

Publications

Companies Should be Aware of, Seek to Stop Traffic Diversion by Competitors

Related Professionals

[Whitney C. Gibson](#)

[T. Blake Finney](#)

Related Services

[eControl](#)

Related Industries

[Retail and Consumer Products](#)

AUTHORED ARTICLE | 10.27.2016

Unauthorized sales are causing issues for many companies across numerous industries. In highly competitive spaces, such as the beauty or skin care industries, a common (but much less talked about) issue affecting many of these same companies is traffic diversion.

In short, companies (or representatives of the companies) attempt to use the registered trademarks of well-known/reputable companies to divert web traffic to other websites – for their own commercial benefit, of course. In other words, competitors (often less-established ones) hijack the goodwill of other companies' products and brands in order to draw consumers to their own products. This is essentially a "bait and switch."

Traffic diversion can take on a number of different forms online. One common practice we have seen is for a website to display what appears to be an objective comparison of several products competing in the same market. However, the purported "Best" or "#1 Recommended" product—often accompanied by a link to another website where a consumer can purchase that product—is actually manufactured or sold by the same individuals or entities operating the website.

Similarly, a company might "review" a well-known company's product. This might consist of arbitrary numeric ratings, presenting the product as fairly average. Adjacent to or below this review and the ratings, the company will provide an eye-catching graphic and link to the "best" alternative product or the claimed "approved choice."

As seen by these two generic examples, individuals and entities behind misleading product comparisons or reviews can wrongfully exploit the marks of other established competitors to attract eyeballs (and ideally wallets) to their own website and products.

Such traffic diversion can give rise to federal Lanham Act violations, including claims for false advertising and misrepresentation of association (essentially a failure to disclose a material connection to a company or product).

In terms of the former, the Lanham Act expressly prohibits “commercial advertising or promotion” that “misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” See 15 U.S.C. § 1125(a)(1)(B).

Moreover, the Federal Trade Commission prohibits deceptive practices and requires that companies make “clear and conspicuous” disclosures when content is actually an advertisement and not—as they might appear—honest, unbiased reviews.

In terms of the misrepresentation of association, the Lanham Act prohibits false, misleading, and deceptive representations concerning an party’s goods and commercial activities.

Specifically, by virtue of 15 U.S.C. § 1125(a)(1)(A), Congress has declared that “[a]ny person who, on or in connection with any goods or services . . . uses . . . any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”

Companies that have had their trademarks misappropriated might be well-served trying to persuade the traffic diverters to remove the offending content. If they have sufficient legal claims and if the harm is substantial enough, the companies can potentially file a lawsuit based on the traffic diverter’s illegal activities.

In short, companies working to combat unauthorized sales should also be aware of the harm they might be suffering from online traffic diversion. Congress’s prohibition of false advertising and misrepresentation of association provides helpful tools for addressing such misuse of a company’s trademarks and provide support should legal action be necessary to remove the traffic-diverting content.

For more information, contact Vorys’ Illegal Online Seller Enforcement team at 877.545.6905. Read more about the practice at [services-648.html](#) and follow Whitney on Twitter (@WhitneyCGibson).