

# DIGITAL MEDIA, TECHNOLOGY & PRIVACY

>>ALERT

## 1-800 CONTACTS UNLAWFULLY RESTRICTED COMPETITORS' TRADEMARK USE IN SEARCH ENGINE MARKETING

The Federal Trade Commission (FTC) has decided that agreements reached by 1-800 Contacts, Inc. with a number of its competitors to settle claims that the competitors' online search advertising infringed on 1-800 Contacts' trademarks unlawfully restricted the competitors' ability to engage in search engine marketing, to the detriment of both consumers and search engines.

### THE FTC'S COMPLAINT

In August 2016, the FTC issued an administrative complaint against 1-800 Contacts, an online contact lens retailer, alleging that various settlement agreements it had reached with other online contact lens retailers unreasonably restrained both price competition in keyword search advertising auctions and the availability of truthful, non-misleading advertising in violation of Section 5 of the FTC Act.

The agreements required the parties, when bidding at search engine advertising auctions, to take steps to ensure their ads did not appear in response to searches for the other party's trademark terms. In particular, the agreements included provisions that prohibited the parties from using the other party's trademarks, URLs, and variations of marks as search advertising keywords. They also required the parties to employ "negative" keywords to prevent their ads from displaying whenever a search included (or, as stated in some of the agreements, contained) the other party's trademarks – even in situations

### THE BOTTOM LINE

The FTC has made clear that some common online advertising methods, such as bidding on a competitor's trademark in search engine marketing, may not always be contracted away, especially when they result in restricting consumers' access to competitive pricing information. Parties to intellectual property and online advertising disputes often enter into confidential settlements to resolve their claims. However, when considering such agreements, parties must now also consider the potential impact upon consumers.

when the advertiser did not bid on the other party's actual trademark and the ad appeared due to the search engine's algorithm, determining that the ad was relevant and useful to consumers.

As asserted in the complaint, the agreements prevented the parties from disseminating ads that would have informed consumers that identical products were available at different and often lower prices, which harms competition. The complaint also alleged that 1-800 Contacts' conduct undermined the efficiency of search advertising auctions, distorted the prices in those auctions by eliminating

bidders, and degraded the quality of service offered by search engines, including the quality of search engine results pages displayed to users.

The FTC's decision affirmed an October 2017 finding by an administrative law judge (ALJ) that the challenged agreements harmed consumers and competition in the market for the sale of contact lenses online and violated Section 5 of the FTC Act. The ALJ then issued an order (subject to certain carve-outs) barring 1-800 Contacts from agreeing with any marketer or seller of contact lens products to prohibit or limit participation in search advertising

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auctions (including prohibiting or restricting the use of keywords or requiring the use of negative keywords) or to prohibit or limit search advertising. The ALJ ordered 1-800 Contacts to cease enforcing existing agreements that were inconsistent with the terms of the order's prohibitions.

1-800 Contacts appealed to the FTC, arguing that the agreements were justified as a way to protect the intellectual capital embedded in its trademarks.

### THE FTC'S DECISION

The FTC upheld the ALJ's ruling by a vote of 3-1-1, with one commissioner dissenting and one not participating. The FTC held that the challenged agreements unreasonably restrained trade and harmed consumers and competition for the online sale of contact lenses without valid offsetting procompetitive justifications. The FTC also determined that the agreements harmed competition in bidding for search engine key words, artificially reducing the prices that 1-800 Contacts paid and the quality of the search engine results delivered to consumers, without offsetting efficiencies.

In the FTC's view, the agreements were, in essence, agreements between horizontal competitors to restrict the information provided by advertising to consumers when they searched for 1-800 Contacts' trademark terms and

URLs. Ultimately, the FTC reasoned, the effect of the advertising restrictions was to make information enabling consumer comparisons more difficult and costly to obtain.

The FTC also decided that the justifications put forth by 1-800 Contacts, including protection of its trademarks, could be achieved through less anticompetitive means, such as by barring competitors from using specific text alleged by 1-800 Contacts to cause confusion or by requiring competitors to clearly disclose their identity in their advertisements. Indeed, the FTC specifically said that it saw "no reason why a brief statement identifying the ad sponsor and/or disclaiming affiliation with 1-800 Contacts would be ineffective or unworkable."

Moreover, the FTC found the challenged agreements harmed search engines because 1-800 Contacts and its online competitors agreed to refrain from bidding in particular search advertising auctions, such as when a consumer's search was for 1-800 Contacts' trademark terms.

Accordingly, the FTC concluded that the advertising restrictions in the challenged agreements constituted unfair methods of competition, in violation of Section 5 of the FTC Act, and it prohibited 1-800 Contacts from enforcing those provisions and from entering into similar agreements in the future.

### GOOGLE'S TRADEMARK POLICIES

This decision is particularly relevant in light of Google's trademark policies for paid search advertising. In the United States, Google will investigate a trademark owner's complaint when their trademark is used by other parties in the text of the paid ads, but generally will allow anyone to bid on any trademarks, including a competitor's trademarks, as a keyword without restrictions (their policies differ outside of the United States). This decision is partly the result of years of litigation over search engine marketing practices involving Google. However, this current FTC action involves disputes directly between competing advertisers.

### FOR MORE INFORMATION

Gary A. Kibel, Partner  
Digital Media, Technology & Privacy  
212.468.4918  
gkibel@dglaw.com

Marc J. Rachman, Partner  
Intellectual Property  
212.468.4890  
mrachman@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP  
212.468.4800  
1740 Broadway, New York, NY 10019  
[www.dglaw.com](http://www.dglaw.com)

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