisingly, it is increasingly common for businesses to attempt to lure competitors' customers away using keyword search advertising. This can be done in several ways:

- they may “purchase” competitors’ trade marks as keywords so, for example, a search for “Coca Cola” could trigger an advertisement for “Pepsi” to appear alongside or above the Google Search results for Coca Cola; and/or
- an advertisement triggered by a keyword may be designed to look like a link to a competitor’s website.

Further details about particular policies put in place by search engine providers to protect trade mark owner’s rights are set out below, along with details of recent cases on this issue. In order to take advantage of the policies put in place, brand owners must ensure that their trade mark portfolios are kept up-to-date.

Action you can take to protect your brand on the internet

The key message for protecting your trade mark rights on the internet is really POLICE, POLICE, POLICE the internet. It is your responsibility as a trade mark owner to police how your mark is being used by others on the internet and to take action early in relation to unauthorised use of your mark, before you lose business.

We suggest that you start each day with an internet search enquiry using your trade mark on key search engines to see what results are found, and in what order.

Further details on search engine policies and recent cases on this issue

In 2007, the ACCC commenced proceedings against Trading Post Australia Pty Ltd alleging that use of competitors’ business names in advertisements could mislead consumers in contravention of s52 of the Trade Practices Act - this case is ongoing.

Although the issue of trade mark infringement in these circumstances remains unresolved in Australia, some search engine operators (including Google and Yahoo!) have adopted policies which can be utilised by brand owners.

Google policy

In Australia, Google will generally respond to complaints from trade mark owners by preventing third parties from using registered trade marks either as keywords, or in the text of advertisements. Further information on Google’s AdWord policy can be found [here](#).

The situation in other jurisdictions varies, and in over 190 regions (including the US, Canada, the UK, and some Asian nations) Google allows advertisers to buy trade marks as keywords to act as a trigger for an advertisement. In March 2010, the European Court of Justice ruled that the use of registered trade marks as keywords will not, of itself, constitute trade mark infringement (although this will depend on the circumstances).

Yahoo! policy

Yahoo! search marketing requires advertisers to agree that their search terms do not violate the trade mark rights of others. An advertiser on Yahoo! will only be permitted to purchase a keyword that may be the trade mark of another where the advertiser presents content on its website that:

- (a) refers to the trade mark or its owner or related products in a permissible nominative manner without creating a likelihood of consumer confusion. The site must either:

- (i) sell or clearly facilitate the sale of the products or services bearing the mark, without creating the impression that the advertiser is an authorised reseller unless the trade mark owner has designated the advertiser as an authorised reseller; or
 - (ii) have the primary purpose of providing substantial information about the trade mark owner or products or services bearing the trade mark, and does not sell or promote (or is not affiliated with an entity that sells or promotes) a product or service that is in direct or indirect competition with the trade mark owner's products or services; or
- (b) uses the term in a generic or merely descriptive manner.

Further information on Yahoo!'s policy can be found [here](#).

Where a complaint is made regarding particular search advertising, Yahoo! will review the listing for compliance with the guidelines and will, if appropriate, remove the listing or require it to be modified.

Our services

Our IP, technology, media and entertainment team advises clients who are at the cutting edge of their industries. We understand the challenges of operating in a fast-paced, dynamic environment and provide our clients with innovative commercial solutions tailored to their individual needs.

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