

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

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AMERICAN AIRLINES, INC.,  
4333 Amon Carter Blvd.  
Fort Worth, Texas 76155,

Plaintiff,

-vs.-

YAHOO! INC.,  
701 First Avenue  
Sunnyvale, California 94089,

and

OVERTURE SERVICES, INC. d/b/a YAHOO!  
SEARCH MARKETING,  
74 North Pasadena Avenue, 3rd Floor  
Pasadena, California 91103,

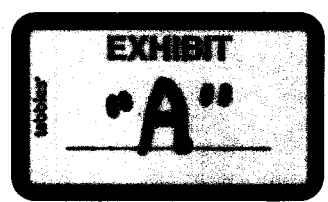
Defendants.

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Civil Action No. 4-08-CV-626A

FIRST AMENDED COMPLAINT

Plaintiff American Airlines, Inc. ("American Airlines"), by and through its counsel, for its Complaint against Yahoo! Inc., and Overture Services, Inc. d/b/a Yahoo! Search Marketing (together with Yahoo! Inc., "Yahoo!" or "Defendants"), alleges as follows.



## NATURE OF THE ACTION

1. This lawsuit relates to the use of trademarks on the Internet, particularly Defendants' unauthorized use of the world-famous trademarks and service marks that identify American Airlines to Internet users. The fundamental purpose of trademark law, in the bricks-and-mortar world and on the Internet, is to protect consumers from being confused as to the source or affiliation of the products or services that they seek to buy. In order to assist consumers in making informed purchasing decisions, trademark law encourages companies to develop brand names to differentiate their products and services within the marketplace. This is accomplished by legally limiting a brand's use to the brand's owner. This legal protection fully applies in the context of the Internet.

2. Unfortunately, some individuals and entities attempt to take advantage of consumers by marketing their products or services using the brands of others. In effect, they seek to free ride on the reputation and goodwill of another's brand. Because of the ease and low cost of setting up a website and the speed with which Internet transactions occur, this has become a particular problem in connection with consumer purchases of goods and services on the Internet. This lawsuit involves exactly such a situation -- efforts by certain companies to free ride on American Airlines' brands. The Defendants have knowingly encouraged these infringements and have provided these companies with the technological tools to carry out these efforts.

3. Defendants own and operate one of the world's largest Internet "search engines," constituting a significant share of the search engine market. A search engine is a computer program that allows computer users to search the World Wide Web for websites containing particular content. Defendants' search engine is available not only on their own website

(www.yahoo.com), but also through other popular websites that use Defendants' search engine.

4. To use Defendants' search engine, a World Wide Web user ("web user") need only type in a few descriptive words and hit the "enter" key (or click on Yahoo!'s "Web Search" button) to receive a list of web pages that Defendants identify as relevant to the search requested. Web users may then visit these web pages by clicking on the hyperlinks ("links") that Defendants provide. Defendants maintain and, on information and belief, many consumers believe that the search results that Defendants provide are the product of an objective formula or algorithm that produces "natural" or "organic" results, *i.e.*, unpaid web listings.

5. Defendants, however, have not provided Internet users with only such objective "natural" results. Without authorization or approval from American Airlines, Defendants have sold to third parties the right to use the trademarks and service marks of American Airlines ("American Airlines Marks") or words, phrases, or terms confusingly similar to those marks, as "keyword" triggers that cause paid advertisements -- referred to as "Sponsor Results" -- to appear above or along side the "natural results." In many cases, the text of these "Sponsor Results" also included American Airlines Marks or terms confusingly similar to those marks. Thus, when consumers entered one of the American Airlines Marks into Defendants' search engine to search or navigate the World Wide Web, instead of being directed to American Airlines' websites, Defendants' "Sponsor Results" may instead have misdirected them to: (i) websites of airlines that compete with American Airlines; (ii) websites that sell air travel not only on American Airlines, but also on a variety of airlines

that compete with American Airlines; or (iii) websites that are entirely unrelated to American Airlines.

6. American Airlines does not bring this lawsuit lightly. American Airlines has long been and remains a strong supporter of the Internet and the promise that it holds for consumers and society as a whole. That said, Defendants' search engine is being used by Defendants and third parties to mislead consumers and misappropriate the American Airlines Marks by using them as "keyword" triggers to paid advertisements and by using them within the text of paid advertisements. Moreover, Defendants appear to have the ability to structure and configure their programming to stop this misuse of the American Airlines Marks because they have already implemented procedures with respect to European Internet users that prevent the misuse of trademarks. Defendants, however, have chosen not to implement these procedures for Internet users in the United States to the detriment of consumers and American Airlines. Accordingly, American Airlines has reluctantly been compelled to file this lawsuit to protect consumers and the American Airlines Marks.

#### **THE PARTIES**

7. Plaintiff American Airlines, Inc. is a Delaware Corporation with its principal place of business at 4333 Amon Carter Boulevard, Fort Worth, Texas 76155.

8. Upon information and belief, Yahoo! Inc. is a corporation organized under the laws of the State of Delaware with a principal place of business in Sunnyvale, California. In addition, on information and belief, Yahoo! advertises, solicits clients, leases office space, and conducts substantial amounts of business in the State of Texas and within this District.

9. Upon information and belief, Overture Services, Inc. is a subsidiary of Yahoo! Inc. and is organized under the laws of the State of Delaware with a principal place of business in

Pasadena, California. In addition, on information and belief, Overture Services Inc. is a full participant in Yahoo!'s practices and conduct of business in the State of Texas and within this District that is relevant to the subject matter of this Complaint.

### **JURISDICTION AND VENUE**

10. This action arises in part under the Lanham Act, 15 U.S.C. §§ 1114 and 1125. This Court has federal question jurisdiction over these claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a), and 1338(b). This Court has supplemental jurisdiction over the Texas State law claims pursuant to 28 U.S.C. § 1367(a) because those claims are so closely related to the federal claims brought herein as to form part of the same case or controversy.

11. Defendants are subject to personal jurisdiction in the State of Texas pursuant to TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.045 because, on information and belief, Defendants practice the unlawful conduct complained of herein, in part, within this District; because the unlawful conduct complained of herein causes injury, in part, within this District; because Defendants regularly do or solicit business, rent or lease office space within this District, engage in other persistent courses of conduct and/or derive substantial revenue from goods and/or services used or consumed within this District; and because Defendants regularly and systematically direct electronic activity into the State of Texas with the manifested intent of engaging in business within this District, including the creation, hosting, and offering of fully interactive websites, advertising, e-mail, and other Internet-related services to web users within this District, as well as entry into contracts with residents of this District.

12. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims herein occurred in this District.

13. Venue is also proper in this District under 28 U.S.C. §§ 1391(b)(1) and (c) because Defendants are corporations whose contacts would be sufficient to subject them to personal jurisdiction if this District were a separate state, as alleged above in this Complaint.

## **FACTUAL BACKGROUND**

### **The Internet And The World Wide Web**

14. The Internet is a global network of millions of interconnected computers. The World Wide Web is a portion of the Internet especially well-suited to displaying images and sound as well as text. Much of the information on the World Wide Web is stored in the form of web pages, which can be accessed through a computer connected to the Internet (available through commercial Internet service providers or “ISPs”), and viewed using a computer program called a “browser,” such as Microsoft Internet Explorer. “Websites” are locations on the World Wide Web containing a collection of web pages. A web page is identified by its own unique Uniform Resource Locator (“URL”) or “web address” (e.g., <http://www.aa.com>), which ordinarily incorporates the website’s “domain name” (e.g., “AA.com”). Because URLs and domain names are not case-sensitive, URLs and domain names that contain capital letters are functionally the same as those that do not.

### **American Airlines and the American Airlines Marks**

15. American Airlines is the world’s largest airline. Together with its affiliates, American Airlines serves 250 cities in over forty countries, with more than 4,000 daily flights

in over 1,000 aircraft. American Airlines' Web site, AA.com, provides users with easy access to check and book fares, plus personalized news, information, and travel offers.

16. American Airlines has a rich history. For almost eighty years American Airlines has developed global name-recognition and goodwill, and has become a household name.

17. American Airlines draws its roots from scores of aviation companies founded in the 1920s. The Aviation Corporation was formed in 1928 to acquire many of these young aviation companies. In 1930, The Aviation Corporation's airline subsidiaries were incorporated into American Airways, Inc. In 1934, American Airways became American Airlines, Inc.

18. On June 25, 1936, American Airlines was the first airline to fly the Douglas DC-3 in commercial service. On Feb. 16, 1937, American Airlines carried its one-millionth passenger. American Airlines began trading on the New York Stock Exchange on June 10, 1939. By the end of the decade, American Airlines was the nation's number one domestic air carrier in terms of revenue passenger miles.

19. In 1981, American Airlines introduced the "AAdvantage" travel awards program, a revolutionary marketing program to reward frequent fliers.

20. In 1984, American Airlines introduced the American Eagle system, a network of regional airlines offering high-level service from small communities to large cities through connections to and from American Airlines.

21. In 1995, American Airlines launched its World Wide Web site, AA.com, which is now available on the Internet at <www.aa.com>, <www.americanairlines.com>, and other URLs. American Airlines offers information about its products and services through

AA.com, as well as the opportunity to purchase such products and services and perform many other travel-related functions such as checking in and purchasing upgrades.

22. To preserve and enhance its trademark rights, American Airlines has obtained numerous federal trademark registrations for many of its American Airlines Marks, the overwhelming majority of which have been in continuous use for more than five years and are therefore considered "incontestable" pursuant to 15 U.S.C. § 1115(b), including but not limited to:

- **AMERICAN AIRLINES**, U.S. Registration Nos. 514,294 and 1,845,693 (both stylized form). Registered, respectively, on August 23, 1949 for "air transport of passengers and freight," based on first use in commerce in 1934; and on April 26, 1994, for "clothing; namely, men's, women's and children's shirts, T-shirts, caps, pants, jackets, shorts, sweat pants and sweatshirts," based on first use in commerce in 1987.
- **AMERICAN AIRLINES**, U.S. Registration No. 1,833,817 (stylized form). Registered on May 3, 1994 for "note paper, memo pads, writing paper, envelopes, date books, calendars, diaries, playing cards and writing instruments; namely, pens and pencils," based on first use in commerce in 1987.
- **AMERICAN EAGLE**, U.S. Registration No. 1,388,600. Registered on April 1, 1986, for "passenger and freight air travel services," based on first use in commerce in 1984.
- **AA**, U.S. Registration No. 514,292. Registered on August 23, 1949, for "air transport of passengers and freight," based on first use in commerce in 1935.
- **A A**, U.S. Registration Nos. 1,895,142, 1,905,580, and 2,695,030 (all in stylized form). Registered, respectively, on May 23, 1995, for "beverage containers; namely, mugs, porcelain mugs, porcelain tankards and beverage glassware," based on first use in commerce in 1993; on July 18, 1995, for "breastpins, brooches, precious metal money clips, and tie clips," based on first use in commerce in 1993; and on March 11, 2003, for "providing an arena facility for sports, entertainment, tradeshow, exhibitions and conventions," based on first use in commerce in 2000.
- **AA.COM**, U.S. Registration No. 2,339,639. Registered on April 11, 2000, for "transportation of passengers and cargo by air," based on first use in commerce in 1998.



- **AMERICAN AIRLINES CENTER**, U.S. Registration No. 2,438,218. Registered on March 27, 2001, for “promoting the goods, services and events of others of others by placing advertising on the radio, TV, newspapers, magazines, flyers, brochures, pamphlets, billboards and on a global computer network,” and for entertainment services, namely, providing an arena facility for sports, entertainment, trade shows, exhibitions and conventions,” based on first use in commerce in 1999.
- **AADVANTAGE**, U.S. Registration No. 2,187,483. Registered on September 8, 1998, for “providing air transportation services featuring a program of bonus flights for frequent travelers,” and for “promoting the goods and services of others by means of an incentive awards programs, whereby purchase points are awarded for purchase made from vendor subscribers, which can then be redeemed for merchandise and travel,” based on first use in commerce in 1981.
- **AMERICAN CONNECTION**, U.S. Registration No. 2,199,596. Registered on October 27, 1998, for “transportation of passengers and cargo by air,” based on first use in commerce in 1997.

23. American Airlines has common law rights to the American Airlines Marks in Texas by virtue of the marks’ eligibility for protection and American Airlines’ status as senior user of the marks.

24. The American Airlines Marks are unique and famous distinctive designations of the source of American Airlines’ various air transportation and other services.

25. American Airlines has invested hundreds of millions of dollars in worldwide advertising and marketing in order to build the fame, reputation, and goodwill of the American Airlines Marks. American Airlines advertises through a variety of media, including television, radio, newspapers, direct mail, and in telephone directories across the country.

26. American Airlines also promotes its products and services on the Internet, via its own websites and through advertising on the websites of third parties.

27. Through American Airlines’ actions, and because of widespread and favorable public acceptance and recognition, the American Airlines Marks have become distinctive designations of the source of origin of American Airlines’ goods and services. The American

Airlines Marks have become uniquely associated with, and hence identify, American Airlines. These marks are assets of incalculable value as symbols of American Airlines, its quality goods and services, and its goodwill.

28. Accordingly, the American Airlines Marks have developed secondary meaning.

29. The American Airlines Marks have become "famous" within the meaning of the dilution provisions of the Lanham Act, 15 U.S.C. § 1125(c). For example, as a result of American Airlines' extensive advertising and promotional efforts and its continuous use of the core service marks "American Airlines" and "AA.com," American Airlines has, on information and belief, attained some of the highest levels of brand recognition among air travelers.

30. On AA.com and other affiliated websites, American Airlines allows consumers to find and purchase flights to locations around the world. The American Airlines websites allow consumers to plan for business trips, vacations, weddings, meetings, and other events, as well as learn about and take advantage of American Airlines' incentive and promotional programs.

31. American Airlines conducts a substantial amount of its business over the Internet and has made a sizeable investment in the development of its online business. It is generally more beneficial for American Airlines when consumers purchase their travel directly through American Airlines. Among other reasons, this is because when consumers book their flights through AA.com, it assists American Airlines in conveying important information to its customers, in developing a direct relationship and future business with its customers, and often in minimizing costs associated with various transactions.

### Defendants' Search Engine

32. Web users who are searching for a specific company product or information, but who do not know the exact domain name or website address at which it may be found, may use an internet "search engine" to locate websites, whether through a home computer, a laptop, certain cellular telephones, or other mobile communications devices. In fact, many Internet users prefer to navigate the Internet by typing phrases and even URLs into search engines rather than type a URL into an Internet browser's address bar. A search engine, such as Defendants', purportedly checks the terms entered into it against its databases and applies a formula or algorithm to produce a search results page that lists the websites that may relate to the customer's search terms. It then provides links to those websites.

33. Defendants claim, and upon information and belief most web users who perform searches with Defendants' Internet search engine believe, that the results given by this search engine are determined by a "natural" or "organic" system that lists results in order of objective relevance to the search terms input into the search engine, with the most relevant websites appearing at the top. According to Yahoo!, "Yahoo! strives to provide the best search experience on the Web by directing searchers to high-quality and relevant web content in response to a search query."<sup>1</sup>

34. On information and belief, among other kinds of searches, Defendants encourage consumers to use their websites to find other websites that offer particular products and services.

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<sup>1</sup> See <http://help.yahoo.com/l/us/yahoo/search/basics/basics-18.html> (visited October 7, 2008).

35. By using Defendants' Internet search engine, web users are identifying to Defendants the subjects in which they are interested, the companies that they seek, or the goods or services they wish to buy. This allows Defendants to obtain a significant percentage of their profits from "contextual" or "search" advertising, which allows companies to place their advertising in front of consumers who have already identified themselves as interested in particular products or services.

36. When a web user carries out an Internet search using Defendants' search engine, Defendants not only provide the web user with purportedly objective "natural" results, but also display a list of similarly formatted "Sponsor Results" above, below and alongside their purportedly objective "natural" search results.

37. On information and belief, the selection and placement of these Sponsor is substantially influenced by the amount of money the sponsors of these links offer to pay Defendants.

38. Until a few years ago, Defendants induced participation in their search advertising programs by representing that Sponsor Results were placed in preferential order based on the amount bid by the sponsor and the likelihood that a user will click on the Sponsor Result.

39. In fact, however, Defendants had entered into agreements with certain sponsors that were not disclosed to other advertisers by which those sponsors were guaranteed top placement for their Sponsor Results based on certain keywords. Sponsors who were not party to these agreements were not able to obtain top placement for their Sponsor Results, regardless of how much they bid for keywords even when those keywords were their own trademarked terms. Plaintiff learned in discovery that Defendants referred to this program as

“Toplink.” One advertiser who used the Toplink program also had other financial arrangements with Yahoo that gave that advertiser unfair advantages.

40. Defendants represent to users and Sponsors that “natural” search results were based on the relevance of the results to the users’ search query, as determined by Defendants’ algorithms.

41. In fact, however, Defendants encouraged advertisers to modify “natural” search results through participation in Defendants’ “Search Submit” and “Search Submit Pro” programs. In those programs, advertisers were able to use titles and text written by them and Yahoo rather than display the natural results Yahoo displayed for others. In essence, Yahoo’s natural search results were another vehicle to earn Yahoo advertising dollars.

42. Defendants’ use of the American Airlines Marks or terms confusingly similar thereto in order to display Sponsor Results falsely communicates to consumers that Defendants’ advertisers are official American Airlines affiliates, or that American Airlines sponsors or endorses Defendants’ advertisers. In many cases, Defendants exacerbate this confusion by publishing text in the Sponsor Results that makes further confusing use of the American Airlines Marks.

43. Further, when some web users click on the links that Defendants’ advertisers pay to place alongside their purportedly objective “natural” results in order to seek information about American Airlines’ services, they are likely to be deceived into believing that they will be provided with official information about American Airlines’ flights and other services directly from American Airlines. On information and belief, however, some of these links and the websites to which they lead provide no such information. In fact, in some

instances, some of these links lead to websites that offer the services of American Airlines' competitors, whether or not they also offer American Airlines' own services.

44. Defendants' unauthorized use in commerce of the American Airlines Marks generates profits for Defendants and their advertisers that are directly attributable to their unauthorized exploitation of the value and name recognition associated with the American Airlines Marks.

#### **Yahoo!'s Search Engine-Based Keyword Advertising Program**

45. Yahoo!'s search engine is available, among other places, through its website located at [www.yahoo.com](http://www.yahoo.com). It also licenses its search engine to other popular websites, such as [www.abc.com](http://www.abc.com), [www.cnn.com](http://www.cnn.com) and [www.sportsillustrated.com](http://www.sportsillustrated.com). In addition, Yahoo! invites consumers to affix a "Yahoo! Toolbar" at the top of Internet users' Internet browsers that allows these users to conduct Yahoo! searches even when they are not currently visiting a website that features Yahoo!'s search engine.<sup>2</sup> In addition, Yahoo! encourages users to download its Yahoo! Go program and other similar programs for mobile communications devices such as cellular telephones, BlackBerry devices, Palm products, and Apple iPhones, and markets the ability to advertise to these devices through Yahoo! Mobile Ad Services.<sup>3</sup>

46. Yahoo! offers a program called "Yahoo! Sponsored Search" that displays advertisements to users of Yahoo!'s search engine in the form of "Sponsor Results." Yahoo! offers advertisers the ability to select certain "keywords" and, even suggests keywords to

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<sup>2</sup> See <http://toolbar.yahoo.com/> (visited Oct. 7, 2008).

<sup>3</sup> See <http://mobile.yahoo.com/business/advertiser> (visited Oct. 7, 2008).

advertisers, that will trigger a Sponsor Result linking to the advertiser's chosen website, which Yahoo! will display alongside the purportedly objective "natural" search results.

47. Yahoo! has described keyword triggers as "a powerful way for customers to find [an advertiser's] website because users are actively searching for the products or services [the advertiser] offer[s]. With Yahoo! Sponsored Search, [an advertiser's] listings can appear prominently in search results on the web's top portals and search engines."<sup>4</sup>

48. In addition, Defendants on their own designate additional keywords that their advertisers have not chosen to buy to trigger their "Sponsor Results." Through a program that Defendants refer to as "Advanced Match," Defendants designate their own secret list of terms in order to trigger "Sponsor Results" for advertisers when consumers use those search terms in the Yahoo! search engine. Defendants tell their advertisers that this Advanced Match program provides them with "a wider range of relevant keywords" or "a broader range of searches related to your keywords, titles, descriptions, and/or web content."<sup>5</sup> On information and belief, in most cases, Defendants do not disclose to their advertisers the list of Advanced Match terms that may trigger the publication of their Sponsor Result advertisements. Furthermore, Defendants set Advanced Match as the default setting for all of its advertisers and requires advertisers to opt out of Advanced Match in order to stop its use.

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<sup>4</sup> See <http://us.il.yimg.com/us.yimg.com/i/us/cn/srch/hssw.swf> (quoted language in audio track) (visited Oct. 7, 2008).

<sup>5</sup> See, respectively, [http://help.yahoo.com/l/us/yahoo/ysm/sps/optimize/sales/sales\\_cam\\_setup.html](http://help.yahoo.com/l/us/yahoo/ysm/sps/optimize/sales/sales_cam_setup.html); [http://help.yahoo.com/l/us/yahoo/ysm/sps/training/takeaways/keywords\\_takeaways.html](http://help.yahoo.com/l/us/yahoo/ysm/sps/training/takeaways/keywords_takeaways.html) (both visited Oct. 7, 2008).

49. On information and belief, Yahoo! charges its advertisers each time a web user clicks on a keyword-triggered Sponsor Result that appears on Yahoo!'s "results" page.

50. These Sponsor Results are not meaningfully or conspicuously identified to consumers as paid third-party advertisements. Most often, Yahoo! posts its "Sponsor Results" advertisements in a color, typeface, and font size that is not sufficiently different from the results that Yahoo!'s purportedly "natural" search system generates and, to the extent that consumers do detect a difference, many consumers believe Yahoo! to be highlighting for them the result that it has objectively determined to be the most relevant to their search as determined by Defendants' purportedly unprejudiced system for determining the websites most relevant to a given search. On information and belief, even the designation of these keyword-triggered advertisements as "Sponsor Results" is confusing to many consumers, because Yahoo! does not inform consumers who has done the "sponsoring."

51. Because Defendants have guaranteed certain sponsors top placement on its "results" page for certain keywords, and have extended that guarantee to cover searches for the trademarks of third parties, sponsors who are privy to these guarantees are able to profit from this confusion by placing their Sponsor Results above those of the trademark holder.

52. On information and belief, in a substantial portion of searches, Yahoo!'s Sponsored Search program makes four distinct uses of keywords on behalf on an advertiser. First, Yahoo! uses the keywords selected by advertisers to trigger the Sponsor Result advertisement. Second, Yahoo! suggests additional keyword to advertisers that the advertiser had not previously chosen. Third, Yahoo! selects its own keywords to trigger the Sponsor Result advertisements of its advertisers through its Advanced Match program. Fourth, Yahoo! sometimes publishes the keyword as part of the advertisement itself.



53. Moreover, Defendants also use the keywords that they sell to their advertisers to determine the placement of additional advertisements through Yahoo!'s "Content Match" program. According to Yahoo!, the placement of these Content Match advertisements "can be determined by the relevance of [their advertisers'] keyword(s) to the . . . content" of the page where the ads will be displayed.<sup>6</sup>

54. On information and belief, Defendants also employ other advertising programs that utilize similar types of keywords, including but not limited to the American Airlines Marks or terms confusingly similar thereto, to cause advertisements to appear on websites across the Internet or on mobile communications devices that themselves display the American Airlines Marks or terms confusingly similar thereto. On information and belief, many of these advertisements lead Internet users to websites that are not American Airlines websites and often to websites that compete with American Airlines.

#### **Yahoo!'s Unwillingness To Refrain From Trademark Infringement**

55. On information and belief, Yahoo! has adopted a trademark policy for its Sponsored Search program (Yahoo!'s "trademark policy") that "requires advertisers to agree that their search terms, their listing titles and descriptions, and the content of their Web sites do not violate the trademark rights of others."<sup>7</sup>

56. Yahoo!'s trademark policy is manifestly deficient.

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<sup>6</sup> See [http://help.yahoo.com/l/us/yahoo/ysm/sps/start/overview\\_cm.html](http://help.yahoo.com/l/us/yahoo/ysm/sps/start/overview_cm.html) (visited Oct. 7, 2008).

<sup>7</sup> See <http://searchmarketing.yahoo.com/legal/trademarks.php>; see also <http://searchmarketing.yahoo.com/legal/lstrademarks.php> (discussing procedure for trademark complaints related to Yahoo! "Local Sponsored Search Listings") (both visited Oct. 7, 2008).

(a) First, Yahoo! does not make an affirmative commitment to restrict advertisements that create a likelihood of consumer confusion. Instead, Yahoo! merely states its willingness to “review the advertiser's listing for compliance with our relevancy guidelines and, if appropriate, Yahoo! Search Marketing will remove the advertiser's listing or the content of the listing's title or description will be modified.”<sup>8</sup>

(b) Second, even if Yahoo! made a more binding commitment to refrain from publishing advertisements that infringe, its policy still puts the onus on the trademark owner to identify and complain about each infringing use, disclaiming responsibility for the advertisements that it publishes on *its own website*. Because the content of Yahoo!’s website is constantly changing, however, it is effectively impossible for even the most vigilant owner of a mark to detect all infringing uses on Yahoo!’s website.

(c) Third, on information and belief, Yahoo! bases the placement of its “Sponsor Results” on the amount of money that an advertiser has paid rather than on any objective relevancy evaluation. This requires trademark holders like American Airlines to bid enough to secure sufficiently prominent placement for their own, authorized Sponsor Results rather than yield the most prominent positions to unauthorized third parties.

(d) Fourth, on information and belief, Yahoo! knows in many cases that the advertiser's representation that it is not violating the trademark rights of American Airlines is false.

57. On information and belief, Yahoo! has the ability to refrain from making infringing use of proprietary marks as part of its keyword-triggered advertising program.

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<sup>8</sup> See <http://searchmarketing.yahoo.com/legal/trademarks.php> (visited Oct. 7, 2008).

Specifically, on information and belief, Yahoo! could reasonably prevent trademarks, service marks, and terms confusingly similar thereto from being used as keyword triggers or in the text of Sponsor Results advertisements.

58. In contrast to its practices with respect to the use of trademarks in the United States, on information and belief, Yahoo! takes steps to prevent advertisers in many countries *outside* the United States from using as keywords the trademarks of others.

59. Yahoo! has even stated that it anticipates trademark infringement lawsuits because of its decision to allow its advertising customers to use trademarks to trigger the delivery of Sponsor Results. In its 2005 Form 10-K, Yahoo! stated as follows:

[T]hird parties have made, and may continue to make, trademark infringement and related claims against us over the display of search results triggered by search terms that include trademark terms. A court in France has held us liable for displaying search results triggered by certain trademark terms....

(Yahoo! 10-K, p. 21).

#### **Yahoo!'s Unauthorized Use Of The American Airlines Marks**

60. American Airlines has not given Yahoo! any permission, authority, or license to use or sell the right to use the American Airlines Marks for the promotion of the goods and services of any third parties, either directly or indirectly.

61. Nevertheless, on information and belief, Yahoo! has in fact sold to third-party advertisers and encouraged the use of the American Airlines Marks or terms confusingly similar thereto as part of Yahoo!'s search engine-based advertising program. As a result, Yahoo!'s programming utilizes the expressed interest of Internet users in the American Airlines Marks to trigger advertisements to websites that are not American Airlines websites,

some of which even compete with American Airlines. In fact, many of Yahoo!'s Sponsor Results are expressly designed to draw consumers away from American Airlines' websites.

62. Moreover, Yahoo!'s use of American Airlines Marks within the text that Yahoo! posts as a part of some Sponsor Results further misleadingly communicates to consumers that such links are endorsed or sponsored by American Airlines or its affiliates, or that such links lead to websites that are official American Airlines websites.

63. As a part of the process of triggering "Sponsor Results," Yahoo! offers the ability to and encourages its advertisers to purchase as keyword triggers the trademarks and service marks of others, as well as words, phrases, and terms confusingly similar to those trademarks and service marks. Thus, a consumer searching for American Airlines websites using Yahoo!'s search engine might be shown a Sponsor Result unrelated to American Airlines that was displayed because a third-party advertiser purchased an American Airlines Mark or a term confusingly similar thereto as a keyword trigger. A statistically significant number of consumers are likely to believe falsely that it was American Airlines who "sponsored" the link that appears alongside the purportedly "natural" search engine results.

64. On information and belief, Yahoo! similarly causes confusion when Defendants select American Airlines Marks to trigger the publication of Sponsor Result advertisements in response to searches for the American Airlines Marks or confusingly similar terms through Yahoo!'s Advanced Match program.

65. On information and belief, a significant portion of the "Sponsor Results" for which Yahoo! uses the American Airlines Marks or terms confusingly similar thereto as keyword triggers link Internet users to: (i) websites of airlines that compete with American Airlines; (ii) websites that sell air travel not only on American Airlines, but also on a variety

of airlines that compete with American Airlines; and/or (iii) websites that are entirely unrelated to American Airlines. American Airlines has not sponsored these Sponsor Results or otherwise authorized Yahoo! to sell the right to use the American Airlines Marks in commerce to draw web users to these websites. Nevertheless, these unauthorized Sponsor Results appear in close and confusing proximity to both the listings generated by Yahoo!'s purportedly "natural" system and the Sponsor Result that Yahoo! forces American Airlines itself to purchase to reduce the likelihood that Internet users will be diverted to other websites. Many of these "Sponsor Results" use American Airlines Marks in whole or in part within the text of the Sponsor Results themselves.

66. For example, below is a true and accurate screen shot of Yahoo!'s website, which show the results pages that appeared when a web user performed an Internet search for the American Airlines Mark "American Airlines" (U.S. Reg. Nos. 514,294 and 1,845,693). In addition to Yahoo!'s "natural" search results listed on the left of the screen, Yahoo! also listed in close proximity Sponsor Results to various websites. American Airlines Marks or terms confusingly similar to the American Airlines Marks appeared in the text of certain Sponsor Results even though the websites linked to these Sponsor Results are not American Airlines websites, some of which even compete with American Airlines. American Airlines has not sponsored any of the unauthorized Sponsor Results that appear below on the right or otherwise authorized Yahoo! to sell the right to use the American Airlines Marks in commerce to draw web users to these websites.