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## ECJ Ruling on Google Adwords

### Good for Google? Maybe, maybe not....

#### Introduction

On 22 March 2010, the European Court of Justice (ECJ) ruled in favour of Google in a landmark decision in respect of Google's Adwords service.

#### What is Google's Adwords Service?

Under their Adwords service, Google sells keywords for advertising searches to bidders. This service thus allows competitor advertisers to bid on brand owners' registered trademarks, in order to appear in the sponsored listings at the top and to the right of the search results page. This service is a source of significant revenue for Google.

#### What is the problem?

Many trademark owners, and it has to be said many trademark lawyers, have regarded the sale of a brand's trademarks by Google as keywords as an infringement of those trademarks. They also believed that a competitor advertiser was also infringing the trademarks by bidding on them. It has been their opinion that both the sale of registered trademarks by Google and the bidding on them by competitors was a "use" of those trademarks "in the course of trade", and therefore constituted an infringement under Article 5(1)a of the Trademark Directive 89/104 (the Directive).

LMVH, the owners of the Louis Vuitton, Dior and Moët & Chandon brands, and others decided therefore to challenge Google in the French court, claiming that the Adwords service constituted trademark infringement by both Google and by competitors. The French courts found initially in favour of LVMH but Google appealed to the ECJ.

#### What is the decision?

The ECJ has come out in favour of Google, and stated that the company has not infringed trademark law by allowing advertisers to purchase keywords corresponding to their competitors' trademarks.

The ECJ stated that, although the "referencing service provider" (Google) operated "in the course of trade" by permitting advertisers to choose keywords which were identical with the registered trademark, and that Google stored those words and displayed the advertisements, the ECJ stated that it did not follow from those factors, that Google itself "uses" those words within the terms of Article 5 of the Directive.

This, however, was on the basis that it was a neutral service provider. The ECJ referred back to the local courts the question as to whether Google had played a more active role in drafting the display advertisement or indeed in the selection of keywords. In cases, such as counterfeiting, if Google is offering a trademark name and the word "imitation", for instance, then this may be regarded as playing an active part, and therefore Google may still be liable for trademark infringement.

Furthermore, the ECJ also stated that a trademark owner is only entitled to prohibit a third party from advertising on the basis of bidding on identical keywords, where the advertisement itself "does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the [trademark owner] or, on the contrary, originate from a third party".

This wording of the court is also likely to generate much debate and acts as a warning shot to advertisers who want to use competitors' registered trademarks as keywords.

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## Final Thoughts

In short, the ECJ has said that Google's Adwords service is basically acceptable provided that the service is neutral, and Google takes no active role in the selection of keywords which may amount to a trademark infringement, or in creating the display ad. Google will also have to take down any advertisement expeditiously where a trademark is infringed.

There is some comfort for trademark owners. The Court's rather vague wording about causing confusion may mean that advertisers are less likely to use keywords in future. Such advertisers certainly need to ensure that the advertisements displayed in the sponsored sections of the search results page do not feature competitor's marks or in any way cause the user any confusion between the goods and service of the trademark owner and the advertiser. They may possibly have to include a statement that the advertiser does not sell the rival product, whose trademark name had originally been searched. This may cause advertisers to decide not to bother using the trademark in the first place.

The main practical result of Google's Adwords service over the last couple of years has been to increase its revenue and at the same time to increase the cost for trademark owners to bid on their own trademarks: as a result of this judgment, the Court has in essence allowed Google's lucrative revenue stream to stay for the time being, but subject to caveats. Google will need to ensure that it can demonstrate that the service is neutral – otherwise it may become liable for trademark infringement, and the repercussions for Google's Adwords service in that event will be considerable.

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