UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

GOVERNMENT EMPLOYEES INSURANCE COMPANY,	)	
Plaintiff,	)	Civil Action No. 1:04cv507 LMB/TCB
v.	)	
GOOGLE, INC. and OVERTURE SERVICES, INC.,	)	
Defendants.	)	

MEMORANDUM OF AMICUS CURIAE PUBLIC CITIZEN

This is an action for trademark infringement and dilution in which GEICO alleges that defendants, two major search engine operators, violate its trademark rights by allowing its competitors to bid for the right to advertise to defendants' potential customers who display an interest in obtaining information relating in some way to GEICO by using the registered trademark "GEICO" as a search term.

Generally speaking, search engines consist of three parts – a large database of copied web pages, a system for identifying additional web pages to add to the database, and software that determines what pages from its database should be identified in response to a given search request by an Internet user, as well as in what order and how those pages should be displayed. Each search engine uses its own proprietary mathematical formula, or algorithm, to rank the "relevance" of web pages to the search terms selected by the search engine's users. *See generally* Sullivan, *How Search Engines Work*, http://searchenginewatch.com/webmasters/ article.php/2168031, and *How Search Engines Rank Web Pages*, http://searchenginewatch.com/ webmasters/article.php/2167961. Search engines commonly compete for users by expanding the database that they search in response to requests (or, at least, optimizing the database that their target user audience wants to search), Sullivan, *Search Engine Sizes*, http://searchenginewatch.com/ reports/ article.php/2156481, and by refining its search and ranking algorithm and its display so that users get the search results that they want. In this regard, the critical objective is not just to give searchers the most complete results, but, perhaps more important, to enable searchers to find the information they seek most quickly, by placing it at or near the top of the list of search results. *See* Sullivan, *Search Engine Size Wars & Google's Supplemental Results*, http://searchenginewatch.com/ searchday/article.php/3071371; Sherman, *Google Gains in Popularity, But Will It Last?*, http://searchenginewatch.com/searchday/article.php/3368371 (noting that specialized search engines with smaller databases can compete effectively with general search engines with large databases by offering more effective search to certain users).

The personnel and equipment needed to perform these functions are expensive, and search engines need to pay for their operations. Although one way to do this would be to charge users in some way for searches or search results, search engines, like many other Internet services, generally support themselves by selling advertising. And although some advertisers are willing to pay for exposure to a general audience, the more advertisers can be assured that their messages will be targeted to Internet users who are likely to be interested in their services, the more they are willing to pay for ads. On the other hand, search engines also compete for advertisers by maximizing the number of persons who use their engines, which in turn requires them to optimize the accuracy of search returns.

Keyword advertising, the specific activity at issue in this case, is born of the desire of many advertisers to pay primarily or even solely for ads that are targeted to audiences who may already be interested in products or services similar to what the advertisers are trying to sell. For example, if an advertiser wants to sell insurance, the advertiser may be willing to pay more for ads that can be directed to persons who are conducting searches either for insurance generally, or for the sort of insurance that the advertiser is trying to sell, or for the sorts of products or services that the advertiser is trying to insure. One way to develop that target audience is by identifying persons who type in generic search terms, such as "insurance" or "auto insurance" or "new cars." Another way to target advertising is to identify internet users who are searching for particular brand names, such as automobile brands whose owners are likely to buy insurance, or competitive insurance brands with whom the advertiser would like to compete. The issue in this case is whether targeting messages (particularly commercial messages) to members of the public who have expressed an interest in obtaining information about particular brands violates the trademark laws.

A. In Applying Trademark Law to this Case, the Court Should Recognize the Limits That the First Amendment Imposes on the Regulation of the Speech Both of Search Engine Operators and of the Web Site Operators Whose Sites the Engines Identify.

The Internet is a democratic institution in the fullest sense. It serves as the modern equivalent of Speakers' Corner in London's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant they may be, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union,* 521 U.S. 844, 853, 870 (1997), "From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer." The Internet is a traditional public forum, and full First Amendment protection applies to speech on the Internet. *Id.* And, because plaintiff seeks an injunction and an award of damages, the Court's actions must comply with the mandates of the First Amendment. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *New York Times v. Sullivan,* 376 U.S. 254 (1964).

The World Wide Web provides enormous possibilities for persons who have information and opinions that they want others to consider. There is no limit to the content that may be communicated on the Web; it ranges from the Internet's original purpose – providing a way for the producers of scientific, technical or other intellectual work to make their results freely available to others – to archives of historical or literary material, political opinions, and comments on government bodies, public officials, or corporations, unions and other influential institutions. Most relevant to the issues before the Court, web content includes commercial information about goods or services that a website owner may have made, or that the owner may want to sell or promote; it also includes contrary or critical information about those same goods and services, and information about products sold by competitors of the web site operator who also want to provide information about why their own products may be more desirable for reasons of quality, price, or convenience. All of this information co-exists in a single, huge public forum.

Moreover, although cases like this tend to focus attention on the commercial aspects of the Internet (because it is primarily commercial enterprises that can afford advertising sold by an auction method), the vast majority of the Internet remains non-commercial. Although the business community has plunged into the Internet, and although the perception that the Internet is a key means of reaching customers has surely driven the growth of the Web over the past several years, commerce remains a distinct minority online. Kelly, *The Web Runs on Love Not Greed*, Wall Street Journal, January 3, 2002 (estimating that commercial web sites comprise less than one-third of the web's content).

Nor are the commercial aspects of the Internet devoid of First Amendment protection. To be sure, the fullest measure of First Amendment protection is reserved for non-commercial speech, but "for [nearly 30 years], the Court has recognized that commercial speech does not fall outside the purview of the First Amendment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001). "It is a matter of public interest that economic decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 366 (2002), *quoting Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment." *Thompson, supra*, quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

Commercial speech receives a lesser form of protection than non-commercial speech – commercial speech can be regulated even if it is misleading but not intentionally or recklessly false. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"); *Smith v. United States*, 431 U.S. 291, 318 (1977) ("Although . . . misleading statements in a political oration cannot be censored, . . . misleading representations in a securities prospectus may surely be regulated."). In trademark cases, unlike copyright cases where fair use is largely co-extensive with the First Amendment, *Harper & Row Publishers v. Nation Enterprises*, 471 US 539, 560 (1985), First Amendment considerations routinely receive separate discussion, although they also inform statutory interpretation. Even if a trademark has been used in a commercial context, courts are required to construe the trademark laws narrowly to avoid impingement on First Amendment rights. *Cliffs Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989).

Moreover, First Amendment interests are weighed as a factor in deciding whether a trademark violation should be found. *Anheuser-Busch v. Balducci Publications*, 28 F.3d 769, 776 (8th Cir. 1994). Injunctions must be narrowly crafted to comply with the general rule against prior restraints of speech. *Id.* at 778; *Consumers' Union v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982). "Restrictions imposed on deceptive commercial speech can be no broader than reasonably necessary to prevent the deception." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43-44 (D.C. Cir. 1985), *citing In re RMJ*, 455 U.S. 191, 203 (1982); *see also Castrol v. Pennzoil*, 987 F.2d 939, 949 (3d Cir. 1993).

B. Nothing About Keyword Advertising Inherently Violates the Trademark Laws.

1. Trademark Law Protects Against the Misuse of A Mark to Create Confusion About Whether Particular Goods and Services Emanate from the Trademark Holder.

Trademark law is constitutional because it is confined to commercial speech, and because it regulates that commercial speech by forbidding speech that is misleading. *Taubman Co. v. Webfeats*, 319 F.3d 770, 774-775 (6th Cir. 2003). The trademark laws do not forbid all uses of trademarks, but only deceptive ones: "When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo." *Prestonettes v. Coty*, 264 U.S. 359, 368 (1924).

Trademark law does not create a general cause of action based on harms caused by any form of misleading speech, but only misleading speech about the source of goods and services. "[T]he general concept underlying likelihood of confusion is that the public believe the 'the mark's owner sponsored or otherwise approved of the use of the trademark.'" *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988). Thus, trademark law does not protect against just any kind of confusion, only confusion about source. The courts have long followed this principle: "the imitated feature must be regarded by prospective purchasers as identifying the source of the product. . . . It is **only when the feature in fact identifies source and the imitation is likely to deceive prospective purchasers who care about source** that the imitator is subject to liability." *West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581, 590 (6th Cir. 1955) (emphasis added). Other courts agree: "All of the[] legitimate trademark purposes derive ultimately from the mark's representation of a single fact: the product's source. It is the source denoting function which trademark laws protect, and nothing more." *Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir, 1979); *Smith v. Chanel*, 402 F.2d 562, 566-569 (9th Cir. 1968) (explaining how confining trademark law to this function best serves consumers' and companies' interests). "The limited purpose of trademark protections set forth in the [Lanham Act] is to avoid confusion in the marketplace by allowing a trademark owner to prevent others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner. Trademark law aims to protect trademark owners from a false perception that they are associated with or endorse a product." (internal quotes and citations omitted). *Mattel v. Walking Mt. Prod.*, 353 F.3d 792, 806 (9th Cir. 2003). "The trademark laws exist not to 'protect' trademarks, but . . . to protect the consuming public from confusion, concomitantly protecting the trademark owner's right to a non-confused public." *James*

Burrough Ltd. v. Sign of Beefeater, 540 F2d 266, 276 (7th Cir. 1976). *Accord Communications Sat. Corp. v. Comcet*, 429 F.2d 1245, 1252 (4th Cir. 1970).

Accordingly, GEICO's contention that it need neither plead nor prove that defendants used its mark as a source identifier, Mem. at 14, 18-19, is incorrect. Although GEICO is correct to note that the Lanham Act is fully applicable to the Internet, Mem. at 14, the novel context of the Internet does not free GEICO from the obligation to prove defendants' use of the marks to identify source and creation of likely confusion about source.

2. It Is Neither the Sole nor Even the Principal Function of Search Engines to Enable Members of the Public to Reach a Trademark Holder's Official Web Site.

The size of the public forum provided by the Internet is staggering. A study in Nature, Vol. 400, 8 July 1999, at 107-109, estimated that there were 800 million discrete pages on the publicly indexable Web; the following year, a commercial estimate put the number at 2.1 billion publicly available web pages, with seven million pages added every day. Mark, *Study Says Internet Size to Quickly Double*, dc.internet.com/views/article/0%2C1934%2C2111_411381%2C00.html. By 2003, Google alone was claiming to have indexed more than three billion pages, and nobody suggests that any one search engine has gathered most of the Web into its database. Sullivan, *Search Engine Sizes*, http://searchenginewatch.com/reports/article.php/2156481.

In these circumstances, it can be quite a challenge for the individual publisher of information to bring that information to the attention of those who may be interested in it; it is a similarly staggering task for the Internet user to search the vast sea of information for the small group of sites that have information relevant to his interests. Nor is there any official index that a user can consult to find particular content. It is as if the entire contents of the Library of Congress (or hundreds of times those contents) were stored in one huge building, with neither a card catalogue, nor a Dewey Decimal System, nor any other orderly means to enable patrons to find what they are trying to locate. Search engines provide an invaluable function, both by providing Internet viewers with a means of locating information in which they may be interested and giving publishers a way to bring their information to the attention of their target audiences. Because of the crucial role played by search engines, it is vitally important that they neither suppress certain sites because they are disfavored, nor give undue prominence to other sites by returning confusing search results.

The fundamental flaw in GEICO's submission is its apparent assumption that any member of the public who uses a search engine to conduct a search using the term "GEICO" must necessarily be searching for GEICO's official site, and only for that site, and hence is likely to experience confusion about whether all of the ensuing search results are linked to GEICO's own site. The underlying assumption is wrong. To the contrary, it is common knowledge that an Internet user who employs a search engine and uses a search term that is in common use is likely to receive a listing of hundreds or even thousands of web sites relating to their search terms. For example, exhibits A, J, and K, attached to GEICO's Opposition to the Motion to Dismiss, reveal that searches using the term GEICO on Yahoo! and Google returned "about 283,000" and "about 307,000" results, respectively. No rational user could possibly think that all of these results identify GEICO's own web site, and no Internet user with even a minium degree of experience would use a search engine in the expectation of finding **only** the official site of a company in which they are interested.

To be sure, some searches are performed with the objective of finding a particular company's official web site. Professor Milton Mueller, one of the nation's leading experts on the domain name system, has argued that, although at one time members of the public commonly used "name-guessing" to locate the official web sites of companies and other entities (by typing their names plus the "dot-com" domain into a browser window), for a variety of reasons, search engines have replaced name guessing as the most common way for the public to find the web sites of companies in which they are interested. http://dcc.syr.edu/miscarticles/mishkoff.pdf, at 4-6. Hence, one common use for search engines today is to find the official web sites of even the most well-known companies.

But the mere fact that the user is looking for information that has some bearing on a trademarked word, such as "GEICO," does not necessarily mean that the user wants to know only who owns the trademark and what the owner wants to convey? The user may be looking for information about the trademark, or about the trademark holder. He may be looking for historical information. The user might have a grievance about the trademarked item, and want information about other similar grievances (for example, the person might have been in an accident with a driver insured by GEICO and believed that the amount offered in settlement was too low, and be trying to learn if others have had similar accidents and what they have done about it). Or the user might be an unhappy owner of a GEICO policy who is trying to find out whether others have had similar problems, whether there are lawsuits pending on such issues, or whether there is any private organization of owners who are trying to find non-litigation solutions to the same problem. Or, the user might want to find archives of information about disputes in which the trademark holder has been engaged.

Or the user might be trying to buy either the trademarked item or some other item similar to the trademarked item, and be seeking a comprehensive list of retailers who sell that item, to use the Internet for comparison shopping. And perhaps, instead of looking for dealers who sell only the goods of the trademarked brand, the user could be looking for dealers who sell multiple brands, on the theory that it is more efficient to engage in comparison shopping on the premises of a retailer who sells several similar products.

In crafting rules for the use of trademarks on the Internet, it is important to bear in mind all these potential objectives of Internet users, so that in trying to prevent customer confusion about the source, the courts do not impair the ability of Internet users to find information about the trademarked item, or the ability of search engine operators to accommodate these differing objectives. In this regard, it is useful to draw an analogy with ways of finding information in a library. If, for example, somebody wrote an unauthorized history of GEICO insurance, he could put the word GEICO in the title without violating plaintiff's trademark. *See Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d Cir. 1989). And if the author were allowed to prepare the relevant entries for the card catalog, he could surely include the word "GEICO" in the title and subject cards. The author card would be different – only GEICO, as the owner of the GEICO trademark, could hold itself out as the author or sponsor of a book. Similarly, the rules governing the use of trademarks on the Internet must allow for these multiple uses of a single word as a target of searches for author, title and subject of each website.

Similarly, just as trademark law must accommodate the various objectives that Internet users may have in resorting to a search engine, the operators of search engines are entitled to take into account the various objectives of their potential customers, including their advertisers. As it happens, pages from GEICO's official web sites provide the first few non-paid listings in all three search result exhibits attached to GEICO's papers, Exhibits A, J and K, although on those search result pages that place some paid listings at the top of the page, they are not the first listings on the page. However, search engine operators are not required either to limit search results that are returned in response to search terms that embody trademarks to the official web sites of the trademark holders, or to even to give primacy of ranking to a trademark holder's official web site.

3. A Trademark Holder's Competitors Are Entitled to Call Their Products to the Attention of Persons Who May Be Primarily Interested in the Trademark Holder's Products.

Just as consumers have a legitimate interest in obtaining information about a full range of competitors before they buy insurance, and not just about GEICO, so too do GEICO's rival insurance companies and insurance brokers have every right to call their competing products to the attention of potential customers, even those customers who may have otherwise focused their principal attention on GEICO as a potential vendor. And the competitors are entitled to use GEICO's name in seeking the attention of potential GEICO customers. For example, a GEICO competitor could legitimately place an advertisement in the *New York Times* bearing a large headline, "If you think GEICO provides good insurance product at a reasonable cost, consider our products instead."

But GEICO competitors are not limited to advertising to the general public. They are also entitled to advertise in locations where consumers already interested in insurance generally are likely to see their ads. If the competitors seek to compete with GEICO specifically, they are entitled to seek out advertising venues where their ads can be seen by people who are thinking about whether to buy GEICO products, or seeking or information about GEICO itself.

For example, if the *New York Times* ran a series of news stories about GEICO, Allstate Insurance Company could properly buy advertising on the adjoining pages of the newspaper. This surely would not violate GEICO's trademark even if the *Times* placed GEICO's name in the news index and readers' attention was drawn to the news stories by the knowledge that information about GEICO could be found there. Similarly, if Allstate were to pay a large enough sum of money to the person who owns the plot of land next to GEICO's headquarters in Chevy Chase, Maryland, Allstate could erect a large billboard offering its own products to draw the attention of customers who had come to Chevy Chase to visit GEICO. The neighboring landowner would not violate the trademark laws by holding an auction among insurance companies for the placement of such a billboard.

If a customer came to see an insurance broker for the particular purpose of buying GEICO, the broker would not violate the trademark laws by responding that he believes that Allstate would represent a better deal for them. By the same token, Allstate might pay several insurance brokers to provide it with mailing lists of people who had come to them looking for GEICO insurance. This transaction might implicate considerations of customer privacy, but, like the other examples discussed above, it would not violate the trademark laws. In each case, Allstate would be delivering its message to persons who had been drawn by GEICO's trademark to the location where they could be identified as prospective targets for competitors' advertising.

Google, Overture, and other search engine operators are analogous to the *New York Times*, the landowner in Chevy Chase, and the insurance brokers in the above hypotheticals. Without implicating customer privacy, they are able to provide potential advertisers with access to people who have communicated a specific interest in obtaining information about GEICO. At the same time that the search engines are providing their customers the precise information that those customers desire – an impartial listing of web sites that contains information relevant to the search term "GEICO" – the search engines are also able to provide access for GEICO's competitors on adjacent property, a portion of the web page adjacent to the normal search results. There is nothing inherently abhorrent to the trademark laws in the engines' sale to GEICO's competitors of such adjacent space on the engines' listing of search results.

As noted above, GEICO's official web site appears at or near the top of each of the examples of search engine listings that GEICO itself has attached to its own papers. Thus, this is not a case in which GEICO is trying to prevent its web site from being concealed from potential viewers; it is rather a case in which GEICO is trying to suppress competitors' advertising to its potential customers. Trademark law does not authorize such suppression, and GEICO's repeated incantation of the "likelihood of confusion" allegation cannot conceal the fact that the trademark theory on which its case is predicated is not actionable.

C. The Legal Limits on Keyword Advertising.

Although keyword advertising programs do not inherently violate the trademark laws, they are not without legal limits. Not all of those limits are enforced by the trademark laws, however.

1. Search Engines Must Clearly Disclose Which Listings Are the Result of Paid Advertising.

One danger from the use of keyword advertising is that Internet consumers may not be able to distinguish between the listings on the results page that have been returned because the search engine operator determined, based on its impartial algorithms, that the results were relevant to their search, and those listings that appear because they provide information that a search engine advertiser has paid to have placed there. As explained several years ago by the organization Commercial Alert,

> The failure to disclose that an ad is an ad is material because it can ultimately affect consumers' purchasing decisions, by diverting their attention to the advertisers. This is, of course, the purpose of the ad, and there is no question that the search listing ads in fact do this.

> Because of the earlier editorial integrity in search engine results, there is an implied representation to search engine users that listings are not skewed by marketing or commercialism. Consumers are accustomed to search engine protocols based on editorial integrity, and have not been told of the departure from these protocols. In effect, this is a high-tech case of "bait and switch."
>
> http://www.commercialalert.org/index.php/article_id/index.php/category_id/1/sub category_id/24/article_id/33#.

The FTC agreed with this complaint, and responded by warning search engine companies of the need for clear notice, finding that "while many search engine companies do attempt some disclosure of paid placement, their current disclosures may not be sufficiently clear." http://www.ftc.gov/os/closings/staff/commercialalertletter.htm.

The exhibits attached to GEICO's opposition to the motion to dismiss provide some reason to be concerned about whether the defendants are providing sufficiently clear warning that particular links constitute paid advertising. Both defendants do provide captions for the sections of their search results pages that include paid advertisements, identifying them as "SPONSOR RESULTS" in Exhibits B and J (listings provided for Yahoo! by defendant Overture), and as "Sponsored Links" in Exhibit K (defendant Google). Yahoo! additionally provides a hyperlinked parenthetical ("What's this?") after the words SPONSOR RESULTS; although the Exhibit does not show the linked page, by replicating the search online we found that Yahoo! uses the links to explain to its users that these links are paid. The language of the labels appears legally adequate to reveal the paid nature of the listings, although the fact that the labels are shown in pale gray, in a font that is sometimes quite similar to and certainly no larger than the other text on the page, tends to downplay the disclosure.

Moreover, the placement of some of the paid listings on Yahoo! tends to bring them to the attention of the user **before** the impartial listings, even though they are labeled. In Exhibit K, Google placed all of the paid results off to the side, plainly separating them from the unpaid search results. In Exhibits A and J, however, the very first results that the user sees when using Yahoo! are sponsored ones, then the sponsored listings resume at the end of the list of search results. Some Google searches performed by undersigned counsel similarly produced a search results listing that placed the paid listings at the top of the list.

Although the use of pastel shading helps to separate the two kinds of listings, the shading may actually accentuate the paid listings, adding to their dominant location from the user's perspective. Like a newspaper that fills the top of the fold on the front page with advertising, a search engine that places several paid listings at the top of the page runs the risk of being perceived as predominantly an advertising publication rather than the provider of impartial search results based on "relevance" to the search terms. There is a real danger that this system of placement may leave users somewhat confused about whether the paid listings represent the most relevant listings returned in response to their search. Although the existence of a market for search engines gives defendants' competitors the opportunity to compete for traffic by making the impartial results more prominent instead of threatening to bury them in paid listings, the allegation in the complaint that Google and Overture supply 90% of all search makes this development worrisome.[1]

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[1] The placement of the paid listings on the right side of Exhibit K, and reproduced on page 11 of GEICO's brief, may misrepresent the portion of the search results page that is consumed by paid listings. On the computer screen as viewed by undersigned counsel when he ran a sample search on Google to examine the layout of the paid listings, the paid listings consumed about 20% of the horizontal width of the page, and are separated from the non-paid listings by white space consisting of about 15% more of the page, leaving the substantial majority of the page width for the non-aid listings; in Exhibit K, however, the paid listings consume nearly 30% of the page's width and there is very little white space between the paid and unpaid listings. We do not suggest that the distortion in Exhibit K is intentional – undersigned counsel found that the same distortion was reproduced when he attempted to print the page of search results. However, this unintentional distortion has the tendency to increase the appearance that the paid listings on Google are jumbled

In addition to the possibility that confusion between paid and unpaid listings may result in an FTC complaint or other proceeding for deceptive advertising, placements that blur the boundaries between paid and unpaid listings may adversely affect the standard of review accorded to search engine companies whose listings are challenged under laws other than the Lanham Act. There is authority that the search ranking provided by a search engine's impartial algorithm is a constitutionally protected opinion under the First Amendment. *Search King v. Google Technology*, 2003 WL 21464568 (W.D. Okla.). To the extent that rankings are paid advertising, the degree of constitutional protection would be considerably lower. It is thus in defendants' interest to ensure that the distinction between their paid and unpaid advertising remains clear and unmistakable.

Although users may find such placements confusing, the problems raised by this practice are not **trademark** problems. Mere confusion about whether a listing is there because the search engine was paid or because the listing is deemed most relevant to the search term through an impartial calculation is not tantamount to confusion about whether GEICO is the source of the listings. Accordingly, this form of confusion is not actionable under the trademark laws.

2. The Content of Paid Listings, Like Other Online Uses of Trademarks, Must Not Create Confusion About Whether the Site Linked From the Listing Is Sponsored by GEICO.

GEICO also argues in its opposition to the motion to dismiss that the content of some of the paid listings creates a likelihood of confusion about whether GEICO is the source of the web sites advertised by those paid listings. Public Citizen agrees that, if one of defendants' advertisers used the GEICO mark in an advertisement in a way that deceptively suggested that GEICO was the source or sponsor of the linked page or of the advertisement itself, such a use could constitute

together with the unpaid listings.

trademark infringement and hence could be the basis for a claim against the advertiser.

We question, however, whether that argument provides a valid basis for suit against these defendants in this case, for two reasons. First, as Google has argued in its reply brief, the amended complaint does not allege the contents of the keyword advertisements themselves as a basis for GEICO's claims. Although, as Google acknowledges in a different context, Reply at 7 n.4, a defendant may point to the contents of a document that is alleged in the complaint as a basis for dismissal under Rule 12(b)(6), *Phillips v. LCI Int'l*, 190 F.3d 609, 618 (4th Cir. 1999), we know of no authority extending this principle to permit a plaintiff to introduce documents that cure the absence of necessary allegations in its own complaint. Plaintiff here has not moved for leave to amend its complaint to allege that the advertisements create an actionable likelihood of confusion, and arguments in its opposition to dismissal are not a proper substitute for a motion for leave to amend. *Griffin v. Potter*, 356 F.3d 824, 830 (7th Cir. 2004); *In re Merrill Lynch Research Reports*, 289 F. Supp.2d 429, 436 (S.D.N.Y. 2003).

Nor, indeed, does the amended complaint allege that defendants have any responsibility for the contents of the advertisements, not to speak of their allegedly infringing content. To the contrary, the complaint only taxes defendants with having created a paid keyword advertising program and with being responsible for the placement of advertisements based on search words used by Internet viewers. Although GEICO argues in its opposition to the motion to dismiss that defendants encourage their advertisers to use search terms in their advertisements, including search terms that embody trademarks, there is nothing inherently improper about identifying a trademark holder as the subject or point of comparison of a web site. An advertisement may create a likelihood of confusion with respect to source if the listing incorrectly implies that the underlying site is about

GEICO in some way when, in fact, it has no relationship to GEICO and does not even mention GEICO or compare the advertiser's products to GEICO's.

However, we question whether, as a matter of law, a publisher such as Google or Overture should be legally responsible not only for scrutinizing the contents of advertising, but for comparing the advertisements to the underlying web sites to make sure that representations of content are accurate and not confusing. The fact that defendants, like any web hosts, retain the capacity to respond to complaints about misuse of trademarks should not alone provide a basis for holding defendants liable when trademarks are, in fact, misused in particular advertisements. Accordingly, although the allegations in plaintiff's opposition brief might provide a sound basis for suing its competitors for their advertisements on Google and Overture, they do not afford a basis for suing defendants here.

CONCLUSION

The Court should consider the motion to dismiss in light of the foregoing analysis. GEICO should be given an opportunity to amend its complaint to provide specific allegations sufficient to state a claim under the theories discussed in the final section of this memorandum.

Respectfully submitted,

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