Chapter X
Trademark Infringement in Pay-Per-Click Advertising

Peter O’Connor
IMHI, Essec Business School, France

INTRODUCTION

Since its launch in 1994, the Web has continued to grow at a phenomenal rate, from an estimated one billion Web documents in 2001 to over eleven billion in January 2005 (Gulli & Signorini, 2005). For most users, navigating this ever expanding sea of data has become a significant challenge. Search engines – sites that maintain indexes of Web content – allow users to specify words / phrases and return a list of sites that potentially match these criteria – have become a key way of finding information on the Web. Google, the world’s largest search engine is estimated to have indexed over 8 billion pages (Sullivan, 2004c) and to be used in nearly 50% of consumer searches (Nielsen NetRatings, 2006). Over 6.4 billion individual searches took place during May 2006 within the USA alone (Comscore, 2006). Clearly being favourably positioned in such search results is very important for site owners wishing to get visibility to the online consumer.

In the beginning, search engines were un-biased, striving to display the results that provided the most relevant answers to user queries (Sullivan, 2002). While many were supported by advertising, in general this took the form of banner advertisements – graphical adverts displayed across the top of the page and clearly differentiated from the engine’s search result listings. Today, however, search engines need more workable business models to meet the substantial costs of maintaining their databases and improving their technology (Princeton Research Associates, 2002). For that reason, many now market their ability to route consumers towards specific Web sites - blurring the line between their ‘results’ and their ‘advertisements’. Like tour guides supplementing their income by bringing potential customers to restaurants or gift shops, many search engines now actively direct users
Trademark Infringement in Pay-Per-Click Advertising

to sites which have paid for positioning on their results pages (Lastowka, 2002).

In most cases, these paid placements are based on advertisers bidding for the specific keywords under which they wish to be displayed. For example, an online sports retailer might wish to appear when ever users enter “running shoes” as a search criterion. Bidding on these keywords would insure that the sports retailer’s site is displayed prominently in the resulting search listing. Controversy has arisen, however, over the use of trademarked terms as keyword triggers. For example, can the same online retailer bid on the keyword “Nike” and / or use the trademark “Nike” in the copy of the advert subsequently displayed, thus potentially diverting shoppers who might otherwise have bought directly from Nike.com - the Web site of the trademark owner? Clearly doing so compromises Nike’s brand equity – its monopolistic right to be able to profit from its investment in building up the Nike brand (Arvidsson 2006). As George (2006, p 215) puts it “brands are the placards by which modern consumers choose their products”. Corporations rely on brands to stimulate consumer awareness and foster an affinity for their products (Spinello 2006). Legal protection against brand infringement comes from trademark law – a subsection of intellectual property law that prevents third parties from benefiting from the value and goodwill built up in a brand (Gallafent 2006). However, such legislation has developed in the off-line world. How do its principles and practices transfer to e-commerce? While still a developing subject, this paper examines the ethical and legal position surrounding trademark infringement in a specific area of the electronic arena – within paid search advertising. The paper explains the rational behind the problem, outlines the current legal situation and offers advice as to how trade name owners can better protect their e-brand.

BACKGROUND

Search engines have become an essential tool, with search volumes increasing at over 20% per year as users struggle to find relevant information on the ever expanding World Wide Web (Sen, 2005). Research has shown that users – in addition to using search engines to perform searches - now also often type site URLs directly into search boxes, suggesting that they use search engines not just as data harvesting tools but for navigation (Smith, 2005). Given such dependence, gaining a favourable position in search results listings is important for anyone wishing to gain exposure to online consumers and maximise traffic. Research by Jupiter Media shows that 93% of users do not look past the first two pages of search results (Thompson, 2004), while Sen (2005) claims that users hardly ever go beyond the first three pages – approximately the top 30 listings - making inclusion in this subset of results essential for consideration by the customer. Search engine marketers use two primary techniques to try to increase their positioning in search result listings. Search engine optimisation focuses on manipulating Web page structure and content in order to be naturally ranked highly under particular search terms, while paid placement instead pays for position, usually on a competitive cost-per-click basis.

Organic Search Engine Optimisation

Search engines use specialized software, known as ‘spiders’, to crawl the Web, classifying each page they encounter and adding it to their database so that it will subsequently appear in search result listings. Marketers try to manipulate these spiders to give their pages favourable positions by modifying their pages’ HTML (for example the title tag, meta-tags, headings or links) and / or page content to convince the spider’s ranking algorithm that the page is highly relevant to the search terms desired, and that thus it should
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