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The Future of Keying in SEO

Over the past few years, the search engine optimization practice of "keying" has been an integral component to various online marketing initiatives and proven to drive brand awareness and traffic to commercial web sites.

Simply, the practice of keying allows advertisers to target consumers with certain specified interests by linking advertisements to pre-defined descriptive terms. Internet search engine providers sell these keywords to the highest bidder on an auction basis, without regard to whether or not the keyword may be another's trademark. Invariably, the practice had allowed search engine operators to profit from others' trademarks and circumvent the protections afforded by the Lanham Act.

In the *Playboy v. Netscape* case, the plaintiff alleged that Netscape sold the keywords "playboy" and "playmate" to an adult web site operator. When a consumer typed these keywords, the banner ad of third party adult oriented advertising pops up with a link to the adult web site. Although the lower court initially ruled against *Playboy* finding that the keywords were generic and *Playboy* has not shown a likelihood of confusion (which is the corollary test in a trademark infringement action), the appeals court ruled differently.

Based upon an eight factor test, *Playboy* convincingly demonstrated a likelihood of consumer confusion through surveys and the fact that the adult-oriented banners failed to communicate the source of the content. As such, a reasonable consumer knowing the sexual nature of *Playboy*'s content, would not know that the ad banners do not belong to *Playboy* unless they clicked through to the advertiser's web site. This was enough for the court to send the case back to the lower court for litigation.

This case is important to agencies in that pure "keying" has not been deemed trademark infringement if there is no likelihood of confusion on the marketplace. The effect of this case really has far-reaching implications in terms of Search Engine providers leveraging others' brands and marginalizing the mark owner's competitive advantage.

Across the ocean in Europe, however, search engine operators have not fared as well. The current headline involves the trademark infringement lawsuit filed by AXA Financial against Google in France earlier this year. The claim alleges that Google sold AXA's trademarks to competitors through its Adwords® program. In 2003, Google was ordered to pay €70,000 for a similar action in France by travel agencies Luteciel and Viaticum.

Why Is This Important?

Although, this influx in litigation is not necessarily the death knoll to keying, it warrants some practical consideration by advertisers and their agencies.

1. Advertisers are warned not to deliberately use a competitor's marks to misappropriate good will. This practice will likely be considered trademark infringement and is precluded under the *Brookfield v. West Coast Entertainment Corporation* case. Further, even innocent uses may subject Advertisers to be sued, so careful selection of keywords would be prudent.

2. If there is a use of a competitor's mark which arguable is a generic term, then identification of the source of the content is imperative to avoid a likelihood of confusion.

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