

META TAGS - MLM Subliminal Marketing

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Ghost Messages

"Hello, this is a subliminal message, please visit my web site to learn more about Amway ... what I'm not telling you is that I am a Rexall distributor."

Of course, this is a fictitious occurrence, but this sort of trickery is enabled by the internet every day. This is accomplished by insertion of "meta-tags" at web sites, invisible descriptive terms that are picked up by internet search engines. Thus, a passenger on the internet who has purchased a ticket to New York finds that they have been hijacked to Los Angeles.

What the user of the meta-tag may not realize is that he or she has committed trademark infringement, and is subject to injunction and www.mlmlegal.com damages.

MLM Explosion in Cyberspace

The internet is an explosive tool for the network marketing industry. It creates a level playing field in the worldwide marketplace for companies and distributors who can present their wares and opportunities to millions of prospective buyers and recruits simultaneously. MLM companies and distributors are signing up new recruits on the internet, engaging in real time communication, and using the full force of multi-media to make a positive impression to the world. For many MLM companies, more than 50 percent of sales are now online.

There is a split on the use of distributor web sites. Many companies offer web template sites for their distributors and regulate those sites. On the other hand, many companies welcome distributors to establish their own sites and market within company guidelines. The latter approach, together with the ability to earn residual income from affiliate links to virtual malls, has created a virtual cottage industry in web site hosting for MLM distributors. And, of course, those MLM distributors wish to drive as much traffic to their sites as possible. This is where meta-tags come in.

Search Engine Technology

If you look at the top ten or twenty internet search engines, Lycos, Yahoo, AltaVista, Google, etc., they all use different technologies to lead an internet searcher to prospective sites. Some will place an emphasis on the domain name, others will focus on text within the site, many will evaluate links to the site and almost all will pick up on the hidden descriptive messages in the sites called meta-tags.

Mastering search engine technology is mastering "the art of advertising," pure and simple. At great expense, the dot coms spend massive amounts on television and print advertising to drive prospects to their sites. However, on the internet itself, in addition to affiliate marketing and online cross-advertising, the search engines are instrumental in driving prospects to sites. For many, how prospects are driven to the site is not as important as the fact that they are in fact driven to the web site. As Deng Xiaoping once said about the modernization of China, "It does not matter if the cat is black or white, as long as it catches mice." The problem is that sometimes the cat may stray into illegal territory.

Meta-Tags - Their Magic

Think of a meta-tag as a Harry Houdini magic routine. The individual who types a name into a search engine may be driven to a site that carries an invisible meta-tag that does not appear anywhere on the face of the site, but appears invisibly encrypted at the home page.

Assume for the sake of a fictitious discussion that an MLM distributor has invisibly embedded key words or trademarks of a competitor on their web site. For instance, an MLM distributor wishing to capitalize on Amway distributors might use the words "Amway" or "Nutrilite" to lure individuals interested in those products to their site. These lists of key words are designed to show up in a search, and when a search engine robotically scans web sites for the occurrence of these key words, it produces a list of web sites in which they are found.

These lists of key words are called "Meta-Tags," and they are placed on the home or "gateway" page, but they are invisible to a viewer of a web site. Search engines use the domain name or URL, along with meta-tags when searching for sites matching www.mlmlegal.com search perimeters. This gives rise to the temptation to include words referring to a competitor or a competitor's product in order to divert web traffic to the site with the meta-tag.

MLM Trademark Infringement

In many cases, MLM distributors believe that by using competitors' trademark names and meta-tags, they are not violating the rights of the competitors, because the trademarks are not used openly on the site. In many instances, MLM distributors and companies who engage in this practice have engaged in negligent trademark infringement, and in others, the intent is blatant "hijacking." Using untrademarked terms such as "MLM," "multilevel marketing," "network marketing," "binary" and "matrix," do not pose a problem. Rather, it is the use of someone else's trademark to lure individuals to a site. In traditional trademark cases, it has become clear that an MLM distributor cannot use the trademark name of a company to inappropriately create business for themselves. This practice is referenced as either trademark infringement or unfair competition.

What is not permissible is leaving the consumer with the impression that the publisher is authorized by or somehow connected with the trademark owner. The test is: have the accused marketers used the mark in a manner that is likely to cause confusion, mistake, or deception, as to the source of their products? A likelihood of confusion also exists where a consumer could be expected to assume there was some association or affiliation between the providers of goods or services or when

a consumer would be likely to purchase goods from one source mistakenly believing them to originate from another.

A famous case involving Amway illustrates this point. In the case, Amway Corporation sued individuals for trademark infringement and unfair competition based upon their publication and distribution of literature concerning Amway products and marketing plan. The publication contained numerous reproductions of Amway trademarks.

The court stated that defendants did not use the marks as labels for their goods as trademarks are generally used to identify source. Nevertheless, the use in textual material constituted an infringement where the idea was conveyed that the www.mlmlegal.com literature originated with Amway or that use of the mark was authorized by the company. The court reasoned that while distributors who ordered the literature from defendants knew where the material was coming from, there was no guarantee that this knowledge would be passed on to distributors further along the line. It also did not matter to the court that some of the literature identified defendant as the source, as this disclaimer did not negate the idea that an unsophisticated distributor or consumer would believe the material was being disseminated by Amway or with its acquiescence.

The court also held that regardless of whether or not there was confusion as to source, Amway was entitled to relief based upon the possibility of dilution of their mark and unfair competition. As to dilution, defendant's publication would create the impression that Amway marks were in the public domain and could be used by anyone. Defendants were unfairly competing by selling the literature for profit, thereby cashing in on Amway's good will and undermining Amway's sales of its own company literature. The court held that Amway was entitled to a permanent injunction to prevent the possibility of defendants causing substantial harm through the publications. Due to the nature of some of Amway's chemical products, the company needed strict control over its product literature. The court also found that Amway needed to control the dissemination of literature concerning its marketing plan:

"... While Amway denies emphatically that it is engaged in unethical or unlawful pyramid selling, it is obvious that its sales program possesses some features of that kind of selling although it may have adequate off-setting safeguards.

In such circumstances the court feels that Amway's apprehensions...are fully justified."

Meta-Tags - Invisible Infringement

Although this is relatively new technology, and the state of the law surrounding meta-tags and trademark infringement or unfair competition is in its infancy, it appears that one who buries competitors' trademarks in a meta-tag string could be held liable under these theories. This has been called "invisible infringement."

The first true case testing the theory that use of a competitor's trademark in meta-tags creates trademark infringement liability was Playboy Enterprise, Inc. v. Calvin Designer Label (1997). In this case, Playboy brought an action against the defendant, a pornographic web site developer,

alleging trademark infringement, counterfeiting, trademark dilution and unfair competition based on defendant's inclusion of Playboy trademarks in their meta-tag lists.

In this part of the case, the federal court granted a preliminary injunction against Calvin, holding that Playboy demonstrated a likelihood of success on the merits of their trademark infringement, unfair competition and dilution claims. Plaintiff Playboy did indeed have success on their claims, as the court granted summary judgment to Playboy in 1999.

This holding was reiterated in the case of Brookfield Communications, Inc. v. West Coast Entertainment Corp., (1999). In this case, the plaintiff sold entertainment software using the name "MovieBuff." Plaintiff discovered that a video rental company run by defendant had registered the domain name "Moviebuff.com," and was using "Moviebuff" as one of its keywords in its meta-tag list. The Ninth Circuit granted plaintiff's request for an injunction stating that there was a likelihood that plaintiff would succeed on the merits of its trademark infringement claim.

Both this court and the court in the Playboy case www.mlmlegal.com reasoned that infringement could be based upon confusion which creates initial customer interest, even if no sale results. The concern of plaintiff alleging this "initial interest confusion" is that potential customers surfing the web might be diverted and/or distracted by a defendant's site, not returning to the plaintiff's site when they are actually searching for the plaintiff's products and not defendant's.

Conclusion: Meta-Tag Etiquette

The internet provides a tremendous vehicle for marketing for MLM companies and MLM distributors. Obviously, the name of the game is to drive prospects to the web site. There is no end to strategies for accomplishing this. However, both MLM companies and distributors should be careful about the surreptitious use of meta-tags that contain competitors' trademarks to drive traffic. Although there may be an initial success, the infringer may also find themselves at the other end of a trademark lawsuit that proves far more costly than the advantage that was gained through the invisible infringement.

Advertising

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On any given day you can catch Jeffrey Babener, editor of www.mlmlegal.com, lecturing on Network Marketing at the University of Texas or the University of Illinois, addressing thousands of distributors in Los Angeles, Bangkok, Tokyo and Russia, or writing a new book on Network

Marketing, an article for Entrepreneur Magazine or a chapter for a University textbook. Over two decades he has served as marketing and legal advisor to some of the world's largest direct selling companies, the likes of Avon, Nikken, Shaklee, Tupperware, Prepaid Legal, Longaberger, Melaleuca, Discovery Toys, Usana, Amazon Herb, NuSkin, Cell Tech, Sunrider.... and he has provided counsel to the most successful telecom network marketing companies...Excel, ACN, World Connect, ITI, Acceris, AOL Select and Network 2000. An active spokesperson for the industry, he has assisted in new legislation and served on the Lawyer's Council, Government Relations Committee and Internet Task Force of the Direct Selling Association (DSA) as well as serving as General Counsel for the Multilevel Marketing International Association. He is an MLM attorney supplier member of the DSA and has served as legal counsel and MLM consultant on MLM law issues for many DSA companies. He is author of multiple books, including, Network Marketing: What You Should Know, Network Marketer's Guide To Success, Tax Guide for MLM/Direct Sellers, Starting and Running the Successful MLM Company, The MLM Corporate Handbook and Window of Opportunity. He is author of countless articles on network marketing, many of which can be found at www.mlmlegal.com where he is the editor. You will see his articles and interviews in such publications as Money, Atlantic Monthly, Success, Entrepreneur, Business Startups, Home Office Computing, Inc., Money Makers Monthly, etc. He has been chairman of numerous industry conference series, including, Starting and Running the Successful MLM Company, The MLM Entrepreneur Series and The MLM Masters series. He has served as the close advisor to scores of MLM Companies and their distributors, comprising millions of distributors and billions of dollars in sales. Mr. Babener is a graduate of the University of Southern California Law School, where he served as editor of the USC Law Review. After an appointment to be an advisor law clerk to a U.S. Federal Judge, he went on to become a member of the California and Oregon State Bar, where he has also served as chairman of the Oregon State Bar Committee on Judicial Administration. He has exclusively practiced in the area of direct selling for over 20 years. A Regulatory Update for MLM, Direct Selling, Network Marketing, Direct Sales, Party Plan Independent Distributors and Companies.