
Federal Trade Commission and Trademark Owners Call for Changes to Pay-for-Placement Search Engines

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In a [June 27 letter](#) to Alta Vista, AOL Time Warner, Direct Hit Technologies, iWon, LookSmart, Microsoft and Terra Lycos, the Federal Trade Commission recommended that the companies provide clearer disclosure to consumers of their pay-for-placement search engines.

Prompted by a [complaint filed by consumer advocacy group Commercial Alert](#) in July 2001, the FTC's letter states that current disclosures by pay-for-placement search engines regarding the fee-based ranking of their search results may not be sufficiently clear. Spokespersons from Alta Vista, Terra Lycos and AOL publicly responded to the letter, stating that they believe that their search engines adequately disclose paid results. Alta Vista and Terra Lycos representatives also added that they would take the FTC's recommendations seriously nevertheless.

Unlike traditional search engines that list search results based on relevance, such as by website content, meta tags and links to other sites, pay-for-placement search engines list results based on fees paid by listed sites. Faced with declining revenues, many major search engine companies have adopted versions of the pay-for-placement model.

The FTC's recommendations follow a [January 2002 complaint](#), filed in federal court in the Western District of Texas by Mark Nutritionals Inc., the maker of Body Solutions weight loss products, against search engine

companies Altavista, Overture, FindWhat and Kanoodle.com for trademark violations. Filed in response to the defendants' use of the Body Solutions trademark as a search term in their pay-for-placement search engines, the suits mark the latest step in trademark owners' efforts to protect their trademarks on the Internet. While the pay-for-placement model itself does not likely pose trademark issues, Mark Nutritionals and other trademark owners complain that the use of trademark-based search terms instead of generic terms violates their trademark rights.

The legal debate over the use of trademarks as search terms in pay-for-placement search engines is related to the metatag debate of the 1990s. A series of cases in the late 1990s and 2000 addressed the issue of whether the use of others' trademarks in a site's metatags constitutes trademark infringement. While no definitive rule emerged from these rulings, in a leading case, *Eli Lilly & Company v. Natural Answers, Incorporated*, the Seventh Circuit found that use of others' trademarks as metatags indicates an intent to confuse consumers. This ruling marked a significant victory for trademark owners because intent to confuse consumers is a required element for a trademark infringement claim. For a discussion of *Eli Lilly's* contribution to the metatag debate, see our [April 2, 2001 Internet Alert](#). Like trademark metatags, trademark search terms on pay-for-placement search engines may confuse users who do not realize they are being led to a competitor's site. However, the legal debate over the use of trademark search terms by pay-for-placement search engines also raises unique issues. One claim Mark Nutritionals may make against the search engine companies named as defendants is that they are, in effect, selling the Body Solutions trademark and directing consumers to competitors' sites in violation of its trademark rights. In statements to the press, representatives of Mark Nutritionals have also called the search engines' practices "online extortion," since trademark owners generally must pay to have their sites listed ahead of competitors' sites in searches for their own marks. In response to such

allegations, search engines may argue that they are merely facilitating comparative advertising, which is considered a fair use exception to trademark infringement.

Coming on the heels of Mark Nutritionals' suits against Altavista, Overture, FindWhat and Kanoodle.com, the FTC's letter illustrates the range of legal issues raised by the pay-for-placement search engine model. The FTC's recommendations suggest that even pay-for-placement search engine companies that do not use trademark search terms may come under fire if they do not adequately disclose to consumers that their search listings are fee-based. Trademark owners and users of pay-for-placement search engines should remain apprised of this developing area of law.

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