

Search Engine Marketing – Click or Trick?

Ken Shiu and Matt Vitins review some of the legal issues associated with search marketing.

The Australian Competition and Consumer Commission's (ACCC) recent action against search engine giant Google Inc. and the Trading Post for alleged breaches of section 52 and section 53 of the *Trade Practices Act 1974* (Cth) (TPA) has fixed a spotlight on new media's answer to print classifieds and directories – the search engine.

Throughout the evolution of the internet over the last decade, brand owners have embraced and at the same time been reticent over the power and marketing reach of new online media. The gradual migration of advertising budgets into online media has in recent times spawned an entire search engine optimisation industry dedicated to devising advertising strategies and campaigns utilising search engines. In Australia, the total annual advertising expenditure in 2007 on search and directories advertising was estimated to be around \$622m with the year-on-year growth pattern for this form of advertising over the last 5 years consistently exceeding 50%.¹ The Australian industry statistics also confirm that search and directories advertising spend comprises a significant share of overall online advertising expenditure.²

Although much loved by internet users, the commercial services provided by search engines have raised a variety of legal issues for brand managers, advertisers (and indeed, regulators) to consider.

Keyword advertising – Trade Practices Act issues?

The majority of popular commercial search engines provide a facility for advertisers to pay for search terms and incorporate links to nominated sites within the search results returned when users search for those specific keywords. Whilst intended to allow advertisers to bid for popular search terms to link search results to their websites, this facility has not prevented online marketers and advertisers from engaging in the practice of paying for keywords attributable to their competitors' products or services in the hope of displaying links to their sites above or alongside natural search results. Does keyword advertising for paid placement in a search engine lead to misleading and deceptive conduct in breach of Australian trade practices laws?

In July 2007, the ACCC issued proceedings against the Trading Post in relation to paid search. The ACCC alleged that the Trading Post purchased 'Kloster Ford' and 'Charle-

stown Toyota' as keyword triggers for the publication of a Trading Post advertisement.³ The advertisements included the words 'Kloster Ford' or 'Charlestown Toyota' as a title line, however, when users clicked on the ad it linked to the Trading Post's website. The ACCC argued this amounted to misleading and deceptive conduct and a representation that the Trading Post had a sponsorship, approval or affiliation that it did not have, in breach of sections 52 and 53(d) of the TPA respectively.⁴

The ACCC further alleged that Google similarly contravened section 52 of the TPA and is seeking injunctions restraining Google from publishing sponsored links where an association, sponsorship or affiliation does not exist and from publishing search results that do not expressly distinguish paid keyword advertisements from organic search results.⁵

Although this is not the ACCC's first dealing with complaints involving the Trading Post's use of Google Adwords⁶, it is its most assertive action to date. No competition regulator in any other jurisdiction has taken formal action against a search engine on misleading commercial conduct grounds and adequate consumer disclosure. The US Fair Trade Commission (FTC) in July 2002 considered the merits of the adequate disclosure of paid search results by various popular search engines of the time following a letter of complaint by a US consumer advocacy group. The FTC took no formal action other than to issue a directions letter to various identified search engine providers to provide 'clear and conspicuous' labelling of paid placement listings.⁷ As a result of the FTC's letter, many search engines changed the labelling of their paid search results from descriptive headings such as 'featured listings' and 'products and services' to more meaningful labels such as 'sponsored links' or 'sponsored results'. In addition, most current search engines also adopt a consistent approach to the use of shaded background (light blue or light yellow) for displaying paid search results in both the right hand sidebar and any results displayed above organic search results. Notably, the ACCC's action contends that the use of the shaded background by Google is only apparent when viewing the screen at certain angles. The FTC in its explanatory statement also recognised the nascent stage and diversity of online business models underpinning search engines and the consequential need to take a light touch approach. Since that time, as the advertising industry will readily

acknowledge, the paid keyword search business model has well and truly been established.

The Federal Court's determination of the larger issue of whether Google's (or any other search engine's) display of sponsored links in these situations fails to adequately distinguish organic search results from paid search results in violation of trade practices law will depend to some extent on the behavioural evidence of search engine users.

The TPA provides certain statutory defences to section 52 and section 53 claims involving publication by information providers⁸ or publication of an advertisement in the ordinary course of business.⁹ These safe harbour defences are dependent on the extent to which the defendant can satisfy certain statutory definitions and overcome the awareness tests applicable to these statutory defence provisions. It will be interesting to see if the Federal Court is required to consider these TPA safe harbour defences and its approach in the context of new media enterprises.

Keyword advertising – trade mark concerns?

Aside from competition law concerns, the majority of legal attention surrounding keyword advertising has been focused on the question of potential trade mark infringement. In particular, whether it amounts to trade mark infringement when a competitor purchases another company's trade mark as a keyword. On one view, the practice merely gives consumers more relevant and informative search results.¹⁰ Alternatively, a trade mark owner might reasonably maintain that competitors are achieving unfair mileage from their brands and goodwill as their marks are being used to direct traffic to competitive advertisements. To constitute infringement under Australian law, 'use' of a trade mark in relation to the same or similar goods or services to those in which the trade mark is registered must be established.¹¹ It is unclear whether an advertiser purchasing a keyword is 'using' that keyword as a trade mark.

Due to the jurisdictional nuances of national trade mark law, much of the publicised litigation in this area has to date been largely confined to US and French courts with Google as the predominant defendant. However despite available authorities on point, ambiguity persists as different courts have expressed divergent opinions.

*Government Employees Insurance Company v Google, Inc.*¹² (GEICO) is a notable early decision from a US District Court in Virginia. In this case the GEICO insurance company

argued that the use of their trade mark as a search term led to related sponsored links appearing in a manner that was likely to confuse consumers as to the source, affiliation or sponsorship of those links.¹³ In a bench trial over Google's motion to dismiss proceedings, Judge Brinkema from the US District Court for the Eastern District of Virginia commented: 'as a matter of law it is not trademark infringement to use trademarks as keywords to trigger advertising.'¹⁴ However, the case proceeded on the more limited question of whether use of the mark 'GEICO' in the heading or text of rival advertisements would infringe.¹⁵ The case was settled before this issue was decided.¹⁶ Judge Brinkema further held the insurance company had not produced sufficient evidence to prove that mere use of their trade marks as keyword or search terms would cause a 'likelihood of confusion' – the plaintiff had therefore failed to establish sufficient evidence of infringement under the relevant legislation.¹⁷ Subsequent commentary has noted that, although interesting, GEICO was therefore quite fact specific and of 'little predictive value'.¹⁸

In *Rescuecom v Google, Inc.*¹⁹ (**Rescuecom**) the Plaintiff took the argument a step further by claiming that Google's 'Keyword Suggestion Tool' had recommended to competitors that they purchase 'Rescuecom' as a keyword which would drive traffic.²⁰ Here, the US District Court (Northern District of New York) granted Google's motion to dismiss on the basis that the:

*Defendant's internal use of the plaintiff's trademark to trigger sponsored links is not a use of a trademark within the meaning of [the Act], either, because there is no allegation that defendant places plaintiff's trademark on any goods, containers, displays, or advertisements, or that its internal use is visible to the public.*²¹

Most recently, a more sizeable plaintiff, American Airlines, has taken action against Google on the same argument that the sale of its trade marks as keywords constitutes trade mark infringement. Following *Rescuecom*, Google moved to dismiss on the basis that the sale of a keyword did not constitute 'use' for the purposes of US trade mark legislation.²² In October last year, however, Judge McBryde declined to dismiss proceedings and offered little by way of explanation.²³ The American Airlines proceedings remain on foot.

Turning to Britain, in *Reed Executive v Reed Business Information* (**Reed Executive**) the defendant company used 'Reed' as a Yahoo keyword that would trigger a result for its website 'totaljobs.com'. The Court of Appeal's decision in *Reed Executive* indicates that British courts may give more credit to internet users than plaintiffs asserting trade mark infringement in keyword cases. Jacob LJ commented:

The web-using member of the public knows that all sorts of banners appear

*when he or she does a search and they are or may be triggered by something in the search. He or she also knows that searches produce fuzzy results – results with much rubbish thrown in. The idea that a search under the name Reed would make anyone think there was a trade connection between a totaljobs banner making no reference to the word 'Reed' and Reed Employment is fanciful.*²⁴

Reed Executive also offers a perspective on the question of use. In *Reed Executive*, the defendant company incorporated the plaintiff's trade mark in their website as a 'metatag' – invisible information embedded in a web page that assists search engines when compiling organic search results. The Court of Appeal suggested that 'It may be that an invisible use of this sort is not use at all for the purposes of this trade mark legislation.'²⁵ By analogy, purchasing a keyword to trigger an advertisement could also be considered an 'invisible' use.

French courts have taken a position that contrasts sharply with any identifiable trend in the US or UK. In 2003 Louis Vuitton brought an action against Google for trade mark counterfeiting, unfair competition and misleading advertising.²⁶ The basis of the action was that Google had sold Louis Vuitton trade marks as keywords, and that the sponsored links (in some cases) promoted counterfeit LV products. Louis Vuitton succeeded both at first instance and on appeal.²⁷ Google has played down the significance of the decision, however, releasing a statement asserting proceedings were commenced prior to the implementation of Google's trade mark policy and the issues raised in the litigation had been dealt with.²⁸

It is premature to draw any kind of conclusions from available international case law. The balance of authority indicates, however, that 'invisible' use of a trade mark should not amount to infringement – but that a line is crossed where the trade mark actually appears in the sponsored link. Assuming that trade mark rights have been infringed, a further question arises as to whether the breach is the responsibility of the advertiser paying for the keyword, the search engine selling the keyword or both, and in what circumstances.

Click fraud

The term 'click fraud' is an industry reference to deliberate human or machine automated clicks on paid banners and hyperlinks, with no legitimate intention of purchasing or interest in the subject of the hyperlink, resulting in the artificial increase of the advertising cost to the advertiser. Disgruntled advertisers have claimed competitors have deliberately used click fraud tactics to deplete their online marketing campaign budgets or click fraud being used by publishers to inflate their revenue and ad rates. The existence of offshore 'click farms' set up with manual operators to click online ads have been reported.²⁹ Click fraud is not unique to search engines and applies to any form of pay per click advertis-

ing, however most of the recent high profile legal claims in this area have been directed at search engines in the US.³⁰

Unlike the independent audit bodies which exist in the print industry, there is no accepted independent auditor who is readily able to verify click fraud or the level of click fraud rates. An accepted definition of click fraud is itself subject to a lack of industry consensus.³¹ The pay per click advertising model by its nature is difficult to reconcile against a measurable outcome (e.g. an actual purchase) unlike credit card chargeback or print audit circulation verification in the offline world.

The ideal online advertising model is perhaps based on 'pay per action' (**PPA**) where advertisement costs are linked to objective actions or outcomes (e.g. customer enquiry, member registration or purchase). Until PPA models are successfully implemented and adopted, online advertisers using traditional pay per click models, will need to understand that they assume a certain level of risk for click fraud and need to assess their return on their online advertising spend on that basis.

Search ranking

All current search engines have their origins in 'organic search' – put simply, the use of either automated software search algorithms or manual/selective human ranking to rank the order of relevant web sites based on a proprietary relevance. There have been several well documented attempts by hackers in the past to artificially trick search engines to elevate website relevancy in search results.³²

This raises the interesting dilemma of the converse issue – the decreased ranking of websites or exclusion of websites from search results altogether (and the revenue impact to website publishers). In 2002, the US Western District Court of Oklahoma dismissed an action by SearchKing Inc claiming that Google had decreased and removed its pagerank on Google search.³³ In 2006, US District Court dismissed a similar action by KinderStart.com against Google on various grounds including violation of free speech, anti-trust law and defamation.³⁴

Conclusion

The progress of the ACCC's action against Trading Post and Google Inc will be keenly watched by all observers in the new media and advertising industries. Irrespective of the outcome, it will be interesting to see whether search engines implement any visual or user notification changes to the screen layout or formatting of their search result pages. Google's search result layout and paid advertising link labelling is consistent with an almost universal template used by all commercial search engines. Whether the outcome will influence the design of emerging mobile search services which in some cases are constrained by the reduced screen real estate of mobile consumer devices remains to be seen.

Underlying the legal debate is the common

policy thread which emerges across the large majority of infringement actions in the online industry – to what extent is the online service provider (whether ISP, search engine, social network, peer to peer network) liable for or contributory to the infringement? In the copyright sphere, courts and legislators have recognised the degree that service providers implement technology screening measures or engage in active manual policing act as relevant factors for consideration of relief from liability. It will be interesting to see whether self policing factors will come into play or be considered by the Federal Court in the ACCC proceedings.

Whatever the decision of the Australian courts, search engines will continue to play a vital role in the internet ecosystem and their role as a router for consumer internet traffic will no doubt evolve further. Where consumers go, advertisers will always follow. For advertisers, brand owners, content providers (and their marketing agencies) it would be prudent to avoid purchasing keywords which are trade marks of their competitors as part of any online campaign, and to conduct routine monitoring and registering their own trade marks on leading search engines as part of an integrated intellectual property portfolio management policy alongside similar practices for managing domain name registration.

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(Endnotes)

1 PricewaterhouseCoopers, 'IAB Online Advertising Expenditure Report – Quarter Ended December 2007' (14 February 2008).

2 *Ibid.* For the 12 months ended 30 December 2007, search and directories ad spend was \$622m (46%), general online display ad spend was \$367m (27%) and online classifieds ad spend was \$356m (27%).

3 *ACCC v Trading Post and Google Inc.* (No 1323/2007) Statement of claim (filed 11 July 2007) paragraph 16(c).

4 *ACCC v Trading Post and Google, Inc.* (No 1323/2007) Statement of Claim (filed 11 July 2007).

5 See 'ACCC Alleges Misleading and Deceptive Conduct by Trading Post and Google' *Media Release MR 180/07* (12 July 2007) Available at <http://www.accc.gov.au/content/index.php/ml/itemId/792088/fromItemId/142>.

6 Adwords is Google's paid keyword search advertising service. In 2005, Stickybeek Australia Pty Ltd alleged that the Trading Post had purchased the word 'stickybeek' on Google Adwords to ensure that a link to the Trading Post's autotrader website appeared in the sponsored links section next to Google's natural search results for 'stickybeek'. Following an ACCC warning letter that Trading Post's actions may be in breach of ss 52 and 53(d) of the TPA, the Trading Post agreed not to use competitors' names and trademarks in sponsored link advertising. See: 'Trading Post Changes its Internet Marketing After ACCC Investigation; *Media Release MR 150/05* (17 June 2005). In 2006, Acer and Toshiba claimed Dell



was registering 'acer notebook' and 'toshiba notebook' for sponsored link placement in searches on Google Australia. See: Simon Hayes 'Rivals ring the bell on Dell ads' *The Australian IT* (18 July 2006).

7 Available at <http://www.ftc.gov/os/closings/staff/commercialalertletter.shtml>

8 *Trade Practices Act 1974* (Cth) s65A. Section 65A excludes statements made by a 'prescribed information provider' (with special reference to media broadcasters) but do not apply to advertisements.

9 *Trade Practices Act 1974* (Cth) s85(3), Section 85 provides a defence for Part V claims (including ss.52 and 53(d)) where the defendant publishes advertisements in the ordinary course of its business and can demonstrate they were not aware or had reason to suspect that publication of the advertisement would be in breach of Part V of the TPA.

10 See Terrence J Keenan, 'American and French Perspectives on Trademark Keying: The Courts Leave Businesses Searching for Answers' (2005) 2 *Schidler J L Com Tech* 14. Also see *Rescuecom Corporation v Google, Inc.* 456 F. Supp. 2d 393 (N.D.N.Y. 2006).

11 *Trade Marks Act 1995* (Cth) s120.

12 330 F. Supp. 2d 700 (E.D. Va. 2004) (Google's motion to dismiss); 77 U.S.P.Q.2d 1841 (E.D. Va. Aug. 8, 2005) (Google's motion for judgment).

13 Memorandum Opinion, *Government Employees Insurance Company v Google, Inc.* 77

U.S.P Q2d 1841 (E.D. Va Aug 8 2005) at 6.

14 Stefanie Olsen, 'Google wins in trademark suit with Geico' *CNet News* (15 December 2004) Available at <http://www.news.com/Google-wins-in-trademark-suit-with-Geico/2100-1024-3-5491704.html>. Note however that this quote is difficult to confirm. It does not appear an available transcript at <http://www.linksandlaw.com/adwords-geico-benchmark-ruling.htm> but instead is an indirect quote from Google's attorney, Michael Page, which was subsequently reported in the media.

15 Memorandum Opinion, *Government Employees Insurance Company v Google, Inc.* 77 U.S.P Q2d 1841 (E.D. Va Aug 8 2005) at 3.

16 'Google and GEICO Settle AdWords dispute' *The Register* (9 September 2005) available at www.theregister.co.uk/2005/09/09/google_geico_settlement.

17 Memorandum Opinion, *Government Employees Insurance Company v Google, Inc.* 77 U.S.P Q2d 1841 (E.D. Va Aug 8 2005) at paragraphs 3, 9.

18 See Terrence J Keenan, 'American and French Perspectives on Trademark Keying: The Courts Leave Businesses Searching for Answers' (2005) 2 *Schidler J L Com Tech* 14 at 20.

19 456 F. Supp. 2d 393 (N.D.N.Y. 2006).

20 *Rescuecom Corporation v Google, Inc.* 456 F. Supp. 2d 393 (N.D.N.Y. 2006). Also see *Google Inc. v. American Blind and Wallpaper Factory, Inc.* 74 U.S.P.Q. 2d 1385 (N.D. Cal. 2007) (Google's motion to dismiss) available at <http://>

techlawadvisor.com/docs/google-motion-dismiss.pdf.

21 *Rescuecom Corporation v Google, Inc.* 456 F. Supp. 2d 393 (N.D.N.Y. 2006) per Mordue, Chief Judge at 14.

22 For a detailed discussion of the concept of 'use' in American trademark law see general Graeme Dinwoodie and Mark Janis 'Confusion Over Use: Contextualism in Trademark Law' (2007) *Iowa Law Review*, Vol. 92, No. 1597.

23 *American Airlines Inc v. Google Inc No.* 4:07-cv-00487 (N.D. Tex. Oct. 24, 2007)

24 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159 per Jacob LJ at 140.

25 *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159 at 142.

26 *S.A. Louis Vuitton Malletier v. Société Google, Inc. et S.A.R.L. Google France*, T.G.I. Paris, 3e ch., Feb. 4, 2005, N°RG 04/05745. Available at www.juriscom.net/documents/tgiparis20050204.pdf.

27 Louis Vuitton was ultimately awarded €300,000 in damages and a further €60,000

for legal expenses. *S.A.R.L. Google France et Société Google, Inc v S.A. Louis Vuitton Malletier* Court D'appel De Paris. 4eme ch. Jun 28, 2006. N°RG 05/06968. Available at www.juriscom.net/documents/caparis20060628. The Louis Vuitton case is consistent with the decision of a Versailles appellate court in *Société Google France v. Société Viaticum et Société Luteciel*, CA Versailles, 12e ch., March 10, 2005, N°RG 03/00051.

28 Google's statement claimed: 'We have a trademark policy, which prevents bids on other people's registered trademarks, and we do not allow people to advertise with AdWords for counterfeit products. Today's case does not raise any new issues whatsoever.' Elinor Mills, 'Google loses French Trademark lawsuit' *CNet News* (28 June 2006) available at http://www.news.com/Google-loses-French-trademark-lawsuit/2100-1030_3-6089307.html.

29 See N Vidyasagar 'India's secret army of online ad clickers', *The Times of India*, 3 May 2004 available at <http://timesofindia.indiatimes.com/articleshow/654822.cms>

30 In early 2007, Yahoo settled a click fraud

class action lawsuit by Checkmate Strategic Group for close to an estimated US\$5m and in 2006, Google \$US90m settlement of a click fraud class action lawsuit was approved by Arkansas courts.

31 Matt Hines, 'Experts say the issue of click fraud not improving' *Infoworld* (19 October 2007).

32 In relation to Google, this practice has been dubbed 'Google bombing', the most infamous involving search terms linking to websites of US politicians. See 'Miserable failure' links to Bush' *BBC News* (7 December 2003) Available at <http://news.bbc.co.uk/2/hi/americas/3298443.stm>.

33 *SearchKing Inc v Google Technology Inc.*, No. CIV-02-1457-M (W.D.Oklahoma, 13 January 2003). The court found that a pagerank amounted to an opinion of website relevance capable of constitutional protection under the First Amendment.

34 *Kinderstart.com LLC v Google Inc.*, Slip Copy, 2007 WL 831806 (N.D.Cal) 2007-1 Trade Cases p 75, 643

Risk Issues for Web 2.0 – To Block or Not to Block Facebook

Nick Abrahams and Robert Rudolf look at how organisations might respond to Web 2.0 in the work place.

With the enormous surge in popularity of social networking programs such as Facebook and MySpace, employers are nervously looking at the ramifications the use of such applications at work can have on company productivity and exposure to vicarious liability for an employee's actions. Given the interactive nature and the ever expanding development and reach of Web 2.0 applications, companies must now consider how to best address such concerns, hopefully without upsetting employees in the process.

What is Web 2.0?

Web 2.0 is the general term used to describe 'second generation web-based communities and hosted services such as social-networking sites, wikis, and blogs, which aim to facilitate creativity, collaboration, and sharing among users'.¹

This includes applications where the content is generated by the user such as MySpace, YouTube, Facebook and virtual worlds like Second Life.

MySpace is reported to be the most popular Web 2.0 application, with 100 million users worldwide, followed by Facebook with 60 million.² The recent uptake of Web 2.0 applications in Australia has been nothing short of phenomenal. Neilson Online statistics show that one third of all profiles created by Australians on social networking

sites occurred in the past three months with close to two thirds created in the past year.³

Why all the fuss?

Web-based social networking applications allow users to create personal profiles, online identities and interact with friends, colleagues and other users all over the world. The reach of these applications is great, unlike the time taken to reach an audience. The now infamous *Leave Britney Alone* YouTube clip created by internet 'personality' Chris Crocker was viewed over 4 million times in the first two days after being posted by its creator.⁴ The video has been viewed nearly 17 million times since being uploaded in September 2007, and has attracted over 240,000 user comments.⁵

Web 2.0 applications not only have a personal appeal. Many companies, such as Intel and IBM have cottoned on to the power of Web 2.0 applications and have established presences in the virtual world of *Second Life* to conduct cost effective meetings with employees in different countries and to demonstrate products to customers.⁶ Telstra's Bigpond is in fact the largest global brand in *Second Life*.⁷

Why the cause for concern?

There are legal risk issues for an organisation allowing the use of Web 2.0 applica-

tions in the workplace. Key areas of concern include:

Copyright: under Australian copyright law, an organisation may be liable for copyright infringement by directly infringing a copyright owner's rights, or by authorising the infringing acts of an internet user's activities.⁸ If a Court determines that an organisation had the power to prevent the infringing activities of its employees and failed to take reasonable steps to avoid such infringement, the organisation may be considered liable.

Defamation: an organisation may decide to monitor the activities of its employees' use of Web 2.0 applications. An employer may be liable for the defamatory content of an employee's work related Web 2.0 applications if it becomes aware of defamatory content and fails to take measures to take down the content or address the issues. Furthermore, if an organisation is seen as the 'publisher' of defamatory material, it will generally be held liable for such defamatory content.

Privacy: a user's personal pages of their MySpace or Facebook sites should be treated carefully by employers. An organisation should never use Web 2.0 applications such as Facebook or MySpace to 'screen' potential employees by reference to their personal sites. Such pre-employment checking may open the company up to the risk of being sued for breach of privacy or discrimination. It should also be noted that the use of Facebook by an organisation for this purpose is a breach of Facebook's terms and conditions which allow only personal, non-commercial use. Termination of employment