UPMC-Highmark war has new battlefield _ Google

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UPMC has purchased Google AdWords on variations of the trademarked word "Highmark," meaning that if you type "Highmark" into Google search, the top results might be paid ads for UPMC companies.

Courts are split on whether, and under what circumstances, the practice ought to be legal, while Google's advertising team itself discourages the practice. But in the open range of Internet advertising, discouraging words are seldom heard, or heeded.

"It's an emerging area of the law that courts are trying to get a handle around," said New Jersey intellectual property attorney Lionel Frank. "I think it comes down to whether or not the courts believe there is going to be consumer confusion."

One of the Google ads that appears when consumers search for "Highmark" is for UPMC Health Plan. Another ad directs them to UPMC's new website explaining its side of the contract dispute, www.KeepYourDoc.com, which tells visitors to switch their insurance coverage to UPMC Health Plan, Aetna, Cigna, HealthAmerica or UnitedHealthcare if they want to keep their UPMC physicians after June 30, 2012.

That's the expiration date of the current 10-year Highmark-UPMC reimbursement contract, which sets the rates that Highmark pays UPMC for service and gives Highmark's millions of local customers unfettered access to the vast UPMC hospital and physician network.

Highmark says the contract has a full one-year run-out period, meaning there will be no changes in coverage or access until at least June 2013. UPMC disputes that and says the two Pittsburgh health care giants will begin their separation next summer.

In a search for "UPMC" in Google, no Highmark-related AdWords appeared.

"I don't believe it's ethical," said Shawn J. Roberts, a small business law attorney who researched this issue last year for a client. "If somebody is searching (Highmark) and they come across the first ad, not everybody is going to realize that they've been taken where they didn't intend to go."

Courts, though, recognize a growing sophistication among Internet users, and that will ultimately be reflected in rulings, Mr. Frank said. While people using Google five years ago might not have realized that some of their search results were paid ads, certainly more are aware of it now and are able to differentiate between the paid content and the regular search results.

Google Ads generally appear in prominent position on the search results page —

above the "organic," popularity-driven search results and in a column to the right of those same search results. Google AdWords work like this: A business buys, or "bids" on, the right to display advertising based on certain keyword search terms.

The company pays for the ads whenever someone takes to time to click though to the destination Web page.

It's called "pay-per-click" advertising, and each click will usually cost a few pennies or a few bucks, depending on the bid. The ads are usually positioned based on which company is the highest bidder on a particular keyword or phrase. Many large businesses will set up keyword pay-per-click accounts on hundreds, or even thousands, of different words and phrases.

The name Highmark is a registered trademark, and Google AdWords and its third-party sales vendors "recognize the importance of trademarks" and "prohibit intellectual property infringement by advertisers."

Which means that UPMC could be asked to stop creating ads and search results based on Highmark's trademarked name, if Highmark chooses to file a complaint and felt its trademark was somehow being "infringed" upon.

"You can draw your own conclusions about UPMC's attempt to buy awareness," said Highmark spokesman Aaron Billger. "Clearly, this is another example of UPMC's efforts to mislead and confuse the public."

UPMC spokesman Paul Wood noted that "this is a common marketing practice," conducted by everyone from hospital systems to automobile manufacturers.

UPMC ads also appear during a search for the term "West Penn Allegheny." West Penn Allegheny Health System is in the process of being acquired by Highmark.

Buying ads tied to a competitor's trademarked name can expose the bidder to a lawsuit. In U.S. district court in California, law firm Binder & Binder was this year awarded damages after a judge ruled that a competing law firm, the Disability Group Inc., should not have purchased the name Binder & Binder on Google AdWords.

The court awarded Binder & Binder $292,000 for damages, profit losses and willful trademark infringement.

But this new area of law is far from settled. Two months after the Binder ruling, the 9th U.S. Circuit Court of Appeals in San Francisco ruled that buying ads based on a competitor's name doesn't always violate trademark law.

In Network Automation v. Advanced Systems Concepts, Advanced Systems had a registered trademarked on a service called ActiveBatch; competitor Network Automation used the word "ActiveBatch" in its AdWords campaign to round up clicks and viewer eyeballs.

The court, in that case, ruled that it's OK to use a competitor's name as an AdWord as long as the ad doesn't mention the competitor and the advertiser doesn't try to harm the competitor's reputation or product.

Data-mining websites such as KeywordSpy.com allow Internet users to see which companies or websites are buying the rights to which keywords. For example, UPMC's KeepYourDoc.com site not only bid on the Highmark keyword but also "United Health Care," ''blue cross highmark" and "highmark blue shield," among hundreds of others.

Highmark, on the other hand, is paying for keyword access to "blue shield, "pa blue," ''high mark," ''pennsylvania blue" and other similar terms, according to KeywordSpy.com.

UPMC Health Plan had staked out keywords such as "Pennsylvania highmark," ''medicare billing codes" and "PA group health insurance," as of last week.

UPMC — the hospital system, not the health plan — has set up AdWord accounts on terms such as "glioma brain tumor" and "trigeminal neuralgia surgery," among many others.

KeywordSpy monitors Google's AdWord's accounts and tracks the bidders for particular keywords, in addition to gathering keyword information from ISP's log files and other publicly available sources. The company does not have access to private advertising spending data.

Other search engines — notably Bing and Yahoo — also offer similar keyword ad programs, but Google is the largest search engine by far, generating 65 percent of U.S. Web searches, according to comScore Networks.

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