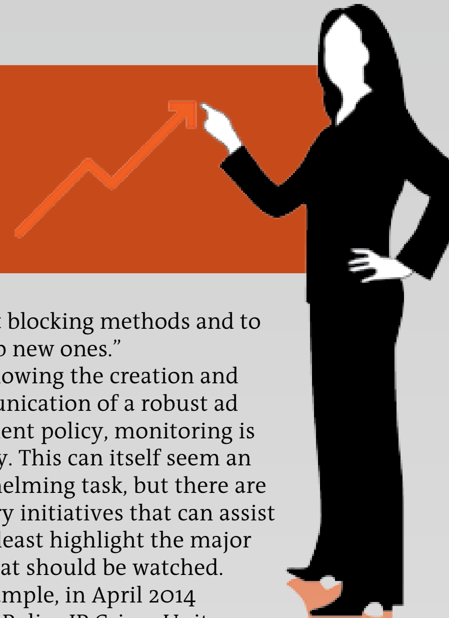
You need to know about...



Where your advertising spend is going

The last thing that any responsible trademark owner would want to do is to fund those infringing the intellectual property of others. But this may already be going on right under your nose

Earlier this year, the Digital Citizens Alliance (DCA) published research undertaken by MediaLink which quantified the profits generated by sites offering pirated content. MediaLink discovered that the 596 websites it researched make a projected $227 million in annual online advertising revenue, with the 30 largest sites that profit exclusively from advertising dollars by pushing stolen movies, music and television programmes each making more than $4 million a year. Crucially, when it drilled down further, it found that nearly one-third of those sites carried advertisements for blue-chip premium brands, while 40% carried legitimate secondary ads (eg, for legitimate gaming, gambling and content aggregation sites).

Other studies have resulted in similar findings. For instance, subsequent to the DCA report, Australian media website Mumbrella.com revealed that a number of international brands were advertising on hosting websites associated with Watchseries, a global piracy portal guiding consumers to illegal content. In short, advertising funds are being directed towards – or diverted by – sites that are engaging in infringement.

Why it matters to counsel

That this issue should be of concern is fairly obvious, and trademark owners – which must tackle infringements of their own intellectual property on a daily basis – should lead by example. Therefore, it is crucial to ensure that advertising dollars are not ultimately helping to fund online crime and IP theft. Related to this is the reputational risk – in terms of both the negative headlines that can arise when the media picks up on such stories and the danger that advertising on such sites will lend them an air of legitimacy (and potentially deceive consumers).

If that were not enough reason to act, there is another motivation that should appeal to all: it may avoid wasting valuable legal budget. "Detection and means of enforcement are wildly moving targets these days," explains Dennis S Prahl, partner at Ladas & Parry. "It is difficult enough for brand owners to budget for IP enforcement measures; there is no reason why they should be spending their legal budget to enforce their IP rights against illicit websites while simultaneously funding those websites out of their advertising budgets."

How to prepare

The first step is to ensure that company advertising policy clearly specifies the types of site on which advertising is permissible and is clearly communicated to marketers and external partners. Next, it is important to monitor ad placement and, if ads do appear on infringing sites, ascertain why this is happening.

When *The Wall Street Journal* spoke to marketers at a number of the big-name brands identified as advertising on infringing sites, the common response was that they had not intended to do so, and that such advertising was in violation of corporate ad placement policies. This is entirely plausible, as illicit sites are nothing if not clever when it comes to attracting unwitting advertisers. For instance, using a method that Mumbrella.com terms 'adnesting', site operators can mask their true location, meaning that brands buy space on one website only for the ad itself to appear elsewhere.

Another complication is that online ads are often placed by third-party ad placement networks, which look first at reads and click levels rather than at the content on particular sites they are considering (in many instances, the process is fully automated). It is thus essential that marketers reinforce company policy when engaging third-party suppliers and are encouraged to look themselves beyond click-through figures and consider where those clicks are coming from. In its recommendations, the DCA argues: "The presence of ads for legitimate brands on content theft sites should be an incentive for those brand marketers to press agencies, ad networks and exchanges to strengthen current blocking methods and to develop new ones."

Following the creation and communication of a robust ad placement policy, monitoring is also key. This can itself seem an overwhelming task, but there are industry initiatives that can assist – or at least highlight the major sites that should be watched. For example, in April 2014 the UK Police IP Crime Unit launched an infringing website list, designed to provide the digital advertising sector with continually updated information on copyright infringing sites which they should avoid advertising on.

Another initiative, spearheaded by the US government's Office of the IP Enforcement Coordinator, takes the form of a series of best practice guidelines for those who supply ads. Last year, technology companies such as Yahoo!, AOL, Microsoft and Google all pledged to back the scheme, which enables them to inform advertising networks when their ads appear on pirate sites. The advertising network then investigates and pull the ads if it agrees that the site is engaged in IP theft.

Ultimately, as is the case with other activities that legal counsel undertake, marketer buy-in and engagement are critical. Prahl concludes: "The need for coordination between intellectual property counsel and marketing personnel has always been great in order to develop strong and cost-effective branding, marketing and enforcement efforts. However, in the context of corporate advertising on illicit websites, the need has become that much greater. Both marketing and legal sides of a company need to know when and where their ads might be appearing on illicit websites and need to stay up to date on how best to prevent such ad placement." WTR