

Online advertising

The do's and don'ts of keyword advertising

April 2022

Recently, questions about the use of “keyword” advertising by New Zealand businesses have been brought before the High Court. In this article, we discuss the cases, and the lessons to be learned from them.

BACKGROUND – KEYWORD ADVERTISING

In New Zealand, Google does not restrict a business from using another party's trade mark as part of its Google Ads keywords. This lack of restriction allows a business to bid on its competitors' brand names, so that its adverts are shown along with the organically generated Google search results for the brand name of a competitor.

This type of competitive advertising can be an important part of a business's online advertising strategy, particularly for lesser known brands or new businesses trying to get a foot in the door.

CASE 1 - USE OF A COMPETITOR'S TRADE NAME

In our first case, InterCity Group (NZ) Limited claimed that Nakedbus NZ Limited's use of the words “inter city” and variations of it in its keyword advertising:

- infringed on InterCity's trade mark;
- amounted to passing off of InterCity's business; and
- was misleading and deceptive in breach of the Fair Trading Act 1986.

InterCity and NakedBus are competitors in the operation of long distance buses. The keyword tactics of Nakedbus meant that Nakedbus adverts were showing up in Google searches for “inter city”.

InterCity also claimed that the use by NakedBus of the words “inter city” in the *actual wording* of its advertisements infringed InterCity's trade mark.

The Court's decision

1. Using trade names in keywords: The Court found that NakedBus's use of InterCity's trade mark as keywords in its Google Ads advertising strategy was not, of itself, trade mark infringement, passing off, or conduct likely to mislead or deceive in breach of the Fair Trading Act.

Even though Nakedbus's use of the words “inter city” as keywords amounted to use of Intercity's trade mark in the course of trade, this use *could not be seen by the consumer*, and so cannot be “taken as being used as a trade mark”.

2. Using trade names in advertising: In relation to NakedBus's use of the words “inter city” in the visible content of its ads, the Court found that this use:

- *did* infringe InterCity's trade mark; and
- amounted to passing off of InterCity's business and was likely to mislead, deceive and confuse consumers in breach of the Fair Trading Act.

CASE 2 – REACHING AGREEMENTS WITH COMPETITORS

Our second case involved competing consumer finance companies reaching an agreement in relation to the use of keywords in their respective advertising campaigns. The Commerce Commission took issue with this, claiming that the agreement breached the cartel provisions in the Commerce Act 1986.

The arrangements involved NZ consumer finance company Moola agreeing with its competitors that they would each not bid on specific keywords on Google Ads so that it would be less likely for a competing consumer finance advertisement to be displayed when a user searched for terms that mainly applied to one of the consumer finance companies.

In some cases, Moola also required competitors to use the “negative keywords” function on Google Ads. The use of “negative keywords” on Google Ads allows businesses to prevent their advertisements from being shown when certain keywords are used.

The Court's decision

The High Court found that Moola's arrangements with its competitors had the effect of limiting consumers' access to information, and reduced the ability of consumers to make informed choices.

The Court emphasised the importance of competitive keyword advertising for consumers, noting that consumers benefit from seeing information on competing products and services when they search for a particular brand, and any action which restricts competitive keyword advertising may result in consumer harm (such as consumers paying higher prices and acquiring consumer finance services on unfavourable or less suitable terms).

KEY TAKEAWAYS

When using a competitor's trade name as part of your online advertising strategy, it is important to stop and consider:

- is the use visible to the consumer?
- am I reaching an agreement with my competitor?

If the answer to either of the above questions is yes, you could risk infringing others' legal rights or the law.

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However, the use of your competitor's trade name as part of a keyword advertising strategy (where the trade name is not visible to the consumer) is not likely to infringe your competitor's rights.

Please contact any of the authors of this article if you any questions regarding your advertising campaign.

KEY JACKSON RUSSELL CONTACTS

David Alizade PARTNER
BUSINESS LAW TEAM

DDI +64 9 300 6 937 | M +64 21 224 8055

E david.alizade@jacksonrussell.co.nz

Tabitha Lau ASSOCIATE
BUSINESS LAW TEAM

DDI +64 9 300 6 938 | M +64 27 201 1133

E tabitha.lau@jacksonrussell.co.nz



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