Intellectual Property and Search

Information ownership vs. information access on the web

Jason Schultz, Senior Staff Attorney
www.eff.org
3 Questions
[1] Who controls access to online info?
Should online access to information be

[ ] more

[ ] less, or

[ ] equal

to our offline access?
What are the competing public policies that decide?
Who controls our access to online info?
Who controls our access to online info?
Who controls our access to online info?
Who controls our access to online info?
Who controls our access to online info?
Who controls our access to online info?
Who controls our access to online info?
Who controls our access to online info?
What is intellectual property?

Patents

$\sigma = \sqrt{\frac{\sum(x_i - m)^2}{n-1}}$
What is intellectual property?

Copyrights

Electronic Frontier Foundation
What is intellectual property?

Trademarks

Google

Electronic Frontier Foundation
What is intellectual property?

Trade Secrets

Electronic Frontier Foundation
What is intellectual property?
Primary IP for Search Providers

Trade Secret + Patent + Trademark
Primary IP threats to Search Providers

Copyright + Trademark

Electronic Frontier Foundation
Trademark Protection

- Promotes investment in brand names/logos

- Prevents consumer confusion

FedEx® v. Froogle®

Electronic Frontier Foundation
Trademark Threats to Search

Web Images Groups News Froogle Local
more »
1-800-contacts

Results 1 - 10 of about 1,090,000 for 1-800-contacts, (0.09 seconds)

1800CONTACTS.com
World's largest contact lens store. We deliver. You save.

1-800 Contacts®
World's largest contact lens store. Over 20 million factory-fresh contacts in stock, including Acuvue, Focus, Freshlook, Optima, ...

Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens Store®
1-800 CONTACTS - The world's largest contact lens store. Over 20 million factory-fresh contacts in stock, including Acuvue, Focus, Freshlook, Optima, ...

We deliver. You save. THE PRESCRIPTION ALL ABOUT THE DOCTOR MY ...
1-800 Contacts Logo ... discontinue use immediately and consult your eye care professional.

Copyright © 2005 1-800 Contacts, Inc. All rights reserved.

More results from www.1800contacts.com

File Format: PDF/Adobe Acrobat - View as HTML
1-800 Contacts, 309 F. Supp. 2d at 478. Each type of ad. 17. appears in a window that is separate ... main browser window (containing the 1-800 Contacts ...

File Format: PDF/Adobe Acrobat - View as HTML
locations within the 1-800 Contacts domain. The URL of a webpage ... the main browser window (containing the 1-800 Contacts website) ...

Macromedia - Showcase : Macromedia Case Study - 1-800 CONTACTS
Keywords v. Trademarks
Keywords v. Trademarks
example
consumer
hungry
driving
freeway
road sign
super duper weenie
cash
Food
hunger
competitor

Lentini's Pizza & Family Restaurant
Weis King's Shopping Center
Route 73, Oley, PA

Electronic Frontier Foundation
consumer
dumpy
super
road sign
here
super
confuse
hungry
consumer
dumpy
food
infringement
Initial interest confusion

- Using a trademark to confuse and “lure” a consumer to a different vendor
- Consumer buys knowingly from second vendor but not without initial deception
- Illegal in several U.S. jurisdictions
- Judged on how likely consumers would be confused by competitor’s use of trademark
So do keywords confuse people?
Are we being diverted or informed?
Are we being diverted or informed?

THREE OF A KIND

EXTERIOR DIMENSIONS

CHEVROLET VENTURE LS 200.9 in

DODGE GRAND CARAVAN LE 199.6 in

FORD WINDSTAR LX 201.2 in

width

68.1 in

72.0 in

76.2 in

length

59.5 in

69.5 in

70.5 in

height

39.5 ft

39.7 ft

40.3 ft

turning circle

68.0 in

68.0 in

68.0 in
Is it pro or anti-competitive?
GEICO v. Google

• Eastern District of Virginia, August, 2005
• Nominative Use
• Survey Says:
  – 67.6% expected to reach GEICO via sp links
  – 69.5% thought that the sponsored links were either for GEICO or affiliated with GEICO
  – 20.1% said that to purchase insurance from GEICO, they should click on sponsored links.
GEICO v. Google

• The Court says
  – “Serious doubts about survey accuracy as to actual users' experiences with and reactions to the Sponsored Links.”
  – None of the control group was confused when Nike ads were displayed in response to a GEICO keyword.
  – use of the trademark as a keyword, without more, not causing a likelihood of confusion.
GEICO v. Google

• Bottom Line:
  – Advertisers can use “GEICO” keyword
  – But cannot put “GEICO” in header or language of advertisements
  – Google liable for ads with GEICO in text or header, so must affirmatively filter
But wait a sec…

If a trademark is only used in a database and consumers never see it, can it really confuse anyone?
advertising + information location
Keyword = only information location?
“Use in Commerce” Test

- TM infringement requires use of TM:
  - “in connection with the sale, offering for sale, distribution, or advertising of any goods or services…”
- auction of keywords = connection with sale or good or services?
- Courts split (NY = no; CA = yes)
Break
Copyright threats to Search

- Spiders
- Linking
- Images
- Books

Electronic Frontier Foundation
Copyright Theory

- To promote art and creativity
- Give strong controls over copying of works of art and science for a set term
- Provides incentive to create new works
- Balance with public dissemination and public access to information
Copyright Theory

• Copyright owner gets to control most “copying” of her work
  – Reproduction
  – Distribution
  – Derivative Work
  – Display
  – Performance
Copyright on the Web

• Before the web, only machines and businesses made most copies
Everything you do online makes a copy
Everything you do online makes a copy

Logical Drive

Physical Disks

Electronic Frontier Foundation
Everything you do online makes a copy

MTA

SMTP

MTA

SMTP

MTA

File System

SMTP or File based

UA

POP/IMAP

UA

Electronic Frontier Foundation
Everything you do online makes a copy.
Copyright on the Web

• Every computer/device is a copy machine
• Every copy is potentially illegal
  – Must either have permission or fair use
  – If not, may face damages of up to $150,000 per work infringed
• Search engines copy, index, and distribute information to millions of people
Search engine strategies

(1) Implied permission/Opt-out
(2) Linking, not hosting (for the most part)
(3) Fair Use
(4) Blind hope
Implied permission/Opt-out

• Theory
  – You made it publicly available
  – You meant us to index it
  – You can opt out via notification or robots.txt
  – Covers spidering, caching, indexing and linking

• Opt-out respected and legally required under certain circumstances (DMCA Safe Harbors)
Linking, not hosting

• Linking to copyrighted works generally not an infringement, unless
  – You knew the link leads directly to infringing material; and
  – You kept on linkin’

• Solution:
  – Take links out of index upon complaint
Fair Use

• Traditionally a defense for
  – Personal non-commercial use
    • VCR/Tivo/iPod
  – Educational/First Amendment activity
    • Teaching
    • Parody/Criticism
  – Transformative Uses
    • Creative (remixing)
Copyright Issues in Image Search

• Capturing image
• Making thumbnail
• Storing thumbnail
• Displaying thumbnails in response to keyword searches
• Providing Link to original picture page
Perfect 10 v. Google

- P10 sells “all natural” adult images on web
- Third party sites copy and re-post images
- Google spiders images from all available sites and puts results in Google Image Search with links to original location + framing of original page
- P10 sends complaints but can’t keep up
Perfect 10 v. Google

- P10 sues Google for
- making and showing thumbnails; and
- Helping 3rd P sites infringe by linking to them and “displaying” them via frames
  - thumbnails substitute for cell phone pix
  - Google can block sites and filter
Perfect 10 v. Google

- Google says:
  - We spider everything
  - We can’t tell who’s infringing until you notify us of the specifics
  - It’s a fair use to make an image directory
  - Image search is important public resource
  - Go sue the bad guys, not us
Perfect 10 v. Google

• Court says:
  – Thumbnails are fair use
    • useful search tools
    • Picture worth 1000 words
    • No evidence of use for cell phones
  – Linking is not illegal b/c Google didn’t know and couldn’t control 3rd P sites
Google Book Search

Interesting

Classics

Highly cited
Author’s Guild v. Google

• Guild says:
  – We sell books
  – You borrowed books from the libraries and copied them without paying us
  – You make money
  – We want money
  – Pay us
Author’s Guild v. Google

• Google says:
  – We had to copy books to make an index
  – No one sees > a few lines at a time
  – We link to where you can buy/borrow
  – Book search is important to public access
  – This will help you sell books
Who’s information is it?

“It's not up to Google or anyone other than the authors, the rightful owners of these copyrights, to decide whether and how their works will be copied.”

Nick Taylor, President, Author’s Guild
Who’s information is it?

“A search engine for books will be revolutionary in its benefits. Obscurity is a far greater threat to authors than copyright infringement, or even outright piracy.”

Tim O’Reilly, publisher, O’Reilly Media, Inc.
Info ownership vs. info access

• Who owns access to the words in a book?
• What laws should govern this access?
• What’s best for the consumer?
  – Market for creativity
  – Market for innovation
  – Market for education
• What’s best for the Internet?
More information

www.eff.org

EFF: member supported since 1990

www.eff.org

Electronic Frontier Foundation