

Cover Your Arse Online

**A Guide To Protecting Your
Online Business Assets**

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Copyright

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Chapter 3

Protecting Your Online Content

"I was an online service provider. It's not my job to police what people are uploading. It's the job of the content owners, and the law is very clear. If you create content, and you want to protect your copyrights, you have to do the work."

Kim Dotcom

What is Intellectual Property?

Intellectual property is not a specific legal right but a collective term for a bundle of different legal rights including:

- copyright
- trade marks
- designs
- patents
- confidential information
- trade secrets

Different things attract different types of protection. The point is that identifying the areas where you have intellectual property in your business allows you to work out what you own, what you don't own, what you don't know about and what you have protected.

You can then make a commercial assessment about whether you spend money now to take ownership or to protect the intellectual property you are using.

When you go to value or sell your business, being able to identify and demonstrate that you have full rights to the intellectual property in your business can have a positive impact on the value of your business.

Protecting your Intellectual Property – is it worth it?

Factors influencing decisions to protect or not protect intellectual property

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- Lack of understanding about how to protect it
- Too costly. Some businesses have simply given up trying to protect their inventions
- Reputational and financial costs of failure in an action to protect
- Staff time involved in the process
- Overseas enforcement simply unaffordable

If you have an idea with potential value and want to present that idea to someone with the resources to develop it, then there are actions available to protect that idea.

What You Need to Know About Protecting Your Ideas

You won't be the only person who thinks they have come up with the next 'great idea' that is going to make millions of dollars. Unfortunately, the value of an idea is in showing that it works and makes money, not the idea itself.

This is not to discount the value of great ideas, if it weren't for creative people challenging the way we have always done things, there would be no innovation. What is important is having a realistic expectation of the value of your idea and at what stage it actually becomes something worth taking action to protect.

People will pay more for what they want than what they need.

If your concept is something people need, think about whether or not your ideal customer is prepared to pay for it before you invest a load of money into development.

Everyone is not your customer.

Even if your idea is something that everyone will use, like toilet paper, it does not mean that your product is for everyone. There is still a huge variety of different types of toilet paper made to cater for different sectors of the market; from 4 ply extra luxurious paper to eco-friendly, down to the cheapest, thinnest paper, you can buy. Think about who your target market is and how you are going to get in front of them.

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Not every idea is viable. I wouldn't have thought that a boat you can fold up and put on the roof of your car was something people wanted, but the people at Quick Boats knew their target market and developed it.

Imagine the first conversations around the idea... "wouldn't it be great if we could just fold it up and stick it on the roof rather than dragging a trailer around." It is unlikely that anyone hearing those first conversations would be in a position to 'steal' the idea and run with it. A lot of development had to go into designing the product and developing the materials that helped make it work.

Develop your concept then bounce the idea off someone who might be able to help.

There is greater risk in sharing your ideas with people who won't understand it and who will say you are wasting your time, than sharing ideas with people who might actually have the experience and background to help you prove your concept.

Turning an idea into a reality takes passion, persistence, and dedication. 99.9% of people you share your idea with won't have the energy or inclination to make it work.

Once you have a workable idea, a plan and maybe even a budget for implementation, at that point you might have something worth protecting, and it's then that you need to think about how you can protect it.

An idea alone is not protected by copyright or trade mark or patent, but you might persuade someone to enter into a confidentiality agreement or a non-disclosure or non-circumvention agreement before you discuss it. All of these protections are grouped as 'intellectual property'.

Is it worth spending money to protect your idea?

YES, where –

- you want to use the idea to make money
- your idea is more than just common sense
- your idea has a novel approach or specialised application
- you can prove you have put time, effort or inspired thought into your idea
- the idea has commercial value
- you have identified a potential market

NO, where –

- you don't even know whether or not you can make money yet
- your idea is common sense
- your idea is a small variation on someone else's idea
- everyone will want to buy it! (but you can't say specifically who your target market will be)
- you don't know how to make money with your idea; it is just such a great idea that you are bound to make money!

How to make a decision about what to do

Identify the purpose

When you identify the 'purpose' of your idea, this will help you to decide what actions and how much money you are prepared to spend to protect it. Look at the end result of your idea, then simplify it to its key concept.

What has this got to do with legal advice? Saving you money!

If you consult a lawyer and ask them to do XYZ to protect your idea, that is what they will do. A lawyer won't always ask you whether or not it is worth spending the money; they assume that you have already made that assessment.

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Examples of purpose:

- to generate income for you
- to generate income for others
- to provide a product or service for community benefit
- to educate people who need it
- to 'enlighten' the world

CASE STUDY

Comic Relief launched Red Nose Day in 1988 with the sale of red noses to raise money for charity. The idea of using a gimmick to raise the profile of a cause was a great concept and has been copied all over the world. The purpose of the red nose was to attract attention and generate income for the cause.

The 'red nose' was worth protecting to ensure the unique identification of the cause, but the idea of using a gimmick could not be protected, or restricted. In Australia, we now have Daffodil day, jeans for genes day, pink ribbon day and many more. That marketing concept alone could not be protected, but the use of a red nose could be protected.

If your idea is a concept which could be referred to as common sense, could have been thought up by just about anyone and is very easy to implement, then it is unlikely that you will be able to protect it as your own; like selling water in 600ml bottles.

You might have something you are able to protect, if you have put considerable research, or used a novel approach, or you developed the idea from specialized knowledge.

Even showing dedicated effort, you can't just have a great idea. You need to have something that will also have a commercial value.

Check key elements for protection

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- Not just common sense
- Research or unique intuitive connection
- Novel approach or specialized knowledge
- Commercial value
- Potential market

CASE STUDY

Raising awareness of world climate issues is a great idea, but it wasn't until that idea was converted into a film, which required some significant research, planning, and effort that "An Inconvenient Truth" became a product and a brand with commercial value capable of protection.

If you can identify a market and a potential commercial value for your idea, then you have a basis for determining whether or not you want to spend some money to protect it before presenting it to anyone.

Collate the evidence

It can make a big difference to your success in protecting your idea if you collate the evidence to demonstrate that your idea is original to you, required some applied effort on your part and that you came up with it first. You may have:

- computer files
- notebooks
- recordings
- rough drafts and so on

Your records should provide evidence of the background work put into producing your idea. You may simply have had a flash of brilliance.

Either way, you can effectively date stamp your ideas by posting them to yourself via email or through the postal system. This little tactic is sometimes referred to as "poor man's copyright".

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In the US you can also register digital materials before publishing them online in order to protect the copyright in that work. Be aware that this still doesn't protect the concept alone, only what you actually register, like the contents of an ebook.

FICTIONAL CASE STUDY

As a great example that is easy to follow, Melanie Griffith's character (Tess) in the movie "Working Girl" demonstrates that a particular idea was hers by referring to the articles she had read in a newspaper which initiated the particular train of thought that led to the final proposal.

Tess wanted to sell an investment idea to a business, with a commission for finding the investment. Her boss wanted to make out the idea was all her own and nothing to do with Tess. Tess produced seemingly unrelated newspaper articles and explained how she linked them to come up with her proposal. Her boss had no explanation for where the idea came from. A small amount of independent proof goes a long way!

Be ready to share

Accept that you will be sharing your idea and let go of any fear around sharing it. Then take appropriate steps to protect yourself.

5 Ways to Protect Your Ideas

You can share your great idea with the world like Martin Luther King Jr did in 1963 in his “I have a dream” speech.

You can keep it to yourself; but Carl Jung’s theory of collective consciousness suggests that your idea is available to anyone, anywhere, anytime, whether you tell someone about it or not.

You can bounce your idea off a few close friends or trusted advisors and see if they think it has any merit. The main legal areas for protection are:

1. Contracts - confidentiality, non-disclosure, non-circumvention
2. Trade mark
3. Copyright
4. Design
5. Patent

Oh, and of course, you always have the option of never sharing your idea with anyone and trying to do everything yourself...

1. Using contracts - confidentiality, non-disclosure, non-circumvention

A verbal contract isn’t worth the paper it is written on – Samuel Goldwyn, movie producer

“Yeh, yeh, I’ll keep it confidential” is hard to prove in court. Get it in writing first!

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Relying upon unsupported oral testimony in court is not ideal. Preferably you should have something in writing that is independent of you, like the post dated letter or a diary note made at the time you came up with the idea.

What is a Confidentiality Deed?

A non-disclosure agreement achieves the same thing.

- legal agreement
- sets out what information is to be kept confidential
- can require one or more parties to keep information confidential
- enables a party to take remedial action if there is a breach

When could you use a Confidentiality Deed?

- Before sharing your idea with a potential investor
- Before asking an expert to work on your idea
- Before bringing a potential partner in to develop your idea
- Before talking to a publisher about your idea
- Before talking to a TV producer about your idea

Not all potential developers or investors will be prepared to sign a confidentiality agreement prior to presenting them with your idea. At that point you need to make a commercial decision about whether or not you are going to be able to move forward without their help, and whether they are likely to do anything with your idea if you don't get an agreement in place. What is your greater risk?

When do you need a Confidentiality Deed?

In theory, you should not need to enter into a confidentiality agreement with your professional advisors, eg., your lawyer or your accountant, because they have ethical obligations not to share your information.

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It is worth making a diary note that you are going to discuss your idea with your professional advisor before you do, as there has been the rare occasion when ideas have suddenly been taken up by others with no explanation...

What is non-circumvention?

If you are taking your idea to someone who has the ability to run with the idea, without you being involved, then you need a non-circumvention agreement. If you have non-circumvention, the person you share your idea with cannot develop or make money from it without involving you.

Key Elements to Include:

WHO - The person entering into the non-circumvention agreement must have the necessary authority to make sure the company behind them is also covered. Let me give an example. If you go to a TV executive to share an idea, you want to make sure that no one in that company, or any related entity to that company, or anyone else the executive deals with as part of his or her work, can develop that idea. If they don't have the authority to enter into that agreement, you might end up out in the cold!

WHEN - Make sure the time frame of your agreement is realistic. Ideas that are shelved one day can look more attractive when business is slow. Depending on the company you are sharing it with and the type of idea, a lifetime might not be unreasonable.

WHAT – Put it in writing! You need to be specific about the nature of the idea you want to share (“new comedy sketch show for television involving impromptu acts and a variety of recognised comedians”) and any specific information you are going to present, like a budget or business plan.

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WHY - There should also be an acknowledgment that you have put some effort into developing this idea for commercial exploitation and that the person you are disclosing this information to understands that you will suffer financial loss if you are excluded.

Enforcing a Confidentiality Deed

To enforce the terms of a confidentiality agreement you will need to be able to be sure that you can bring the offending party to court.

If you are based in Australia and share a great idea with someone in Singapore, to enforce your agreement you would probably have to bring an action in Singapore rather than Australia, because the money or property to meet the payment of any judgment is likely to be in Singapore.

It is also important that you can prove to a court that the idea was unique to you and the other party did not have it before speaking with you. If you have proof that the other party would not have had the idea without your input and that there is money in it, you'd probably be able to find a law firm prepared to take the risk in exchange for payment of their fees from the judgment.

2. Copyright

This has already been covered. The important things to remember are:

- Copyright automatically exists upon creation in certain types of products, like written works, photography, film and music and there are similar copyright laws all over the world.
- Copyright is automatic, and it is free.
- You can warn people that you will take action to protect your copyright by using the © symbol. You're still protected without it.
- Single words and short phrases, slogans and catchphrases cannot be copyrighted, they must be considered under trade mark protection.

3. Trade Mark

This will be covered in more detail later, but the key things to remember are:

- Letters, words, phrases, numbers, logos, images, smells and sounds can be protected as trade marks
- Protection under trade mark law requires registration
- Registration bodies are government or semi-government bodies
- Not everything can be registered as a trade mark, generic words or phrases will usually be excluded
- You don't have to register a trade mark, but it's easier to protect if you do
- When you register your trade mark it is only protected in your country of registration
- It is easy to check for existing trade marks through trade mark registers before settling on a brand name
- There are 45 categories for trade mark registration, you're only protected within the categories you register and every category attracts a fee
- Trade mark registration is valid for 10 years, then requires renewal
- Trade mark registration can be challenged and overturned if you don't actually use the mark

4. Designs

Design protection is not as common as other forms of protection for intellectual property and a highly specialised area. In a lot of cases copyright or patent protect are used as an alternative to design protection. In general:

- design registration protects the shape, layout, pattern or decoration that makes an item look unique
- design must be new and distinctive to gain protection
- to get protection a design will usually have industrial or commercial use

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Examples of products that have design protection in Australia are:

- the shape of the Holden Monaro
- the Speedo full-body swimsuit
- flood-proof building panelling

Design registration is limited to the country of registration, regulated by government and legislation and lasts for five years.

5. Patents

This is another highly specialised area and patent attorneys are often qualified in science and engineering. Once a patent is registered, the information you want to protect becomes publically available. In general:

- patent registration protects newly invented methods, processes, devices or substances
- prior to granting protection, there is substantial technical investigation into uniqueness
- if you share a patentable idea without confidentiality protection in place, you might not be able to file your patent successfully

Examples of things that can be patented:

- the Aussie hills hoist (a clothes line)
- pharmaceutical drugs
- software

Again, registration is not international and there are requirements to demonstrate the uniqueness of the product before it will be accepted for registration.

Patent registration lasts up to 20 years, although it is also possible to register an 'innovation patent' for 8 years where the application is not sufficiently strong to gain a full patent. An innovation patent is not a default and there are still a number of things you have to prove.

Trade Mark Protection

Trade Mark

A trade mark and a trademark are both the same thing. A bit like metre and meter. It just depends on which country you are in.

For something to be a trade mark and protected, you do actually have to be able to show that you are using it in business. If you register a trademark then don't use it, you can lose your registration. So think it through and be prepared.

Consider whether or not you want to invest in registration and wait at least six months getting something registered, only to change your mind about the direction of the business and not use it.

Using a trade mark in the course of business may include:

- advertising in the country for the purpose of sale (this needs more testing in the internet age where advertising might be internationally accessible, but delivery into a country might not be possible)
- making available for sale in Australia
- overseas manufacturers may 'use' their mark by selling wholesale into Australia
- use subject to a licence agreement with an overseas supplier
- selling retail is use

CASE STUDY

The actual sale of a dozen bottles of wine under the 'Barefoot' brand in Australia did not constitute 'use' because the trademark owner had no knowledge, intent or influence on how those bottles of wine got into the Australian market.

The wine was actually sold into Germany, then imported to Australia from the German purchaser. The amount imported was only small and the sales of the wine were correspondingly very small. At the same time, the manufacturer was in discussion with McWilliams (an Australian winemaker) about possible imports to Australia.

This came up in an argument over beer and wine. Lion Nathan started selling 'Barefoot Radler' beer after seeking to have the 'Barefoot' mark removed for non-use in relation to alcoholic beverages. The argument in court was that Lion Nathan breached the trademark. Lion Nathan argued that the trademark should be removed for non-use.

The court order the mark be removed and that Lion Nathan was able to sell 'Barefoot Radler'.

Registering a trade mark

Trade mark registration is unique to each country and usually lasts around 10 years. Registering a trademark in one country does not mean that it is registered in any other country. Registration and renewal are the responsibility of the trade mark owner.

Some countries follow a first-to-file system (China, Japan, Germany, France) where you gain priority of trade mark rights only by filing an application for registration and ultimately obtaining a registration. However, some countries follow a common law system recognising trade mark rights acquired through being the first to use a mark in commerce.

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Examples of common law system countries are Australia, the United States and the United Kingdom. In these countries, it is most important to not only search for prior pending registration applications and prior registered marks but also to search for marks that are already in use in commerce in these countries.

Taking action to protect an unregistered mark is generally more cumbersome and harder to do than taking action to protect a registered mark. People are also more likely to stop using a trade mark after getting a legal letter advising them that it exists and they are infringing upon it, rather than having to go through court action.

Deciding to register a trade mark

It is always advisable to assess your risk position before deciding whether or not to register a trade mark. Some lawyers will urge you to register a trade mark without delay, but it really depends on the type of business you have and the likely competitors who might copy or leverage your brand.

For start-ups, you may choose to delay an application for registration until your business is generating a cash flow to support it.

On the other hand, if you are concerned a foreign company may bring in the same or a similarly branded product or service, check the trade mark register to see whether or not it has already been registered. If not, consider registering without delay.

CASE STUDY

A client had been importing and marketing a particular brand of product for about four years before a foreign supplier decided they also wanted to sell to the Australian market.

The foreign supplier registered the trade mark then sent threatening letters to the client. The client did have an argument for prior use as a defence to the claim.

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The problem with having a potential defence is that if the other party does not agree with you, you have to wade through court proceedings at a high cost and over a long period of time to get a result.

We negotiated to continue the client's business without interruption during a reasonable change-over period, rebrand and sell the client's domain name to the company making the complaint, rather than participate in court proceedings. The client didn't lose any business and paid minimum costs.

Get support rather than operating blind in this area. You will have greater peace of mind if you are confident that you are using your own and other people's intellectual property appropriately.

What is a trade mark?

A trademark is something capable of distinguishing the goods or services of one enterprise from those of other enterprises. Commonly used expressions are generally not capable of protection, nor is a geographic location.

For example, BUTCHERS APRON may not be able to be registered as a trade mark for apparel, where it is a common description, but it might be registrable as a trade mark for food and books.

A trade mark can be any one or combination of things including:

- a letter
- a word
- a name
- a signature
- a numeral
- a device
- a brand
- a heading
- a label
- a ticket

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Trade marks must be used or intended to be used:

- to distinguish goods or services
- dealt with or provided in the course of trade
- from goods or services dealt with or provided by anyone else

Examples of trademarks:

This is not an endorsement of any particular business, just examples.

1 - COMBINATION OF LETTERS

The National Australia Bank spent millions of dollars on rebranding its 'NAB' brand from capital letters to lowercase to be 'less threatening and more accessible'. As far as I know, it made not a jot of difference to anyone!

The combination of the letters 'nab' constitute the trade mark.

Any protected acronym of a company name is probably a protected trademark:

BMW, KFC, MGM ... what others can you think of?

2 – WORD

A large number of mundane words that are now internationally recognised as brands, and also protected trade marks, words like:

- VIRGIN
- FORD
- the SHARK

3 – NAME

Many celebrities and loads of sports people protect their names as brands.

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Some companies have spent vast amounts of money coming up with new names to distinguish themselves from others and protect that new name.

- MICROSOFT
- PIXAR
- NIKE

The trouble with some brands that lead the market is that they go from being trade marks to common language. When a former trade mark is considered common language, it can no longer be protected as a trade mark. Things like -

POST-IT NOTES, BAND AID, ASPIRIN no longer have trademark protection.

4 – SHAPE

Shapes have been controversial in seeking trademark protection. Weird and wonderful things have gained protection.

The shape of Cadbury's Freddo Frog has trademark protection, but when Guylian applied to stop a cheap Asian copy of their shell chocolates, the court decided that the shells were not sufficiently distinctive to warrant protection. The Toblerone triangles are protected too.

Whistles, dog toys that hold biscuits for dogs, the Rubix cube all have protection.

5 – COLOUR

Cadbury ran into trouble trying to stop other companies from using its distinctive purple colour for wrapping chocolates.

Weis have gained trademark protection for the distinctive white ice cream and coloured fruit ice-cream bars.

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This means that no other ice-cream manufacturer can distribute a similar looking ice-cream bar in Australia.

6 – SOUND

What are some of the most easily distinguished sounds in the whole world? The tones that phones and computers make when you turn them on. Each brand has a different collection of notes and many are trade marked.

Categories of Trade Mark

A trademark is not something that can be protected ‘across the board’.

You can only protect your trade mark against a competitor in the same category. There are 34 different classifications for goods and another 10 different classifications for services - 45 in total.

When you choose to register a trade mark, you pick one or more classifications for the protection of that trademark to DISTINGUISH your product or service from other providers in the same industry. Cars are a great example.

Consider how many different brands of cars there are on the road. You may not be able to tell one immediately from the other by shape, size or colour, but you can certainly distinguish the car by its badge.

When car manufacturers are bought and sold, one of the most valuable items on their list of assets is the brand and associated trademarks.

For example, throughout history the Jaguar brand has been owned by the original founders, British Leyland, Ford and currently Tata Motors. Most people don’t care who owns the company provided the car displays the Jaguar brand.

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In Australia, the Jaguar trade mark is registered in a variety of categories including:

Class: 3 Perfumes, cosmetics, soaps, non-medicated toilet preparations; cleaning and polishing preparations for motor land vehicles

Class: 14 Smokers' articles of precious and semi-precious metals; watches; clocks; jewellery; parts of and fittings for all the aforesaid goods

Class: 18 Articles included in class 18 made of leather or of imitation leather but not including any made from or resembling jaguar skin; travelling bags; handbags; document cases; suitcases; pocket wallets; purses; parasols; umbrellas; walking sticks

If the trademark is likely to cause confusion with another merchant in the same class, it probably won't get registered. In fact, you'll probably get accused of infringing the mark, or passing off. "Passing off" is a legal cause of action that applies where there is a representation that one person's goods or services are those of someone else so that the person making the representation is falsely getting the benefit of the first person's branding.

Crazy John's mobile phones challenged Crazy Ron's mobile phones successfully for passing off, but it was not successful on appeal in stopping Crazy Ron's from applying to register a trademark. Why? Because Crazy John's trademarks were composite marks, the first with words and picture and the second with stylised words. The words by themselves were never trademarked.

In the end there was no point in Crazy Ron registering the mark because they would still be passing off by using it...

IMPO: Don't think that you can use a clever play on your competitor's trademark and get away with it.

Trade mark symbols

™ ® ™ ® ™ ® ™ ® ™ ® ™ ® ™ ® ™ ®

The quickest way to warn the public that you will take action to protect a trade mark is to include a ™ next to that mark. It is also the quickest way to work out whether or not someone intends to protect their mark before you copy it.

™ indicates that it is a trademark of the business where ® shows that the trademark is registered. Don't use ® if it is not registered! That is an offence.

It is not a requirement of registration to use a trade mark symbol, and many businesses don't bother to clutter up their advertising or product badges with one.

When is a Trade mark not a Trade mark?

There have been a few cases around the world that highlight the limits of trade mark protection.

In Singapore, the Court found that the use of a distinctive floral pattern with four pointed petals similar to the Louis Vuitton trade mark on the face of a watch, was not using the pattern as a trade mark, but merely decoration.

The trademark 'Solvil' was written in small typeface on the watch faces and the watches were marketed at the bulk market, rather than exclusive merchandise.

The Court in Singapore found that to be a trade mark, the mark needed to be used in the promotion of the product.

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In Australia, candy makers Nature's Blend and Nestle have had a similar tussle over the expression "Luscious Lips" used as a descriptive term on the advertising blurb of packet of Allens Retro Party Mix (Nestle).

Nature's Blend held the trade mark "Luscious Lips" for the class of products covering confectionery and claimed trademark infringement. The Court said 'no'.

The Court pointed out that if any customer actually took the time to read the blurb on the packet, it would only be after they were very clear as to which brand of sweets the customer was buying. (It is kind of obvious)

The mere presence of the words "luscious lips" in the blurb on the packet was insufficient to mislead customers in any way as to who was the maker of the product. So there was no breach of trade mark.

Keywords – Yours, or Your Competitors?

Recently decided US cases provide more pragmatic and realistic approaches to trade mark infringement using keywords.

In Toyota Motor Sales v. Tabari, the court recognised that online shoppers are pretty savvy about what they are doing. "They skip from site to site, ready to hit the back button when they're not satisfied with a site's contents . . . consumers don't form any firm expectations about the sponsorship of a website until they've seen the landing page — if then."

In that case the court refused to uphold an injunction stopping a car sales yard from using the trademark "Lexus" in domain names.

In Network Automation, Inc. v. Advanced Systems Concepts, Inc the court looked at the use of infringement of trademarks in the use of keyword search terms.

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As close competitors, Advanced systems purchased the use of a keyword “activebatch”, which just happened to be the name of Network’s main product. Of course their ads showed up – although in the sponsored field, not the natural search field.

Previously, companies upset about having their competitors ads show up have been able to argue that:

- advertising is part of trade
- the mark belongs to the company complaining
- both companies use online advertising, which could lead to confusion on the part of the customer

Now the 9th Circuit Court is asking keyword abuse complainants to show:

- what is the strength of the trademark (well known?)
- is there any evidence of actual confusion by customers?
- what type of goods are being advertised and what degree of care is the purchaser going to exercise before hitting the “buy” button; and
- looking at the results page, the appearance of the ads and surrounding text on the page, is the customer likely to be confused?

The last point addresses the fact that Google users are pretty familiar with the results page format and can tell the difference between natural results, paid advertising and premium advertising and often trust the natural results first.

The result was that the Court removed an injunction stopping Advanced from using the “activebatch” keyword in its advertising.

A 2016 decision in Australia in the Veda Advantage v Malouf Group case clearly stepped out the legal position, finding that:

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When selecting keywords and including them in an Adwords campaign, the advertiser is not using those words to distinguish the goods or services from goods or services of another trader. The advertiser is using those keywords to identify internet users who might have an interest in the product or service.

All Adwords account users have the ability to use the same keywords at the same time, which adds weight to the argument that those keywords are not being used as trade marks.

Where the keywords used are “invisible and inaudible, indeed imperceptible, to consumers” their use cannot be as a trade mark to distinguish goods or services. Where trade marks are used in a way that is merely descriptive of services, like “fix my Veda file”, that is not used as a trade mark.

Similarly, use of someone else’s trade mark in metatags is not considered a breach either. For more, see <http://onyxonline.com/trade-marks-in-keywords-metatags>

Prior to this decision the European Court had found Google not liable for the purchase of trademarks as keywords for advertising, although it did comment that the advertiser itself may be in breach. In Australia trademark protection has not been the chosen approach. Instead, the Australian courts have looked at whether or not the behaviour can be considered to be misleading and deceptive from the perspective of the customer – more in line with the 9th Circuit Court’s new approach.

It will be interesting to see what other international decisions take note of this approach.

What does this mean for you?

- Using another company’s trademarks as keywords is something you do at your own risk
- You can now test the argument that customers are not stupid and are likely to know the difference between what is a paid advertisement and what is a natural search result

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- If the courts think your use of another company's trademark is likely to confuse customers, you're more likely to be in trouble than not
- As long as the domain name dispute resolution bodies pay attention to court decisions, it may be possible to register new domain names including the trademarks of other companies

Good planning makes all the difference. See the planning checklist we have on our website.

Automated Content Creation

There are software systems available that can create written content from scratch. Reviews suggest that although the content may be understandable and indistinguishable from that written by a human being, it is boring to read. If you are going to use automatically generated content, test it first to see if it is suitable for what you want to achieve.

There are also systems available that assist you in curating content automatically from the internet. These systems use your nominated keywords to find appropriate material and repost it on your website.

Depending on how you use curated content will affect whether or not you are in breach of copyright. Don't rely upon the content curator to take responsibility for copyright. What you are paying for is for the system to collate content. Check your settings for how it is displayed.

Some systems do it well. Content gets created and displayed in a newspaper type format with headings, thumbnails and a snippet of the article and a link back to the original.

Some systems don't do it well. Full-size images are scraped together with a large portion of the original content and rather than a link back to the original article, you get an attribution to the original website and no direct link. A system that does this places you at high risk of copyright breach, for which you are responsible.

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Check our website for a review of some of the different software available.



**For checklists, recordings,
templates and other useful
resources, go to**

www.coveryourarseonline.com/readers