

WEBSITE PROMOTION AND PROTECTION OF INTELLECTUAL PROPERTY: A SPANISH LAW PERSPECTIVE

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Abstract

Purpose – The aim of this article is to analyse actions to promote websites that can violate intellectual property rights, in other words, copyright and the rights of online commercial brands.

Methodology/approach/design – An analysis of Spanish legislation on intellectual property rights.

Findings – Service providers that advertise on Internet deploy increasingly aggressive advertising formats which, on occasions, violate intellectual property rights. Spanish law on brands and unfair competition provides effective tools to sanction the various types of infraction that occur on Internet. This legislation could also be supported by industry self-regulation.

Practical implications – The analysis in this article can be of considerable use to all actors who operate in this setting (society, and the public and private sectors).

Originality/value – This article analyses the infractions that occur in advertising in relation to meta-labels and online links.

Keywords: E-commerce. Competition. Internet. Regulation. Telecommunications.

INTRODUCTION

Advertising, thanks to the arrival and consolidation of new technologies, has new commercial settings in which to act, and one scenario with considerable potential is e-commerce. Advertising has had to adapt to the presence of virtual spaces, and venture forward into the future by instigating new and impactful commercial practices. Unfortunately, there are actions that violate laws protecting intellectual and industrial property. The use of new but illegal techniques whose only aim is to boost company sales must be stamped out by public authorities. Although the nature of the legislation in this area is both

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preventive and repressive, through laws in force to ensure compliance, we must take into account the unique circumstances surrounding Internet.

A company with an online presence must take adequate measures to protect its own copyright and intellectual property rights. All websites have three elements that require copyright protection: the site's own information content; any type of graphic design –images, icons, etc.-; and the source code. The firm must also avoid violating the rights of others, and inform when the source of any content is copyright of a third party.

There are innumerable business practices that are commercial in nature, so an assessment of the corresponding limitations that affect the legislation of different states' laws on this subject is essential. The best way to tackle the problem we examine is by preventive action aimed at the efficient resolution of problems. Here, the importance of codes of conduct, functioning by self-regulation, cannot be underestimated.

REFLECTIONS ON INTELLECTUAL PROPERTY

There is a typology of rights for industrial property that protects the creators of inventions, brands or designs, among others, to enable them to develop their activity in the face of market competition; and they count on sufficient protection against potential misappropriation of their rights. There are various types of industrial property titles depending on the nature of the exclusive right one wishes to acquire and the type of intellectual creation in question.

Intellectual property –in the broad sense of the word it includes industrial property and copyright-, is formed of a set of rules that regulate the acquisition and use of rights over intangible goods for commercial use. The term intellectual property does not allude to a particular subjective right equivalent to that of the expression of “copyright”, as has traditionally been the case in Spain and Latin American countries, but rather it is a legal space in which, in addition to the regulatory dispositions of these rights, other rights coexist –which confer, or not, subjective rights- that control the economic activity over which such rights exercise influence, and in which occurs the incidence of “economic competition”.

In Spanish law, intellectual property consists of a series of personal and patrimonial rights that attribute to the author of an original work –and to other legitimate titleholders- the full ownership of it, and the exclusive right to exploit it, within the limits stipulated by law.

Copyright, which tries to protect and encourage creativity, safeguards scientific, literary and artistic creations by attributing to the author the exclusive

right to exploit them by the simple fact of being their creator. These include moral as well as patrimonial rights whose importance in Europe –especially in terms of the latter- is greater (Sterling, 1998; Samuelson, 2001; Koelman, 2004). It is the subjective conception which, in copyright terms, is present in most European states' legislation. However, the copyright system, which adheres to the objective conception of copyright, has always centred on the protection of patrimonial rights, while resorting to other mechanisms to protect moral rights. Clearly, there is no uniform international idea on the reach and content of copyright (Lea, 1999; Peeler, 1999; Sterling, 2003; Arditi, 2017).

One very important feature of the rights we examine here is that they are voluntary in nature.

In both cases, this is a question of the exclusive rights that confer on titleholders the opportunity to take jurisprudential and administrative action to protect their rights and pursue infractions and violations of these in all their forms: falsification and defrauding, misappropriation, plagiarism and imitation (Stim, 2017). While copyright and other intellectual property rights come under Civil Law, although inclining more towards Mercantile Law, industrial property rights are those that confer use and exploitation whose protection extends to commerce and industry in all its forms, with an evidently close link to Mercantile Law (Dratler & McJohn, 2018). There are conceptual differences between intellectual and industrial property, yet if we consider intellectual property as a broad concept, industrial property could easily fall within its scope.

There are innumerable actions involved in the commercial promotion of goods and services, or simply information, which can violate intellectual and industrial property rights. These practices must be quashed by public authorities exercising the full force of the law. However, it would be more suitable to apply preventive action based on the principle of free will, in the form of codes of conduct that define a wide range of good commercial practices in e-commerce.

THE DEVELOPMENT OF SELF-REGULATION

If we consider the limited efficacy of the various regulations mentioned currently in force, and the aggressive nature of online advertising practices linked to e-commerce which, on occasions, can break the law, there is a case to be made for using other instruments such as codes of conduct (ROBINSON & CHIAROLLA, 2017).

Codes of conduct on e-commerce are voluntary in nature and include a set of rules and principles and that are, in effect, good practices that can be certified by an independent body. The code of conduct considers the interests of user and consumer associations, the disabled or other groups potentially affected by issues related to online pre-contract, contract and post-contract procedure,

without prejudice to other questions. These actions could include interactive advertising, the protection of minors as well as questions relating to intellectual property whose aim is to instil and strengthen the confidence of the potential user and consumer (LÓPEZ JIMÉNEZ, MONROY & CRICHLAW, 2017).

This scenario is in constant evolution and moving at a frenetic pace. Since laws and reforms necessarily pass through various stages before reaching the statute books, legislation can be enacted late and, consequently, with limited practical effect. However, codes of conduct can provide preventive instruments to head off future possible non-compliances, and are constantly updated. These codes will append any legislative changes regarding intellectual and industrial property rights, and regulations to curb inadmissible practices. The advertising techniques used in e-commerce sometimes apply increasingly cutting-edge procedures that need to be classified as illegal and, therefore, subject to sanction. Convincing all the agents involved of the need to act together thoroughly and efficiently is the most sensible way forward.

Good practice codes must demand scrupulous respect for legislation that protects intellectual and industrial property laws, and laws regulating unfair competition. They must draw attention to illegal advertising practices such as the concealed insertion of meta-labels in the source code that resemble brands, names, signs or company names or services over which they exercise no authority and to which they have no title. Since codes of good practice are voluntary, such calls to good behavior only carry force with those companies that have signed up to them.

ACTIONS THAT POTENTIALLY VIOLATE INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENTS OF COPYRIGHT AND ONLINE COMMERCIAL BRANDS

As is well known, there are texts, images, software and databases that are freely accessible online; indeed, there are innumerable and significant intellectual and industrial works that have been produced by their creators with no profit motive. These exist alongside works whose creators intend to profit by their labors, hence, the regulatory regime governing both cases should be, and is, undeniably different.

These two phenomena clash as, on the one hand, defense of intellectual and industrial property rights has to be maintained, while on the other, there is the necessary –and desirable– impulse to develop culture.

Although these notions seem irreconcilable, both the law and self-regulation try to foment behavior among the private agents that complies with legislation governing the medium in which they operate, without undermining the promotion and subsequent development of culture. The violation of

intellectual and industrial property rights not only affects authors, editors and producers –and their legitimate economic interests- but society as a whole because it endangers economic and cultural development by discouraging intellectual and industrial creation.

We now examine the various techniques conceived to develop advertising for e-commerce whose aim is to generate the biggest number of sales possible. These practices occasionally break the law; such practices are largely unknown, but must be combatted rigorously when they violate legislation on intellectual and industrial property rights.

A legal analysis of search engine optimization and contextual advertising

Today, questions of legality surround the new modalities of e-commerce advertising, especially in relation to meta-labels and keyword advertising. These techniques, which center on search engine optimization and contextual advertising, are generally legal (SIROVICH & DARIE, 2007). But, as we shall see, there is a strong case for their elimination when they infringe laws designed to protect intellectual and industrial property rights (REYES, 2015).

Certification of good practice for search engines exists in the form of Qweb, which originated as an online self-regulatory initiative that promotes good practice among firms, organizations and private users on Internet. Ranking a search engine's quality is becoming increasingly important for providing good value search results.

The use of meta-labels

Meta-labels –also known as meta-tags, meta-names or meta-links which, although defined as keywords inserted into a specific section of an HTML document's source code to describe its content (JOHNSON & FRANCIS, 2008), could more accurately be described as special HTML labels. These are inserted at the start of each webpage, with the meta/name format, and are useful for gathering fundamental data on the webpage to enable the indexation of each page in the search engines' databases. This has been described as the electronic version of written library catalogue files that detail the important elements of a work, such as author and plot (LOOK, 1999).

Meta-labels can be categorized in two ways. Description meta-tags, which contain a brief description of the website content. This description appears in innumerable online data search programs in the list of results. And, keyword meta-tags, which consist of a set of key words that identify the website

content (KNAAK, 2014). The modality that causes most problems in practice is the latter, which we shall discuss in this section. So, although we allude to meta-labels in general, it is in fact keyword meta-tags that we are referring to.

These are normally used by some search engines to index and classify webpages on their databases, so as to provide users with their location. For this reason, advertisers use these names, which are hidden from the user (ROSSI, 2002), to direct users' attention to webpages that promote their product. One reason why a third party would use a brand that is not theirs as a meta-label is to attract visitors to their website, by appearing on the list of search results in a position that is just before or after the brand holder, but always close to the link generated towards the website of the brand holder. This close placing is guaranteed if the sign used is identical to the protected brand. But if the sign used as a meta-label is only similar, the search engine might situate the link far away from the brand (KHAN & MAHMOOD, 2018).

Search engines provide content location on Internet, enabling active exploration and indexation inside the search engine's storage system of which it forms a part. These practices pursue the best position on a website or resource for a specific request which, by corrupting the initial philosophy, is known as "positioning" optimization. Search engine positioning is based on implementing certain technical solutions, and not necessarily within the law, aimed at getting search engines to situate a specific website in a desirable position for particular search terms and expressions. Optimization is evidently important in practice as it increases a website's visibility and popularity.

Terms that can be classified as meta-label are the nominative elements of protected brands, frequently famous brands which, when written in by users on search engines, are those that obtain a higher number of visits. There is no legal concept of the renowned brand name, with the exception of Article 8.3 of Spain's Trademarks Law –when the brand or commercial name is known by the public in general, they are to be considered to be renowned-, understood to mean, known to the public at large.

Considering the significant role of brands or distinctive marks used as meta-labels for positioning on search engines, it is important to evaluate two effects that are directly connected. If the website owner uses certain meta-labels and receives a high number of visits, the probability of selling products or services on offer is greater, and, the chance to obtain more advertising revenue increases, because if entrepreneurs see that users' visits to the website are frequent and prolonged, the website owner will surely demand more money from potential advertisers than if the opposite were true (MOYER, 1999).

In practice, there are websites that sell neither products nor services but use meta-labels to capture a high number of users and register the greatest

number of visits possible, yet in certain cases, by doing so they will garner advertising revenue. Here, the brand's nominative element, which acts as the meta-label, is not used as a brand and, hence, does not violate the exclusive right of the titleholder even though the person who uses the meta-label is benefiting from the efforts of others (KILEJIAN & DAHLSTROM, 2016). However, the norm in e-commerce is that websites push products and services.

As the utilization of these keywords constitutes a form of communication aimed directly or indirectly at promoting goods, services or a company image, these messages would fall within the legal concept of advertising as set out in Article 2 of Spain's General Law on Advertising. Thus, being legally classified as advertising, it is a minor point that such words or messages are not detected by the user since, although they remain hidden, they perform the inherent function of all advertising messages, namely to promote goods, services or a company image (PEYRON, 1998; MENKE, 1999).

We understand that the products and services that are differentiated by meta-labels correspond to the content on the website where the meta-label is inserted (CLARK, 1999); nevertheless, some authors (WEININGER, 2001) consider that meta-labels in e-commerce differentiate the websites themselves and not their content.

In this sense, there are doctrinal differences on the distinctive features of the brand as used by others as a meta-label.

On the one hand, there are authors (KUR, 1998 & 2000; KOTTHOFF, 1999; VARANIDEK, 2000) who deny the potentially distinctive character of the brand used by others as a meta-label since, in their estimation, the aim is not product or service differentiation in e-commerce but merely to ensure that the meta-label is located by the search engines when the user enters the brand name in question; in this case, its address is offered to users. The key argument in denying the distinctive nature of meta-labels is that they go unnoticed by the online users.

The opposite argument (CHONG, 1998; PEYRON, 1998; TOSI & TOSI, 1998; KAMINER, 1999; MENKE, 1999; MACQUAIG, 2000; BLAVIN & COHEN, 2002) recognizes the distinctive nature of meta-labels, for although the brand contained within the meta-label is not visible, its effects certainly are when a search is performed.

We can say that, a priori, it is neither possible nor convenient to decide to take one side or the other in this debate. In reality, it seems that this is a question that needs to be decided case by case on its merits. In other words, whether the meta-label is used for its distinctive features or not depends on how it is perceived by the online user, because a mark is used as a brand when the public believes that this mark informs them of the origin of the product or service in

question. In certain cases, potential users and/or consumers understand that the meta-label in question will differentiate the goods or services on offer on the website while in other cases, the opposite will happen (Hyman & Franklyn, 2014).

In principle, the use of meta-labels for advertising is perfectly legal. There is no legal impediment to the use of keywords to identify or define a webpage, regardless of the common terms that have a direct relation to the webpage content to which it refers. Not even in those cases when so-called word stuffing occurs, which consists of repeatedly entering the name of a meta-label, a word which the user might enter in the search engine, with the aim of getting the search engine to situate the page in question at the top of the list of search results (HUANG, 2018).

There are certain cases in meta-labelling practice that can be considered legal. There are cases in which there is a legitimate reason for its use, such as when there is a notification that the webpage that features the name of another's brand as meta-label legitimately carries information related to the brand that is the meta-label's target. This situation can be legitimately compared to the case of products or services commercialized under the brand used as meta-label by a third party –Article 10 of the Unfair Competition Law and Article 6 of the General Law on Advertising- or the legitimate offer of products or services to which the brand in question corresponds, or, products and services that the brand no longer provides –Article 36 of the Trademarks Law- provided that the impression is not given that there is a relation between the business that offers the product or service and the brand titleholder.

This practice, which is legal in principle, is linked to websites that distribute products that are differentiated by brands belonging to third parties. Doubts could arise as to whether the owners of such websites can use as meta-label the brands of products that they distribute. So, it could be said, in line with the doctrine on this issue (KOCHINKE & TRÖDLE, 1999) that as a rule, distributors can use as meta-label another's brand of products to which the goods are targeted, except when the brand titleholder expressly forbids a third party from using its distinctive mark as a meta-label.

One potentially delicate case would be that of the retail distributor of products or replacements for goods belonging to various brands that disproportionately used as meta-label a renowned brand of products that amounted to only a small part of that firm's total distribution. In such a case, this usage would run counter to the principles of fair competition because it is an act of exploitation of another's reputation.

However, there are other advertising practices related to meta-labelling that are legally problematic. This occurs with the use as meta-label of words that

have nothing to do with the content the webpage carries, nor in terms of the products or services promoted on it. Two significant infringements can occur in this instance. First, the use of another's brand as meta-label can harm the brand's reputation if the goods or services on offer on the website are of low quality, and, if it decides to publish unpleasant content –for example, if a pornography website uses a registered brand of children's products as a meta-label-. Second, the brand's distinctive character could be seriously undermined, for example, in search engine positioning; search results or listings might show websites that have absolutely nothing to do with the brand's differentiated products or services, thereby diminishing the capacity of the distinctive mark to establish the association between the brand and its title-holder.

This practice should be classified as an act of deception and made illegal, in that the cases mentioned above show how meta-labels successfully divert users' attention towards a particular webpage by attributing to this webpage characteristics or content that do not correspond to it in reality, or it might even represent an act of unfair competition since it would, at the very least, be in violation of Articles 7 and 12 of the Law on Unfair Competition.

Another legally reproachable technique in meta-label use in advertising is the unauthorized use of brands or other distinctive registered marks of others in order to differentiate identical products or services; such behaviour runs counter to regulations on correction and good trading practices. This is in violation of Article 34.1 of the Trademarks Law, which states that the owner of the registered brand can prohibit third parties from using without his/her consent any mark identical to the brand for products and services that are identical to those for which the brand is registered. In addition, section 3 b) of Article 34 of the same law clearly states that the proprietor of the registered brand can prohibit the use of the distinctive mark registered on telematic communication networks, and as a domain name. In the latter case, the legislation refers to possible violation of the title-holder's rights by using the brand on Internet via the use of others' brands in this medium, and even via the website itself –links, banners and framings-. It should be irrelevant whether the illegal use of the brand occurs in a real or virtual context.

Ultimately, the use as meta-label of others' brands that differentiate products or services that are similar or identical amounts to a violation of trademark law that takes precedence over the repressive nature of unfair competition law. There could be situations in which trademark law is insufficient to prevent acts generated by distinctive marks that do not possess an exclusive right, in which case it is to be wished that the laws governing unfair competition support trademark law.

We consider that meta-labels whose function it is to promote distinctiveness are in violation of trademark law, as established in Article 34.2 of the Trademarks Law, when three requisites are satisfied: 1) the meta-label exercises this distinctiveness function in an e-commerce setting; 2) the meta-label identifies itself with the nominative element of a brand or commercial name, the title to which is held by a third party; 3) the products and services distinguished by the meta-label are identical or similar to the differentiated products and services under the mark of a third party who is owner of that brand.

Keyword advertising

The objective of a company in possessing a distinctive mark is to be able to act competitively within the market by fomenting the relation between the company and its clients. It is important for these marks not to generate risk of confusion with other leading brands. The brand, with regard to all other distinctive marks, is the most characteristic because it is the one most specifically derived from the activity of the entrepreneur. The brand not only communicates specific content on the differentiated product and its level of quality, but also guarantees the veracity of all the information provided. In this way, consumers can place their confidence in it, and extend the information received to all the differentiated products under the same mark, thus adjudicating a kind of presumption of *iuris tantum* to these products and, in particular, to the quality.

The modality of banner advertising, whose use is growing significantly, operates by using banners or emblems with keywords, keyword banners, although here we prefer to use the term keyword advertising, or contextual advertising. In these cases, the webpage proprietor signs a contract with an advertiser so that the search engine webpage only shows banners from that advertiser when the user taps in a particular word for a search. The system has two advantages. First, the advertising message targets a public interested in the goods and services on offer, and potential clients obtain more information on these goods and services (SHEA, 2002), and secondly, the advertiser maximizes the investment in publicity (KAUR, AGGARWAL, BAGGA & MAAN, 2017).

This advertising practice, which is legal in nature, has been described by various names coined by practitioners outside the practice of law, although it is true that the legal profession cannot stand aloof from such terminology. In effect, it is the law that disciplines the social reality that encompasses other branches of knowledge which, inevitably, have to adapt to the legislation in force at all time and in all places. These descriptions are: sponsored links;

keyword purchasing; targeted advertising, and contextual advertising. One inherent characteristic of the advertising techniques we examine is determined by the fact that it is the search engines themselves that push relevant content towards the users when they write in keywords to search for the information they require. It is a tool that converts advertising into a service for the Net surfer, and complements their searching rather than being an irritant. It is a way to make advertising less intrusive and more informative.

The aim of the entire strategy developed via sponsored links is to point potential clients towards advertisers' websites. Good management of this type of advertising is based on raising the visibility of the brand, the product or service (MAGAGULA & LEES, 2017).

A typical contextual advertising service is Google's adwords adsense; similar contextual advertising services are offered by search engines such as Yahoo and Microsoft.msn –and other e-commerce websites like Ebay and Amazon-.

The sale of keywords is a significant source of income for the biggest online search engines (GRIMMELMANN, 2007). It is common practice for search engines to contractually oblige advertisers to comply with certain requisites when displaying their banners: they must always include their brand name, domain name and a brief description of services in order not to adduce a variation of the keyword that identifies another's brand.

Adwords adsense is an advertising service provided by Google by which the company that contracts this service has the right to advertise itself, in the form of links or sponsored search results alongside the results that emerge from an online search for a particular word. In addition, when a suggestion is made on Google, this search engine not only presents words in plural or words associated to places or adjectives but also offers synonyms or contextual variations on the same word, such as recommendations.

When a user goes to a search engine and enters a keyword acquired by a company, there appears, together with a list of results of that search, a banner or advertising inset with a link to the webpage of the advertiser that had acquired the keyword in question, under the heading "sponsored link". A priori, there is nothing to object in Google's promotion of a commercial activity to contract adwords, in that Google is only responsible for contracting the presence of these advertising spaces linked to generic terms. And, to avoid charges of embedded advertising, the exact nature of the advertising in these spaces is made sufficiently clear to users.

The question of legality arises when Google sells as keyword not only common or descriptive terms but also terms that overlap with distinctive brands

registered to companies other than the one with title to brands whose practice is manifestly illegal (WATSON, 2011).

As we have seen, contextual advertising does not contravene trademark law in cases when the keyword used is a generic term, yet it does so in cases where that keyword is a brand name and the banners associated to it correspond to an advertiser other than the brand owner. In this latter case, it is reasonable to assume that when a particular distinctive mark is used as keyword there is considerable risk of confusion among consumers. They might easily believe that the advert that appears in the banner –or emblem- belongs to, or is presented by, the brand holder that uses it as a search criterion (FRANKLYN & HYMAN, 2013).

In other words, the practice of keyword advertising is legal in principle by any advertising medium or mechanism, and no determination of legality or illegality of the banner in content terms can be made except in a case-by-case scenario.

The use of another's brand as keyword will be considered in violation of the exclusive right when all suppositions in Spanish trademark law, or Regulation 207/2009 of the Council of Europe, 26 February 2009, on the European Union trademark, are satisfied, in terms of a national brand, an international brand with effect in Spain, or an EC-wide brand. These requisites are: 1) that the keyword used in the commercial activity to distinguish products and services is identical or very similar to another's distinctive mark; 2) that between the products and services differentiated by the brand and those differentiated by keyword there exists an identity or similarity that is liable to generate risk of confusion among consumers.

When the user enters the keyword that is coterminous with a firm's brand, there appears together with the list of search results a banner that provides the user with direct access to a competing company. As in other similar examples, this is illegal as it clearly violates intellectual and industrial property laws, and those governing unfair competition

The use of a distinctive mark of another, as in the case we examine here, implies an act of unfair competition because there appears to be no justification for the use of another's distinctive mark when there are so many distinctive marks available in commercial activity. This is supported in Article 6 of the Unfair Competition Law, which refers to acts of confusion, stating such cases should include distinctive marks that are deliberately imitative. Thus, whenever the behaviour is liable to cause confusion or risk of association it will be deemed unfair.

Confusion, as described in Article 6 of the Unfair Competition Law, should be understood to mean immediate or direct confusion –that is, a client

confusing one product with another- and risk of association –regarding company of origin, or immediate confusion.

When a keyword advert is formed of another’s renowned distinctive mark, this use could amount to undue exploitation of another’s reputation – Article 12 of the Unfair Competition Law-. This position is coherent with reinforced protection that renowned brands receive considering the wide dissemination of that brand name in the market. In this case, the entity that exploits the renowned distinctive mark of another might sidestep accusations of unfair competition by successfully differentiating the products and/or services that it offers and those of the proprietor of the renowned brand.

However, some keyword ads overstep the line into illegality. For example, they can be deemed fraudulent when they infringe the principle of veracity, such as banners whose content does not match the reality of the products or services on offer –paragraph 1 of Article 4 of the General Law on Advertising- and those that omit important data on the products or services on offer and induce error in a potential customer - paragraph 2 of Article 4 of the General Law on Advertising-.

Spanish and EC jurisprudence has dealt with this question. Madrid’s Commercial Court N° 9 determined that the use of another’s brand as keyword – in this case Google Adwords- and the positioning of meta-tags in the source code, constitutes a violation of brand rights if, by its actions, it performs the function of a brand. In line with the Court of Justice of the European Union, cases C-236/08 to C-238/08 (Louis Vuitton vs. Google), the Spanish court ordered the competitor company to cease using the Masaltos registered trademark in its webpage source code and as a keyword. The case was complex for the alleged lack of distinctive quality of the Masaltos brand in terms of the potential descriptive faculty of the shoes that both companies commercialised. The sentence included a detailed explanation on the need to eliminate from the trademark register all those generic brands that allowed their owners to block access to them by other operators, because this would unjustifiably restrict competition as the product would not be available to all.

THE INCREASING USE OF LINKS

Other practices regularly developed in e-commerce can affect intellectual and industrial property rights, such as linking, deep linking, framing and in-lining. It might seem obvious but not all such links are illegal, although some certainly infringe intellectual and industrial property rights (JAUHAR, 2013).

Linking is the hypertext connection between one webpage and another part of the same or a different webpage. This connection enables us to navigate

from one webpage to another –or, even within the same webpage-, by clicking on the link or hyperlink, giving us access to content on other webpages. Classifying the creation of a link as copyright violation requires a standard consensual legal interpretation because linking is the basis of Internet navigation in general, and of e-commerce in particular. It is not clear to see how linking can be an infraction of intellectual property rights since a link could amount to no more than an electronic citation or bibliographical reference, with the acts of reproduction performed by the user who activates the link, not the creator of the link. However, content obtained via a link amounts to more than just information provided by the citation. In general, it could be said that a violation of copyright does not occur with the creation of a hyperlink or link to the home page of a website, and this link must be eliminated if the title-holder requests it. But copyright violation does occur when a hyperlink is created that enables others to copy a work that is copyright protected if the party that creates the hyperlink is sufficiently aware of the fact that he/she is allowing a copy of the protected work to be copied.

Deep linking, or deep link or connection, occurs when, instead of directing the user to the home page, the user is lead to a different page on the same website or to a specific document on the linked page (KELLEY, 2002). By avoiding the home page, the deep link is deemed to harm the legitimate interests of the website owner as it implies loss of advertising revenue and user access to the services generally offered on the home page of the linked website (NESPOR & DE CESARIS, 2001).

Deep linking gives the impression that the linked page is part of the page that contains the link, adjudged by some (HIMMELRICH & DEAN, 2000) to mean an act of transformation. This type of practice in the systems that recognise the author's moral rights can be considered a violation of these rights because it would create confusion in terms of the authorship of the work. Others (PLAB, 2000) believe that when there is a big difference between the content on the webpage that contains the deep link and the content of the webpage to which it refers, it could be understood that the party that establishes the link does not create the content on it. Though these suppositions are not admissible, practice shows that in most cases the links –including deep links- connect us to pages with related content.

The use of these hyperlinks without authorization could amount to exploitation of another's endeavour and, in certain cases, illicit gains at the expense of another. It could also be a violation of the website owner's right to public communication (KELLER, 1998) or an act of unfair competition (CHANCEY, 1999). In sum, for this instrument not to impinge on intellectual

and industrial property rights, prior authorization from the author or title-holder of the linked content is required.

In-lining and embedded links are processes that present a file, text, sound or image on a specific webpage, the file in question having been generated on another webpage without the user's knowledge. In-lining functions via IMG, or image, links that are activated automatically –without any specific action on the part of the user-, when loading a page that carries an image or any other content from a file on a different webpage (BEAL, 1998). However, as a result of this IMG link, the content drawn from the other website counts as an integral part of the webpage initially loaded by the user. Once again, a violation of intellectual and industrial property rights occurs when this type of activity is performed without the author's consent.

In general, when these links lack authorization from the title-holder of the embedded work they constitute a mechanism for acquiring illicit gains at the expense of the work of another. Firstly, in terms of the exploitation of rights, because the use of these links amounts to an infraction of reproduction rights, as the page that contains the link reproduces on the same page a work –text, photograph, sounds, etc.- configured as an element of another webpage. Secondly, because this link can represent a violation of the exclusive public communication right to communicate a part of a work that belongs to another if done so without authorization (WASSON, 1998; ROARTY, 1999). Thirdly, this technique enables the server hosting the webpage that contains the link to save space because it is not obliged to store the linked information.

Framing relates to access to a webpage different from the one requested by capturing the original webpage sought, and surrounding it with advertising and the indicative marks of the webpage that has captured it, thus giving the impression that the captured webpage is part of the website that has undertaken the framing action (WEINBERG, 1997; KOCHINKE & TRÖNDLE, 1999); as a result, the consumer cannot distinguish whether the content now being consulted belongs to the webpage initially visited, or as happens in reality, it belongs to a different webpage.

Framing cannot be compared to a citation because it does not send the reader to the source but hands possession of it to them, thereby performing acts of reproduction, public communication and even transformation. Intellectual property rights are violated by framing (KOHLER & BURMEISTER, 1999; SAW, 2018) since the activity is performed without the consent of the owners of the captured webpage; the captured webpage's content appears on the user's screen as if it belonged to the website initially consulted. This amounts to unfair competition and a fraudulent act to the consumer's detriment, and liable to sanction under user and consumer defence legislation. It could also be an

infracción sui generis of the rights of the proprietor of the webpage that has been framed, whenever there is justification for this right to be applied, since the frame's creator is clearly using all or a significant part of the content of the original website's database.

CONCLUSION

Entrepreneurs are increasingly resorting to aggressive advertising practices. There are numerous actions linked to the promotion of goods, services, or just information that can violate intellectual and industrial property rights. These practices should be stamped out by the public authorities applying the full force of the law.

However, preventive action would be more suitable, applying the principle of free will in the form of codes of conduct that define the wide range of good commercial practices in e-commerce.

This article has discussed meta-labels and keyword advertising, as well as the various types of links. We have analysed cases in which these activities comply with the law, and these should clearly stand apart from those that violate legislation.

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