



88 - What You Can and Can't Say In Your Google Ad Copy - We Talk All About The Legal Aspects Of Ad Copy

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Brief Background About Brigit Rubinstein

- Brigit is the Co-Founder and Principal Lawyer of Level Up Legal. She has 20 years of experience in Intellectual Property and Commercial Dispute Resolution.
- Level Up Legal is a boutique Intellectual Property and Compliance law firm that understands that you don't want legal jargon, you want strategic advice and commercial solutions.
- Learn more about her and Level Up Legal on their website: <https://leveluplegal.com.au/>



The Do's and Don'ts of Ad Copies In Terms of Legality

- You mustn't engage in conduct that is likely to mislead or deceive, you must not make false or misleading claims or statements. And those are sort of the Golden truths. And your starting point for everything.
- And some basic guidelines, when you're asking yourself, how do I make sure that my advertising is not likely to mislead or deceive or doesn't contain false or misleading claims.
- And we always tell our clients that the starting point is to put yourself in the shoes of the consumer. And ask yourself, what is the overall impression that's created by this advertisement?
- And so for example, what people often don't understand is that a statement can be true, but also be misleading.
- A disclaimer is something that you can use to qualify a statement, or to perhaps explain some of the further details. But you can never use a disclaimer to correct a misleading statement.
- I think that's you've got to be pretty careful in those industries, not to over promise. Essentially, you cannot make any claim that you cannot substantiate and prove with evidence.
- But if you're going to make a statement that says, lose 10 kilograms in two weeks, you've got to make sure that the average reasonable person is going to lose 10 kilograms in two weeks on your product, and that you can substantiate that with evidence.



Can You Bid on Your Competitor's Brand?

- And so there has been a couple of cases around that. And our courts have actually found that because the keyword is not visible to consumers. They have found that isn't trademark infringement, you've got to use your, you've got to use the word as a trademark to infringe someone else's registered mark.
- And if no one can see it, the courts have found that that's not trademark use. So as long as it's invisible, you can bid on your competitors registered trademark.

Using Your Competitor's Brand in Ad Copies

- So, again, to explain what trademark use is, it's when you use a registered trademark as a signifier of your goods or services.
- But actually, there's also what we haven't discussed and should mention is you can't reach the Australian Consumer Law on those ads either. So if you use the trademark in a way that's confusing to consumers, but not trademark infringement, it may still be misleading and deceptive conduct in terms of the Australian Consumer Law.



What to Do If Someone is Infringing Your Trademark

- So our view is always that you start off with an intellectual property protection policy, don't wait until that happens. So have a clear policy in place. We always advise our clients not to send their own letter to the other side.
- Try to get lawyers to send a cease and desist letter immediately. And as soon as possible. The reason why you don't want to be sending that letter on your own. And I often see that it happens people sort of name and shame on Instagram and things like that.
- The first thing is that in terms of the trademarks act, it's actually you're prohibited from making unjustified threats of trademark infringement. So it may look like trademark infringement to you.
- But in the example that you and I discussed Ilana, where it may be someone's incorporated your mark into the copy, it may not be trademark infringement, and you then could potentially be liable for damages if you accused them of trademark infringement. And it's not, that's the first thing.
- The second thing is that you want to be really clear and accurate, in terms of what it is you're saying the person is doing, and what you expect from them to do, because that's really your foundation of any further legal action that you take.



I Haven't Registered my Trademark, What Can I Do?

- But if you haven't got a registered trademark, you can still argue that you've built up a substantial reputation or goodwill, in your unregistered trademark in your name.
- And what that really means is that someone can't, you know, let's say you spent years and significant resources, building up a brand, someone is not allowed to kind of hop onto your ride on your reputation by using a similar brand to get business.

Trademarks in the Space of SEO

- If not, it's not entirely related to Google advertising. But I think it's interesting from an SEO perspective, and what we're talking about with using competitors registered trademarks, interestingly enough, although you can use your competitors Registered Trademark as a keyword, you can't actually use it as a meta tag, funnily enough on your website.
- And the courts that's based on a court decision, the court found that if you know where to look, you know how to read the coding of someone's website, and therefore their trademark is potentially viewable to consumers and may constitute trademark infringement. That is an interesting judgment.



Biggest Mistakes that People do in Writing Their Ads

- Not necessarily in writing their ads, but certainly one of the areas where I see the most confusion and potential infringement is around reviews, getting Google reviews or getting Facebook reviews.
- So for example, a lot of people don't understand Can I give incentives for reviews? Can I say to people, you can have a free nights accommodation at our hotel, if you write us a positive review? That's a good example. Of what you can't do.
- So yes, you can offer an incentive, but you've got to offer the incentive to all customers, those that are likely to be happy or unhappy. And you've got to invite them to review honestly. So the incentive shouldn't be linked in any way to a positive review.
- So an example of something you could do is you could say please give us an honest review of your stay at our hotel and enjoy a free cocktail when you leave, that would be totally acceptable.

Dealing with Negative Reviews

- So with negative reviews, if somebody does write really negative review of your goods or services, I think that you can respond to it, and potentially try and manage it in that way. But you absolutely cannot remove it.
- The only basis that you can remove a negative review is if it is potentially misleading. And this would apply to a negative or positive review. So for example, if you make burgers 100% beef burgers, and somebody says on your Facebook page, these were the worst vegan burgers I've ever eaten. You do get to remove that because it's misleading consumers that the burgers are vegan when they're not.



Dealing with Trolls Who Might Be A Competitor

- So you've got a number of options. If the person that's written the comment has left their true identity, which often they do, you can send them a concerns notice, accusing them of defamation, provided that what they've said is goes beyond then just the sort of honest opinion.
- When you aren't able to identify the person, you would normally every major platform has a complaint policy. And you would then have to flag the review as either defamatory, untrue, you know, unlawful in some way.
- And you're sort of final port of call would be to have to actually go to court to get the records from Google to find out who posted the ad. I haven't seen that happen yet.