

## Internet search of your name, company might hold surprises

If you run almost any type of business, you really should regularly ask, "Have I Googled myself lately?"

I know, I know, you'll probably giggle the first few times you actually say it, but get over it. And put your company's name in some search engines. You might be surprised at what you find.

One thing that might surprise you is something called "AdWords." This is a popular advertising tool on the Internet. Using this approach, Internet search engines (for example, Google and Yahoo!) sell trademark terms that trigger the appearance of links to paid advertisers. These are called "sponsored links."

So imagine a prospective customer searching for "ABC Bank" who pops that trademark term into Google. While part of the results page might have the link to the actual ABC Web site, the right-hand side of that page will feature a list of "sponsored links" whose appearance is triggered by the entry of the ABC Bank trademark.

That "sponsored link" might say something like "Check ABC Bank Mortgage Rates." Of course, a click on that link will take your prospective customer to a competitor's site. And, once there, who knows whether they'll return.

This problem clearly deserves an acronym. And here it is: CRUD. That's right, CRUD.

- **Confusion.** The Internet user probably will not understand just who or what the sponsored link is.

- **Reputational harm.** If the user believes you are affiliated with an undesirable site, it affects the reputation of your business.

- **Unfairness.** The program takes advantage of a trademark that you have developed through an investment of time and money.

- **Deception.** A browser looking for you



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Jack Greiner

(why else would they enter your name?) is unwittingly diverted to a competitor's site.

Of course, having noted that it's CRUD, the question remains – is it legal? The answer is: maybe. The Federal Lanham Act – which governs trademark law – prohibits a "use in commerce" that is likely to confuse customers.

So, are AdWords a "use in commerce"? Courts have split over this issue. Some find the "trigger" itself not to be a use in commerce, because it is invisible. That is, the prospective customer doesn't actually see the trademark at that point. Some courts, however, have found the "trigger" to be a use in commerce. Most courts, however, agree that placing the trademark in the text of the sponsored link ("Check ABC Bank Mortgage Rates") is a "use in commerce."

Are AdWords "likely to confuse"? Again, courts are split. Some say yes, while others find that prospective customers can easily distinguish the "sponsor" from the trademark holder. Also, trademark holders frequently have struggled to establish actual harm – i.e., evidence that consumers who might otherwise have dealt with the trademark holder were confused into using the "sponsor."

And while courts haven't come to a final conclusion, at least one state – Utah – has passed legislation to combat the problem.

The Utah law, which amends the state's Trademark Protection Act, allows "owners" of eligible words as defined by the bill to register the terms in the new registry by paying a nominal fee, not more than \$250, according to the legislation. The law is enforceable through civil lawsuits in cases of infringement upon an electronic registration mark.

Because of concerns with the commerce clause – states may not burden interstate com-

### STAY ON YOUR TOES I

**When's the last time you did a Google and Yahoo! search on your name and the name of your company?**

**It's something** that needs to be done regularly and can turn up some surprising results. **Through AdWords** and "sponsored links," other companies can create situations that appear to attempt to divert potential customers to other Web sites and create confusion over the company.

**It's not** yet entirely clear whether this practice is legal or can be challenged in court.

merce – the Utah statute applies only to electronic marks used to trigger an ad delivered in Utah or sold by an advertiser or person located in Utah.

So the Utah law has limited reach. The Utah statute, however, might spur other states, and even Congress, to enact similar laws.

Until that happens, though, the key question is: What can you do?

Consider these steps:

- Google and Yahoo! yourself periodically to see what's happening.
- Gather and retain any evidence of things that could create confusion.
- Contact the search engine and complain. Google and Yahoo! appear willing to take down sponsored links that include the trademark in the text or heading of the ad.
- Consider a Lanham Act lawsuit.

A trademark is like a drink – it's not as good if it's diluted. Staying on top of how that trademark is being used in cyberspace should be a high priority for every business.

**Greiner** is an attorney in the Commercial Litigation and Dispute Resolution Department at Graydon Head & Ritchey LLP.