

Russia

Contextual online advertising is big business in Russia, much of it potentially infringing. A lack of clear law in this area makes enforcing trademark rights almost impossible

The Russian market for contextual advertising is enjoying a boom, showing nearly 100% growth annually. This rise is demonstrated, in particular, by Google's recent attempt to purchase Begun Ltd, a leader on the Russian market for contextual advertising, for \$140 million. However, the deal was prevented by the Federal Antimonopoly Service. At the same time, in spite of the large turnovers in this field, very little attention has been paid to IP protection with regard to contextual advertising. For example, I am not aware of any Russian court decision relating to infringement of intellectual property through contextual advertising. It seems that a close examination of this issue is long overdue.

Contextual advertising in detail

Contextual advertising is a special type of online advertising based on technology that selects and shows to the user only those advertisements in which he might be interested. The subject matter of interest is determined by analyzing the textual content of the sites that the user is browsing or by analyzing the content of the user's search requests (there also exist a number of other more complicated methods). In Russia, contextual advertising occurs on the sites of search engines such as www.Google.ru and www.Yandex.ru, which are the biggest players in the field of online advertising. Not only do they show contextual advertisements, but they also gather information on the numbers and types of search requests undertaken, and transfer this data onto other sites. Using this information, such sites present the user on a subsequent visit with advertisements based on previous searches.

While contextual advertising is of interest to the owners of well-known brands, it is perhaps even more of a valuable resource for smaller manufacturers and service providers, as the costs involved are relatively low. Further, by purchasing

advertising based on a keyword related to the brand of a well-known competitor, smaller businesses can potentially gain access to the competitor's customers. This practice is very common on the Russian market for contextual advertising. Many Russian manufacturing and trading companies use the names of competing companies, including foreign businesses, as well as the names of competing products, as contextual keywords for online advertisements.

One illustrative example of such advertising has a special connection to Gorodissky & Partners. The name Gorodissky has been purchased as a keyword to display an advertisement for an unrelated patent firm. A search for the name Gorodissky (in Cyrillic characters) at www.Yandex.ru is very likely to bring up a 'sponsored link' for a competitor of Gorodissky & Partners near the natural search results.

While one might think that such use of third-party marks to display contextual advertisements for competing goods and services should be classified as a clear infringement precluded by law, the situation in Russia is not quite so clear cut. Because of deficiencies within the current legislation and the way in which contextual advertising deals are formalized, it is often very difficult or impossible to stop such infringements.

New law; new problems

The new provisions of the Russian Federation Civil Code regulating trademark matters, which came into force on January 1 2008, have created a number of legal problems. These provisions state that no one is allowed to use without the authorization of the rights holder designations similar to the rights holder's marks in respect of goods for which the trademark is registered, or in respect of similar goods, if such use is likely to result in confusion. In connection with such wording, one has to determine, whether "confusion" may take place when the designation similar to the trademark is used in contextual advertising. Here, brand owners are faced with the following problem: usually the designation similar to

the trademark is not presented within the advertisement displayed to the user. Moreover, the advertising message may contain the advertiser's trademarks, which are not similar in any way to the designation used as the contextual phrase. Thus, the advertiser's goods and services are unlikely to be confused with those of the rights holder, especially when the contextual advertisement is shown at a third party's site. Moreover, the moment when the similar designation is used (ie, the user entering the relevant search term) and the moment when the contextual advertisement is displayed are separated in time, which potentially excludes an association between the advertised product/service and the rights holder's goods/service.

It may be possible to close this legal loophole by applying Russian competition law. However, the legal definition of 'unfair competition' may be problematic when dealing with contextual advertising. 'Unfair competition' is defined as any action aimed at gaining a benefit as a result of business practices that:

- contradict the law of the Russian Federation;
- contravene the principles of fair business, decency, reason and justice;
- have caused or may cause losses to competing business entities; or
- have damaged or may damage the business reputation of another party.

Unfortunately, law enforcement bodies in the Russian Federation (in particular the Federal Antimonopoly Service) are not eager to apply this definition as a direct legal norm in cases when there is little proof that a competitor's actions have violated the law. As noted above, it is typically difficult to show that the contextual use of a designation similar to a trademark infringes IP law. Moreover, advertising regulations simply note that such matters are covered by the provisions of competition law, taking the rights holder back to square one!

Evidence

The difficulty in collecting evidence to prove unfair competition with regards to contextual advertising creates additional

problems. On the one hand, the unfair use of contextual words is publically available: any internet user, including the rights holder's lawyers, notaries and representatives of law enforcement bodies, may notice an unfair use and obtain evidence of it; on the other hand, it is not quite so easy to acquire proof as to the identity of the advertiser. The advantage of contextual advertising over traditional advertising is that it is available to anyone. No written agreement is required to place a contextual advertisement, and in some cases one need not even provide one's company name, address or other contact information. Also, payment may be effected with 'virtual' money. All this means that when a rights holder requests from a provider of online contextual advertising information about the advertiser, it may be difficult to establish the name of the advertiser or ascertain that person's connection with the manufacturer or seller of the advertised goods and services.

Key strategies

As the above discussion outlines, potentially infringing contextual advertising is prevalent on the Russian market at both ends of the scale. It is cheap and effective, and therefore highly attractive to a wide range of businesses large and small. Due to the number of advertisers, the varying scales of infringement and the lack of clear law in this area, many rights holders are currently struggling to deal with the problem effectively. Fighting each and every minor case involving contextual advertising is not economically viable. Nonetheless, there are strategies that may lend some assistance.

First, rights holders should look to ramp up their enforcement practices by filing complaints with the courts and antimonopoly bodies, and ensuring that such moves are well publicized. This may make some advertisers think more carefully when selecting keywords. Second, brand owners should notify the main players in the market about their IP rights: some of the larger Russian providers of online advertising services have confirmed that they are ready to consider rights holders' requests automatically and will work with them to prevent third-party use of their trademarks and names. [WTR](#)



Mark Chizhenok
Attorney-at-law
pat@gorodissky.ru

Mark Chizhenok graduated as a lawyer from the Peoples' Friendship University of Russia in Moscow in 2001. He started his career with Gorodissky & Partners in 1999. Mr Chizhenok counsels clients on matters pertinent to patent, trademark and copyright legislation. He also handles matters relating to domain name registrations. He speaks English and French.