

Pay-Per-Click Advertising on Trademarks: Fair or Foul?

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Many a marketer has received that dreaded call from their boss complaining that when the company name or trademark is typed into a search engine, the first thing that appears on the results page is their #1 competitor!

Welcome to the complicated world of search engine marketing and trademark law. Several lawsuits are currently underway, and clarity for trademark owners and marketers is not likely anytime soon. A panel of experts discussed this dilemma recently at the Search Engine Strategies Conference, held March 1-4 in New York City.

What is a Trademark?

A trademark is a word, symbol or slogan indicating the source of a particular good or service. Deborah Wilcox, a partner at Baker & Hostetler LLP specializing in intellectual property and trademark law, explains that trademark infringement basically means improper use of a trademark, or use that causes consumer confusion.

American Blind and Wallpaper Sues Google

Take the case of home decorating retailer American Blind and Wallpaper, who recently filed a trademark infringement lawsuit against Google. When American Blind's registered trademarks are entered into the Google search engine, competitors' listings are returned, both as natural listings and as paid ads, oftentimes more prominently than listings for American Blind and Wallpaper. American Blind contends that the listings are confusing to consumers. At the core of this case are Google's algorithms, search technology, and AdWords advertising program.

Google has tried to avoid these conflicts in the past, often preventing competitors from bidding on trademark terms, as was the case recently with eBay and Dell. But the situation is less clear with *descriptive* terms and phrases such as "American Blind". To date, Google has refused to stop selling pay-per-click ads on these keywords.

Is Google trafficking in trademarks and unfairly profiting from this practice, as American Blind claims? Or is this situation just a natural by-product of an effective search engine? And why isn't Overture being sued?

How Google and Overture Handle Trademarks

American Blind's lead attorney, Dave Rammelt explains, "Overture takes a more hands-on approach, and did prevent advertising on American's registered trademarks, once the situation was brought to their attention." The other big difference is the way Overture and Google handle keyword matching:

- Overture uses a "standard" default match type, versus Google, whose default is "expanded broad match". This means that on Overture's ad network, which includes Yahoo! and MSN, an advertiser's ad will appear only when people search for the *exact words* the advertiser bids on. (Plurals, common misspellings, and variations are also included.)
- In contrast, Google advertisers who don't proactively enter their keywords surrounded by quotes (specifying phrase match) or brackets (for exact match) will be implementing expanded broad match across the entire ad network, which includes AOL, Ask Jeeves, CompuServe and EarthLink. Many believe that this is one of the least understood aspects of the Google AdWords program, and that novice pay-per-click advertisers don't realize their ads are being matched against such a wide range of search queries.

To illustrate, if an advertiser bids on "faucet", and doesn't explicitly indicate exact or phrase match in the Google AdWords program, they may actually be advertising on phrases like "Moen faucet" or even the trademark "Moen". In this way, many Google advertisers are unaware that they are advertising on trademarked terms.

To further complicate matters, both Overture and Google actually *suggest* that advertisers consider bidding on trademarks as part of their search term suggestion tools. The trademarks are not explicitly selected by Google or Overture; rather these suggested keywords are automatically generated based on actual search query data.

Advice for Search Marketers

So what's a marketer to do? According to Douglas Wood, of Reed Smith Hall Dickler LLP, in the short term, the best advice is to really understand what terms you are advertising on: Review your use of phrase and broad match on Google and Overture. Add negatives, or excluded words, or switch to exact/standard match, to eliminate trademarks from your campaigns.

If you do decide to bid on a trademark, make sure you are doing so properly. Ask yourself these key questions:

- Does my ad imply that I am the owner of the trademark?
- Would a searcher reasonably expect my ad to lead to a different site?
- Does my landing page provide specific information on the trademark?

Bottom line; don't engage in "bait and switch" behavior. Make sure that both your ad and landing page clearly indicate that you are not the trademark owner, but are simply comparing your product to the trademarked one, or offering an alternative.

Additional Resources

Websites for the Federal Trade Commission (FTC.gov) and American Lawyer Media (Law.com) provide good general information on trademarks, trademark protection, and trademark infringement.

If you are a trademark owner and want to track the use of your trademark online, consider a surveillance program such as Discovery Eye from Envisional, or VigilActive from NameProtect.

Nearly every search engine or search ad provider publishes information on their policies for handling trademarks and trademark complaints.

For Google, visit: http://www.google.com/tm_complaint.html

For Overture, visit: <http://www.content.overture.com/d/USm/about/company/trademarkinfo.jhtml>

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