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“Intellectual Property lies at the centre of the modern company's economic success or failure”

Lester Thurow : Economist

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Google Keyword Policy - Trade Mark Infringement or Not?

by Kirsten Toft
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On 5 May, Internet search engine Google introduced changes in the UK and Ireland to its online advertising policy. The changes allow companies to bid on rivals trade marks and brand names via pay-per-click ad slots. Google's stance is that the changes do not amount to trade mark infringement and that it cannot be held responsible for policing other people's trade marks.

The new keywords bidding policy has caused serious concerns amongst many leading brand owners within the travel, retail and financial services industries who are now considering what legal action (jointly or individually) they can take against Google.

Prior to the change in its policy Google restricted advertisers from bidding on their competitors trade marks in its Adwords programme. A Google search for a brand name such as "Evian" would only bring up sponsored links from Evian itself. However, if a search was made for "Evian Bottled Water", in addition to the sponsored link for Evian, sponsored links for other brands of bottled water would be brought up in cases where the retailer had paid for the search term "bottled water".

As a consequence of the keyword policy change, competitors can now bid on a trade mark belonging to another, so that a search of that trade mark may bring up the competitor's advert. Although, the trade mark owner can still stop its trade mark from being used in the text of the competitor's advert. The policy changes may be due to the recent decline in Google's paid advertising clicks. The changes are likely to drive up the cost of pay per click advertising and hence increase revenue for Google. Google's bidding policy for UK and Ireland will now be in line with Google's US and Canadian policies.

The consequences for brand owners are not insubstantial. The cost of pay-per-click advertising is likely to increase and if a company fails to buy the advertising space, customers are likely to receive competitor advertising when making a search for the brand owner's trade mark. This could certainly lead to

confusion amongst online users.

In the US, where this practice has been in place for 4 years, American Airlines has commenced a legal action for trade mark infringement against Google. However Yahoo UK, which already has a similar policy, recently won a High Court case regarding competitors advertising using trade marks as search terms. This may be the precedent Google is now relying upon.

It will be interesting to see what action brand owners take to protect their intellectual property.