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POP GOES THE TRADEMARK? COMPETITIVE ADVERTISING ON THE INTERNET

By Kendall Bodden¹

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ABSTRACT

The rights and obligations of online advertisers are uncertain in light of recent technological developments. There is not yet a consensus regarding the application of existing advertising law doctrines to the use of trademarks to trigger search result ads or “pop-up” ads on the Internet. However, the developing majority position will allow trademark-triggered ads that properly identify their source, and who’s content is not confusing to consumers. In addition, pending legislation may restrict or even outlaw adware.

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INTRODUCTION

<1> Online advertising often peppers Internet users, either as pop-up ads, or when a search engine displays their search results. In addition, a consumer’s visit to a particular site might trigger a pop-advertisement for a competitor. For example, if a consumer searches for, or visits an online bookstore, he or she may also see a banner ad or a pop-up advertisement for a competing bookstore. This happens because the search engine used may display paid results based on the consumer’s search terms or else software on the consumer’s hard drive can deliver a targeted pop-up ad based on the website being viewed.

<2> This situation has been described in different ways – as legitimate competitive advertising on the one hand and as trademark infringement on the other. This article examines the current case law, and emerging legislation that impacts Internet advertising. The litigation on trademark-

triggered advertisements has not yet uniformly defined when or if trademark infringement has occurred, but a trend may be emerging. Practitioners should be aware that pending state or federal legislative action might restrict certain Internet advertising delivery methods.

INTERNET ADVERTISING: TECHNOLOGIES AND BUSINESS MODELS

<3> Online advertising's typical goal is to get the web-surfing consumer to stop and click through to an e-commerce site and buy the product advertised. This article will focus on these attention-seeking online ads and will refer to them as "competitive advertising." As a subset of competitive advertising, "comparative advertising" may specifically compare the advertised brand with another brand of the same product. General principles of advertising law will govern competitive advertising with additional rules specific to comparative advertising.

<4> Advertising online has two primary components that must be considered when reviewing it for compliance with current advertising law: delivery method and content. Technological advances generate new delivery methods that are subject to review under current law, but challenge the boundaries of current doctrine. Online advertisement content is subject to traditional rules, regulations and guidance regarding advertising and prohibiting false or misleading advertisements.²

<5> Currently, some controversial delivery methods for advertising on the Internet are: (1) ads generated based on search engine results (search result ads) and (2) adware generated pop-up ads. Search result ads usually take one of two forms: ads that are placed within search results, or banner ads that are linked to search terms. Advertisers pay search engines to list their links before other search results or to have their banner ad displayed when certain keywords are searched for. This use of trademarks to trigger search result advertising has been challenged by trademark owners.

<6> Pop-up advertisements have two common forms: site-generated ads and adware generated ads. Site-generated ads are controlled by the host site and advertise the site or a third party. They are annoying but have not generated any notable litigation. Adware generated pop-up ads are more controversial. An adware program resides on the user's computer, monitors the user's web activity and generates targeted pop-up ads when the user visits a specific site. For example, a user who visits U-Haul.com may experience adware generated pop-up ads for other moving companies. Again, trademark owners have challenged adware's use of trademarks to trigger competitive pop-up ads.

STANDARDS FOR FTC REVIEW OF INTERNET ADVERTISEMENTS

<7> The Federal Trade Commission ("FTC") and the laws of trademark and unfair competition govern advertising in the "brick and mortar" world.³ FTC policy supports the use of brand names in comparative advertising when the comparisons contain appropriate disclosures and are truthful, non-deceptive, and clear.⁴ False or misleading statements that disparage a competitor's standing, or business, violate the prohibition against unfair competition or unfair or deceptive acts found in 15 U.S.C. § 45.⁵

<8> These traditional doctrines are now being applied to the Internet. In addition, since many FTC industry-specific rules and guidelines are not limited to any particular medium, they also apply to online commerce.⁶ The FTC has published guidelines for online advertising and marketing⁷ which discuss deceptive, unfair or unsubstantiated claims on the Internet, as well as specific issues surrounding online disclosures.⁸ The guidance provided by the FTC emphasizes the applicability of offline standards to online activity: When it comes to online ads, the basic principles of advertising law apply: 1) Advertising must be truthful and not misleading; 2) Advertisers must have evidence to back up their claims (“substantiation”); and 3) Advertisements cannot be unfair. Unique features in Internet ads also may affect how an ad and any required disclosures are evaluated.⁹ Depending on the product or service advertised online, additional FTC subject matter rules might also apply.¹⁰

<9> Evaluation of the content of online comparative advertisements is left open to “case-by-case” scrutiny by the FTC, taking into account whether the advertisements: (1) follow closely the FTC’s subject matter guidance on advertising; (2) contain the appropriate disclosures; and (3) avoid misleading or deceptive statements. Advertisements are considered from the perspective of the “reasonable consumer” when the FTC evaluates an online ad.¹¹

<10> For example, in 2002, the makers of Wonder Bread advertised on television and the Internet that Wonder Bread was a good source of calcium that helped children’s mental performance and memory. The FTC found that the representations regarding calcium’s benefits were not substantiated, and that the ad campaign was therefore false or misleading.¹² Thus, the FTC has used traditional advertising criteria to determine if online advertising content is misleading. Therefore, advertisers should carefully review their online ad content to make sure it is not misleading.

POSSIBLE CHALLENGES FROM TARGETS OF SEARCH RESULT OR POP-UP COMPETITIVE ADVERTISEMENTS

<11> In addition to agency enforcement actions, a business running search result or pop-up comparative ads could expect that the target of the ads might challenge these ads. The leading cases on traditional comparative advertising content have held that the use of a competitor’s trademark in comparative advertising will be allowed under the Lanham Act and common law, as long as it is not misrepresentative, and is not likely to confuse consumers “as to the source, identity or sponsorship of the advertiser’s product.”¹³ Businesses targeted by comparison ads may bring a variety of unfair competition or trademark infringement claims. Those running comparative advertising may assert various affirmative defenses under the Lanham Act, including fair use in comparative commercial advertising, noncommercial use of a mark, or use of a mark in commentary or news reporting.¹⁴

Cases Addressing Search Result Advertisements.

<12> Playboy Magazine filed an early suit objecting to Netscape’s practice of displaying unlabeled banner ads for competitors’ online adult content

alongside the results of a user's search for Playboy's trademarks. Playboy alleged that consumers would mistakenly believe that Playboy sponsored the unlabeled banner ads, when in fact the banner ads took users to competitors' websites. The Ninth Circuit agreed, found this to be trademark infringement based on "initial interest confusion" and held that Netscape's use of Playboy's trademarks did not fall within any of Netscape's asserted defenses of fair use, nominative use or functional use.¹⁵ However, the Ninth Circuit very clearly limited the *Netscape* holding to the facts presented (where a trademark triggered an *unlabeled* banner ad), and stated that if a trademark triggered banner ad clearly labeled its source or overtly compared its products to Playboy's own, then there would be no consumer confusion and thus no infringement.¹⁶ This decision was an initial victory for trademark owners, and GEICO has subsequently tried to stop similar advertising practices.

<13> Government Employees Insurance Company (GEICO) sued search engine operators Google and Overture for selling ads triggered by a user's search for GEICO's trademarks (e.g. "GEICO"). The Eastern District Court of Virginia initially held that GEICO had stated a valid trademark claim because this was "use in commerce" of GEICO's marks.¹⁷ Subsequently, the court issued an oral bench ruling on Dec. 15, 2004 that Google's practice of using GEICO's marks to trigger advertisements **that do not** contain any of GEICO's marks was not likely to cause confusion. This ruling has been viewed as a victory for Google that will enable it to continue generating advertising revenue from the sale of keyword-triggered ads.¹⁸ However, the court has not yet decided whether ads for competitors **that do** contain GEICO's marks violate trademark laws.¹⁹ Furthermore, this case could impact other similar online advertising trademark-infringement cases, such as Google's ongoing dispute with American Blind & Wallpaper Factory.²⁰

<14> The *GEICO* decision taken together with *Netscape* signal that trademark triggered search result ads are a "use in commerce" but such ads that clearly identify their source and do not use the competitor's trademark in the ad itself are not likely to confuse consumers. Thus, this delivery method likely does not violate trademark laws, as long as the content of the triggered ad properly identifies its source or overtly compares the triggering product to the product advertised. However, courts have not yet decided if use of the triggering trademark in the triggered ad is infringement. Therefore, advertisers using a competitor's trademark to trigger ads should clearly identify the source of the ad, and refrain from using the competitor's trademark in the triggered ad.

Cases Addressing Adware Delivered Pop-up Advertisements

<15> Recent litigation regarding online comparative advertising has also targeted the adware delivery of pop-up advertisements. WhenU is an adware provider that has been the target of recent litigation regarding its "SaveNow" adware, which WhenU describes as "just-in-time marketing."²¹ Its SaveNow software comes bundled with downloadable utilities such as WeatherCast and ClockSync. In return for free weather reports or computer clock setting, the user receives SaveNow generated pop-up ads targeted to the user's web activity.²² The Gator Corporation has also come under attack for its "GAIN Network" adware. Now known as Claria Corporation, it describes itself as

"the leader in online behavioral marketing."²³ Gator's GAIN Network adware is bundled with downloaded shopping, utility, or file sharing applications and generates pop-up ads based on the computer user's web traffic. WhenU and Claria claim that their ads are effective because they reach the consumer who is about to make an online purchase.

<16> At issue in *U-Haul v. WhenU.com*, was WhenU's use of U-Haul's trademark as a keyword that triggered a pop-up ad for a U-Haul competitor.²⁴ U-Haul alleged trademark infringement, dilution, copyright infringement and unfair competition. On cross motions for summary judgment, the district court found that: (1) U-Haul's claims for trademark dilution and infringement, and unfair competition failed because WhenU's use of U-Haul's trademark to trigger a pop-up ad was not a "use in commerce" for purposes of either trademark infringement or trademark dilution;²⁵ (2) the pop-up advertising scheme did not interfere with U-Haul's right to display its copyrighted works; and (3) the scheme did not create derivative work under the Copyright Act. The court also relied on the fact that users agreed to download the WhenU adware. Moreover, the court noted that the user controlled the display, and that the pop-up ad window was no different from other multiple windows that a user might purposefully open.²⁶

<17> A subsequent decision in *Wells Fargo v. WhenU.com* followed *U-Haul's* logic and gave WhenU another victory by denying plaintiffs' motion for preliminary injunction to prohibit WhenU's pop-up advertisements.²⁷ The *Wells Fargo* court found that WhenU's adware was a legitimate form of comparative advertising, did not violate trademark laws, and was not likely to confuse Internet consumers.²⁸ The plaintiffs failed to show harm or likelihood of success, and the court found that the preliminary injunction would harm WhenU and others.

<18> WhenU received a setback in *1-800 Contacts, Inc., v. WhenU.com*. The U.S. District Court of the Southern District of New York granted a preliminary injunction barring WhenU from placing advertisements triggered by an Internet consumer's use of "1800contacts."²⁹ The court denied injunctive relief based on copyright, but granted relief based on trademark infringement. The court found that WhenU's use of 1-800 Contacts' trademark to trigger a pop-up was a "use in commerce" and a trademark infringement based on the likelihood of consumers' mistaken belief that 1-800 Contacts endorsed the competitive pop-up, and consumer's "initial interest confusion."³⁰ The court noted WhenU's recent victories described above, but dismissed them as non-binding.³¹

<19> Claria Corporation (once known as the "Gator Corporation"), which utilizes similar adware (also referred to as "client-side advertising"), has also been the subject of multiple lawsuits to stop its adware generated pop-up ads. However, Claria has settled almost all of these disputes out of court. While not much guidance can be gleaned from Claria's settlements, Claria claims that the settlements still allow their business model to continue.³²

<20> Thus, courts have split on the matter of restricting adware delivered pop-up ads in which there is no visible use of a competitor's trademark and no evidence of bad faith or intent to deceive the consumer. Courts have also split on whether the use of a trademark to trigger a competitive pop-up advertisement is a "use in commerce" that leads to consumer initial interest

confusion. *1-800 Contacts* found that WhenU had used 1-800 Contacts' trademark in commerce and, due to the likelihood of consumer's source confusion and consumer's initial interest confusion, had infringed.³³ However, *U-Haul* and *Wells Fargo* found that WhenU's adware did not use plaintiff's trademarks in commerce and therefore did not infringe.³⁴

LEGISLATIVE RESPONSES TO ADWARE

<21> The online advertising industry is trying hard to distinguish adware (software that is a lawful form of advertising), from spyware (software that improperly monitors or controls a user's computer). Despite these efforts, legislative responses to spyware are also affecting adware. Utah was the first state to pass a law that prohibited adware, the Utah Spyware Protection Act.³⁵ Commentators have suggested that adware was included as prohibited software due to lobbying from WhenU adversary, Utah-based 1800 Contacts, Inc. However, WhenU challenged the law as unconstitutional and won a preliminary injunction that is currently preventing the law from taking effect.³⁶ On the other hand, California's anti-spyware law took effect on January 1, 2005,³⁷ but its critics say that it won't impact adware such as WhenU or Claria. ³⁸ In addition, several other states have introduced anti-spyware statutes that may impact adware.³⁹ Meanwhile, there are several anti-spyware bills pending in Congress that would most likely preempt state spyware statutes,⁴⁰ but it is difficult to predict the effect of Federal anti-spyware legislation on adware. However, The FTC has advocated the position that current law on deceptive practices is adequate to prosecute malicious spyware purveyors. Due to the difficulty in crafting a legislative definition of "spyware" and the complications of unintended consequences, the FTC feels that current laws combined with technology solutions, would be superior to any new legislation.⁴¹

CONCLUSION

<22> Existing trademark and advertising law doctrine will be applied to the content of online advertisements, but new technologies for delivering content raise difficult issues that have produced conflicting outcomes in litigation. Search result ads triggered by trademarks have been found non-infringing if they do not confuse consumers and do not use the triggering mark in their content. The courts have not yet evaluated the use of a triggering mark in search result ad content. Adware's use of trademarks to generate pop-up ads has been found to be either non-infringing non-use or an infringing use-in-commerce. Thus, the case law on these online ad delivery methods is unsettled.

<23> State and Federal legislation has been proposed, enacted, and challenged in an effort to limit harmful spyware. Adware providers are striving to carve out a niche for acceptable adware. While this legislation is well meaning, current laws and technological solutions will likely prove more effective than new legislation, and will likely avoid the pitfalls of an over-inclusive definition of prohibited software or practices. However, a federal law that preempted the potential multitude of state laws would bring much needed uniformity to the regulation of online advertising.

<24> Thus, absent new legislative remedies, recent case law indicates that

trademark triggered pop-up ads or search result ads that are properly identified and not misleading should be allowed under current advertising law.

PRACTICE POINTERS

- The content of online competitive advertising is subject to existing state and federal law, and must not be deceptive or misleading. See, for example, the FTC's Dot Com Disclosures, *available at* <http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.pdf>.)
- Online advertisers should ensure that trademark triggered ads plainly state the source of the ad in order to prevent consumer's from mistakenly believing that the ad is somehow endorsed by the triggering mark's owner.
- Advertisers that utilize trademark-triggered advertising, whether search result ads or adware, should bear in mind the possibility that the trademark owner may try to enjoin such advertisement.
- Adware advertisers should monitor state and federal spyware legislation for its potential effect on adware.

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FOOTNOTES

1. Kendall Bodden, University of Washington School of Law, Class of 2005. Thank you to Professor Jane Winn and Sayoko Blodgett-Ford for their time and assistance with this article.
2. Fed. Trade Comm'n, Dot Com Disclosures: Information about Online Advertising (2000) [hereinafter Dot Com Disclosures], *available at* <http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.pdf>.
3. In addition to the federal law discussed, state law may be applicable, but it is beyond the scope of this article. See George E. Rosden & Peter E. Rosden, *The Law Of Advertising* § 31.03[2] (2004). Comparative advertising rules are traditionally more restrictive in the European Union than the US. Such EU rules are also beyond the scope of this article. See e.g. Joanna Schmidt-Szalewski & Nicolas Bouche, *France*, in 2 *International Encyclopaedia of Laws Intellectual Property* § 582 (H. Vanhees ed., 2004); Peter Sayer, *Google France Loses Appeal in AdWords Trademark Dispute*, IDG News Service, March 17, 2005 at http://www.infoworld.com/article/05/03/17/HNgooglefranceadwords_1.html (last visited May 31, 2005).
4. 16 C.F.R. § 14.15 (2004).
5. 54A Am. Jur. 2d *Monopolies and Restraints of Trade* § 1216 (2003).
6. Dot Com Disclosures, *supra* note 2.

7. Bureau of Consumer Prot., Fed. Trade Comm'n, Advertising and Marketing on the Internet: Rules of the Road (2000) [hereinafter Rules of the Road], *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/ruleroad.pdf>.
8. Dot Com Disclosures, *supra* note 2.
9. *Id.* at 4.
10. such as the rules pertaining to: business opportunities, credit and financial issues, environmental claims, free products, jewelry, mail and telephone orders, negative option offers, 900 numbers, telemarketing, testimonials and endorsements, warranties and guarantees, wool and textile products, made in the U.S.A. *See* Rules of the Road, *supra* note 7 at 5-11.
11. 16 C.F.R. § 14.15.
12. *In re* Interstate Bakeries Corp., Docket No. C-4042, April 16, 2002, 2002 WL 663659 (F.T.C.).
13. *Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968) (Manufacturer of perfume imitating Chanel No. 5 may use Chanel trademark in advertising as long as it does not mislead or confuse consumers). *See generally* *Pizza Hut, Inc., v. Papa John's Int'l, Inc.*, 227 F.3d 489 (5th Cir. 2000) (Papa John's was not liable for misleading ambiguous comparative advertising because Pizza Hut failed to prove that consumers' purchasing decisions were affected by the complained of ads); *August Storck K.G., v. Nabisco, Inc.*, 59 F.3d 616 (7th Cir. 1995) (Lifesavers use of Werther's trademark when advertising that Lifesaver's Delites are 25% lower in calories than Werther's Original was permissible because claim was valid, and ad not confusing to consumers).
14. 15 U.S.C. § 1125(c)(4) (2003).
15. *Playboy Enterprises, Inc. v. Netscape Comm. Corp.*, 354 F.3d 1020 (9th Cir 2004). Initial interest confusion on the Internet occurs when a trademark searching consumer is lured away from their original goal by a competitor's similar mark, even if no actual confusion occurs. *See* *Brookfield Communications Inc., v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir.1999).
16. 354 F.3d at 1025 n16, 1030.
17. *Gov't Employees Ins. Co. v. Google, Inc.*, 330 F.Supp.2d 700 (E.D. Va. 2004).
18. Stefanie Olsen, *Google wins in trademark suit with GEICO*, CNET News.com, Dec. 15, 2004 *at* http://news.com.com/Google+wins+in+trademark+suit+with+Geico/2100-1024_3-5491704.html (Last visited May 2, 2005). *See also*, Transcript of Bench Trial at 286-287, *Gov't Employees Ins. Co. v. Google, Inc.* (E.D. Va. 2004) (No. 1:04cv507), *available at* <http://www.patentlyobviousblog.com/files/geico1215.txt> (last visited May 31, 2005).
19. 12/17/2004 PTD d7, Patent, Trademark & Copyright Law Daily, Recent Cases, Dec. 17, 2004, *citing* *Gov't Employees Ins. Co. v.*

Google Inc., E.D. Va., No. 1:04cv507 (LMB/TCB), bench ruling 12/15/04.

20. In response to Google's request for a declaratory judgment that its use of American Blind's trademarks was not trademark infringement, American Blind filed counter-claims of trademark infringement and unfair competition, contributory trademark infringement and contributory dilution, and tortious interference with prospective business advantage. The tortious interference claims were dismissed on summary judgment, while American Blind's other claims survived but were not decided on the merits. "The Court notes that its approach is consistent with the approach taken" in *GEICO. Google, Inc. v. American Blind & Wallpaper Factory, Inc.*, 2005 WL 832398, *7 n.26 (N.D.Cal. 2005).
21. <http://www.whenu.com/> (Last visited May 2, 2005).
22. See <http://www.whenu.com/background.html> (Last visited May 2, 2005). For an alternative view of WhenU see <http://www.thiefware.com/whenu/> (Last visited May 2, 2005).
23. See <http://www.claria.com/companyinfo/> (Last visited May 2, 2005); <http://www.gator.com/home2.html> (Last visited May 2, 2005); and <http://www.gainpublishing.com/> (Last visited May 2, 2005). For an alternate take on Gator see <http://www.doxdesk.com/parasite/Gator.html> (Last visited May 2, 2005).
24. *U-Haul Int'l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 728 (E.D.Va. 2003).
25. *Id.* at 729.
26. *Id.* at 728-731.
27. *Wells Fargo & Co., v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 773 (E.D. Mich. 2003).
28. *Id.* at 769 and n.23.
29. *1-800 Contacts, Inc., v. WhenU.com*, 309 F.Supp.2d 467 (S.D.N.Y. 2003).
30. *Id.* at 493. Initial interest confusion occurs when a trademark searching consumer is lured away from their original goal by a competitor's similar mark, even if no actual confusion occurs. See *Brookfield Communications Inc., v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir.1999).
31. 309 F.Supp.2d at 489, n.43.
32. Stefanie Olsen, *Pop-up Purveyor Claria settles suits*, CNET News.com, August 31, 2004 at http://ecoustics-cnet.com.com/ecoustics-cnet.com.com/Pop-up+purveyor+Claria+settles+suits/2100-1024_3-5333003.html (Last visited May 2, 2005).
33. *1-800 Contacts, Inc., v. WhenU.com*, 309 F.Supp.2d 467 (S.D.N.Y. 2003).

34. *U-Haul Int'l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D.Va. 2003), *Wells Fargo & Co., v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 749 (E.D. Mich. 2003).
35. Utah Code Ann. § 13-40-101, et seq.(2004).
36. Stefanie Olsen, *Utah judge freezes anti-spyware law*, CNET News.com, June 22, 2004 at http://news.com.com/Utah+judge+freezes+anti-spyware+law/2100-1024_3-5244151.html (Last visited May 2, 2005).
37. Cal Bus & Prof Code § 22947, et seq. (2004).
38. Reuters, *California Goes After Spyware*, Wired.com, Oct. 2, 2004 at <http://www.wired.com/news/politics/0,1283,65203,00.html> (Last visited May 2, 2005).
39. National Conference of State Legislatures, *2004 State Legislation Relating to Internet Spyware or Adware*, Jan. 28, 2005 at <http://www.ncsl.org/programs/lis/spyware04.htm> (Last visited May 2, 2005).
40. Spyware Removal Blog, Nov. 5, 2004 at http://www.spywareremove.com/blog/spyware_removal/archives/spyware_legislat (Last visited May 2, 2005).
41. Roy Mark, *FTC to Congress: Lose the Anti-Spyware Plans*, InternetNews.com, Nov. 5, 2004, at <http://www.internetnews.com/xSP/article.php/3432111> (Last visited May 2, 2005).

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