



InFocus - January 2010

Keyword advertising - Adwords opinion favours Google

Keyword advertising raises a number of tricky questions for brand-owners and the legality of keyword advertising in Europe is still unclear. However, recent developments in the US suggest that the position is even more complicated for pharmaceutical companies as they must consider not only trade mark law but also industry regulation.

Uncertainty in Europe

On 22 September 2009, the long anticipated Opinion in the three joined Google France references to the European Court of Justice (ECJ) was published. This is the first judicial comment from the supervising courts in Luxembourg on the legality of paid for 'keyword' advertising and a negative outcome could force search engines such as Google to dramatically alter the way they do business.

In an Opinion which will disappoint brand owners, Advocate General Pociès Maduro concludes that Google France should not be found guilty of trade mark infringement by offering trade marks for sale as Adwords. He also concludes that there is no European provision for contributory infringement and therefore, search engines, such as Google cannot be found liable under the harmonised European trade mark laws. However, they may be vulnerable to an action for contributory infringement under national laws of liability. Furthermore, in the AG's view, Google would not be able to defend itself from liability under national law by relying on the hosting safe harbour contained in Article 14 of the E-Commerce Directive.

In respect of the potential liability of advertisers, the AG was of the view that the purchasing of trade marks as keywords is not trade mark infringement, on the basis that it is not use 'in the course of trade'. This was because it was a private act between the advertiser and the search engine operator (Google) and not an act with a view to commercial activity.

The Opinion is steeped in policy. The AG explicitly refers to the interests of free expression and free competition and the need to curb the trade mark owner's absolute monopoly. The AG effectively creates an exception to trade mark infringement to add to purely descriptive use and comparative advertising. However, in contrast to comparative advertising, there is no Directive which specifies the conditions of permitted keyword advertising.

The Opinion is likely to be controversial and its reasoning is unconvincing in places. Although the ECJ often follows the AG's Opinion, this has not been the case of late in trade mark infringement cases. There are other cases before the ECJ on keyword advertising involving similar but also different points. The judgment of the ECJ might not therefore be forthcoming for quite some time. If the AG's Opinion is followed Google's main source of revenue (which made Google \$21 billion in 2008) will be secure.

It is important to note that this is not carte blanche for search engine operators to do as they please. The Opinion does not cover use in the advert text or on the websites that the adverts link to. However, it does mean that brand owners will have to continue to police actively and take action against advertisers on a case by case basis.

Developments in the US

There is a further level of complexity for owners of pharmaceutical brands, as they operate in a heavily regulated industry. Indeed, Google operates an 'Online Pharmacy Qualification Process', by which they will only accept online pharmacies that are based in certain territories, including the UK, Ireland and the US. In the UK, online pharmacies must be registered with the Royal Pharmaceutical Society of Great Britain and advertising campaigns for an online pharmacy can only target UK consumers. Furthermore, unlike the US, advertising campaigns by UK online pharmacies cannot promote specific prescription drugs.

Perhaps because of the ban on direct to customer advertising of prescription only drugs in Europe there has been very little comment on the relationship between keyword advertising and pharmaceutical brands in the UK or Europe to date. None of the outstanding cases before the ECJ consider the special circumstances that arise where pharmaceuticals are involved. However, there have been some recent developments in the USA, which highlight the difficulties that may face [by] pharmaceutical brand-owners if and when the rules on direct to customer (DTC) advertising were to change.

The rules on branded DTC advertising of prescription only medicines were relaxed in the US in 1997. At the end of March 2009, the Division of Drug Marketing, Advertising and Communications of the US Food and Drug Administration (FDA) wrote to fourteen pharmaceutical companies in the USA in respect of their use of sponsored links on Internet search engines. The FDA's warning letters contained five specific warnings about advertisements that violate US regulation:

- Omission of risk information – by omitting details of the risks associated with the advertised drugs, the FDA considers that the advertisements suggest that the drug is safer than it has been demonstrated to be. Even if the advert is linked to the relevant risk information, the FDA considered this insufficient to mitigate what was being said in the advertisement.
- Minimisation of risk information – the advert in question stated that the drug had a "low incidence of side effects". The FDA considered that this information 'severely minimises the risks of [the advertised drug]'.
- Inadequate communication of indication – the majority of the warning letters criticised the advertisers for failing to adequately describe the indication for the drug on the basis that this failure meant that the indication for the drug was broadened.
- Overstatement of efficacy – the FDA considered that one of the adverts in question overstated the drug's efficacy as it suggested that the drug could be used indefinitely when this was not the case.
- Failure to use established brand names – all fourteen warning letters criticised the advertisers' failure to use the full-established names of the promoted drugs.

One of the key issues for pharmaceutical companies using keyword advertising (where it is permitted) appears to be the very limited space available to advertisers in keyword adverts. Whilst the position in the UK and Europe is very different, what is clear is that the FDA considers prescription products can no longer use branded advertising on keywords related to the conditions. It is not enough that the full information is "one click away". The FDA regards Internet keyword advertisements to be complete advertisements and not simply a link to information about a drug.

There is no suggestion that the FDA's actions will shape regulatory policy internationally. There are significant differences in the rules on DTC advertising and it is unlikely that branded direct to customer advertising would ever be acceptable in Europe even if the rules on DTC advertising were to be relaxed. However, the warning letters do highlight issues that could be raised by regulators in Europe were the position on DTC advertising to change.



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