



511 Hot Topics in eCommerce & Technology Law

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Faculty Biographies

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Daniel R. Harper

Daniel R. Harper is vice president, corporate counsel for Océ-USA Holding, Inc. in Chicago. He provides general legal guidance and counsel to the North American operations of Océ N.V. a Dutch company the stock of which trades on the Amsterdam Stock Exchange and on NASDAQ as American Depositary Receipts. His responsibilities at Océ include counseling on commercial transactions, employment matters, internal investigations, litigation, corporate policy and procedure, intellectual property, software licensing, technology, and marketing.

Prior to joining Océ, Mr. Harper was senior counsel at Spiegel, Inc. where he provided legal guidance to the information technology and iMedia groups for the corporate parent as well as the Eddie Bauer, Spiegel Catalog, and Newport News subsidiaries. He also managed the Spiegel Group intellectual property portfolio, negotiated and drafted commercial transactions, managed litigation, and was the chairman of the Spiegel Group corporate privacy committee. Prior to Spiegel, Mr. Harper was in private practice with the law firm of Carey, Filter, White & Boland in Chicago where he divided his time between litigation and transactional work.

Mr. Harper serves as the secretary of the information technology and ecommerce committee and is a member of the board of directors of ACC's Chicago Chapter.

He received a B.A. from Villanova University and is a graduate of DePaul University College of Law.

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Session 511: Hot Topics in eCommerce & Technology Law

Presentation by panelist

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Fandango, Inc.

(former General Counsel, Shopzilla, Inc.)



Session 511: Hot Topics in eCommerce & Technology Law

Four Topics:

- 1. Keyword Advertising**
- 2. Secondary Liability for Copyright Infringement**
- 3. Protection from Liability for Third-Party Content**
- 4. Click Fraud Update**

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Fandango is a privately-held, venture-backed company providing movie showtimes and ticketing, entertainment news and information, entertainment events (sporting, concert, and theater) ticketing, and related products and services. The nation's largest movie ticketing service, Fandango sells tickets to more than 14,000 screens and 1,200 theaters, and entertains and informs moviegoers with reviews, commentary and trailers. Fandango is available online at www.fandango.com, by telephone at 1-800-FANDANGO, and via wireless mobile devices at mobile.fandango.com.

Fandango theater partners include the nation's leading exhibitors: AMC Theatres, Carmike Cinemas, Century Theatres, Cinemark Theatres, Edwards Theatres, Regal Cinemas and United Artists Theatres, as well as many others.

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**Shopzilla, Inc. – Leading Comparison Shopping service
efficiently connecting online buyers and merchants**

**More than 20
million unique
shoppers**

28 million products

**More Than 70,000
merchants**

- Find any product sold online
- Product specifications and availability
- Product ratings and reviews
- Compare prices, including shipping & handling and taxes
- Merchant ratings and reviews
- Deep links to product page on merchant site

Source: ComScore Media Metrix,
May 2006



Shopzilla acquired in June 2005 by The E. W. Scripps Company

The E.W. Scripps Company (NYSE: SSP) is a diverse and growing media enterprise with interests in national cable networks, newspaper publishing, broadcast television stations, electronic commerce, interactive media, and licensing and syndication. Shopzilla's comparison shopping services are widely distributed across Scripps online media properties.



Keyword Advertising

Google AdWords Program



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Keyword Advertising

The legal rules are still evolving via court decisions and search engine policies.

- In April 2004, Google announced new policy that in the US & Canada Google will not restrict bidding on trademarked keywords. Takes the position that the parties should resolve such matters between themselves and Google will not undertake to police trademarks.
- But upon receiving a complaint from the trademark holder, Google will not allow others to use trademark in content of ad itself (header or ad copy).

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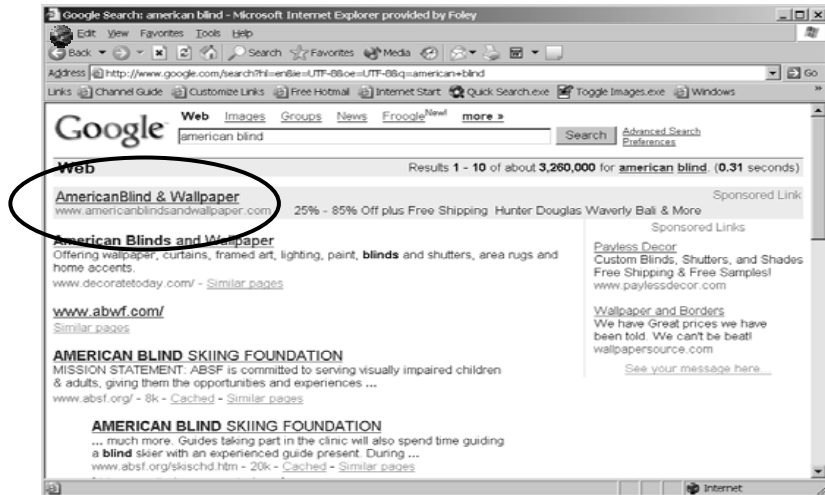
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ACC Association of Corporate Counsel

Keyword Advertising:

American Blind & Wallpaper v. Google

Search: "american blind"



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American Blind & Wallpaper web site

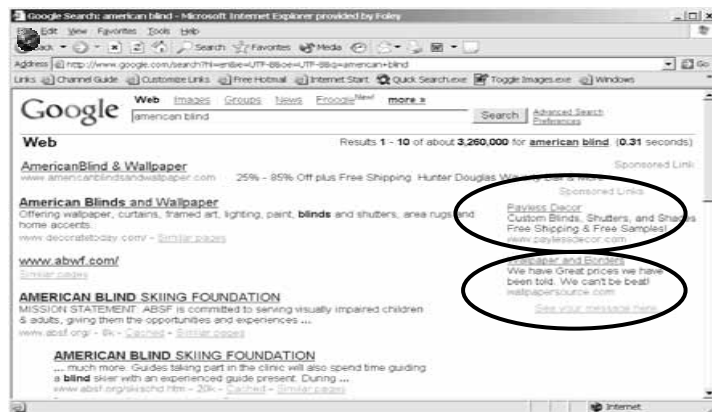


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www.paylessdecor.com



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www.wallpapersource.com

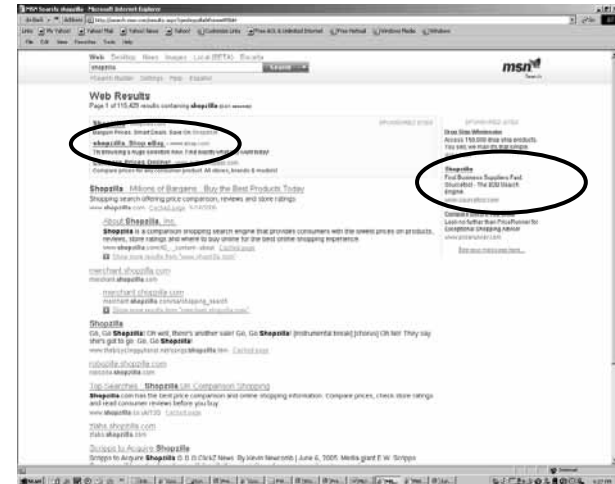


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Keyword Advertising But this Google will not allow...



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Keyword Advertising

The legal rules are still evolving via court decisions and search engine policies.

- Key case is *GEICO v Google* (E.D. Va. Aug 2005), which held that Google's merely allowing competitors to bid on GEICO's trademark as a keyword to serve competitive ads was not illegal, but that if Google knowingly allowed infringing use of GEICO's trademark in those competitor ads that might be a basis for contributory trademark infringement.
- Outside US & Canada, Google will restrict others from bidding on trademarked keywords, due to a series of unfavorable court decisions in EU countries.
- Full Google policy and complaint procedure at: www.google.com/tm_complaint_adwords.html.



Keyword Advertising

The legal rules are still evolving via court decisions and search engine policies.

- As of March 1, 2006, Yahoo started allowing TM holders to block direct competitor advertising on a trademarked keyword (but not all other bidders).
- Yahoo's decision supposedly motivated by desire to attract more big-brand advertisers to Yahoo without fear of customers being diverted by competitors.
- Still allows bidding in keywords by non-competitors.



Keyword Advertising

Search 1: bizrate



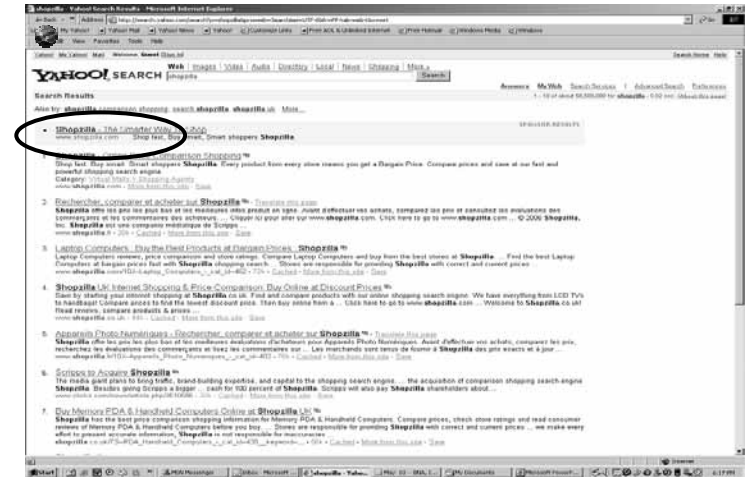
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Keyword Advertising

Search 2: shopzilla



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Keyword Advertising

Search 3: shopzilla comparison shopping



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Keyword Advertising

- Issues can be complicated: What if you run a car rental agency specializing in renting Ferraris, or a car repair shop specializing in Mercedes repairs? How do you effectively advertise online without using the trademarked terms “Ferrari” or “Mercedes” in your ad copy, and why shouldn't you be able to bid on keyword “Ferrari rentals” or “Mercedes repairs”?
- Shouldn't nominative fair use be allowed, as it is in offline world?
- Many trademarks are also generic words or have multiple trademarks holders for different PTO classes. Examples:
 - If a searcher types in “amazon” or even “amazon books”, should Borders be prevented from presenting an ad for books about the Amazon rainforest or travel to the Amazon? (Or for that matter, business books about Amazon.com's amazing success?)
 - If Arrow shirts can block other bidders on the keyword “arrow”, what about retailers of Arrow staplers?

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Keyword Advertising

- The law is currently unsettled and courts are split as to whether mere purchase of keyword advertisements is “use in commerce” sufficient to sustain a trademark infringement claim under the Lanham Act, 15 U.S.C. § 1051 *et seq.*
 - In *Rescuecom Corp. v. Google, Inc.*, Civ. 5:04-CV-1055 (N.D.N.Y. 9/28/06), the court dismissed trademark infringement claims against Google based on selling Rescuecom’s trademarked name as a keyword in its AdWords program, finding that there is no “use in commerce” supporting a trademark infringement claim since keyword not visible to the public.
 - In *Merck & Co., Inc. v. Mediplan Health Consulting, Inc., d/b/a RxNorth.com*, 425 F.Supp.2d 402 (S.D.N.Y. 2006) (motion for reconsideration denied 5/24/06), the court dismissed trademark infringement claims arising out of defendants’ purchase of the keyword “Zocor” to trigger display of “sponsored links” to websites at which they sell both branded and generic versions of Merck’s popular anti-cholesterol medication, finding that such purchases do not constitute the requisite “use in commerce”.
 - See also *1-800 Contacts Inc. v. WhenU.com Inc.*, 414 F.3d 400 (2nd Cir. 2005), holding that use of a trademark owner’s internet address in an internal directory to trigger pop-up advertising was not a trademark “use” of the mark.



Keyword Advertising

- But a number of other cases, including
 - GEICO v. Google, Inc.*, 330 F. Supp.2d 700 (E.D. Va. 2004) (Lanham Act claim subsequently dismissed on 12/15/04 following bench trial, based upon finding no likelihood of confusion).
 - Google Inc. v. American Blind and Wallpaper Factory Inc.*, 2005 WL 832398 (N.D. Cal. 3/30/05),
 - Edina Realty, Inc. v. TheMLSonline.com*, 2006 WL 737064 (D. Minn. 3/20/06) (motion for reconsideration denied 2006 WL 1314303, 5/11/06), and
 - 800-JR Cigar, Inc. v. GoTo.com, Inc.*, 2006 WL 1971659 (D.N.J. 7/17/06),
 go the other way, holding that the purchase of keyword advertisements triggered by a search containing another’s trademark is a “use in commerce” sufficient to support trademark infringement claims.



Secondary Liability for Copyright Infringement

- Key decision: *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005). Songwriters, record producers and motion picture producers alleged that two popular file-"sharing" networks, Grokster and Streamcast (dba Morpheus), should be held liable for facilitating the commission of massive amounts of copyright infringement by the end-users who employed their peer-to-peer (P2P) software to copy and redistribute films and sound recordings to other users. The Court unanimously reversed the Ninth Circuit's grant of summary judgment for defendants, holding that they could be held liable for "actively inducing" the end-users' acts of infringement.
- Focus on "intent" is potentially troublesome new development if it precludes summary judgment and it may be hard to predict what indicia of intent may exist in a company's history/emails.

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Secondary Liability for Copyright Infringement

- Secondary copyright infringement is applied in instances in which the defendant did not personally engage in the violating activity but still bears some responsibility for the infringement.
- There are two categories of secondary copyright infringement, developed by the courts as a matter of federal common law:
 - contributory infringement
 - vicarious infringement

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Secondary Liability for Copyright Infringement

- A defendant is liable for contributory copyright infringement if the defendant, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.
 - Intentionally helping consumers locate unauthorized copies of software or links to illegal download sites would be an example of contributory infringement.
- A defendant is liable for vicarious copyright infringement where the defendant has the right and ability to control or police the infringer's acts and receives a direct financial benefit from the infringement.
 - Classic example is flea-market operator that allows blatant and rampant sale of bootleg music tapes by vendors after being notified of the illegal activity by the copyright holder. See, e.g., *Fonovisa v. Cherry Auction*, 76 F.3d 259 (9th Cir. 1996).

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Secondary Liability for Copyright Infringement

- Key decision: *Perfect 10 v. Google, Inc.* (N.D. Ca. 2/17/06), in which the operator of an adult entertainment website alleged Google was both directly and secondarily liable for copyright infringement and obtained a preliminary injunction to prevent Google's search engine from displaying thumbnail copies of Perfect 10's copyrighted images.
- But court rejected injunction to prevent Google from linking to and/or framing third-party websites that display infringing full-size images, finding that Google would not be contributorily or vicariously liable for such third-party infringement.
 - Court was persuaded that thumbnail images themselves had economic value to plaintiff since it was selling them to a third party for use on cell phones.
 - Rejected fair-use defense for that reason, distinguishing *Kelly v. Arriba Soft Corp.* (9th Cir. 2003), where the 9th Circuit held that Arriba Soft's display of copyrighted thumbnail images of professional photographer in its search engine amounted to fair use, since no one bought the thumbnail images from the photographer.

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Secondary Liability for Copyright Infringement

Section 512(c) of the Digital Millennium Copyright Act (DMCA) protects an online service providers (OSP) from liability for storage at the direction of a user of material that resides on a system or network controlled or operated by or for the OSP if it quickly removes or disables access to material identified in a copyright holder's complaint. Commonly referred to as "take down" procedure.

- In order to qualify for DMCA safe harbor protection, an OSP must:
 - have no knowledge of the infringing activity
 - receive no financial benefit directly from the infringing activity (if the OSP has the right and ability to control such activity)
 - provide proper notification of its policies to its users
 - designate an agent to deal with copyright complaints, notify the Copyright Office of the agent's name and address, and make that information publicly available on its web site.



Secondary Liability for Copyright Infringement

- OSPs entitled to DMCA safe harbor protection have been interpreted very broadly to include Internet service providers (ISPs), search engines, bulletin board system operators, auction web sites, etc. Essentially almost anyone who receives and posts third party content online.
- *Corbis Corp. v. Amazon.com Inc.* (W.D. Wash. 2004), held that the DMCA's §512 safe harbor for OSPs who adopt reasonable anti-infringement measures protected Amazon.com from a copyright infringement suit arising from the unauthorized display of approximately 200 digital images on its zShops third-party vendor Web sites.
 - Court held that Corbis had failed to prove that Amazon.com had actual or apparent knowledge of infringement occurring on its zShops sites or that Amazon.com had a right or ability to control infringing activity on these sites.



Secondary Liability for Trademark Infringement

- Note that DMCA safe harbor protection only applies to copyright infringement claims. There is no equivalent legislation pertaining to trademark infringement, and it remains an open question as to whether or not an OSP could, or should, be held liable for acts of trademark infringement by its users.
- Contributory trademark liability may exist when a manufacturer or distributor intentionally induces another party to infringe a valid trademark, or when it continues to supply products to a party that it knows, or has reason to know, is using the products to engage in trademark infringement. *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982).
- In *Gucci America, Inc. v. Hall & Associates*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001), the District Court refused to grant an ISP's motion to dismiss in a case involving instances of trademark infringement occurring on a subscriber's website hosted by the ISP, where the ISP allegedly failed to take action after receiving two e-mail complaints from the plaintiff regarding the infringement.

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Secondary Liability for Trademark Infringement

- Although the case law is sparse, an OSP might have contributory liability for a third party's trademark infringement even where it would have DMCA safe harbor protection against a similar secondary liability copyright claim, if it knew or should have known about the trademark infringement and actively facilitated it in some material way.
- This brings us back to *GEICO v Google* (E.D. Va. Aug 2005), suggesting that if Google knowingly allowed infringing use of GEICO's trademark in competitor ads that might be a basis for contributory trademark infringement.

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Protection from Liability for Third-Party Content

- The Communications Decency Act, 47 U.S.C. §230, is also an important protection for online publishers of third-party content.
- It broadly provides that **“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by any other information content provider.”**
 - An "interactive computer service" is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server...”
 - An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."



Protection from Liability for Third-Party Content

- In general, courts have interpreted "interactive computer service" very broadly, and have interpreted "information content provider" very narrowly, thereby giving an expansive scope to CDA §230.
- The immunity under CDA §230 has been held to provide legal protection against a wide variety of contract and tort claims, but there are express exceptions against granting immunity against (i) Federal criminal statutes, (ii) intellectual property claims, and (iii) electronic communications privacy laws. *See* CDA §230(e)(1), (2) & (4).



Protection from Liability for Third-Party Content

- In a leading case, *Carafano v. Metroplash.com Inc.*, 339 F.3d 1119 (9th Cir. 2003), the 9th Circuit held that the MatchMaker.com online dating service's formulation of open-ended "profile" questions in a questionnaire and subsequent posting of a third party's false answers to create a phony profile for the actress plaintiff did not disqualify the service from the immunity under CDA §230.
- See also *Gentry v. eBay Inc.*, 121 Cal. Rptr. 2d 703 (Ct. App. 2002), holding that CDA §230 protected eBay from liability for allegedly defamatory or misleading information in its "user feedback" system for rating auction sellers.
 - *Accord Sturm v. eBay, Inc.*, No. 1-06-CV-057926 (Cal. Superior Ct. July 27, 2006).

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Protection from Liability for Third-Party Content

- *Barnes v. Yahoo! Inc.* (D. Or., 11/8/05) held that CDA § 230 immunized defendant Yahoo from claims arising out of its alleged failure to timely honor an employee's promises to promptly remove from Yahoo's web site objectionable content about plaintiff maliciously posted by a disgruntled ex-boyfriend. The content consisted of dating "profiles" containing indecent photos of plaintiff and her contact information. *Accord Zeran v. America Online Inc.*, 129 F.3d 327(4th Cir. 1997).
- But *Anthony v. Yahoo! Inc.* (N.D. Cal. 3/17/06), held that the federal immunity from suit enjoyed by online publishers of third-party content under CDA §230 does not protect Yahoo from claims that it fraudulently created phony user profiles in its online dating service and misrepresented expired users as still available for dates.
 - "Because Anthony posits that Yahoo!'s manner of presenting the profiles--not the underlying profiles themselves--constitute fraud, the CDA does not apply."

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Protection from Liability for Third-Party Content

- In a similar vein, *800-JR Cigar, Inc. v. GoTo.com, Inc.* (D.N.J. 7/17/06) stated that the search engine GoTo.com did not qualify for CDA §230 immunity against a claim of deceptive telemarketing and consumer fraud in selling the plaintiff's trademarks as keywords (but still sustained summary judgment for the defendant on those causes of action under Federal and New Jersey state statutes due to the plaintiff's lack of standing).
 - "It is not the purpose of the [CDA] to shield entities from claims of fraud and abuse rising from their own pay-for-priority advertising business, rather than from the actions of third parties."



Protection from Liability for Third-Party Content

- *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), broadly held that the exclusion of "publisher" liability under CDA §230 "necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message." *Accord DiMeo v. Max* (E.D. Pa. 5/26/06); *Landry-Belle v. Various Inc.* (W.D. La. 12/27/05); *Donato v. Moldow* (N.J. Super. Ct., App. Div. 1/31/05); *Ramey v. Darkside Productions, Inc.* (D. D.C. 5/17/04).



Protection from Liability for Third-Party Content

- *But Hy Cite Corp. v. Badbusinessbureau.com* (D. Ariz. 12/27/05), in the context of a motion to dismiss, held that the operator of a consumer “gripe site” called the “*Rip-off Reports*” might not be immunized by CDA §230 where it added its own editorial comments, titles, and other original content to defamatory material about a merchant posted by third parties.
 - The plaintiff in that case alleged that the activities of the defendant to embellish the consumer complaints exceeded the modest involvement or editorial functions approved by other courts, and were part of a scheme to extort the businesses involved.
 - *Accord MCW Inc. v. badbusinessbureau.com*, 2004 WL 833595 (N.D. Tex. 4/19/04).



Protection from Liability for Third-Party Content

- Starting with the seminal case of *Zeran v. America Online Inc.*, 129 F.3d 327(4th Cir. 1997), courts have generally held the “publisher” immunity under CDA §230 as necessarily covering immunity as a “distributor” of defamatory content, but there are a few cases suggesting that scienter-based “distributor” liability may still apply if the defendant “knew or had reason to know” of the defamatory nature of the content.
 - *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379 (1st Dist. 2004) (opinion superseded by California Supreme Court review; oral arguments scheduled for September 2006).
 - *Grace v. eBay, Inc.*, 16 Cal. Rptr. 3d 192 (2nd Dist. Ct. App. 2004) (opinion vacated and de-published).



Protection from Liability for Third-Party Content

- *OptInRealBig.com, LLC v. IronPort Systems, Inc.* (N.D. Calif. 6/25/04) held that a company forwarding consumer spam complaints to the ISP from which the alleged spam originated as part of a “SpamCop” anti-spam service was immunized by CDA §230, in a lawsuit by bulk commercial e-mailer for trade libel, interference with contractual relations, etc.
 - Case rejected any distinction between immunity for a “distributor” as opposed to a “publisher.”



Protection from Liability for Third-Party Content

- *Associated Banc-Corp. v. Earthlink Inc.* (W.D. Wis. 9/14/05) held that an ISP enjoys CDA §230 federal immunity from state-law business tort claims arising from the operation of anti-phishing software that erroneously displayed a fraud alert when subscribers attempted to access a legitimate Web site.
 - An Earthlink employee provided an affidavit that a third-party vendor had identified the plaintiff's Web site as a potential phisher site, and that the list of phisher sites supplied by the vendor "was directly input into Defendant's database without any alteration of content on Defendant's part."
 - Earthlink's free ScamBlocker tool informed the user: "The Web address you requested is on our list of potentially Dangerous and Fraudulent Web sites. Those who visit the site may be at high risk for identity theft or other financial losses."



Protection from Liability for Third-Party Content

- Even the vendor who supplies the erroneous data may be protected from liability, if it received the data online from a third party.
- *Prickett v. InfoUSA Inc., SBC Internet Services, et al.* (E.D. Tex. 3/29/06) held that InfoUSA, a compiler of proprietary business databases provided to SBC Internet and others, was protected under CDA §230 from liability for listings falsely categorizing plaintiffs as adult entertainers based upon phony online data submission by third party, even though it falsely assured users that it verified the information
 - "We deliver the utmost quality information, and this is one way we keep track of all the business changes that are happening. We also call every business to verify the information, so you can be assured of the most current and accurate listings."



What is Click Fraud?

- "Invalid clicks" generated manually or by automated software.
 - CPC affiliates and traffic partners.
 - Other reasons - revenge (disgruntled employee), etc.
- Difficult to define precisely – a click may be deemed "invalid" for a variety of reasons.
- Some click-fraud auditors and others have claimed that click-fraud runs as high as 15% to 30% of CPC traffic, but these claims are highly suspect and based on questionable methodologies.



Response to Click Fraud

Click Fraud Detection

- **Detection and filtering techniques:** Each click on an AdWords ad is examined by our system. Google looks at numerous data points for each click, including the IP address, the time of the click, any duplicate clicks, and various other click patterns. Our system then analyzes these factors to try to isolate and filter out potentially invalid clicks.
- **Advanced monitoring techniques:** Google uses a number of unique and innovative techniques for managing invalid click activity. We can't disclose details about the software, except to say that we're constantly working to expand and improve our technology.
- **The Google Team:** In addition to our automated click protection techniques, we have a team that uses specialized tools and techniques to examine individual instances of invalid clicks.

Source: Google AdWords Help Center

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From: AdWords Support
Sent: Friday, XXXX XX, 2004 X:XX PM
Subject: Google AdWords Credit

Hello,

We want to let you know about a credit for \$XXX.XX USD that we are applying to your account XXXX. You should see this credit in your billing summary, included under the line item labeled 'Adjustment,' within the next ten business days.

Google strictly prohibits any method used to artificially and/or fraudulently generate clicks or page impressions, and closely monitors clicks on Google AdWords ads to prevent abuse. We believe that your AdWords account may have been affected by invalid clicks, and are crediting your account for \$XXX.XX USD.

For more information, please see our Click Quality Monitoring FAQ at: <https://adwords.google.com/select/faq?clickquality.html>.

Should you have any further questions or concerns, please email us at adwords-support@google.com. One of our AdWords Specialists would be happy to assist you. Thank you for your understanding.

Sincerely,
The Google AdWords Team

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Response to Click Fraud

Click Fraud Enforcement

- *Auctions Expert Int'l (Cal. Superior Ct. 2005)*
Google wins \$75,000 from former AdSense publisher for click fraud
- *U.S. v. Tam:* On March 28, 2006, a federal grand jury in the Northern District of California indicted a man on charges of conspiracy, mail fraud, and wire fraud for allegedly running a "click fraud" scheme against the online business FreeRide from 2000 to 2002.

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Response to Click Fraud

Google Fires Back:

<http://www.google.com/adwords/ReportonThird-PartyClickFraudAuditing.pdf>

*How Fictitious Clicks Occur in
Third-Party Click Fraud Audit Reports*

*Click Quality Team
Google, Inc.
August 8, 2006*

Summary

Google has detected pervasive reproducible problems in the way third-party click fraud auditing firms gather and report their data. These problems cause their reports to contain fictitious clicks, clicks which were never made on Google AdWords ads. Because of these fictitious clicks, third-party click fraud auditing firms significantly overestimate the number of clicks occurring on an advertiser's account, and even more significantly overestimate the amount of "click fraud" detected. This report presents:

- Background on third-party click fraud estimates and methodology problems
- Findings from an internal Google review of third-party click fraud auditing reports
- Recommendations for addressing this issue
- Demonstrations of how fictitious clicks occur in third-party systems
- Detailed case studies for three major third-party auditing services

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Response to Click Fraud

Google Fires Back:

<http://www.google.com/adwords/ReportonThird-PartyClickFraudAuditing.pdf>

Over the last year, these [high click-fraud] estimates have received widespread media coverage. A different kind of report (from Outsell, Inc.) has also been widely cited for estimating the scope of the problem. But in fact that report did not measure click fraud. It was an opinion survey of advertisers asking them to guess at the extent of the problem. Thus the report's conclusions about the percentage of fraud and financial loss for the industry are essentially a poll of the perception of the size of the problem (with the backdrop of the previous coverage of high estimates) rather than actual size of the problem. This is analogous to estimating crime rates in a country by asking some residents how much crime they think there is, and averaging those guesses to state that number is the actual rate.

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Response to Click Fraud

Google Fires Back:

<http://www.google.com/adwords/ReportonThird-PartyClickFraudAuditing.pdf>

Next steps

What Google will do:

Work with third-party click fraud auditing firms to address their engineering and accounting issues

Continue to provide feedback to advertisers when flawed reports are submitted in order to help them avoid making harmful advertising decisions based on faulty data

Work with these firms and such industry groups as the IAB Click Measurement Working Group to establish standards in this area, especially with respect to the format of reports submitted to Google

Continue our heavy investment in invalid click detection technology, and continue to keep the industry informed about issues related to click fraud

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Click Fraud Litigation

- *Lane's Gifts & Collectibles LLC et al. v. Yahoo! Inc. et al.* (Ark. Cir. Ct 2005)
 - Google settles nationwide class action for \$90 million (including \$30 million in attorneys' fees)
- *CLRB Hanson Industries LLC v. Google, Inc.*, (Cal. Superior Ct. 2005)
- *Click Defense Inc. v. Google, Inc.*, (N.D. Cal. 2005)

31. Nevertheless, Google knows, and at all relevant times hereto has known, that click fraud is rampant in its AdWords program and that the advertisements it sold and sells to Plaintiff and the class are worth significantly less than the amount which plaintiff and the Class have bid for key words and have consequently paid to Google for clicks.

32. Google has failed to take any significant measures to track or prevent click fraud, and fails to adequately warn its existing and potential customers about the existence of click fraud.

33. When customers become the victims of click fraud, Google fails to (a) adequately advise them that they have been victimized, and (b) refund them the excess charges that they have incurred as a result of the fraudulent click activity.

34. Google has an inherent conflict of interest in preventing click fraud since it derives the same amount of income from each fraudulent click as it does from each legitimate click.

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Click Fraud Litigation

Google Doing 'Reasonable' Job Pruning Out Invalid Links, Independent Expert Tells Court

Google Inc. has the problem of click fraud detection "under control," according to an independent expert report filed July 21 in a click fraud class action lawsuit in Arkansas state court (Lane's Gifts and Collectibles LLC v. Yahoo! Inc., Ark. Cir. Ct., Case No. CV-2005-52-1, report filed 7/21/06).

Alexander Tuzhilin, a computer scientist at New York University, found that Google's efforts to combat click fraud are "reasonable," and that software filters used by the search engine detect the "vast majority" of invalid clicks. Tuzhilin's 47-page report was largely affirming of the suite of technological countermeasures Google uses to interdict invalid clicks and protect advertisers from overcharges.

Tuzhilin found that although Google's filters have a "surprisingly simple" structure to them, they perform "reasonably well" when layered one atop the other such that each click passes through multiple filters. He attributed this effectiveness to the fact that "the majority of the invalid clicks usually come from relatively simple sources and less experienced perpetrators."

Google's engineers are continually tweaking old filters and rolling out new ones in a constant quest for incremental improvement. In one instance, Tuzhilin recounted, the engineers deployed a new filter even though their data suggested that it would only improve capture rate by 2 to 3 percent.

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Click Fraud Litigation

Checkmate Strategic Group Inc. v. Yahoo! Inc. (C.D. Cal., No. 05-CV-04588, 6/28/06)

- ☛ Yahoo! Inc. has agreed to a one-time extended period during which advertisers may submit "click fraud" claims for review, as part of a proposed settlement of a 2005 class action complaint that charged the Internet search firm with improperly charging or overcharging advertisers for fraudulent or otherwise invalid clicks over several years. Yahoo! maintained that all monies received from the plaintiff class were properly and legally charged, and denied "each of the claims and contentions alleged" in the complaint. The company also agreed to pay \$4.95 million in attorneys' fees to plaintiffs' lawyers.
- ☛ Under terms of the proposed settlement, for which a final approval hearing is scheduled in U.S. District Court in Los Angeles on Nov. 20, Yahoo! will offer advertisers a one-time extended period during which advertisers may submit click fraud claims for clicks dating back through January 2004. This extended claims period going back two-and-a-half years overrides the normal 60-day period contained in most advertisers' contracts.
- ☛ The company also agreed to take several other steps aimed at addressing advertisers' concerns about click fraud, including appointment of a traffic quality advocate, and agreeing to annually host a panel of individual advertisers at Yahoo's Clickthrough Protection (CTP) system headquarters, to review the system and provide feedback on how to enhance the company's approach to fighting click fraud.
- ☛ Yahoo! will also work with "a reputable third party" (the Internet Advertising Bureau, or IAB) to boost industry-wide efforts to combat click fraud, including the development of industry definitions of click fraud, and "comprehensive lists of identified bots." Additionally, the company will commit technical and human resources to provide advertisers with more detailed information about traffic quality issues and solutions.

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