

QUARTERLY NEWSLETTER

JUNE 2012

What Google Adwords breach the *Competition and Consumer Act 2010*?

The Federal Court of Australia held that using Google AdWords of a competitor's business or reputation is a breach by the advertiser of the *Competition and Consumer Act 2010* (Cth) formerly known as the *Trade Practices Act 1974* (Cth) (TPA). This is also likely to have consequences on the advertising service provider that displays the contravening words in its search results.

Google's AdWords program is a paid advertising service which allows advertisers to reach specific internet users on the basis of the search terms they type into Google. These internet advertisements called sponsored links are shown above or alongside organic search results.

The ACCC issued court proceedings in 2007 against the Trading Post and Google for misleading or deceptive conduct and false representations under the *Trade Practices Act* regarding instances where the Trading Post used the names of its competitor, Kloster Ford in its sponsored links.

In 2011 the Federal Court of Australia found that the Trading Post's use of Google AdWords were misleading or deceptive or was likely to mislead or deceive the public into thinking that there is some sort of association or affiliation with the Trading Post and Kloster Ford and that information about Kloster Ford, could be found on Trading Post's website when in fact this was not the case.

Google as the advertising service provider was found not to have breached section 52 of the TPA and the ACCC's claims against Google were therefore dismissed.

The ACCC appealed the decision in favour of Google.

The Full Court of the Federal Court found that the sponsored link is displayed on the screen in response to the user's search query and this implies to the ordinary and reasonable user that it is Google who is showing the sponsored link and not just the advertisers. Hence, Google's action in response to the user's interaction with Google's search engine was held to be misleading.

It is uncertain whether or not Google will appeal the decision. Following the decision, Google will undoubtedly be more vigilant with users seeking to use the words of competitors to benefit their own business.

To minimise the risk of liability, businesses should only use AdWords in relation to words or phrases that are specific or related to their business and/or their activities and avoid words which will associate them with their competitor or any other entity which has no association with them.

One Direction Case emphasises the Importance of Trademark Registration

The successful UK boy band has been sued by a US pop-rock band that had been using the name "One Direction" from 2009, a year before the UK group commenced using the name and over 2 years before the UK group entered the US market.

An application to register the trademark "One Direction" was filed by the US band with the United States Patent and Trademark Office in February 2011 at the same time as the UK group began selling its debut Album.

The US band alleges that by using the mark "One Direction", the UK group is "likely to cause confusion, mistake and/or deception" among consumers.

The US band seeks a permanent injunction restraining the UK group from using the name "One Direction" on all products, promotional material and advertising. Damages in excess of \$1 million, plus interest and lawyers' legal fees are also claimed by the US band.

It appears that the UK group and its managers might not have carried out a detailed search before deciding on a name for its group and delayed filing their trademark application. The reason for failing to conduct a proper search and delaying trademark registration was probably due to the band not anticipating its success.

It is not uncommon for new businesses to use logos of other successful competitors. Businesses should therefore protect their business by registering their trademarks and conducting proper trademark searches before deciding on a logo or name.

The case demonstrates the importance of registering a brand name/logo as a trademark prior to a brand name becoming successful.

At MLB Lawyers & Associates we have strong expertise in trademark and other forms of intellectual property law.

The Liability of Directors in Workplace Injury Cases

In the case of *Keating v Fry [2012] WASC 15*, Mr Luke Aaron Murrie was employed by D&G Hoists and Cranes Pty Ltd (D&G). Whilst working for D&G, Mr Murrie died in October 2007 when crane components slipped while being lifted and repositioned.

The Magistrate prosecuted and convicted the directors, Mr Keating and Mr Decesare of D&G under the provisions of the *Occupational Safety & Health Act*.

The directors appealed the decision, conviction and fines imposed on them to the Supreme Court arguing that they were unaware that an unsafe system of slinging the load was used by their employees. The

directors alleged that the method that was supposed to be used was a safe method, but that an unsafe method of slinging was used on the day Mr Murrie died.

The prosecution alleged that the directors were aware that the unsafe method was occasionally used and for that reason were negligent by failing to take steps to improve work place safety to avoid the risk.

The Supreme Court agreed with the Magistrate that the directors should be convicted and dismissed the appeal against the conviction. However, the Supreme Court reduced the total fine payable by the directors and the company. The company was ordered to pay \$70,000 and the Directors were each fined \$10,000.

The case demonstrates the importance of a company and its directors to ensure a safe working environment and to avoid instances that pose a risk of injury to employees. If a workplace injury occurs, legal advice should be sought immediately.

SEMINARS*

Venue for all Seminars

MLB Lawyers & Associates,
Level 1, 441 South Road,
Bentleigh Victoria

Preparing to sell your business

ABSTRACT: This seminar provides invaluable legal and marketing advice on preparing your business for sale.

DATE: 25 July 2012

TIME: 6:30 – 7.30PM

Purchasing a business

ABSTRACT: This seminar provides essential information on choosing the right business for you and on successfully maintaining and building your new business.

DATE: 22 August 2012

TIME: 6:30 – 7.30PM

**All dates and times of our seminars are subject to change depending on numbers of participants attending.*

MLB Lawyers & Associates, Level 1, 441 South Road, Bentleigh Victoria 3204

Telephone 1300 688 421 - Facsimile 61 3 9580 6962

Email: enquiries@mlblawyers.com.au

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