

Getting Noticed on the Web

Terrell W. Mills

Wyche Burgess Freeman & Parham, P.A.

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As the Internet has evolved and grown, so have the strategies companies have adopted to gain attention and access to the purchasing power of Web users. The promotional methods used on the Web have and continue to force the evolution of existing laws and the adoption of some new laws.

Are the laws different for advertising on the Internet than through other media?

As a general rule, the same laws that apply to advertising in other media also apply to online advertising. The Federal Trade Commission (FTC) is charged with policing and preventing any deceptive and unfair acts or practices, including practices in ecommerce activities. It is through the FTC that many of the issues related to individual privacy are addressed and enforcement actions brought. U.S. trademark laws also apply in the context of the Internet and have been the key offensive weapon in many disputes related to online advertisements. Beyond existing laws, new laws have been adopted that are specific to ecommerce activities, such as the CAN-SPAM Act and the Children’s Online Privacy Protection Act.

What are some of the unique issues for online advertising and promotion?

There are two elements that make online advertising unique: (1) the fact that much of what is done to tailor and deliver advertising content is hidden from the user, and (2) the fact that data from multiple inputs by the user can be collected and consolidated to drive the delivery of the advertising content.

What is an example of hidden activities?

Advertisers are able to make use of its competitor’s trademarks in a way that is not seen by the consumer, but promotes the company at the expense of its competitor. The earliest cases of this related to the use of trademarks in metatags. Metatags are hidden codes that

reside on a website and have historically been used by search engines to index the content of the site. As you can imagine, including your competitor's trademark in your website metatags would direct users looking for your competitor to your site because your site would be prominently listed in the search results. In general, the courts have found that this practice is infringing of the rights of the trademark owner and have prohibited it. More recently, this issue has arisen in key word advertising programs, such as Google's Ad Words. In that and other similar programs, the advertiser can purchase the display of its advertisement and link to its web site in the "Sponsored Link" section of the results page based on the terms the user has searched. Google allows the advertiser to include in its list of search terms the trademarks of its competitor. Again, the user is never seeing the competitor trademark used directly in connection with the advertiser's listing or web site, but there seems to be some connection or the listing for the advertiser would not appear based on the user's search. So far, the courts have split on whether this practice constitutes infringement. However, there is a pending case before the U.S. Court of Appeals for the Second Circuit that, when decided, should provide further guidance to advertisers.

What new issues do you see developing in the area of online advertising?

I see a growing interest in the use of behavioral advertising. As a result, the FTC has started to focus more of its attention on this matter. **The FTC has defined behavioral advertising as "the tracking of a consumer's activities online - including the searches the consumer has conducted, the web pages visited, and the content viewed - in order to deliver advertising targeted to the individual consumer's interests."** The FTC has stated that it is cautiously optimistic that self regulation will be effective in this area and has proposed a set of self-regulation principals. There are four principals: (1) transparency and consumer control; (2) reasonable security, and limited data retention, for consumer data; (3) affirmative express consent for material changes to existing privacy promises; and (4) affirmative express consent to (or prohibition against) using sensitive data for behavioral advertising.

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