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BLOGS

Trademarks

Keyword Advertising Claims Against Google Resurrected

Last month, the United States Court of Appeals for the Fourth Circuit issued a highly anticipated ruling on the legality of the use of others' trademarks in Google's keyword ad/sponsored links program, AdWords. The case is *Rosetta Stone Ltd. v. Google, Inc.*, 2012 U.S. App. LEXIS 7082 (4th Cir. Apr. 9, 2012). The appellate court reversed most of a 2010 ruling by a federal district court in Virginia, which had granted summary judgment in Google's favor on all claims. The lawsuit claimed that the search giant committed direct and contributory trademark infringement and trademark dilution, and was unjustly enriched, by allowing purveyors of counterfeit software to purchase Rosetta Stone's trademarks as keyword search terms.

The decision implicitly acknowledges that keyword advertising programs are being used by some advertisers for deceptive purposes, including trademark infringement and counterfeiting. This is helpful to franchisors, who are both trademark owners and advertisers. The Fourth Circuit joins other courts that are not prepared to give Google and other search engine companies a free pass when it comes to trademark infringement and dilution claims. Additionally, damaging internal Google studies concerning trademark confusion that Rosetta Stone unearthed during discovery could be useful fodder for future plaintiffs.

Franchisors and franchisees alike should review their keyword advertising policies to be sure that they do not utilize competitors' trademarks as keywords in a manner that steps over the line from fair use to infringement. Besides being a sound business practice, legally defensible advertising will avoid an unclean hands defense should a competitor or anyone else cross the line in its use of another's trademark.