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Press and Information

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

Google France & Google Inc. v Louis Vuitton Malletier, Google France v Viaticum & Luteciel and Google France v CNRRH, Pierre-Alexis Thonet, Bruno Raboin & Tiger, franchisee Unicis

ADVOCATE GENERAL POIARES MADURO CONSIDERS THAT GOOGLE HAS NOT INFRINGED TRADE MARK RIGHTS BY ALLOWING ADVERTISERS TO BUY KEYWORDS CORRESPONDING TO REGISTERED TRADE MARKS

However, Google's liability may be engaged for featuring content in AdWords that involves trade mark infringement.

Under Community trade mark rules¹, the owner of a trade mark can prohibit others from using the sign in advertising.

The E-Commerce Directive² exempts, under certain conditions³, information society service providers from liability for the information stored at the request of a recipient of the service.

Google allows internet users free access to the Google search engine. On entering keywords into that search engine, users are presented with a list of natural results selected and ranked according to their relevance to the keywords, determined by objective criteria.

Google also operates an advertising system called 'AdWords', which enables ads to be displayed, alongside natural results, in response to keywords. These ads typically consist of a short commercial message and a link to the advertiser's site; they are differentiated from natural results by their placement and design. 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

¹ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) and Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

³ This exemption applies where: (i) there is an information society service; (ii) that service consists in the storage of information, provided by the recipient of the service, at the request of that recipient; and (iii) the provider of the service has no actual knowledge of the illegal nature of the information, or of facts which would make such illegality apparent, and duly acts to remove it upon becoming aware of its illegality.

entry of those keywords in Google's search engine. Google supports its search engine with its income from AdWords.

In France, legal proceedings have been initiated by trade mark owners against Google as to the legality of the use, in the Adwords advertising system, of keywords corresponding to trade marks. It has been established in those proceedings that entering certain trade marks into Google's search engine triggered the display of ads for sites offering counterfeit versions of the products covered by the trade mark or identical or similar products of competitors.

The Cour de cassation, called upon to settle the issue at last instance, has asked the Court of Justice whether Google has committed a trade mark infringement by making available such keywords to advertisers and if the company can be held liable for the content featured in AdWords.

In his Opinion delivered today, Advocate General Poiares Maduro suggests that **Google has not committed a trade mark infringement by allowing advertisers to select, in AdWords, keywords corresponding to trade marks.** He highlights that the use of the trade marks is limited to the selection of keywords which is internal to AdWords and concerns only Google and the advertisers. When selecting keywords, there is thus no product or service sold to the general public. Such a use cannot therefore be considered as being a use made in relation to goods or services identical or similar to those covered by the trade marks. Similarly, advertisers themselves do not commit a trade mark infringement by selecting in Adwords keywords corresponding to trade marks.

By contrast, the Advocate General finds that Google, by displaying ads in response to keywords corresponding to trade marks, establishes a link between those keywords and the sites advertised which sell products identical or similar to those covered by the trade marks. The very same link is established between keywords which correspond to trade marks, and the sites displayed as natural results.

However, in the view of the Advocate General, **such a link also does not constitute a trade mark infringement.** In effect, 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. Internet users are aware that not only the site of the trade mark owner will appear as a result of a search in Google's search engine and sometimes they may not even be looking for that site. These users will only make an assessment as to the origin of the goods or services advertised on the basis of the content of the ad and by visiting the advertised sites; no assessment will be based solely on the fact that the ads are displayed following the entry of keywords corresponding to trade marks.

The Advocate General then recalls that trade mark rights cannot be construed as classical property rights enabling the trade mark owner to exclude any other use. Accordingly, **internet users' access to information concerning the trade mark should not be limited to or by the trade mark owner** even if it involves a trade mark which has a reputation. He notes that many of the sites reached by internet users by entering keywords are perfectly legitimate and lawful even if they are not the sites of the trade mark owner.

Mr. Poiares Maduro also rejects the notion that Google's actual or potential contribution to a trade mark infringement by a third party should constitute an infringement in itself. He opines that instead of being able to prevent, through trade mark protection, any possible use – including many lawful and even desirable uses –, **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 context, the Advocate General finds that both Google's search engine and AdWords constitute information society services. He adds that 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.

However, whilst the search engine is a neutral information vehicle applying objective criteria in order to generate the most relevant sites to the keywords entered, that is not the case with Adwords where Google has a direct pecuniary interest in internet users clicking on the ads' links.

Accordingly, **the liability exemption for hosts provided for in the E-Commerce Directive should not apply to the content featured in AdWords.**

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: BG, ES, DE, EL, EN, FR, IT, NL, PL, PT, RO

The full text of the Opinion may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/08>

It can usually be consulted after midday (CET) on the day of delivery.

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