

CLIENT ALERT

ISP-Liability & Media Law

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On 22 September 2009, the Advocate General Pociès Maduro suggested to Europe's Court of Justice that Google has not committed a trade mark infringement by allowing advertisers to select, in AdWords, keywords corresponding to trade marks. However, in individual cases Google might be held liable for the content of AdWords advertisements.

Introduction

Through Google's search engine, internet users can search information by entering keywords. On entering keywords, users are presented with a list of so-called natural results selected and ranked according to their relevance to the keywords, determined by objective criteria.

Displayed alongside with the natural results, the user might also find sponsored results with small advertisements. These sponsored results are generated through Google's advertising system called 'AdWords'. Through AdWords, Google allows advertisers, in return for payment, to select keywords so that their ads are displayed to internet users in response to the entry of those keywords in Google's search engine.

Request for a preliminary ruling by the French Cour de Cassation

In France, a number of trade mark owners initiated legal proceedings against Google on the basis of the use of their marks as sponsored keywords. Sponsored keywords were used to display ads for sites offering counterfeit versions of the products covered by the trade mark or identical or similar products of competitors.

Europe's Court of Justice was asked by the French Cour de cassation whether or not Google had committed a trade mark infringement by making available such keywords to advertisers and whether or not, according to the E-Commerce Directive, the company can be held liable for the content featured in AdWords.

Opinion of the Advocate General

On 22 September 2009, the Advocate General Pociès Maduro suggested to the Court of Justice that Google has not committed a trade mark infringement by allowing advertisers to select, in AdWords, keywords corresponding to trade marks. Also displaying advertisements in response to keywords corresponding to trademarks would not necessarily constitute a trade mark infringement. The Advocate General considers that the mere display of relevant sites in response to keywords is not enough to establish a risk of confusion on the part of consumers as to the origin of goods or services.

Furthermore, the Advocate General commented that instead of being able to prevent, through trade mark protection, any possible use, trade mark owners would have to point to specific instances giving rise to Google's liability in the context of illegal damage to their trade marks.

In this regard, the Advocate General opined that where Google has a direct pecuniary interest in internet users clicking on advertisement links, Google does not provide a neutral information vehicle applying objective criteria. As service providers seeking to benefit from a liability exemption under the E-Commerce Directive should remain neutral as regards the information they carry or host, the liability exemption for hosts provided for in the E-Commerce Directive should not apply to the content featured in AdWords, according to the Advocate General.

Hence, in individual cases where the content of an AdWords advertisement would constitute a trademark infringement, trademark owners would be entitled to hold Google liable for this in the Advocate General's opinion.

Although the opinion of an Advocate General is not binding on the Court, quite often it is followed by the Court and thus provides a strong indication on how the Court will rule.

References: Advocate General's Opinion in Joined Cases C-236/08, C-237/08 and C-238/08

Links: http://curia.europa.eu/jcms/jcms/Jo1_6308/

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