Canadian News and Legal Update

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Legal Considerations for Internet Advertising Targeting U.S. Customers

The Internet is connecting workers, markets, advertisers and contractors from all around the world. We are on Skype, Twitter, LinkedIn and Facebook nearly every day visiting with clients and friends worldwide. One of the most recent trends is the increase in microtargeted electronic advertising by both domestic and international organizations. For example, one can microtarget a particular demographic in a specific geographic region using ads through Google and Facebook. With this new form of electronic globalization comes a fresh set of legal issues to be considered.

With respect to Canadian companies advertising on the Internet in the United States, keep in mind that many of the same rules that apply to non-Internet ads also apply to Internet ads. So, "unfair or deceptive acts or practices" are still prohibited. Also, if you have an Internet advertisement that makes an express or implied claim that may be misleading without certain qualifying information, you must disclose that qualifying information. These disclosures must be presented "clearly and conspicuously." Here is a summary of best practices to consider when evaluating whether your disclosure is clear and conspicuous:

- When making a disclosure, place the disclosure near the triggering claim.
- Always prominently display disclosures so they are noticeable to consumers. Use the same type, color and graphic treatment for the disclosure as used for the claim.
- Make sure that text, graphics, sounds, hyperlinks or other features don't distract the consumers' attention from disclosures. For example, moving pictures behind a text message may make the text hard to read and may distract consumers' attention from the disclosing message.
- Make sure to repeat disclosures on lengthy websites (sometimes, consumers enter websites via links other than the home page).
- When using audio disclosures, present them at a volume and in a cadence that consumers can hear and understand. Also, visual disclosures should appear for a duration sufficient for consumers to notice, read and understand.

When using Google AdWords (or other search engine marketing vendors), a disagreement has arisen over using others' trademarks as keywords. Some advertisers argue that they should not be prohibited from using a competitor's trademark as a keyword for search terms. Some trademark holders argue that a competitor should not be allowed to use their protected mark as a

keyword to drive Internet traffic to their competitor's website. Trademark owners have sued search engines to end the practice. For now, it appears that the search engines are winning. For example, Google just received a complete win against Rosetta Stone. In ruling for Google, the court stated, "no reasonable trier of fact could find that Google's practice of auctioning Rosetta Stone's trademarks as keyword triggers to third party advertisers creates a likelihood of confusion as to the source and origin of Rosetta Stone's products." The court also ruled that Google's use of trademarks as keyword ad triggers qualifies for the trademark functionality doctrine (typically a defense reserved for trade dress cases). Unfortunately, this most recent ruling created more questions than answers. It opened the door for doctrinal development in this area, which means there is a lot of room for the law to evolve (and for advertisers to be wary).

While these best practices are important to consider, it is equally important to experiment with various techniques and – perhaps more importantly – to have fun with your Internet marketing. In the event that international online advertising becomes confusing or worrisome, intuitive marketers and advertisers should call on experienced lawyers to navigate Internet advertising laws.

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