

Taming the Wild, Wild West of Lead Generation

Legal Considerations and Remedies

By Michelle Hon Donovan

Our school clients and some lead generators and aggregators have frequently referred to the lead generation industry as the “Wild Wild West.” Schools are frustrated by the tactics used by some lead generators and often feel that there is little they can do to control their behavior. This is not to suggest that lead generators are bad. On the contrary, there are many valid, ethical lead generators out there. However, the practices of a few unethical lead generators have resulted in significant criticism. That criticism is not limited to the lead generation business, but is attributed to the for-profit education sector as a whole. In a recent news story by *Marketplace*, a public radio program, the commentators criticized the entire for-profit school sector for alleged false and misleading advertisements made by lead generators that promised government grants for single mothers.¹ Although the article was about the unethical practice of some lead generators, the blame was clearly directed to the for-profit education sector who use the generators as evidenced by the title of the article, “For-profit school ads mislead mothers.” This news story has been picked up and republished by numerous news organizations and

commentators, including the *Huffington Post*.²

Some schools either are not aware of these practices, think that they have no control over such practices or are simply willing to overlook these practices. However, the proposed regulations recently published by the Department of Education (“DOE”) have raised the stakes and if enacted,

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schools could be held directly liable for the actions of their lead generators. What are the possible repercussions under the proposed DOE regulations for schools that use these vendors? If a student submits a request for information through one of the banner ads promising grants to pay for tuition and your school solicits the student, are you liable for any allegations of

misrepresentation? Under the proposed DOE regulations, quite possibly. The result could be fines, suspension or termination of all Title IV eligibility. Additionally, class action consumer lawsuits are sure to follow based on various state consumer protection and unfair or fraudulent business practices laws.

This article will examine this and other legal issues associated with lead generation, including republishing outdated information from the Integrated Postsecondary Education Data System, bidding on school names as keywords, purchasing domain names using school names, copying information and images from school Web sites, and creating unauthorized landing pages to redirect potential students to competitor schools. We will also discuss how to best address each specific legal issue and overall best practices for how to proactively protect your school.

Department of Education Proposed Rulemaking

One of the most important legal issues schools currently face in connection with lead generation is the potential liability for “substantial misrepresentations” under proposed regulations published by the DOE on June 18, 2010. If passed, schools could

be liable for any substantial misrepresentations made by their lead generators. The repercussions can be severe and include complete loss of Title IV eligibility. Schools thus need to be proactive in ensuring that they have complete control over the content on lead generator Web sites.

Currently, the DOE regulations define “misrepresentation” as “[a]ny false, erroneous or misleading statement an eligible institution makes to a student enrolled at the institution, to any prospective student, to the family of an enrolled or prospective student, or to the Secretary.”³ Thus, schools are currently only liable for their own statements.

Under new proposed rules, schools could be held accountable for any “substantial misrepresentations” made by their lead generators. The proposed revised regulation states in relevant part: “Any eligible institution is deemed to have engaged in substantial misrepresentation when the institution itself, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement, makes a substantial misrepresentation regarding the eligible institution, including about the nature” [emphasis added], and redefines substantial misrepre-



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sentation as “Any false, erroneous or misleading statement an eligible institution, one of its representatives, or any ineligible institution, organization, or person with whom the eligible institution has an agreement, makes regarding the eligible institution, including about the nature.”⁴

The penalties of engaging in any substantial misrepresentation are severe. An institution found to be in violation can result in fines, or limitation, suspension or termination of its eligibility to receive Title IV funding. Alleged violations may also lead to class action litigation filed by students and potential students under various state laws. Many states also have laws that create private causes of action based on alleged violations of these regulations, which may be brought on a class action basis.

It is not clear exactly how far this regulation will extend. It is a common practice for lead generators to purchase leads from third party Web sites. For example, a school has an agreement to purchase leads from vendor A. The school will definitely be liable for any misrepresentations on vendor A’s Web site. However, vendor A not only generates leads from its own Web sites, but also buys leads generated from Web sites owned by vendors B, C, D, and E. Vendor B may in turn be purchasing leads from Web sites owned by vendor F, G, and H and so on. Lead generators and aggregators typically do not share the source of their leads with the buyers, claiming that such information is trade secret information. This means that schools frequently do not actually know where a lead originated or what is contained on the Web site that generated the lead. It is unclear under the language of the proposed rules what,

if any, liability schools will face for misrepresentations made by these third party vendors where there is no direct agreement between the school and the downstream vendors.

What actions can schools take to avoid liability from lead generators? I suppose schools might not use lead generators, but that’s really a non-starter. Instead,

schools must make sure that they have a written contract with their lead generators that has appropriate quality controls and restrictions. Do not rely on an insertion order that has been prepared by the lead generator or your aggregator. Minimally, the agreement should

contain quality control provisions that require the lead generator to get approval for any Web page that contains information about your school before going live with the Web page. Additionally, any changes to the Web page must be pre-approved before going live. The agreement should also prohibit selling any leads that did not specifically request information about your school. This will cut down on the non-specific leads that may be derived from questionable advertising and marketing ploys like promising grants. The agreement should also prohibit purchasing leads from third party Web sites. You can expect strong objections to this provision from many of the larger lead generators, which essentially function as aggregators and purchase leads from hundreds of different Web sites. When this limitation is not practical, make sure your aggregator

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has a written agreement with its partners with quality control provisions that restrict each partner to the use of content that has been approved by the school and contains the same restrictions enumerated in the agreement between the school and the aggregator.

Republication of IPEDS Data

We are seeing an increasing number of lead generation Web sites republishing data from the Integrated Postsecondary Education Data System (IPEDS) and other third party databases. This information is frequently outdated and could give rise to claims of substantial misrepresentation under the proposed regulations and class action lawsuits by consumers.

All schools that are Title IV eligible are required to complete all IPEDS surveys. The surveys catalog information about the school including among other things, educational offerings, admissions requirements, student charges, including tuition and required fees, enrollment data, completion data, and financial aid data.⁵

The main issue with republishing this data is that it is generally out of date. By the time that the data is published by IPEDS the information can be anywhere from one year to three years out of date. This issue is exacerbated when the lead generator does not update the information on its Web site. In most instances, lead generation Web sites are republishing data from 2007–2008. This is particularly problematic when the lead generator publishes tuition information. The difference in tuition costs from 2007 to 2010 is likely to be significant and could be deemed to be a substantial misrepresentation.

Schools can avoid such liabilities by ensuring that this matter is covered in

any written agreement with their lead generators. If the agreements contain sufficient quality control provisions as discussed in the previous section, schools can, by rejecting any Web page designs that include this data, ensure that none of this information is republished. However, to remove all doubt, the agreement should also contain an express prohibition against republishing IPEDS data.

Keyword Bidding

Some lead generators bid on school names as paid keywords for their online advertising campaigns, including Google Adword campaigns. This bidding practice reduces the number of organic leads that a school may otherwise receive directly and increases the online advertising costs for the school by increasing the cost per click on its own Internet ads.

Most search engines use a similar format to display Internet search results. Preferred paid advertisements are placed at the very top of the page. Under the preferred paid advertisements are the natural or organic search results. To the right of the organic search results may be additional paid advertisements.

The placement of these ads is determined by what Google terms as an “Ad Rank.” The ad with the highest Ad Rank appears in the first position, and so on down the page.⁶ Ad Rank is determined using a combination of a relevance score and your cost-per-click (CPC) bid. In general, a higher CPC bid will cause your ad to show at a higher position on the page.⁷ The CPC bid establishes how much you pay each time someone clicks on your advertisement.⁸ The more people who bid on a keyword or words, the more each click will cost. Thus, the more people who are bidding on your

school name, the higher your CPC will be for your own name. This may contribute to significantly increased Internet advertising costs.

Bidding on school names can also reduce the number of organic leads that a school would otherwise receive through its own Web site. When searching specifically for a school name, students are presumably looking for the official school Web site. The official school Web site should appear first in the organic search results when using the school name as the search term. However, the preferred paid advertisements may appear directly above natural search results for your school name when the advertiser is bidding on your school name as a keyword. Lead generator ads are designed to look like an official school Web site and frequently include the name of the school in the title and in the body of the advertisement itself. Using keywords in the ad is one of the ways to increase relevance score and Google specifically recommends that the keyword be used in the title of the Web page as a means of elevating your ad position on a search page. This means that a prospective student may be clicking on the preferred paid advertisement instead of the official school home page. When that occurs, the school is paying for leads that it would otherwise have gotten through its own Web site for free.

Reporting trademark abuse to Google will do little, if anything, to stop lead generators from bidding on your school name as a keyword. Under Google's Adword policy, Google will only investigate use of trademarks in the ad text. Google will not disable keywords in response to a trademark complaint.⁹

So how do you stop lead generators from bidding on your school name as

a keyword? For lead generators with whom you do not have an agreement, you may have a legal claim under trademark and unfair competition laws. The judicial interpretation of whether keyword bidding constitutes trademark infringement is still an evolving area of law and may vary between jurisdictions. Talk to your trademark lawyer

about whether to pursue legal action. In our experience, most lead vendors have agreed to remove our clients' names from keyword accounts and/or add the school name as a negative keyword

rather than dispute the issue in court.

Negative keywords help make sure that an ad doesn't appear for searches that include that term.¹⁰ This is important for school names that include descriptive terms such as "technical college." Negative keywords work in unison with normal keywords. For example, adding "-free" as a negative keyword will ensure that your ad does not appear to people looking for a free product. By adding your school name as a negative keyword you can make sure that no lead generator ads appear when using your school name as a search term, even if your name contains descriptive terms such as "technical college."

For authorized lead generators with whom you have an agreement, make sure your written agreement includes an express prohibition against bidding on school names and trademarks.

Domain Name Purchasing

Another practice used by some lead generators to drive traffic to their Web

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sites is to purchase domain names that contain school names and trademarks. This practice is likely to confuse consumers who believe that they are on the official school Web site. This can also result in having to pay for leads that the school would otherwise have gotten free from its own Web site.

Most schools use the “.edu” top-level domain (TLD). However, many students

out of habit will type the “.com” TLD.

Additionally, schools often use a domain name that is an abbreviation of their name. For example, Internet Technical Institute might use www.iti.edu for its official Web site.

Again, students may out of habit type the

whole school name into the address field as www.internettechnicalinstitute.com.

We commonly see lead generators using variations on the school’s domain names: (i) www.iti.com, (ii) www.iti.info, (iii) www.iti.net, and (iv) www.internettechnicalinstitute.com.

Registering domain names that contain your school name is likely actionable under cybersquatting and trademark laws.¹¹ Schools may also have a mandatory arbitration claim under the ICANN Uniform Domain Name Dispute Resolution Policy (UDRP).¹² Talk to your trademark lawyer about which option is best suited for your circumstances.

For authorized lead generators with whom you have an agreement, make sure your written agreement includes an express prohibition against purchasing any domain names that contain your school name or any abbreviations, misspellings or confusingly similar variations of your name. Another preventive

measure is to register domain names with common variations and abbreviations of the school name. For example, do not just register www.iti.edu. Also register www.iti.com, www.iti.net, www.iti.info, www.iti.us, www.internettechnicalinstitute.com, www.internettechnicalinstitute.net, www.internettechnicalinstitute.info, www.internettechnicalinstitute.us, etc. It is also important not to let any of these domain names lapse for failure to renew. If your domain name registration lapses for even a minute, it may be lost.

Copying Information and Images from School Web Sites

When creating a landing page for your school, lead generators will sometimes copy information and images directly from the official school Web site. Copying content from a third party Web site may constitute copyright infringement. Where the school has not authorized such copying, the school will have claims against the lead generator. However, even if the school authorizes the copying, there could be third party claims for copyright infringement against both the lead generator and the school if the school does not own all the rights to the content.

For example, if a third party Web developer created the school’s Web site, the developer may still own the copyright to the Web site itself. Many companies assume that if they pay for the Web site, then they own all rights to the Web site. Not necessarily true. The only way to own all rights to the Web site design is to make sure that the developer assigns all rights and interest in the Web site to the school. This assignment must be in writing to be valid. The exception is when the developer is also an employee of the school, in which case the copyright

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holder is considered to be the school. The same rule applies for any graphic art images or logos created by any third parties.

Schools should be particularly cautious about letting lead generators copy photographs from their school Web sites. Many of the photographs are stock photographs that have been licensed from a third party. Stock photograph licenses are typically limited licenses that restrict how and where the photograph can be used and do not include the right to sublicense the photo. Copying and displaying the photograph on the lead generator Web site without a license constitutes copyright infringement. A school may be held secondarily liable for copyright infringement if stock photos are used on your lead generator's Web site with your knowledge or permission. Not only should you refuse any request for authorization to copy such content, any agreement with the lead generator should contain an express prohibition against such activities.

Use of School Names and Marks on Unauthorized Lead Generation Web sites

Lead generation Web sites are often presented to consumers as a directory of schools. In order to drive more traffic to their Web sites, the lead generators will not just list the schools for which it is collecting leads, but will also create landing pages for schools for whom they are not collecting leads. These landing pages may contain the school name and logo, information copied from the school Web site, outdated data republished from IPEDS (as discussed above), Google ads, and links to competitors' landing pages. Creating these landing pages increases the traffic to the Web site and increases the number of leads collected for their contracting schools.

These unauthorized landing pages frequently contain outdated or inaccurate information about the school. Common inaccuracies include inaccurate tuition costs, listing campus locations that have been closed or moved, listing degree programs that aren't offered, failing to list a complete list of programs offered or inaccurately stating what degrees are offered for each program.

These unauthorized landing pages compete with the official school Web site and authorized lead generation landing pages for ranking in the natural search results. We frequently see unauthorized landing pages outrank authorized landing pages. If a potential student goes to an unauthorized landing page, they are not given an opportunity to fill in a lead form and are likely to be redirected to one of the competing schools advertised on the same page. Additionally, we sometimes see lead forms on these unauthorized landing pages. When the student fills out the lead form, the lead is not sent to the school. In some instances the leads are sold to other schools.

Schools whose name and logos are being used on unauthorized landing pages may have legal claims for trademark infringement, unfair competition, and false advertising. Talk to your attorney about whether to pursue legal action.

Best Practices

Obtain Federal Trademark Registrations for School Names and Logos

The first step to preserve your rights is to obtain a federal trademark registra-

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tion for your school name, school logo and any marketing slogans frequently used. Holding a federal trademark registration will be one of the most important weapons in your enforcement arsenal. The sooner you obtain a registration the better. While there is limited protection under the

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state “common law” (judicially created law) there are numerous advantages to having a federal trademark registration. One advantage is that the older the trademark registration is, the more

powerful it becomes. For example, after a federal trademark has been registered for 5 years, the trademark owner may apply for incontestable status. Once a trademark becomes incontestable, it is extremely difficult to challenge an owner’s right to use the trademark. This is very important for schools where the trademarks are often challenged as being generic or geographically descriptive.

Another advantage of obtaining a federal trademark registration is that the trademark can be enforced nationwide. Under the state common law, an unregistered trademark can only be enforced in the area where it is actually used and under certain circumstances, in the areas where the trademark is likely to be used. Thus, without a federal trademark registration, schools may find they only have protection in the city and surrounding areas where their campus is located.

Obtain a Written Assignment of All Rights from Contractors

The intellectual property rights for all works created by an employee

within the scope of his or her employment should automatically belong to the employer. However, the intellectual property rights for any work created by a contractor belongs to the contractor unless there is a written assignment assigning all of those rights to the company. All contractor agreements need to include a section that addresses the respective intellectual property rights of the parties and an assignment of all rights for the work that the contractor is paid to create. If the company does not have such an agreement, a form assignment can be used to assign all rights.

Written Contracts with Lead Generation Vendors

Make sure you have a written contract with every lead generation vendor and aggregator from which you purchase leads. The contract should have sufficient quality control guidelines and restrictions. These may include (but in no way are limited to):

- Approval process for all Web pages and marketing materials;
 - No change to any approved Web page or marketing materials without approval;
 - No leads that did not specifically request information about your school;
 - No purchasing leads from third parties;
 - No republishing data from IPEDS or other third party database;
 - No bidding on the school name or trademarks as a Google Adword or other paid keyword; and
 - No use of the school name as part of domain names.
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Police Your Trademarks

Perform routine Internet searches for the school name and abbreviations. Alternatively, there are third party services that will perform this search on the school's behalf for a reasonable fee. Check the paid advertisement section of the search results to identify any unauthorized keyword bidding for your name. Investigate the Web pages listed in the organic search results.

Schools whose name and logos are being used on unauthorized landing pages may have legal claims for trademark infringement, unfair competition, and false advertising.

How many of the results listed are for authorized lead generators versus unauthorized lead generators? Do you see any unauthorized uses on the authorized lead generation landing pages? Is the information accurate and approved pursuant to the quality control provisions of your agreement? Are there any ads or links for competing schools? Do you see any use of your marks as domain names?

Audit Vendors

Even if you have a written agreement with your lead generators, do not assume they will always comply with the terms of the agreement. Make sure that the lead generators are routinely investigated and audited to ensure compliance. The routine Internet search will be an important part of this audit process. Also, submit test leads periodically to ensure that the lead delivery provisions are followed. Confirm that the leads are not only delivered, but also timely delivered. Also check to see if you are redirected

to a third party school at any point during or after the lead collection process. Finally, check to see if any third party school contacts you after submitting the lead. This will indicate that your leads are coming from a general inquiry and/or sold to multiple schools.

Conclusion

Third party lead generation is an important service used by most schools in some form. Schools need to be proactive in making sure that they have the tools to protect themselves against the various legal issues that arise from the conduct of lead vendors. Doing nothing is not an option, and neither is accepting the mistaken view that lead generation is doomed to be the Wild Wild West.

¹ <http://marketplace.publicradio.org/display/web/2010/07/23/pm-for-profit-school-ads-mislead-mothers/>

² http://www.huffingtonpost.com/2010/07/26/for-profit-colleges-tout_n_658987.html?page=3&show_comment_id=54995949#comment_54995949

³ 34 CFR § 668.71

⁴ Federal Register Vol. 75, No. 117 (June 18, 2010)

⁵ <http://nces.ed.gov/ipeds/datacenter/>

⁶ <http://adwords.google.com/support/aw/bin/static.py?hl=en&topic=21903&guide=21899&age=guide.cs&answer=146296>

⁷ <http://adwords.google.com/support/aw/bin/static.py?hl=en&topic=22356&guide=21899&age=guide.cs>

⁸ <http://adwords.google.com/support/aw/bin/static.py?hl=en&topic=21906&guide=21899&age=guide.cs&answer=146300>

⁹ <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6118>

¹⁰ <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=63235>

¹¹ 15 USC § 1125(d) and 15 USC §§ 1114 and 1125

¹² <http://www.icann.org/en/udrp/udrp.htm>