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"Invisible" Infringement -- Metatags and Keywords

Internet marketers are always in search of methods to bring us to their sites. While it may seem obvious that you cannot use another company's trademark on your website when your site is otherwise unrelated to that trademark, what about if you use the trademark *in a way that isn't visible to the consumer* ?

The use of **metatags** and **keywords** are bringing this issue into courts of law, and the issue has not yet been firmly decided.

Metatags are non-visible text inserted into the "head" section of HTML or XHTML web pages, typically to describe the content of a page, and are used by certain search engines to determine if the page is relevant to a search term.

Keywords are used in programs such as Google's Adwords program, where advertisers are allowed to buy certain search terms, giving them the right to a "sponsored link" - in other words, when someone searches that keyword, Google not only provides links to the relevant sites, but also provides direct links to the "sponsoring" advertisers.

Here is how it works in practice: a competing shoe company might use the words "Nike" "Adidas" and "Puma" as metatags, or purchase those same

trademarks as keywords from Google, in hopes of luring Web surfers. That surfer, who is initially looking for Nike, Adidas or Puma products, clicks on the competitor's link and (maybe) the competitor sells them his shoe instead, all as a result of the "misdirected" click.

The "invisibility" of metatags and keywords has created difficulty in determining when trademark infringement occurs, since "likelihood of confusion" and "use in commerce" are hallmark tests of trademark infringement. *If you can't see it, some argue, how can it be said to be used in commerce or be creating a likelihood of confusion?*

Courts are clearly not yet in agreement on this emerging issue. The Ninth Circuit, which includes California, has held that the use of competitor trademarks in metatags constitutes trademark infringement, although this holding is not universally accepted, and has been criticized even within the Ninth Circuit.

The Second Circuit, which includes New York, recently held (in a case involving Google and its use of keywords) that use of another's trademark in internal software programs does not insulate the alleged infringer from a charge of infringement. The Court, in reversing a lower court decision, went on to say that the trademark owner was entitled to its day in court - in essence, the Court allowed the trademark owner to proceed in its attempt to prove Google's use of its trademarks in their Adwords program caused a likelihood of confusion or mistake.

One particular defense available to those using another's trademark is "**fair use**," such as when the use of the trademark describes the goods or services or their geographic origin. For example, a former Playboy playmate was permitted to use certain Playboy trademarks because she used the words (such as "playmate") to describe herself. Likewise, a website distributing a certain toy company's products would be able to use that toy company's trademarks in its metatags because it accurately describes the goods offered at the website. But there is no clear cut test for demonstrating fair use, so the use can still spur a lawsuit.

When in doubt, it pays to be cautious and secure the trademark owner's consent; otherwise, the costs of infringement may quickly outpace the value of increased traffic to your site. If consent cannot be obtained, it may be time to seek some legal advice.

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