

Application and Response of Keyword Advertising under Competition Law

Abstract

Keywords: keyword advertising, advertisers, search engine platforms, keywords, trademark infringement, unfair competition, Fair Trading Act, competition enforcement

The high popularity of the Internet and the continuous development of digital technology make digital advertising techniques, including keyword advertising, become one of the important tools of enterprise marketing. At present, keyword advertising in most countries are provided by Google, and the search advertising service provided by Google Ads platform can be subdivided into eight detailed operation modes. Another important concept of keyword advertising classification is that the "keyword" itself actually appears in the advertisement title / advertisement text or not.

In addition to its own name or trademark, the enterprise may also use the name or trademark of a competitor as the keyword of the advertisement. However, using a competitor's name or trademark as a keyword may cause Internet users to mistakenly believe that the goods or services advertised by the advertisement are related to the advertiser, resulting in disputes including trademark infringement and unfair competition.

The author compare legislation and relevant judicial cases in the United States, Japan, the European Union, the United Kingdom and Australia. Due to the possible differences in the case circumstances and the application of legal provisions, the discussion on whether the advertiser constitutes trademark infringement is divided. However, if the keyword does not appear in the title or

content of the advertisement, it is generally accepted that it does not constitute trademark infringement. If the advertiser does not constitute trademark infringement, it is also generally considered that unfair competition is not established.

Regarding the responsibility of search engine platforms in keyword advertising issues, there may not be relevant discussions and cases in the target countries. In the United States, earlier lawsuits against search engine platforms ended in settlements.

The Australian Full Court of the Federal Court once found that Google played an active role in keyword advertising and content control, thereby overturning the the Federal Court's view and holding Google liable for misleading and deceptive statements. However, the Federal High Court of Australia ultimately ruled that Google was merely communicating "sponsored links" and neither accepted nor endorsed the misleading statements made by the advertiser. Reasonable users may also understand that sponsored links and representations based on such links are created by the advertiser and are not adopted or endorsed by Google. The Federal High Court of Australia also held that an average reasonable user can also understand that sponsored links, and representations based on links, are created by advertisers and have not been adopted or endorsed by Google.

For the analysis of Taiwan's keyword advertising market, the author conducted a number of industry interviews to fully grasp the current situation of Taiwan's keyword advertising market. After summarizing the relevant results, the author put forward eight important findings for the analysis of Taiwan 's keyword advertising market, including: 1. the market size of keyword advertising in Taiwan; 2. the function of keyword advertising and the type of

enterprises that place keyword advertising; 3. the professionalism of advertising agencies in keyword advertising and the considerations of enterprises; 4. keyword advertising is only a part of the overall advertising strategy of the enterprises; 5. transparency of Google and Yahoo's keyword advertising policies; 6. only Google provides the purchase of competitive keyword services; 7. development trend of Taiwan's key word advertising market; and 8. the impact of Generative AI technologies on keyword advertising decisions.

In the application of the Unfair Competition Chapter of Fair Trade Act, keyword advertising might be subject to Articles 21, 22 and 25. There were differences in views on whether the "trademark" mentioned in Article 22 was limited to unregistered trademarks, but after the 2015 amendment, registered trademarks were explicitly excluded, so that the problems caused by keyword advertising were mainly the provisions of Article 21 and Article 25. In addition, some recently emerging keyword advertising types may also involve the application of Article 24 of the Fair Trade Act.

Observing the trend of competition law enforcement, the Administrative Decisions made by the Fair Trade Commission on keyword advertising have increased rapidly in recent years. There have been 2 cases of violation of Articles 21 and 18 cases of violation of Articles 25 of the Fair Trade Act, all of which were cases in which the keyword actually appeared in the title or content of the advertisement.

Based on the results of comparative law analysis, keyword advertising market research and practical case analysis, the author finally put forward the law enforcement recommendations for keyword advertising derivative disputes under the Fair Trade Act. First of all, the Fair Trade Commission should examine the international development trend and the current situation of

domestic practical development, and sort out the possible forms of keyword advertising, so as to facilitate the correct understanding and grasp the scope of the problem when dealing with the unfair competition disputes involved in keyword advertising.

In the handling of dispute cases, the first step is to observe the "keyword itself" set by the advertiser. In addition to the common "enterprises' name or registered trademark", there are also "general terms" which have nothing to do with the name or registered trademark of the enterprises as the keyword. In the absence of any representation or symbol of a enterprise, the controversy caused by keyword advertising often does not lie in the keyword itself, but in the specific content of the advertisement triggered by the keyword. Thus, the second step in case handling is to analyze whether the keyword in question appears in the "title" or "content" of the keyword advertisement. In addition, where emerging types of controversial applications do not necessarily involve the representation or symbol of the enterprises, the Fair Trade Commission should also scrutinize the advertiser's true intent in the use of keyword advertising. If it is not directly related to market competition, even if the keyword itself or the content of the advertisement is suspected to be illegal, it does not necessarily fall under the Unfair Competition Chapter of Fair Trade Act.

In the case of keyword advertising suspected of violating Article 25 of the Fair Trade Act, related Administrative Decisions over the years could be summarized into four specific law enforcement judgment rules: 1. The trademark owner has certain economic interests in the market; 2. The enterprise being punished is the subject of the dispute; 3. The behavior of the fined enterprise is an unfair act that exploits the fruits of others' efforts; and 4. The

conduct of the enterprise disposed of has affected the trading order of the relevant market. Since all Administrative Decisions are cases in which the keyword actually appears in the title or content of the advertisement, for the situation in which the disputed keyword does not actually appear, the author believe that the above four judgment points can still be directly invoked, but in the part of " the behavior of the fined enterprise is an unfair act that exploits the fruits of others' efforts ' efforts", further discussion of specific details of the judgment criteria is necessary.

Under the widespread use of keyword advertising, the author also believe that it is necessary to review the specific judgment indicators of "the behavior of the enterprise affects the market trading order". In particular, the "consumer perception situation" is becoming more and more important. For the competition enforcement of keyword advertising, the author suggesnt to assess the proportional relationship between the specific number of clicks of consumers and the overall number of ads of advertisers and establish the necessary "quantitative" criteria as a judgment indicator of whether it affects the market trading order.