

Legal perspective

Q&A WITH ATTORNEY KEITH KLEIN

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Driving Online Traffic

Establishing an online brand presence demands careful navigation through practical and legal waters. In the past, hanging a shingle was an easy first step in driving customers into a business. Similarly, launching a website is relatively easy—but driving traffic to your website and social media pages involves keeping up with a rapidly evolving area of law. We asked franchise attorney Keith Klein to provide some advice. Klein is a partner at Bryan Cave LLP and is certified by the California Board of Legal Specialization as a specialist in franchise and distribution law.

What are the most common legal issues involved in driving online traffic? In addition to social media marketing, search engine marketing (SEM) and search engine optimization (SEO) are two significant tools for increasing the visibility of websites. SEM is an Internet marketing strategy that includes, among other things, the purchase of keywords and contextual advertising to heighten the visibility of a website in response to pre-designated search terms. SEO is the organic process of embedding a website's content with words, hyperlinks, and other mechanisms to ensure that the website appears higher in search engine results. Both methodologies may have legal ramifications, most prominently in the trademark area. Keyword advertising is the process by which, when the keyword is used in a query, the advertiser's website will appear at the top of the search results under "Sponsored Links" or a similar category.

The most common legal issue arises when one advertiser purchases a competitor's trademark as a keyword. The current trend recognizes that use of a trademark

in keyword advertising is sufficient to establish infringement to the extent that the resulting search listings would likely cause confusion among consumers as to the source of the ad. The law continues to change, however, requiring marketing departments to remain vigilant in monitoring legal developments.

Do search engines address trademark infringement with keywords?

Major search engines have established trademark policies that seek to address infringement with respect to keyword purchases. Thus, when a competitor purchases a trademark as a keyword, the first step in evaluating legal recourse options should be consultation with the particular search engine's policies. Microsoft adCenter, for example, does not permit advertisers to bid on keywords infringing a third party's trademark unless their use is truthful, lawful, and the bidder is a reseller of goods distributed under the mark; the website provides information about goods or services represented by the trademark; or the bidder is using the "ordinary dictionary use of a term" and the site does not sell a competing good. Google, conversely, implemented a less stringent policy, as it does not "investigate the use of trademarks as keywords" and will not disable keywords using the trademark of another in the United States. It only investigates ad text that uses another's trademark and is "competitive, critical, or negative."

Do keyword issues exist that are particular to franchising?

Yes. The keyword situation is more complex for franchise systems, particularly with the increased presence of franchisees on the Internet. Unlike other companies, franchi-

sors and franchisees must be concerned about keyword strategies implemented by each other. While it may appear innocuous to allow the franchisor and multiple franchisees to purchase keywords for the brand's trademark or other, non-proprietary words, the repercussions are more troubling.

The positioning of sponsored links is determined through a bidding process. Advertisers willing to pay more can receive priority in the listing. For companies with one advertising agent, the bidding should be relatively straightforward. With franchises, however, there could be thousands of franchisees bidding on the same trademarks or keywords. This leads to an increased per-click cost—benefiting only the search engine company—and will dilute the effectiveness of keyword advertising for the entire system.

What are the best practices to avoid these issues?

The franchisor should stake out the trademarks and other keywords it intends to purchase, driving traffic to the company's website which, in turn, enables consumers to connect to local franchisees. This generates two benefits: first, it advances the interests of the brand over the interests of particular franchisees; and second, it may enhance SEO for both franchisor and franchisee sites by including multiple hyperlinks. Franchisees, conversely, should focus keyword bidding on words particular to their locations, such as nearby intersections, city buildings, or other widely recognized landmarks.

The same is true for search engine marketing. When using a competitor's trademark to drive traffic to your website, the best practice is to clarify to consumers the source of the content and website—even before they arrive. Franchisors and franchisees are encouraged to coordinate regarding the manipulation of their metadata to ensure that each does not have a dilutive impact on the others. To avoid confusion, franchisors should include provisions in franchise agreements or operating manuals expressly prohibiting franchisees from bidding on keywords containing the franchisor's trademarks and/or that are not approved in advance by the franchisor. ■