

## Brand Owners dealt a blow by Advocate General opinion on Google AdWords

### 1. Introduction

1.1 Further to our previous *PageView* on this subject which can be accessed [here](#), the Advocate General has now issued his opinion as to whether Google AdWords that contain the trade marks of brand owners amounts to trade mark infringement.

### 2. Background

2.1 A number of national courts faced with decisions<sup>1</sup> concerning whether the use of registered trade marks within AdWords amounted to an infringement, referred detailed questions to the European Court of Justice (ECJ) for determination and guidance.

2.2 As stated in our previous *PageView*, the answer to the vital question put to the ECJ as to whether such AdWords that use trade marks without the consent of the proprietor amount to infringement is possibly the most commercially sensitive decision the ECJ will ever have to rule upon, as it could make or break the sponsored word internet industry.

### 3. Advocate General Opinion

3.1 This opinion from the Advocate General is not currently binding on national courts and their own decisions but goes a long way to supporting Google and the search engines by stating that the search engines do not infringe trade mark rights by allowing advertisers to buy keywords containing those trade marks.

3.2 Whilst brand owners argue that many of the keyword links go to websites selling fakes of the official branded goods, the Advocate General stated that linking other companies to brand names in this way does not amount to infringement of the registered trade mark.

3.3 The crucial part of the Advocate General's statement was:

---

<sup>1</sup> Including *Google France v. Louis Vuitton Malletier* case (C- 236/08)

*"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 the goods or services."*

### 4. The Law

4.1 Essentially, the essence of the issues to arise out of this opinion are:

*"a trade mark proprietor (including the proprietor of a trade mark with a reputation) may not prevent the provider of a paid referencing service from making available to advertisers keywords which reproduce or imitate registered trade marks or from arranging under the referencing agreement for advertising links to sites to be created and favourably displayed, on the basis of those keywords."*

4.2 The Advocate General stated that the use of a brand name in a keyword cannot be considered as being use made in relation to goods or services identical or similar to those covered by the trade marks. Similarly, the advertisers themselves do not infringe the trade marks by selecting and purchasing such keywords.

4.3 In his view, internet users' access to information through search engines concerning the trade mark should not be limited to or by the trade mark owner.

4.4 However, the one possible saving grace for brand owners was in a statement regarding AdWords in which an Internet service provider has a 'pecuniary interest'- In others words, for sponsored links where Google earn money for the number of hits made to such links, the exemption from liability would, in the Advocate General's opinion, not apply.

4.5 It is not yet clear whether the ECJ will opt to approve this opinion in its entirety or alter it in any way. The full ECJ decision is not expected until around March 2010 and we will report further news on this issue when it arrives.

