

## **Keyword Advertising and Trademark Law**

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Navigating through the shifting legal landscape of keyword advertising can be frustrating. Keyword advertising is purchased by signing up with companies who deliver the ads, such as Google, Yahoo! and MSN. Once an advertiser has an account, the advertiser bids on terms that are related to the products or services being sold. For example, a guitar teacher may purchase the keyword "guitar lessons." Assuming the bid is sufficiently high, the advertisement will appear on the search result page when anyone conducts a search for the term "guitar lessons."

Purchasing the term "guitar lessons" is not likely to create legal liability because it is a generic, non-protectable term. However, the use of trademarks in advertisements may create liability for trademark infringement. Although the law is unsettled in this area, the majority of courts that have considered the issue have found that use of a competitor's mark as keyword advertising can be trademark infringement. In order to reduce the potential for trademark infringement, companies should do their homework prior to placing an online keyword advertisement.

A company using a trademark as a keyword to trigger and display an online advertisement may be liable for trademark infringement, even if the trademarked term does not appear within the ad itself. Courts have found that the use of a trademark to trigger a keyword advertisement is sufficient to create legal liability. There is heightened risk if the competitor's mark is displayed in the advertisement visible to consumers.

This does not mean that a company can never use a competitor's or another company's trademark in its advertising. Indeed, the use of a competitor's trademark in a comparative advertisement is often times found to be a fair use. Consider the guitar teacher mentioned above. Assume he teaches on a Fender guitar. Would he be liable for using the keyword "Fender" in his online advertising campaign? Maybe. If consumers thought that Fender Music Instruments Corporation endorsed or sponsored the guitar teacher's lessons, he may be liable. However the guitar teacher can take steps to reduce the liability.

First, he can choose not to use "Fender" at all. Alternatively, he could make it clear in his advertisement that he uses Fender guitars, fairly telling consumers what brand of guitar he uses to teach. Advertisers should beware of hidden or secondary meanings of keywords, for example the term "apple" can mean a fruit and a computer company. Another preventive measure is to limit the geographic placement of advertisements. By choosing to limit the advertisement to a particular location, an advertiser can limit potential liability.

For example, a Denver-based business may own trademark rights within that state. However, another business may own that same name and trademark rights in New York. By limiting the advertisements geographically, the Denver advertiser likely limits its liability.

Advertisements can be prepared and placed online in minutes. Taking some additional time to assess the landscape will help in protecting online keyword advertisers from potential liability.

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