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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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Regulated by the Solicitors Regulation Authority
SRA number: 466530



Use Of Google Adwords A Decision At Last

by Kate Reid
17/06/2010

Background

Google's Adwords system allows advertisers to pay for keywords, including the registered trade marks of others, which, when a user enters them into Google's search engine, will bring up the advertiser's website.

The question of whether such use by the advertiser or by Google constitutes trade mark infringement has been the subject of much litigation throughout the European Union and has recently been the subject of a decision made by the European Court of Justice.

In *Google France, Google Inc v Louis Vuitton Malletier*, the advertiser paid for keywords which were the registered trade marks of Louis Vuitton. These keywords triggered an advertisement for counterfeit Louis Vuitton goods.

Louis Vuitton claimed that the use of its trade marks as Adwords constituted trade mark infringement and that, by allowing advertisers to bid for keywords which corresponded to Louis Vuitton's trade marks, Google had also infringed the trade marks in question. The case was brought against Google rather than the advertiser and after losing in the French courts Google took the case to the European Court of Justice.

The Court's Decision

In September 2009 the Advocate General (who advises the Court as to its decision) gave his opinion that Google had not committed any trade mark infringement. At that point most brand owners feared that the European Court would follow his advice.

In March 2010 the Court ruled that an internet reference service provider such as Google will not be held to have infringed the trade mark in such circumstances because it has not "used" the trade mark and has only created the technical conditions for third parties to use the trade mark. The court went on to say, however, that liability may be incurred if, having obtained knowledge of the unlawful nature of the advertiser's activities, it fails to act quickly to remove or to disable access to the data concerned.

The Court also ruled however that the owner of a registered trade mark will be entitled to prohibit an advertiser from using, without the owners consent, keywords, which are identical to the owner's trade marks and for goods or services which are identical to those for which the trade mark is registered in circumstances where the advertisement does not enable the average internet user to ascertain whether the goods or services being advertised originate from the trade mark owner (or someone connected to it) or a third party.

This decision does not put an end to the uncertainty surrounding the use of Adwords because there may still be many arguments about whether the average internet user can see, without difficulty, where the goods being advertised originate from and it does not address the question of what Google's position will be if, on being contacted by a trade mark owner, Google decides that the trade mark owner's complaint is unjustified.