WHAT IS KEYWORD ADVERTISING?

Keyword advertising refers to advertisements that appear alongside or above "organic" search results in response to terms or "keywords" in the user’s search query. A search for "cheapest unlimited cell phone plans," for example, yields paid ads for mobile communication companies appearing above the organic results for this search. The attraction of keyword advertising is that an ad that is relevant to a user's query is more likely to be clicked. Search engines such as Google, Bing and Yahoo allow advertisers to bid on keywords, which may include both generic terms such as "cell phone" and trademark or brand terms, such as "Verizon."

WHAT DOES THIS HAVE TO DO WITH TRADEMARKS?

Purchasing generic terms (for instance, “golf course” or “golf club”) as keywords will almost never raise any trademark concerns. Problems in keyword advertising sometimes arise when a company buys a competitor’s trademark as a keyword so that its ad displays with search results for the competitor’s mark. One might wonder, for example, why there is an ad for the Wendy's in the results of a search for "mcdonalds." Although this is common practice in online advertising, buying a competitor’s trademark as a keyword entails risk in the form of lost customers,
increased ad spend, and potential legal repercussions for trademark infringement.

A successful brand-owner bringing a case for trademark infringement must satisfy four criteria: (1) the plaintiff must own a valid trademark, (2) the plaintiff must have prior rights to the trademark, (3) the defendant must use the plaintiff's trademark in commerce in connection with the sale of goods or services, and (4) defendant's use must cause a likelihood of confusion about product source, or affiliation with the plaintiff. The first two criteria are relatively simple factual determinations; the uncertainty and danger lay in the second two criteria. Most courts have found that the purchase of another party's trademark as a keyword that triggers an advertisement is a "use in commerce." The more complicated question is whether that use is causing the "likelihood of confusion."

WHAT IS ALLOWED AND WHAT IS PROHIBITED?
Generally, courts do not find a sufficient "likelihood of confusion" only by the purchase of another's trademark for keyword advertising. The offline equivalent of this happens frequently in competitive markets where companies set up shop right next to each other hoping that the site of their logo or advertisements will pull customers from their competitor at the last minute.

Where courts do draw the line, though, is when a company bids on a competitor's trademark and then includes that trademark in the triggered advertisement. In fact, courts have stated that it is the labelling and appearance of these advertisements and the surrounding context of the screen displaying the search result that is the most critical factor in determining whether a likelihood of confusion exists in cases where the defendant has used a competitor's mark as a keyword search term. There are exceptions to this rule, for example an authorized reseller (or similar) of the trademarked product/services in question may be able to use the trademarked term in the advertisement.

However, where the ad clearly identifies its source, or overtly compares its goods or services to
the competitor, the risk of confusion and legal reprimand is greatly reduced. Google’s AdWord policy follows this same guidance by distinguishing between trademarks as keywords and trademarks used in advertisement text:

**Trademarks as Keywords**
Google won’t investigate or restrict the selection of trademarks as keywords, even if we receive a trademark complaint.

**Trademarks in Advertisement Text**
Google will review complaints and may restrict the use of a **trademark in ad text**. AdWords ads using restricted trademarks in their ad text may not be allowed to run. This policy applies worldwide. An ad can use a trademarked term in its text if either of these conditions is true:

1. the ad text uses the term descriptively in its ordinary meaning rather than in reference to the trademark, or
2. the ad is not in reference to the goods or services corresponding to the trademarked term

Google’s policies are similar to those of Bing, Yahoo, and others and strongly caution against, or explicitly prohibit against using another’s trademarked term in the actual ad text in a manner that creates a likelihood of confusion. In addition to complying with the law, Google also justifies this policy by reiterating its desire to put the user experience first:

*We don’t want users to feel misled by ads that we deliver, and that means being upfront, honest, and providing them with the information that they need to make informed decisions. For this reason, we don’t allow the following:*  
**Misrepresentation** - promotions that represent you, your products, or your services in a way that is not accurate, realistic, and truthful  
**Unavailable offers** - promising products, services, or promotional offers that aren’t easily found from the landing page  
**Misleading content** - making false statements about your identity or qualifications or falsely implying affiliation with, or endorsement by, another individual, organization, product, or service  
**Untrustworthy behavior** - concealing or misstating information about the business, product, or service.

A search engine is only appealing if it is reliable, simple to navigate, and if it provides relevant results. Search engines, then, are justifiably concerned with practices that would deceive, confuse, or misdirect their users. In keyword advertising, this means that companies using a competitor’s mark in order to disguise themselves, falsely imply a commercial relationship with a competitor, or mislead in any way, are in violation of Google's policy. Additionally, these violators have crossed into the dangerous territory of "causing the likelihood of confusion" and
risk legal action.

Although this may seem too abstract or nuanced in the ever-changing digital world, the same principles are common-sense offline. McDonalds and Burger King may compete vigorously in locations next door to each other, offering innovative deals, competitive pricing, or other incentives. Imagine, though, if McDonalds took down its logo and put up a Burger King sign instead, or if Burger King put up a sign saying "Big Mac's sold here!" Obviously those practices would be in violation of the law and companies would take swift action to ensure their competitor paid for the wrongdoing.

Keyword advertising is no different. Do not divert or trick Internet users into coming to your website, even accidentally. Avoid attracting false advertising complaints, or any other disputes that could be used against you later in any legal proceeding. The wrongful use of another's trademark in an advertisement; especially where the ad deceives or misleads the user is actionable in court and may violate the search engine's policies.

**SHOULD I BID ON MY COMPETITORS' KEYWORDS?**

Understanding the boundaries of appropriate use of a competitor's trademark in keyword advertising is only the first step. Leading advertisers carefully consider and calculate the risks and the benefits of this practice before going down this path. In many cases, the risks outweigh the benefits as many of the benefits can be attained through careful planning and strategic campaigns. The risks of bidding on a competitor's mark include:

- **Potential Bidding War** – The competitor may retaliate and bid on your brand name, potentially driving up your costs.
- **Can be Expensive** – Stealing customers directly from a competitor is almost always more expensive than developing new customers. In keyword advertising, this is typically the result of the high bounce rates and low click-through rates of competitors' marks as keywords. Accordingly, Google (and other search engines) will require you to pay more for those keywords than the competitor pays.
- **Negative Brand Experience** – This practice is becoming transparent with increasingly savvy consumers and can make you seem desperate or out of touch to your potential customers.
- **Risk of Litigation** – The law here is constantly evolving. Even innocent intentions when purchasing a competitor's keyword may draw you into an expensive legal battle

**CONCLUSION**

Bidding on and using a competitor's trademarks in keyword advertising should not be undertaken lightly. Even larger and more reputable companies have shifted away from these strategies in recent years. In the illustration below, Samsung's use of a competitor's trademark was done more as a publicity stunt than as actual keyword advertising, however, it illustrates several best-practices of appropriately using a competitor's mark in keyword advertising.
Samsung avoided using any competitor's trademarked terms anywhere in the ad-text and also added its perceived advantages over the competitor product. Samsung also took the "likelihood of confusion" challenge head-on by expressly acknowledging that it is not what the customer searched for, instead turning it into a lighthearted competitive jab. Importantly, rather than ruining the user's experience and damaging Samsung's reputation for being deceptive or out of touch, this ad, at worst, generated a few laughs from even the most devout iPhone loyalists.

In summary, first, understand the boundaries of what is and is not permitted in keyword use and the penalties for violation. Second, consider the implications and risks of using a competitor's trademarked terms. If you have any questions or doubts, seek legal guidance on these issues. Third and last, if you are going to do this as part of your keyword advertising strategy, be sure to consider the user experience when you are creating these campaigns.