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USE OF GOLF COURSE NAMES AS KEYWORDS

Golf courses are increasingly experiencing issues related to third-parties using their names or their trademarks as keywords to trigger competing advertisements for tee time reservations. The source of these problems begins with search engine providers, such as Google or Bing, auctioning the right to attach certain words to companies' sponsored advertisements. Companies commonly bid for, win, and use words that are trademarks as keyword search terms to trigger certain sponsored advertisements. Of course, keyword advertising using another's name or trademark seems unfair, but does not always give rise to a claim for trademark infringement unless there is a likelihood of consumer confusion as to the source of the advertisement or product offered in the advertisement. To determine whether a golf course can complain about use of its name as a keyword to trigger a sponsored advertisement, it is necessary to examine the degrees to which a third-party may use another's trademark.

Generally, courts have concluded that consumers can distinguish between a sponsored advertisement and organic search results. Thus, the risk of customer confusion and trademark infringement from the mere purchase of keywords that are also trademarks is rela-

tively low. On the other hand, use of another's trademark in the text of advertising content is unquestionably misleading. The following are examples of common keyword scenarios and an analysis of applicable trademark issues.

DECEPTIVE USES OF GOLF COURSE NAMES

First, deceptive use of another's trademark includes situations which are likely to cause consumer confusion. Therefore, deceptive use will almost always be actionable. As a "real world" example, imagine a Ford dealer builds his lot immediately adjacent to a Chevrolet dealership and instead of putting up a "Ford" sign, he erects a "Chevrolet" sign. The fake-Chevrolet sign is likely to cause consumer confusion as to which company is actually selling the cars in that lot.

In the tee time reservation setting, deceptive use could look like this example concerning a hypothetical Oceanside Golf Course¹. For instance, a search performed for "Oceanside Golf Course" might result in a sponsored ad link to www.teetimesonline.com/OceanSideGC/ and the sponsored advertisement might read:

However, upon clicking on the link, the Tee Times Online website would not offer tee time reservations for Oceanside Golf Course, but instead offer reservations for numerous competitors' courses. There is no doubt that a consumer who searches for "Oceanside Golf Course" may see Tee Times Online's offer for Oceanside Golf Course reservations and click on the link to Tee Times Online. Therefore, Tee Times Online's use of the Oceanside Golf Course name is actionable because it creates a likelihood of consumer confusion stemming from its inappropriate use of a competitor's trademark in the text of its advertisement. As discussed, previously, there is no requirement that a Golf Course's name be registered to complain about this type of unlawful behavior.

USES OF GOLF COURSE NAMES IN A MISLEADING OR AMBIGUOUS MANNER

Second, it is possible that the use of a trademark as a keyword may trigger an advertisement that is so unclear or ambiguous that it is also likely to cause consumer confusion. In the "real world," this may occur if a Ford dealer built his lot immediately adjacent to a Chevrolet dealership, and refuses to raise a "Ford" sign to indicate to sellers who wander on the lot

Golf Course Tee Times Book Online at Tee Times Online
[Ad] www.teetimesonline.com/OceanSideGC/ (555) 555-5555
Book Tee Times Online and Save @ Oceanside Golf Course.

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that the lot is selling Fords and not Chevrolets. Imagine further that the hypothetical competitor automotive dealer constructs his lot so that it shares driveways with the Chevrolet dealer's pavement and he chooses to design the interior and exterior of his building in exactly the same manner as the Chevrolet dealer. Is this actionable? It depends on the likelihood of a consumer being confused as to the source of the cars or services provided on the lot.

In keyword advertising, use of another's trademark in an ambiguous manner occurs when a keyword search returns a sponsored advertisement that has content with no source indication. Whether ambiguous use is actionable depends on the content of the advertisement or subsequent webpage. Do the webpages look the same? Would an average consumer be able to tell the difference? In the keyword advertising context, the use will be actionable if the advertisement or website is designed to create a likelihood of consumer confusion as to the source of the ad or the source of the offered products or services.

For instance, if one searched for "Oceanside Golf Course tee times" and the following paid-advertisement link to "www.coastalgolfguide.com" was displayed:

Looking for Golf Courses on the Coast?

[Ad] [www.coastalgolfguide.com/Ocean SideGC/](http://www.coastalgolfguide.com/OceanSideGC/) (555) 555-5555

Book Tee Times Online and Save.

Once the user clicks the link to Coastalgolfguide.com, he or she is provided with several different links to make reservations at other local golf courses, but not Oceanside Golf Course. Again, whether such misleading use of a trademark term as a keyword is actionable and likely to lead to consumer confusion depends on a variety of fact-intensive considerations, including:

1

The structure of the website;

2

The labeling and appearance of the advertisement; and

3

The surrounding context of the results page.

In this hypothetical, it seems likely that consumers searching for Oceanside Golf Course have been diverted and that this was done in an intentional manner to trade-off of the popularity and recognition of this golf course's name.

USE OF GOLF COURSE NAME IN A NON-CONFUSING MANNER

Finally, use of another's trademark in keyword advertising is not likely actionable if it poses no risk of consumer confusion as to the source of the advertisement, product, or service. This category is akin to product placement. It is not unlawful for one brand of snacks to be placed next to a popular brand of the same type of snacks in a grocery store.

In the keyword advertising context, "product placement"-like advertising occurs when use of a competitor's trademark as a keyword triggers an advertisement that is clearly unrelated and not likely to cause customer confusion. For example, if one searches for "Oceanside" and the following sponsored advertisement was displayed:

Tri-County Municipal Golf Course Tee Times

[Ad] www.coastalgolfguide.com

(555) 555-5555

Book Tee Times Online and Save.

Google's AdWord policy establishes guidelines distinguishing the use of trademarks as keywords from the use of trademarks in advertisement text. For example, Google will not investigate complaints regarding the use of trademarks as keywords, although

a complaint regarding the use of a trademark in ad text will be reviewed. This is likely a result of Google understanding that the use of a trademark as a keyword creates a low risk of consumer confusion, because consumers can typically differentiate a paid ad from an organic result. Thus, risk of infringement from such use is very low. Conversely, use of another's trademark in ad text creates a significantly higher likelihood of misleading a consumer to believe that the mark holder sponsors the ad, and thus, the risk of infringement is higher. Thus, Google and the majority of other search engines strongly caution or explicitly prohibit against using another's trademark in ad text in a manner that creates a likelihood of confusion.

CONCLUSION

So, what should a golf course do in the event that a competitor is using its name (i.e., its trademark) as a keyword? Depending on which of the above categories the competitor's use fits, there are a number of options.

First, if the use falls into the category of product placement, it is probably not legally actionable—the mark holder has no recourse but to monitor the third-party's use.

On the other hand, if a party's use is arguably misleading or unclear in its source, it would

be wise to consider sending a demand letter to request that the party ceases use of one's name or trademark as a keyword or creates an advertisement that is not misleading. In these cases, it is advisable to consult an attorney to determine the proper demand and course of action if there are further communications or no action by the infringer. Lastly, it may be appropriate for a brand-owner to file a lawsuit if the competitor refused to comply with demands or is using a trademark in such a manner as to substantially and irreparably harm a golf course's goodwill or its reputation.

Should you need any assistance in registering for a trademark, monitoring a third party's use of your trademark or assistance, creating a demand letter, or any other issue please visit www.teetimecoalition.org/concerns or call 800-933-4262, Ext 273. (include some info here for what they can do..hopefully we can have brand-shield as an option for them rather than saying the markholder has no recourse but to monitor).

REFERENCES

1. An illustration of deceptive use can be found in the following YouTube video: <https://www.youtube.com/watch?v=m0emNXeMsNM>. This video is listed for educational purposes only as GolfNow is no longer purchasing keywords of the golf courses listed in this video. Golf courses should be aware that Online Tee Time Agents (OTTA) can still show up in the organic results (usually in the 4th to 8th return position) based on the golf course's listing in the OTTA's course directory. This relatively high position within the organic search results may still cause consumers to believe reservations can be made through the OTTA, even when the golf course does not offer inventory to the OTTA.