



Google AdWords – Infringing or Liberalizing Trade?

- A Comparative Analysis of Treatment of Google AdWords under U.S. and EU Trademark Law

Bachelor's thesis within Commercial and Trademark Law

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SUMMARY

Since Google as the world's largest and most popular search engine encourages Internet users to browse their search results, it is naturally functioning as an advertising vehicle and has turned into the most profitable Internet company in world's history. Google's success, however, has been subject to strong criticism as one of the main concerns is linked Google AdWords, which reveal key-word triggered advertisements as well as sponsored links besides unsponsored search results. Courts both in Europe and the United States under different trademark legislation felt forced to address the collision of pre-Internet trademark infringement doctrines with modern technology.

As Google AdWords have changed the way consumers observe Internet advertisements and search engines, the boundaries of trademark law have continuously been pushed forward. This development, thus, raises the final question of whether Google AdWords by now are considered to function as trade liberalizer or trade infringer under two different trademark jurisdictions. What is certain as of now is that, if the current circumstances are to change, courts cannot solely rely on old doctrines to adapt to new situations. Instead, new rules should not be subject to isolated court proceedings by individual instances regarded that jurisdictions of courts are limited by territorial boundaries and Google AdWords have evolved as an element of borderless online sphere. Taking these new challenges into account, this paper argues that addressing trademark issues originated by AdWords will demand an international consideration and coordinated efforts between the EU and United States to bring forward an international solution.

Keywords: Google AdWords, trademark law, trade liberalization, trademark infringement, keyword-advertising

PREFACE

This thesis represents the final assignment to get my bachelor's degree in European studies with a major in European and International law at Linnæus University, Sweden, and has been developed during a 16-week long practical training at an international law firm in Estonia primarily dealing with commercial law, M&A and contract law.

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Tallinn, 6 May 2012

Anne-Kathrin Adler

ABBREVIATIONS

AG	Advocate General
CJEU	Court of Justice of the European Union ¹
EC	European Communities
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Communities
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
GDP	Gross Domestic Product
ISDN	Integrated Services Digital Network
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
URL	Uniform Resource Locator
U.S.	United States
WTO	World Trade Organization

¹With the entry into force of the Treaty of Lisbon, the name of the European Court of Justice has been changed to the Court of Justice of the European Union. Reference will therefore be made to the CJEU and not to the prior name of the Court.

1 INTRODUCTION

The Internet nowadays poses new challenges to the legal world. One of those challenges applies to the sale of someone else's trademark as a keyword in different referencing service programs on the Internet. This issue has, in the last few years become an important legal topic and a central subject to litigation. The referencing service providers earn big profits on their referencing service programs and the largest provider for a referencing service on the market today is represented by Google and its AdWords program.

1.1. PROBLEM FORMULATION

As mentioned previously, Google is regarded the most popular search engine worldwide, being used by an audience of about 82 percent of the Internet users worldwide². By encouraging so many people to browse their search results, Google is naturally acting as an advertising vehicle and has exploited this status to turn into one of the most profitable Internet companies in world's history. Thus, its success has not been uncontroversial as one of the gravest concerns is related to Google AdWords, which reveal key-word triggered advertisements as well as sponsored links besides unsponsored search results. Both in Europe and the United States Google AdWords were exposed to strong criticism for their presence as trademark infringer on the Internet. Accordingly, courts felt forced to address the collision of pre-Internet trademark infringement doctrines with modern technology. On the one hand, they are willed to sensitively deal with the demands of trademark holders, but on the other hand courts feel disinclined to harm the functions of Google per se which has become elementary to Internet efficiency and structure.

As Google AdWords in the meantime have reorganized the way consumers observe Internet advertisements and search engines, the boundaries of trademark law have continuously been pushed forward, so that to a certain extent, the final word on what is or isn't "done" in Internet advertising is not up to the courts but to Google instead. Taking this ongoing development into account, the following questions may arise for consideration:

- How is keyword-triggered advertising treated differently under EU and U.S. trademark law?
- Are Google AdWords by now functioning as trade infringer or trade liberalizer?

²Search Engine Market Share, Search engine Usage Statistics, available at http://www.statowl.com/search_engine_market_share.php (accessed 2012-04-01)

- And is there a need for internationally cooperated efforts towards the legitimized use of trademarked terms by search engines?

What is certain as of now is that, if the current circumstances are to change, courts cannot solely rely on old doctrines to adapt to new situations. Moreover, the responsibility for the creation and enforcement of such rules should not only be concern of isolated individual court proceedings considering that territorial boundaries are restrictive for the jurisdiction of courts and Google AdWords have evolved as a component of borderless Internet. In consequence, this paper argues that addressing trademark issues originated by AdWords will demand an international consideration and coordinated efforts between the EU and United States to bring forward an international solution.

1.2. PURPOSE

The aim of the thesis is to comparatively examine how keyword- triggered advertisement is treated under current EU and U.S. trademark law. By putting a special focus on Google's search engine, it will be further outlined whether Google AdWords function as a trade infringer or trade liberalizer. The legal status regarding keyword-triggered advertising within the EU and the U.S. will be illustrated by examining, at first, whether it is trademark infringement to use someone else's trademark as a keyword in a referencing service according to the legal rules and case law in both jurisdictions and, secondly, which conditions have to be satisfied in order to establish trademark infringement in keyword-triggered advertisement cases. Furthermore, the risk for inefficient balkanization of the Internet will be identified and based on that Google AdWords' potential to function as a generator of trade liberalization provided that efforts towards a legitimized use of trademarked terms by search engines are coordinated at international level.

1.3. DELIMITATIONS

When analyzing the thesis' principal questions, particular attention has been paid on EU legislation and case law. As the issue of trademark infringement in key-word-triggered advertisement is a relatively new phenomenon within the EU, the CJEU recently started developing the Community case law regarding this topic. In the section dealing with EU trademark law, the recently decided case law will serve as a basis for further examination and will be analyzed with respect to CJEU judgments and comments by legal writers.

As the U.S. part of this thesis is concerned, the legal situation and relevant case law will only briefly be taken into consideration. The U.S. part of the analysis, however, will be sufficiently described to provide an empirical basis for a final comparative conclusion between the two jurisdictions and a potential solution in form of a cooperated EU-U.S. platform for keyword advertising. Given that the focus of the thesis is put on EU legislation, the analysis of U.S. trademark law is limited to legal rules and relevant case law in the respective legislation.

For the topicality of the thesis, only cases in which a decision has been reached will be taken into account at the time of writing. Cases that are currently under examination of courts both in the EU and the U.S. will therefore not be subject of the analysis in the present work.

Chapter 3 of this thesis will provide explanatory information on how Google AdWords work and are applied on the Internet. In this context it should be noted that almost every search engine on the Internet is equipped for paid referencing services that offer online advertising to its Internet users. Google, for instance, has the AdWords, Bing has the Microsoft adCenter and Ya-hoo! has the Yahoo! search marketing program. Google, however, remains to be the largest search engine on the web at present, and its AdWords program is the referencing service that has been most attracting to lawsuits both in the EU and in the U.S. Based on this awareness the thesis will take the particular example of Google AdWords for illustrating the treatment of keyword-triggered advertisement in form of Google AdWords under two different legal standards. Nevertheless, it should be kept in mind that what is elaborated about Google AdWords in this thesis in particular is applicable to all Internet referencing services on the Internet.

1.4. METHOD AND MATERIAL

As the overall aim of the thesis is to identify whether Google AdWords under the current treatment of EU and U.S. trademark law represent a trademark infringer or trademark liberalizer, the necessary legal analysis will be primarily provided by the application of a legal dogmatic approach³. Due to the comparative assessment of both legal systems, this method will be added by a descriptive and analytical study of the EU and U.S. legislation and case law on the issue of keyword-triggered advertising and Google AdWords in particular. The sources of law used in this thesis have mainly comprised legal instruments such as legal rules and case law, both originating from the CJEU and the U.S. federal courts. Considering, that keyword-triggered advertisement represents a relatively new field within both legal systems,

³Aarnio, Aulis: *Reason and Authority: A Treatise on the Dynamic Paradigm of Legal Dogmatics*, Aldershot (1997), p. 12

only contemporary law review articles have been used as basis of enquiry. The articles in concern have been analyzed in order to establish how the current legal treatment of Google AdWords is understood by legal scholars.

Ultimately, a comparative legal approach⁴ has been chosen in order to identify the problematic treatment of Google AdWords under two different jurisdictions.

1.5. DISPOSITION

The thesis is divided into six chapters. The first section of the thesis is aimed at briefly outlining how key words are used by Google AdWords to generate online advertisements. Still relating to the first section, it will then be clarified where trademark terms can possibly enter this process and how the use of such terms is currently addressed by Google's legal policy. The ensuing part will give an overview about the present status of EU trademark law and policy objectives with regard to keyword online advertisement and the fourth chapter will, in the same manner, briefly take the U.S. legal status into account. The fifth chapter finally contends that there is a need for cooperated international efforts by the EU and United States to make - through legislation - particular uses of trademarked terms by search engines legitimate in order to prevent ineffective balkanization of the Internet and to protect a search engine's potential to foster trade liberalization. While this chapter initially gives a brief introduction to trade liberalization, it will further be analyzed which risks for impairment of international trade AdWords bear when they are regulated by trademark holders themselves. By taking the aforementioned considerations into account, the fifth chapter, thus, conclusively outlines the need for an internationally-cooperated platform for AdWords. Ultimately, the sixth and final part of the thesis provides some summarizing remarks on the paper's principal questions for analysis.

⁴Reimann, Mathias; Zimmermann, Reinhard: „*The Oxford Handbook of Comparative Law*“, Oxford Handbooks in Law (2008), p. 34

2 GOOGLE ADWORDS

*“The act of typing a keyword into an internet search engine has become part of our culture, its results immediately familiar. The actual inner workings of how those results are provided are, it is fair to say, mostly unknown to the general public. It is simply assumed that if you ask, it shall be given to you; seek, and you shall find.”*⁵ This statement delivered by the Advocate General Poiares Maduro captures the essence of an Internet search and simultaneously raises the thought of how the functionality of Internet searches is linked to Google AdWords.

2.1. HOW DO GOOGLE ADWORDS WORK?

In simple terms, Google AdWords aim to manipulate search results to artificially prioritize an advertiser’s website over other possible search results. In doing so, an advertiser purchases the keywords with which he intends his webpages and AdWords ads to be associated⁶. Here, several ad formats can be chosen; thus, the most common form remains to be a simple text ad consisting of a hyperlink headline to the advertiser’s website, two short lines of descriptive text and the URL of the advertiser’s website⁷. At the same time, this ad is internally linked to the keywords that have been purchased⁸. Therefore, if the Internet users conduct any kind of search, the ad will automatically be displayed alongside other search results⁹. AdWords account holders can adjust their ads to certain sections or webpages in the scope of Google’s “content network” and can target customers using both computers and mobile devices. Apart from that, the precision with which the search results match their keywords can manipulatively be set by the account holders¹⁰. They can also stipulate that particular ads are blocked from appearing in response to selected keywords.

The setting-up of an AdWords account is as simple as the online registration with accounting information. While the account holder has to pay a small, non-refundable fee upon the activation and creation of an account, the creation of ads and selection of keywords is free of

⁵Joined cases C-236/08-C-238/08, Opinion of Advocate General Poiares Maduro on September 22, 2009

⁶Google.com, AdWords Help: “What is Google AdWords?”, available at <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6084> (accessed 2012-04-01)

⁷Google.com, AdWords Beginner’s Guide: Ad basics, available at <http://adwords.google.com/support/aw/bin/static.py?page=guide.cs&guide=21899&topic=21903&answer=146296> (accessed 2012-04-01). The hyperlink or the “destination URL” may or may not be the same as the displayed URL, although generally the destination URL is an individual webpage within the website associated with the displayed URL.

⁸What is Google AdWords? note 3

⁹Account holders of AdWords can also set their ads to appear in other Google program’s search results, e.g. Gmail, see What is Google AdWords

¹⁰Google.com, AdWords Help: What are keyword matching options?, available at: <http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6100> (accessed 2012-04-12)

charge. After having set an ad to run, the account holder is billed by Google according to one of the following two options: cost-per-thousand-impressions, where fees are charged every time an Internet user views the ad or cost-per-click where charges are triggered every time an Internet user clicks on the ad. The account holder can then decide on a maximum billing rate, which represents one tool Google applies when determining the ad's "ranking". Where in the search results page the ad will appear is thus determined by an ad's ranking. In other words, an account holder who "bids" on a keyword sees himself competing for it with all other account holders who aim to take use of that keyword. The financial power of an account holder is, thus, not a too inconsiderable factor when the exposure of his ad is determined¹¹. By comparison, non-sponsored links are usually displayed on the search results site in accordance to their "relevancy" to the search query. Here, Google's search algorithm typically determines the relevancy by using non-commercial criteria such as the number of other websites that link to a website to mimic a consumer's natural search behavior¹². What appears to be valuable to advertisers of AdWords derives from the fact that Google's keyword-linked ads are allowed to circumvent Google's common site ranking system for non-sponsored links. While ads are still subject to "rankings" among themselves, they gain priority over non-sponsored links on Google's search results pages. Furthermore, as the ads are displayed besides search results that have been subject to the usual page ranking algorithms and often do not expressly indicate that they have been sponsored, Google's Internet users may be led into error to assume that the ads represent the most relevant search results. Thus, the ads trade on Google's reputation for providing the most appropriate search results to attract users to click on them, while making a potentially worldwide advertising audience available through modest financial investment.

2.2. WHERE DO GOOGLE ADWORDS AND TRADEMARK LAW INTERFACE?

The controversy evolving around Google AdWords stems from its practice of allowing an account holder to pick a trademarked keyword even though he is not holding the rights to the trademarked term concerned. At the time of selection, the trademark status of a keyword is not checked by Google. Instead claims of infringement are only investigated after having received a complaint¹³. Moreover, Google currently applies different policies to the choice of

¹¹Technically seen, the user-selected "maximum billing rate" represents a billing cap and the winning bid may not in all cases be equal to the billing rate. See Google.com, AdWords Help: "*Maximum Cost-per-Click*", <http://adwords.google.com/support/aw/bin/answer.py?answer=6326> (accessed 2012-04-13)

¹²Brin, Sergey; Page, Lawrence: „*The Anatomy of a Large-Scale Hypertextual Search Engine*”, Journal Computer Networks and ISDN Systems (1998), p. 43-49

¹³Google.com, AdWords Help: "*What is Google's AdWords and AdSense trademark policy?*", available at

a trademark as keyword, all depending on in which region trademark is registered. As the United States are concerned, Google only investigates alleged uses of trademarks in the displayed text of an ad; the use of keywords is not subject to investigation¹⁴. Considered that an ad is displayed to U.S. Internet users, Google may force the ad's owner to remove the infringing term but the use of the mark as Google AdWords keyword will not be disabled¹⁵.

The same policy is applied by Google to the United Kingdom and Ireland. However, for the remaining countries of the EU, Google investigates suspected used of trademarks in keywords, ad texts, or in both, keywords and ad texts. Google further demands to remove trademarked terms from the keyword list of the breaching AdWords account holder. Regardless of the country, Google's trademark infringement inquiries are restricted to keywords associated with the ad or AdWords ad in general and do not have effect on the internal use of trademarked terms by Google's search processes. When a trademark holder is no longer willed to display his trademark in search results, Google instead asks the trademark holder to apply to the webpages owners appearing in the search results in order to request removal of the trademark from those sites. Following Google's perception, as an intermediary service provider, it should not be requested to act as a first-instance enforcer of trademarks¹⁶. In accordance, advertisers, but not Google should be primarily responsible for ensuring that their use of AdWords is fully compliant with trademark rights. Google's current policy prompts trademark holders with alleged trademark infringements to satisfy their claims directly with advertisers – constituting Google's own "*limited investigation of reasonable complaints about the use of trademarks in ads*" as a mere "*courtesy to trademark owners*"¹⁷.

Apart from its stated position, Google has been subject to lawsuits in the U.S. as well as in the EU where it has been alleged that Google holds the prime responsibility for trademark infringement policies in AdWords and that this responsibility has been deliberately disregarded by Google¹⁸. Such lawsuits have to the present been resisted by Google¹⁹. It cannot be assumed that Google's policies or strategies will be changed in the very near future

<http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=6118> (accessed 2012-04-12)

Complainants need not have an AdWords account.

¹⁴ What is Google's AdWords and AdSense trademark policy?

¹⁵ Google's trademark policy further makes a distinction between ads running inside and outside of the U.S. For ads which are displayed within the country, Google only demands to remove a trademark from a text ad if it is using trademark "*in a manner which is competitive, critical or negative*". Any removal will not be required if the trademark is used by resellers or "informational" reasons. For ads displayed outside of the U.S., on the other hand, Google only requires use of a trademark in ad text to induce removal.

¹⁶ *What is Google's AdWords and AdSense trademark policy?*

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Google has preferably chosen to contest trademark infringement suits against AdWords in court rather than to modify or settle its AdWords policies. Whitney, Lance: "*Google cleared in AdWords trademark suit.*"

as such a policy alteration would put Google in the unfavorable situation of functioning as a first-instance enforcer of trademark rights, significantly increasing Google's expenses for monitoring on keywords.

3 THE LEGAL STATUS OF TRADEMARK LAW IN THE EUROPEAN UNION

According to EU legislation, trademarks are allowed to be registered both at the member state and at EU level²⁰. As EU level is concerned, trademark law is only partly harmonized and harmonization is explicitly restricted to “*those national provisions of law with the most direct effect on the functioning of the internal market*”²¹. Although harmonization does completely cover enforcement rights against infringement, the application of EU law (“Community law”) is still mainly a matter of the national courts of the EU member states²². In view of the fact that Community law has been applied very differently by the national courts, rise is given to conflicts in the legal interpretation amongst the member states²³.

3.1. TRADEMARK LAW OF THE COMMUNITY

Trademark infringement under Community law can be referred to two different legislative bases. The first basis is established under Trademark Directive II, Article 5(1), stipulating that:

The Trademark holder shall be authorized to prevent all third parties not having his consent from *using the course of trade*.

(a) any sign which is identical with the trademark in relation to services or goods which are identical with those for which the trademark is registered²⁴.

The second basis of trademark infringement is found under Trademark Directive II, Article 5(2), constituting that:

Any Member State may also provide that the trademark holder shall be authorized to prevent all third parties from not having his consent from using in the course of trade any sign which is identical with, or similar to, the trademark with respect to services or goods which are not similar to the those for which the trademark is registered, *where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of trademark*²⁵.

²⁰Parliament & Council Directive 2008/95/EC, Preamble (4)-(5) [hereinafter Trademark Directive II], amending Council Directive 89/104/EEC [hereinafter Trademark Directive I]. Any trademark registered at EU level is recognized as a Community trademark and is valid in all Member states.

²¹Trademark Directive II, Preamble (4)

²²Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, (1978) E.C.R. 629, § 15

²³Ibid, §§ 19, 24

²⁴Trademark Directive II Article 5 (1)(b) (emphasis added)

²⁵Trademark Directive II Article 5(2) (emphasis added)

Article 5(2) thus grants additional protection for certain trademark constructs by removing the requirement to prove “*likelihood of confusion*” with regard to the trademarks in concern²⁶.

Both Article 5(1)(a) and Article 5(2) require that the trademark is “used”, which the CJEU has determined as indicating that an allegedly infringing sign is representing a trademark²⁷. In other words, the mere use of a trademark is not sufficient for infringement; instead the sign must act as effective shorthand for the trademark amongst the consumers²⁸. In addition, the alleged “use” must fulfill four “cumulative” conditions:

- (1) the use is not authorized
- (2) the use is in the course of trade
- (3) the use is “*in respect of services or goods which are identical with, or similar to, those for which the mark is registered;*”
- (4) the use “*affects or is liable to affect the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services, by reason of a likelihood of confusion on the part of the public.*”²⁹

Taking a closer look at the four above conditions, the first requirement “*not authorized use*” is usually a non-controversial definition. The second requirement, “*in the course of trade*” on the other hand, is fulfilled in cases where the allegedly infringing sign is applied to a “*commercial activity aimed at economic advantage and not to a private matter*”³⁰. The third criterion, “*in relation to services or goods*” is fulfilled provided that the sign is used in a way that it establishes a link “*between the services provided or the goods merchandized by the alleged infringer*”³¹. The fourth and final requirement is satisfied when the sign is used in such a manner that the risk for consumers of being confused to the service’s or good’s origin is posed³². Additionally, since trademarks falling under the scope of Article 5(2) are not required to show “*likelihood of confusion,*” claimants alleging infringement under that provision may satisfy the fourth criterion simply by indicating that the infringer has taken “*unfair advantage*” of the trademark’s reputation³³. The failure of one condition is

²⁶Case C-487/07 L’Oréal SA v. Bellure NV (2009), §§ 33, 36

²⁷Case C-533/06, O2 Holdings Ltd. v. Hutchison 3G UK Ltd. (2008), § 34

²⁸Case C-487/07 L’Oréal, § 43-44

²⁹Case C-533/06, O2 Holdings, § 55

³⁰Case C-206/01, Arsenal Football Club P.L.C. v. Matthew Reed (2002), §38

³¹Case C-17/06, Céline SARL v. Céline SA (2007), § 28

³²Case C-533/06, O2 Holdings, § 57

³³Case C-487/07 L’Oréal, § 66 “*Unfair advantage*” is notably the case when an infringer benefits via association with the trademark holder’s efforts to achieve and maintain the trademark’s reputation, without offering financial compensation to him.

satisfactory to prevent a finding of infringement and removes the need for an analysis under the remaining conditions³⁴.

3.2. TRADEMARK JURISPRUDENCE OF THE COMMUNITY

With regard to the EU, judicial power is shared between the Court of Justice of the European Union (“CJEU”) and the national courts³⁵. As far as national courts are concerned, they act as courts of first instance in issues in the context of Community law, although they may transfer cases to the CJEU when they are unsure about the interpretation of Community law or when the validity of Community legislation is called into question³⁶. Provided that the CJEU accepts the transfer, it only is binding on the national court seeking for transfer as well as on the other national courts within the EU³⁷.

Regarding the decentralized organization of trademark enforcement in the EU, it appears plausible that national courts would bring about inconsistent interpretations of Community law, particularly when facing a technical progress such as Google AdWords. While French courts have repeatedly held that Google AdWords’ use of trademarked terms as keywords represents a violation of EU trademark law³⁸, British courts have held that AdWords’ uses are not infringing³⁹. National courts in Germany, the Netherlands and Austria were also faced with difficulties of formulating a consistent approach to keyword advertisement and have finally all raised references to the CJEU for primarily rulings on how to apply the Trademark Directive II to Google AdWords⁴⁰. On March 23, 2010, the CJEU passed its ruling on the subject⁴¹. While the CJEU held that AdWords services are capable of infringing trademark law, it was adamantly opposed to hold Google directly liable for infringements in terms of keyword use⁴². Instead, the individual AdWords account holder is to be held liable for any

³⁴Case C-533/06 Holdings, §54

³⁵Europa. Summary of EU legislation: “*The reference for a primarily ruling*”, available at http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114552_en.htm (accessed 2012-04-20)

³⁶Ibid.

³⁷As far as the interpretation of Community law is concerned, national courts have some discretion on whether or not to transfer cases to the CJEU and may reject to make a reference if they are convinced that the proper interpretation of Community law appears to be clear already, Case C- 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (1982), § 23

³⁸Reed Executive plc & Another v Reed Business Information Ltd & Others, Case Reference (2004), p. 147-151

³⁹Wilson v. Yahoo! UK Ltd. [2008] EWHC 361, p. 65-69

⁴⁰Brokate, W.Brian & Winsor, Christina L.: “*When, Where, How and Who: Anti-Counterfeiting Enforcement in the Wake of eBay and the Struggling Economy*”, p. 564-570

⁴¹Joined Cases C-236/08, C-237/08, Google France SARL v. Louis Vuitton Malletier, ECJ CELIX LEXIS No. 62008J2036 (23 March 2010), [hereinafter *Google France*]

⁴²*Google France*, p. 34 (no liability under art. 5 (1) or art. 5 (2))

trademark infringement⁴³. Google's indirect liability for trademark infringements of its AdWords account holders is further restricted by other EU laws. In assessing the AdWords program, the CJEU first examined how trademarked terms have been used under Trademark Directive II, separated into three specific "uses": how keywords are stored on Google servers, how AdWords ads based on associated keywords are displayed and how keywords are selected⁴⁴.

The CJEU further examined whether the above uses met the four cumulative conditions for trademark infringement. After having found that the first requirement for "unauthorized use" was fulfilled, the court analyzed the "use in the course of trade" requirement and held that all three AdWords "uses" fell within that scope for the reason that they had a clear connection to an AdWords user's offering of services and goods for online sale⁴⁵. Nonetheless, the CJEU maintained that these "uses" were not made by Google, even though Google provided the means by which they are implemented. Instead the court found, that unauthorized uses were implemented by third-party users: AdWords account holders. The court further argued that Google itself made no "use" of trademarked terms that fall under the scope of Article 5 of Trademark Directive II⁴⁶. As a consequence, Google AdWords cannot be held to represent a trademark infringement under Trademark Directive II.

However, the "uses" of enabled by AdWords may still facilitate actions for trademark infringement within the scope of Article 5 (1)⁴⁷. The CJEU noticed that individual advertisers using trademarked terms in their AdWords campaigns are making use of those terms "in relation to services or goods". In doing so, the third requirement under Trademark Directive II is satisfied⁴⁸. An individual advertiser accordingly commits a trademark infringement if his AdWords use of trademarked terms occasions an "adverse effect" to the function of trademarked terms with regard to the fourth requirement. The CJEU recognized the "*relevant functions to be examined as the function of signifying origin and the function of advertising*"⁴⁹. The Court then stated more precisely that AdWords ad is adversely affecting the indication-of-origin-function if it is misleading or that vague that "*a normally informed and*

⁴³Ibid., p. 46-51

⁴⁴Ibid. p. 55-66

⁴⁵Ibid., p. 68

⁴⁶Ibid., p. 68-73 (*"AdWords] enable its clients to make use of signs which are identical with, or similar to, trademarks without itself making use of the signs. The creation of technical conditions necessary for the use of the sign and getting paid for such service must not mean that the party providing the service itself uses the sign."*)

⁴⁷Advertiser liability under Art. 5 (2) has not been addressed by the CJEU.

⁴⁸*Google France*, p. 64-69

⁴⁹Ibid., p. 67

*reasonably attentive*⁵⁰ Internet user is not able to ascertain whether it has been displayed by the trademark holder or by a third party. But on the other hand, the CJEU explicitly stated that AdWords do not represent harm to the advertising function, although they in fact raise the costs of purchasing a trademarked term as a keyword for trademark holders without the guarantee that the respective ad will appear in the most desirable position⁵¹.

In this context, it might be relevant to compare the CJEU ruling with the CJEU Advocate General Poiares Maduro's point of view with regard to the case. Although an Advocate General Opinion is not of binding character for the CJEU, it mostly has great influence on the CJEU's final judgment, and if the court's decision is consistent with the Advocate General's recommendations, can serve as explanation for the reasoning behind a CJEU final ruling⁵². Following Maduro's point of view, AdWord's use of trademarked terms is even less harmful to the advertising function than comparative advertising, considering that comparative advertising intentionally takes advantage of a trademark's success⁵³. On the other hand, Maduro understood AdWord's uses as "*restricted to providing information*" about competitors' uses of trademarked terms, regarding that they only disclose to customers where the terms are used on webpages as well as in ads without necessarily supporting the uses⁵⁴.

The CJEU final decision does not expressly agree on Maduro's point of view; however, its ruling allows national courts to adopt an analysis similar to that of the General Advocate. While it has not been observed how the *Google France* judgment will be applied by national courts, the CJEU appears to concentrate mainly on AdWords ads for counterfeits.

As the final step, the CJEU dealt with the application of EU "*information society service*" platforms for "*internet referencing service*" providers⁵⁵. As Google is not making use of trademarked terms, AdWords are not subject to platforms for the storage of keywords and displaying of ads triggered by keywords. However, Google may fall under the platform with respect to hosting services, provided that Google's actions concerning AdWords are "merely technical, passive or automatic, hinting at a lack of control or knowledge of the data which it

⁵⁰Ibid., p. 78-82

⁵¹*Google France*, p. 94-96, The CJEU points out that no harm may arise at all to the advertising function, since the trademark holder's webpage is still likely to appear as topmost natural search results, which are returned just under and for that reason still on the same start page view as the topmost sponsored search results.

⁵²Dehaese, Renaud: "*The European Court of Justice: The Politics of Judicial Integration*" (1988), p. 56-58

⁵³*Google France* Opinion AG, p. 103-106

⁵⁴Ibid., p. 46-49

⁵⁵*Google France*, p. 44 (platform is also referred to as "safe harbor")

stores⁵⁶”. In consequence, even if trademark infringements are committed by individual AdWords users, Google may not even indirectly be held liable for those infringements⁵⁷.

In turning away from contradistinctive national court decisions, *Google France* fundamentally altered the landscape of EU trademark infringement legislation. However, its general ruling stands in conflict with judgments passed by U.S. courts. Taking into account, that the importance of borders is becoming more and more meaningless in e-commerce, *Google France* may appear as controversial as the fragmented national court decisions that preceded it.

3.3. EU TRADEMARK POLICY OBJECTIVES

Despite the fact that the member states’ legal traditions have influenced Community law in many respects, it presents an independent body of law from the legal codes of the member states⁵⁸. Furthermore, considered that the EU has completely harmonized trademark law in terms of infringement, Community law remains supreme in this field⁵⁹.

The overall goal of the European Community is to establish and maintain a single European market consisting of minimal internal barriers to trade and other economic efforts⁶⁰. Taking this central purpose into account it appears natural that the trademark’s “main function” in Community law is that of a source identifier⁶¹, regarded that this function is the most obvious manner in which a trademark advances trade and commerce. The CJEU also acknowledged that trademarks can have valuable secondary functions in ensuring quality and in encouraging “innovation, communication or advertising” efforts⁶². Considering the history of the EU setting according to which inter-state trade has been more difficult as compared to the United States, these two functions are particularly useful in aiding producers to expansively enter into new markets and in helping consumers being faced with a wider range of choices. At the same time, both functions may be used for the consolidation of established producers and services providers which would be prone to reduce inter-state trade. For trademarks already having a “reputation”, Community law appears to be even more favorable to established companies,

⁵⁶Ibid., p. 108-113

⁵⁷This exemption would be divested of Google if once informed by an AdWords user about an infringing use, Google failed to “act expeditiously to disable or remove access”, Ibid., p. 115

⁵⁸Dehaussse, p. 24-27

⁵⁹Trademark Directive II, art. 5

⁶⁰Treaty Establishing the European Community, Preamble, 197 (hereinafter EC Treaty)

⁶¹For instance Case C-206/1 Arsenal Football Club; Case C-487/07 L’Oréal: the underlining of the source identification is found in the EU legislation establishing Community-wide trademarks as well as in both versions of the Trademark Directive, Council Regulation 207/2009, preamble 2&8 (hereinafter Community Trademark Regulation); Trademark Directive I, Preamble 1; Trademark II, Preamble 11.

⁶²Case C-487/07 L’Oréal

regarding that infringement does not demand the consumer-focused argument of “confusion”, but only considers the injury to the trademark’s “character” or “reputation”⁶³.

The Google France opinion does not constitute a divergence from the above mentioned rationales⁶⁴, which is unfortunate regarded that the CJEU has missed an outstanding opportunity to approach potential new trademark functions and policies in the Internet environment. By way of contrast, the CJEU Advocate General Poirares Maduro’s point of view for Google France asserted that the overall policy of all previously recognized trademark functions is “*to promote innovations and investments*”⁶⁵. Maduro further stipulated that this interest should be weighed against remaining interests, especially the Community interests in terms of freedom of expression and freedom of commerce⁶⁶. With respect to Internet setting, the particular interest in providing information to consumers and Internet users should override trademark holders’ interests. Failing that, Google’s outstanding capability to supply information to its users, and also Google’s key function as an information exchange, would be detrimentally affected by trademark holders aiming at controlling all possible uses of their trademarks⁶⁷. However, the only hint of Maduro’s argument which remains in the Google France judgment is the notice that Google supplies free and typically prominent visibility to trademark holders via its *natural* search results. But even this statement is addressing the danger to trademark holders in contrast to the benefits of AdWords for consumers⁶⁸.

Although the Google France judgment appears to be favorable to Google AdWords, the underlying Community policy on trademarks does not seem to be changed. Google France provided the CJEU an opportunity to gradually adapt Community law to the altering programs such as AdWords have created in the manners that businesses seek customers and consumers search for services and goods online. On the contrary, the CJEU decided to rely on reaffirming old doctrines that are not anymore in line with the current development of e-commerce. Despite the fact that Google France could have signaled a fundamental change in how intellectual property in the Internet context is treated by Community law, it may be limited to only harmonizing legal treatment of AdWords.

⁶³Trademark Directive II, art. 5 (2). Community law goes even further than U.S. anti-dilution law in adopting the perception that a trademark has value in its own right, expressly stating that “*a trademark is to be considered as an object of property that exists separately from the undertakings whose services or goods are identified*”, Community Trademark Regulation, Preamble 11

⁶⁴Google France, p. 46-49, 66-71

⁶⁵Google France AG Opinion, p. 54-60

⁶⁶Following Maduro, trademarks should therefore not be seen as “*classic property rights offering the trademark proprietor to exclude any other*”.

⁶⁷*Given that the Internet operates without any central control, this is maybe the key to its growth and success: it is dependent on what is freely inputted into it by different users. Keywords represent one of the tools – if not the main tool – by means of which information are organized and made accessible to Internet users”.*

⁶⁸Google France, p. 67-72

4 THE LEGAL STATUS OF TRADEMARK LAW IN THE UNITED STATES

4.1. U.S. FEDERAL TRADEMARK JURISPRUDENCE

With a view to the federal level, trademark law has been elaborated as a part of unfair competition law until 1946. According to U.S. common law, a trademark is recognized as an *appurtenant* right but not a right *in gross*, such as a patent or a copyright for instance⁶⁹. A trademark thus only exists when it is used in commercial activity and does no longer exist when the commercial activity has ended⁷⁰.

In 1946, under the Interstate Commerce Clause, the Lanham Act was passed by the Congress which was aimed at providing a framework for federal trademark law⁷¹. The prior common trademark law has not been replaced but instead been incorporated into the Lanham Act by providing an expanded legal protection for trademarks. The Lanham Act allows for both the federal registration of a trademark and a civil cause for trademark infringement under § 1114⁷². In order to find an infringement under § 1114, U.S. courts generally share the view that:

- (1) the trademark has to be valid;
- (2) the trademark has been used in commerce and in connection with sale or advertising of services or goods;
- (3) without authorization; and
- (4) this unauthorized use is likely to create confusion⁷³.

As keyword advertising is concerned in U.S. case law, controversy has mainly evolved around the second and fourth element of trademark infringement. The second criterion, “*use in commerce*” is stemming from the Lanham Act’s on the basis of the Interstate Commerce Clause, which requires that the trademark must be associative with interstate commerce in order to fall within the Congress’ power to enact legislation regarding it. The determination of whether a traditional good is being “used” brings about a few conceptual difficulties considered that the occurrence of a physical good is detectable without much ambiguity or

⁶⁹McCarthy, Thomas J: „*McCarthy on Trademarks and Unfair Competition*” (4th ed. 2012), p. 44-46

⁷⁰Ibid, p. 55-62

⁷¹The Trademark Act of 1946 (“Lanham Act”). Contrary to the law for patents and copyrights under the Patent and Copyright Clause, the U.S. Constitution does not explicitly entitle the Congress to legislate on matters of trademarks, *United States v. Steffen* (the Trademark cases)

⁷²McCarthy, p. 102-105

⁷³*Armstrong Paint&Varnish Works v. Nu-Enamel Corp.*, 305 US (1938). Even though Armstrong was based on the Federal Trademark Act of 1920, the same provision was incorporated into the Lanham Act without being substantially changed.

difficulty. The Internet sphere, however, leads to certain problems when determining whether a trademark is “*used in commerce*” or not.

When Google’s servers work out a search query including a trademark and subsequently display certain AdWords ads on the search result pages, they are apparently “using” the trademark. The federal courts, however, have struggled with the question whether or not this use represents a “*use in commerce*”⁷⁴.

4.2. U.S. TRADEMARK POLICY OBJECTIVES

According to early U.S. trademark law, trademarks have primarily been considered as identifiers of a product’s source⁷⁵. Recent federal trademark law identifies that trademarks also serve as advertising tools for producers as well as quality guarantees for consumers⁷⁶. Here, the Lanham Act explicitly states that protection of a trademark favors both the consumers who are less affected by confusion in identifying certain products and the trademark holders who do not have to fear losing their markets through deception. While the former objective is directed at a growing concern for consumer interests, the latter one indicates U.S. trademark law initially consisted of a subset of unfair competition law, and that federal trademark law still today lays its focus on the use of a trademark in a competitive environment⁷⁷. Both objectives illustrate the transition of U.S. trademark law from treating trademarks as mere appurtenant rights into acknowledging them as a right in gross⁷⁸. Nonetheless, U.S. trademark law still formally maintains a distinction between appurtenant and in gross rights, resulting in that it sometimes remains unclear how much weight courts should put on the harm done to the trademark in its own rights compared to the trademark’s function with regard to its appertaining services or goods⁷⁹. At the same time there is no agreement existing on how to best balance the occasionally occurring conflicts of interests in protecting the rights of trademark holders and safeguarding the usefulness of search engines to consumers⁸⁰.

It remains unclear how the various policy objectives with regard to the use of trademarks in keyword-triggered ads should be prioritized by U.S. trademark law. This confusion only

⁷⁴Darrow, Jonathan J.; Ferrera, Gerald R.: “*The Search Engine Advertising Market: Lucrative Space or Trademark Liability?*” (2010), p. 264-267

⁷⁵McCarthy, p. 53

⁷⁶Ibid, p. 67-69

⁷⁷McCarthy, p. 77-79

⁷⁸United Drug Co. v. Theodore Rectanus Co. 248 U.S.90 (1918)

⁷⁹Norris, Patrick J: “*The Sale of Internet Keywords: Trademark Infringement Actionable Under the Lanham Act?*”, Charleston Law Review 889 (2010), p. 123-126

⁸⁰Hernandez, Jose L.: “*A Comprehensive Solution for Trademark-Triggered Displays Online*”, Journal of Technology Law and Policy (2010), p. 189-194

exacerbates the fragmentation of legal issues, since the federal courts lack a good sense of the overall doctrinal framework to be developed and applied. A clearer setting on objectives for trademark law would facilitate the resolving of differing schools of thoughts in terms of AdWords' legal status and would offer better guidance on the adaption of federal trademark law to the new challenges posed by technical advance. Ultimately, the movement towards such clarification may require prioritizing one policy objective over the rest⁸¹.

⁸¹Norris, p. 134-139

5 A COOPERATED EU-U.S. PLATFORM FOR KEYWORD ADVERTISING

Considering the United States, any judicial solution to the trademark matter presented by AdWords appears unlikely to occur in the very near future. However, as regards the EU, a common judicial standpoint on the matter has already been reached. But even assuming that U.S. courts will in foreseeable future reach consensus on the question of how to treat keyword advertising, Google AdWords would still remain as a subject to different legal treatments on both sides of the Atlantic. Such a splitting will keep off the United States and the EU from efficiently regulating the use of trademarked terms in AdWords. Furthermore, Google's ability to promote the liberalization of international trade and commerce and to foster global economic development will be impeded. Thus, businesses as well as consumers will neglect the potential trading benefits provided by Google. The United States and the EU should therefore cooperate closely in efforts towards the creation of an internationally coordinated platform for search engine keywords against trademark infringement, with the main goal of promoting an internationally coordinated platform for that matter.

5.1. DANGER OF BALKANIZATION?

Once an Internet user browses through websites, his movements are usually not fixed by his local position: a website hosted on a server in another country is normally as easily accessible as a website hosted on a server in the same country as the user⁸². In practical terms, imposing geographically-based restrictions on Internet users can be performed but even with today's technology it remains extremely difficult to obtain complete remote control over an Internet user's online movements. As a consequence, a huge quantity of resources and effort will be needed to separate all particular parts of the Internet with the purpose of applying different legal systems to them. With regard to the thesis' specific example of Google, its internal region-specific trademark policy clearly illustrates a private attempt for the achievement of such separation. Acting as a private company, Google has the ability to assert a much more extensive and limited trademark policy than any other nation, being restricted broadly by its technological capabilities. However, not even Google is able to segregate completely all individual parts of the Internet for the purpose of applying various AdWords trademark policies. Modern technology enables the user to prevent Google from detecting the actual geographical position of his Internet access point in a manner that Google is not effectively

⁸² Leiner, Barry, et. al.: "*Histories of the Internet – A Brief History of the Internet*", (2003), Internet Society.org, <http://www.isoc.org/internet/history/brief.shtml> (accessed 2012-04-19)

able to counteract⁸³. A consumer in one country under one trademark policy still has the possibility to create an AdWords account which appeared to be in another country, regulated under the trademark policy of that particular country, and not that of the consumer's own country. Even though this failure may to a certain extent be due to Google's own reluctance to fully use its capacities⁸⁴, Google's inability to flawlessly apply the proper regional trademark policy to a particular consumer, is not completely within its scope of control – considered that such control appears to be relative to how precisely it can determine the consumer's geographical position.

Regarding that Google as by intuition the cheapest cost-avoider, is not always able to precisely apply the trademark policy for a given locale to the actual Internet user in that locale, then a country striving after the regulation of trademark use by AdWords is expected to be confronted with even greater difficulties. A country's regulatory power is characteristically restricted by its territorial jurisdiction⁸⁵. A state can either make sure that existing policies across different regions are in accordance with each other and are equally enforced. A danger that may arise from state intervention in cyberspace is that different countries also have different policies, yet no country will have the capability to efficiently implement its policy for the reason that it can neither prevent Internet users from changing their "true" local positions nor implement the respective policy against users outside of its jurisdiction. Private businesses in a country adopting a stricter than just the average trademark policy are faced with the disadvantage with regard to online marketing where they are obliged to comply with their state's laws while at the same time competing against foreign businesses regulated by a less strict legislation. Google's current policy on trademark infringement complaints to a certain extent paves the field, considering that it does not apply to all advertisers within a given region but to all *advertisements* displayed within a given locale. Nevertheless, an Internet user can easily perform Google searches as if he would be located in a country governed by more relaxed laws, and therefore would be able to access ads not allowed in his own country. As a natural consequence, those businesses who comply with a

⁸³ For instance, proxy servers allow an Internet user to have his Internet connection rerouted through different servers in such a manner so that the user appears to have accessed the Internet from a different country than the one in which he actually stays.

⁸⁴ Regarding one U.S. trademark infringement case about AdWords, Google queries using the putatively infringing keyword were considered by the trademark holder to have stopped returning ads for competitor's webpages incidentally on the day when oral arguments were to be held.

⁸⁵ Regarding that trademarks are determined by consumer perception of a mark, the implementation of the trademark is restricted to the geographical area in which it is recognized by consumers as a symbol of commerce.

stricter trademark policy in one region are prone to use their resources to support policies being less effective at preventing users from accessing ads of non-compliant competitors.

An approach to balkanization with regard to trademark policy nonetheless implies other costs for businesses requesting to reach more than only one region. In particular, they would have to establish different ads for each individual region which each determined a different set of keywords even if their target plans or the region's local language did not explicitly demand such differences⁸⁶. In AdWords, any ad campaign demanding advertisers to establish different ads and different keywords according to regions would cause more costs for advertisers than if they were able to display only one single ad with a single set of keywords for all regions. Regarding that the placement of the ads is partly dependent on the bid amount on an associated keyword, the lack of requested keywords increases the bid amount for an ad to have an efficient position on the search result site. Provided that the trademark policy for one region permits trademarked terms to be used as keywords, as a result, that particular region will have more possible keywords available. If, on the other hand, the region's trademark policy prohibits trademarked terms to be used as keywords, the amount of available keywords will in turn reduce. Keywords which would usually be less desirable – for instance, for the reason that they are less precise – would become more cost-intensive as businesses feel forced to compete for them. Furthermore, a business may be forced to submit bids for more keywords in order to make sure that their ads in fact target the designated audience, since it is not permitted to use the keyword most probably to be searched by an Internet consumer⁸⁷. Companies with restricted marketing budgets may ultimately have to run ads in more regions than their supply capacity may be able to reach.

Not enough with that, region-specific trademark policy has negative impacts on a third group consisting of consumers. When the current trademark policy is applied to programs such as AdWords, the degree of access an Internet user has to competing providers of goods and services is directly affected. An Internet user may start a search query into Google using a trademarked term without the intention of receiving only the trademark holder's webpage.

⁸⁶Exemplifying, "cookie" is "biscuit" to most English speakers besides Americans. Numerous European languages also use cognate words to "biscuit" such as "biscotto" in Italian. Given that a company plans to advertise biscuit barrels to U.S. audience, it would probably already intend to purchase "cookies", "biscuits", "biscotti" with the objective of reaching as many potential consumers as possible.

⁸⁷For instance, just think of any notebook-producing company that is in direct competition with Toshiba notebooks and particularly striving after targeting Toshiba customers. The most obvious keyword phrase would be "Toshiba notebooks", but regarding that the company is not allowed to buy "Toshiba" as keyword, only "notebook" can be purchased. As the keyword is not as precise as "Toshiba notebooks", it will be triggered especially by any potential buyer but not those searching for Toshiba notebooks. Provided that the company would be permitted to buy "Toshiba" as keyword, it would be in the need for buying extra keywords in order to restrict how often the ad is triggered.

The expectation to which a trademarked term will provide a broad list of search results does not necessarily mean that a consumer is overwhelmed – he may search in order to find all competitors for the trademarked service or goods. Although he may not be familiar with the competitor’s names, he is deliberately using the well-known trademarked term to find out the unknown competitors. Such kind of search makes undeniably clear why Google is representing an invaluable resource for Internet navigation, as it first releases an incomplete set of information and generates a much broader set of results from it. Also, this form of search may more accurately reflect the way in which consumers actually use Internet search engines. A country governed by a trademark policy which prohibits trademarked terms as keywords would alter which ads are returned in the search results in a manner that is not in accordance with consumer expectations. An internet user restricting his search queries to merely a trademarked term may not have access to the ads of direct competitors. The Internet user, thus, would consider that his results page consists of all relevant links for his issue, including links to direct competitors. He will probably not run additional search queries comprising of extra search terms, and would therefore never be able to access competitor’s webpages. Compared to an Internet user in a country governed by a more lenient policy, this user inevitably has a more restricted range of choices.

Moreover, once again the consumer is worse off regarding that the additional costs for complying with different trademark systems may particularly disadvantage out-of-state businesses⁸⁸, as illustrated above. The number of companies able to reach the Internet user’s notice is limited even more and the consumer has even less of the possibility to access competing services or goods. With respect to the Internet per se, this restriction on the consumer’s choice is even more remarkable since the Internet is regarded to be the global marketplace in which Google represents the point of access to it⁸⁹. But region-specific trademark legislations would considerably limit this online marketplace by limiting Internet users to regionally recognized providers and by favoring existing domestic companies over foreign ones.

When applying a fragmented approach towards AdWords, outcomes which have negative impacts on the key objective of ensuring fair competition and promoting consumer interests, are found both in the U.S. and the EU trademark law. It goes without saying that another trademark policy objective to the United States as well as the EU is the protection of

⁸⁸The same argument applies to new businesses within the same state: they can use trademarked terms as keywords either, which limits the chance of their ads to reach the consumers targeted. A restrictive use of trademarked terms in AdWords creates an overall barrier to market entry and favors already existing companies.

⁸⁹Lastowka, Greg.: “*Google’s Law*”, Technology and Innovation Paper, Brook Law Review (2007) p. 123-125

trademark holders' investments. Here, the EU expressly makes the protection of existing market shares to an objective of its trademark legislation in explicitly allowing member states to grant further protection to trademarks with a "reputation"⁹⁰. However, the danger of different state policies towards AdWords is that states are not able to effectively implement them without penetrating into other states' legal systems. As demonstrated above, the effects of a state's trademark policy are not limited to the country's borders but can also reach out-of-state companies. Provided that the state has a more lenient approach towards the use of trademarked terms as keywords, foreign companies will be confronted with fewer obstacles in running AdWord ads in that particular country. But if, on the other hand, the state pursues a stricter approach, companies from abroad will be discouraged from running ads in the country concerned. At the same time, consumers within a state cannot be completely closed off from accessing ads running under more lenient trademark systems, resulting in that domestic companies will still lose out. The companies concerned may then take a stand for more stringent implementation by asking the respective state governments to coerce more liberal states to adopt more restrictive rulings. Such pressure ultimately causes friction among the states that wish to enforce different trademark policy goals.

Summarizing, the state-specific approach to trademark matters in AdWords remains inefficient for achieving its main objective of regulating the use of trademarked terms as ad keywords and rather has considerable negative impacts on states, businesses and consumers. It does not only create frictions between states that wish to pursue different trademark policy goals but it also degrades the general quality and puts limitations on the full economic potential of the Internet. Before continuing pursuing individual against AdWords, states should therefore seriously take these significant flaws into consideration.

5.2. GOOGLE ADWORDS AS GENERATOR FOR LIBERALIZATION

The disadvantages of regulating the use of AdWords as trademarked terms arise from the tensions between the borderless character of the Internet and the territorial character of state jurisdiction. Paradoxically, however, the advantages Google AdWords bring about are also due to this tension. As AdWords transcend national boundaries, they function as a highly effective generator for the liberalization of international trade. Google AdWords particularly favors those with restricted initial resources by enabling them to viably competing against global-spanning companies. The implication of AdWords on trade and commerce, however,

⁹⁰Trademark Directive II, preamble 4, 5, 10

benefit by protecting it against trademark holders with the aim to disable those capabilities that make AdWords such an efficient means of liberalization.

5.2.1. A BRIEF INTRODUCTION TO TRADE LIBERALIZATION

Overall, the ability of trade to flow freely has a greater influence on the world's economy than the sum of gross domestic products of all states together⁹¹. Not enough with that, trade represents a more important factor in the domestic economy of most states compared to their gross domestic products⁹². In consequence, policies that have effect on the cross-border flow of trade and commerce have a substantial influence on how the global economy develops.

Economists by now generally consent that free trade represents the most economically sound policy in order to promote the overall world's economy⁹³. The central principle of free trade is represented by the *law of comparative advantage*, which presupposes that by opening its borders to trade, a state is allowed to specify its production since it can import its other needs⁹⁴. Production remains simultaneously less costly and more effective and producers are provided access to the largest market possible as they can offer their products to wherever they are demanded. In addition, free trade makes sure that the consumer is offered the best price/quality ratio possible regarded that companies from different states are allowed to compete within the same market and thus increases the consumer options' quantity and quality⁹⁵. As a logical consequence, also states have come to consider free trade as overall desirable and have established institutions such as the WTO for the promotion of a continuous advance towards free trade⁹⁶.

5.2.2. HOW DO ADWORDS LIBERALIZE INTERNATIONAL TRADE?

Usually international trade policy is connected to changes with regard to trade measures such as quotas or tariffs which imply to physically exchanging services or goods. As opposed to this, AdWords represents a prime example for how technological progress in the virtual space affects trade. As illustrated above, AdWords benefits companies with restricted resources. It reduces the barriers to market entry and offers companies the incentive to expand their online

⁹¹World's trade also grows faster than world's GDP. World Trade Organization, International Trade Statistics 2011 [hereinafter *International Trade Statistics*], available at http://www.wto.org/english/res_e/statis_e/its11_toc_e.htm (accessed 2012-04-14)

⁹²As regards the most states, a greater percentage of their economies is made up by trade than GDP, *International Trade Statistics 2011*

⁹³Pauwelyn & Guzman, p. 12-17

⁹⁴Ibid, p. 22-24

⁹⁵Ibid, p. 34-40

⁹⁶World Trade Organization, *About the WTO—Statement by the Director-General*, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (accessed 2012-04-17).

advertising actions to territories where they might not have the resources to implement more traditional marketing strategies as television ads amongst others. Furthermore, AdWords facilitate the consumer to find and contact foreign companies or recently founded domestic companies. By removing these barriers to cross-border trade, AdWords favor the free flow of international trade in such a manner that a state-based trade policy approach is not able to.

State intervention at the domestic level for the most part addresses obstacles occurring within a state's territorial jurisdiction. For addressing foreign trade barriers, indirect domestic policies such as subsidies can be pursued by a state; but these policies may unintentionally and detrimentally affect free trade and can trigger diplomatic tensions which can ultimately result in unproductive trade wars⁹⁷. Another state strategic step is the negotiation with the other state in hopes of convincing it to reduce its national trade borders. Bilateral trade agreements, however, tend to be *preferential agreements* in which two states consent to give each other more benefiting treatment compared to the remaining states in the world in the hope of maintaining the status quo against states not party to the covenant⁹⁸. Nonetheless, preferential agreements oftentimes result in retaliation by disfavored third-party states through establishing trade barriers or with the aid of their own preferential agreements. As a consequence, transactional costs of trade incur, as a company has to surmount a different composition of trade barriers for each country.

Both the WTO and bodies as the European Community for instance are supposed to particularly address the difficulties to internationally coordinate trade policies. However, they are also subject to numerous drawbacks. First of all, the bodies in concern are state-oriented and tend to concentrate on macro-economic matters, with the result that problems of smaller dimension may be left out of consideration⁹⁹. Secondly, although the WTO and the European community can remove legal barriers to trade, these organized bodies seldom can do anything about barriers of financial or physical nature. At this point, AdWords come into play, allowing consumers and companies to create virtual marketplaces that otherwise would be prevented by geographical and logistical obstacles. By doing this, AdWords embody trade

⁹⁷WTO, World Trade Report 2007: “*Six Decades of Multilateral Trade Cooperation: What Have we Learned?*”, p. 34-39 (2007), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf

⁹⁸While bilateral trade negotiations are only binding to the parties involved, they are never only truly bilateral. When engaging into an agreement, each state will still take regard to the effects on non-party trading partners since the state will be reluctant to let one bilateral agreement harm its trading position in the world. See Pauwelyn & Guzman, p. 45-50

⁹⁹Only members who are either states or a collection of states are allowed to use the WTO dispute settlement mechanism for overcoming trade barriers. See Agreement Establishing the World Trade Organization arts. 11-12. Regarding the EU, individuals and private companies may be asked to submit their views during trade policymaking; thus they are not officially shaping EU external policy. See Woolcock, Stephen: “*Trade Policy: From Uruguay to Doha and Beyond*”, p. 99-102

liberalization's primary goal: the establishment of a global market where a company in any country can reach a consumer in any other country.

In addition, AdWords achieve this effect at relatively inexpensive costs for both parties at a commercial transaction. To set up an AdWords account can often be cheaper than the conduct of a traditional media- or print-based marketing campaign, while providing a potentially global coverage¹⁰⁰. Moreover, Google as the only entity is the administrator for any given regional territory, allowing AdWords to uphold a standardized infrastructure and interface regardless of where at the globe the account is located or the ad runs. Thus, the informational costs of determining what kind of advertising can be done in each market are substantially lowered. Reduced informational costs also apply to the consumer, as he no longer needs to physically search for competitors. Instead, a search can be performed without greater efforts via Google's search engine, which compile all relevant links - both commercial and non-commercial - into one single resource for the consumer to access.

Not enough with that, AdWords remove some considerable costs of promoting international trade from the states. Trade policies that favor exports are usually considered unpopular at domestic level, which is one reason why states continuously pursue protectionist policies although lacking an economic rationale for these policies¹⁰¹. In political terms, it can be very difficult for a state to establish, promote and uphold free-trade-friendly policy goals¹⁰². Google search engines, however, have already established an environment that forwards free trade, with only little intervention from any type of national government. Not only does Google texturally promote these borderless transactions, but the Internet user has also become accustomed to certain expectations regarding this type of commercial forum.

Apart from that, Google is highly attracted to an increase in AdWords availability to as many consumers as possible, considering the large revenue deriving from the program¹⁰³. The more AdWords accounts are established, the more competitors for a given service or good are available, both with respect to numbers and geographical distribution. As a result, increased

¹⁰⁰For instance, one applicant reportedly spent \$ 6 US on Google Ads to find a job at an advertising company. Indvik, Lauren: "*Man lands jobs with 6 \$ US Google campaign*", [cnn.com](http://www.cnn.com/2012/TECH/04/02/google.job/index.html). (accessed: 2012-04-02), <http://www.cnn.com/2012/TECH/04/02/google.job/index.html>, compare to Gaebler.com "*Costs for Advertising in Newspapers*", <http://www.gaebler.com/Newspapers-Advertising-Costs.htm> (accessed 2012-04-02), estimating a full-page ad in local newspapers to cost at least \$ 1000 US.

¹⁰¹Pauwelyn & Guzman, p. 32-34

¹⁰²Indeed, the problem of domestic resistance is another reason behind the usefulness of bodies such as the WTO, which can serve as a counterweight to domestic opposition in advancing trade policy. See Pauwelyn, Joost: "*New Trade Politics for the 21th Century*" (2009), p. 33

¹⁰³Google Investor Relations: "*2011 Financial Tables*", <http://investor.google.com/financial/tables.html> (total advertising revenue of 23\$ billion in 2011)

competition will generate pressure for innovation and specialization, which in turn will ensure more efficient production and higher-quality services and goods. AdWords has turned out to an experiment within the private sector by applying free trade policies to a worldwide marketplace, and its success has demonstrated the value for the support of such policies. Consumers are given access to the widest range of providers of services and goods possible, while barriers to new market entry for foreign companies are significantly reduced, all with few expenses for state governments. As there is a direct link between the economic fate of a state and the well-being of the world's economy, states thus should be cautious not to interfere with AdWords' ability to promote trade liberalization.

5.2.3. ALLOWING TRADEMARK HOLDERS TO DICTATE ADWORDS POLICIES

DETRIMENTALLY AFFECTS TRADE LIBERALIZATION

Trademark holders are a challenge to AdWords' use of trademarked terms as keywords since they are convinced that such a use wrongly appropriates the trademark's value to third parties. By contrast, trademark holders argue that a trademarked term should not be made accessible as an AdWords keyword except when permitted by the trademark holder. The restriction of keywords used in this manner, however, greatly limits AdWords' value in promoting trade liberalization, as Google search results are manipulated with the result that they are unable to return links to the competitors of the trademark holders.

As illustrated above, Internet users conducting a search query including a trademarked term are usually not looking for the exact match to, for instance, the trademark holder's webpage. Instead consumers not only expect to see but are also willed to access search results that contain links to competitors' webpages. Letting the trademark holder to prohibit the use of a trademarked term as AdWords keyword reduces the likelihood that any ad except from the trademark holder's ads would be displayed on the search results site. Internet users thus are less likely to take other ads into consideration, as in order to do so consumers would have to conduct additional search queries with other, non-marked trademarked terms. If they are not given the opportunity to view the competitors' ads they will be much less aware of that such competitors exist. Accordingly, their knowledge of services or goods will not exceed companies they already are familiar with. At this point, companies with established local and physical presence will have a clear advantage over companies which cannot afford Internet ads outside that region. Based on that, the approach to AdWords by trademark holders would limit Internet users to local and territorially-determined markets consisting of companies with

an established market presence through traditional non-online means, undercutting the borderless nature that AdWords render to trade.

Trademark holders hold a valid argument in defending their trademarks from infringement, but the concept of trademark infringement stems from the initial idea that it somehow harms trade and commerce¹⁰⁴. It remains unclear how the use of a trademarked term as an AdWords keyword leads to any particular harm to the trademark holders. Instead, the possibility is given that this use in fact brings about advantages for the trademark holders by increasing Internet users' knowledge about the trademark. As internet users seeking for the trademark holders' webpage do not seem to suffer from confusion when other links appear, it remains unlikely that trademark holders can advert to lost sales due to AdWords¹⁰⁵. The manner AdWords promote competition by enabling easy comparisons between different competitors may effectively drive traffic towards trademark holders' webpages. Trademark holders are not excluded from also making use of the same trademarked term as a keyword for their ads¹⁰⁶. Indeed, the presence of other ads using that term as a keyword may lift the costs trademark holders have to bear to making sure an advantageous placement of their ad on the search results site¹⁰⁷. This expenditure, however, represents a continuing investment in the trademark and is not differing from other kinds of marketing expenses within the scope of AdWords. For instance, with regard to more traditional advertising means such as billboard and packaging ads, trademark holders are open for continuously spending money in order to protect their trademarks from becoming generic and being without protection. But following the trademark holders' approach, trademarked terms would be reserved without demanding trademark holders to yield equivalent efforts to ensure continual association with their marks in the consumer's eyes. While it is not clear whether these cost-savings to the holders of the rights outweigh the additional expenses imposed on consumers and competitors, it has clearly been indicated that the use of a trademarked term as an AdWords does not cause general harm. By contrary, such use facilitates the free flow of international trade and commerce. Ultimately, the balance of harms to benefits weighs considerably more heavily on the side of allowing trademarked terms to be used as AdWords keywords.

¹⁰⁴The different policy objectives of trademark law discussed in part 3.2 and part 4.3 are all rooted in the concept of promoting commerce and trade.

¹⁰⁵Jacoby, Jacob; Sableman, Mark: "*Keyword-based Advertising: Filling in Factual Voids (GEICO v. Google)*", (2007) p. 212-215

¹⁰⁶See note 4 (keywords basics)

¹⁰⁷See note 3 (What are Google AdWords?)

5.3. AN INTERNATIONALLY COORDINATED PLATFORM FOR ADWORDS

Regarding the strains arising from the interpretation of AdWords in accordance with the current trademark law, an alternative solution would be a legislative act establishing an explicit internationally coordinated platform for AdWords. This coordinated platform should be targeted not at a particular search engine but rather at safeguarding the function of keywords in search engine advertising per se. The interest to be protected should be not to provide Google with the means to continue making profit from promoting AdWords but to reduce the costs for companies to enter the market and to provide the Internet consumer with as much information as possible. Keywords make a direct contribution to the *number* of options an online user has when reviewing his or her search results. Accordingly, it is not the *number* of search results presented that might potentially lead to confusion but the *manner* in which search results are displayed which in turn represents a separate issue. Based on that, owners of the rights should not be allowed to block the use of trademarked terms as keywords, either as internally used by Google or selected as a keyword by AdWords account holders. Nonetheless, as it remains currently unclear how much the use of trademarked terms in ad text creates confusion among Internet consumers or to which extent its use contributes to an Internet consumer's ability to make a well-founded decision between suppliers, the use of trademarked terms in ad text should not be part of the internationally coordinated platform. It can be assumed that the damage or value of freely using trademarked terms in ad text will be dependent on the experience an online user makes with the Internet. The establishment of a blanked internationally coordinated platform for this use does not represent an appropriate option at present. Therefore, legislators should reduce their actions only to the preservation of the use of trademarked keywords.

Moreover, legislative action should not be restricted to the national or even regional stage for the same reasons, as mentioned above, that argue against uphold judicial action on the issue: different legislative standards risk the same matters of balkanization as different judicial rulings.

The most efficient solution would be the enactment of an international agreement, and as a minimum measure, an effective internationally coordinated solution is desirable. Considering that the protection of trade and commerce has always been of central importance to United States and EU trademark law, a legislative platform for AdWords on trade issues is compatible with the underlying policy objectives of both legal traditions. To internationally justify trade would be premised on generally-accepted and comparatively uncontroversial bases of legislative power in both the United States and the EU. Hence, any internationally

coordinated platform would most probably stand up to judicial challenges¹⁰⁸. Since courts in both the United States and the EU have given rulings on the liability for AdWords on trademark infringement, they already approach a need of acting on the issue in a manner that other nations are not. In addition, as the United States and the EU are representing the two most influential trading powers worldwide¹⁰⁹, their action would most likely be regarded as standard-setting by other nations. Not enough with that, both trading powers have an exceptional influence to push forward a uniformed and global standpoint on internationally coordinated efforts against trademark liability for AdWords. In particular, the WTO would on that point be an especially powerful forum since it provides a dispute resolution mechanism that would allow for any trademark agreement to be enforced¹¹⁰. Implementation, combined with the ongoing trend of Internet-based programs to cross territorial boundaries, would greatly promote adoption of the same trademark policy. Nonetheless, actions through a multilateral forum would at the same time allow for taking individual states' circumstances into consideration in a manner that a United States-EU agreement would not be able to. Furthermore, working through a multilateral forum would limit the suspicion that both superpowers set the target to impose their will on the global economy. Ultimately, to justify trade liberalization would also be particularly useful for counteracting this perception, since it focuses on the improvement of overall welfare and not on giving benefits to one single state or even one single Internet company.

The establishment of an internationally coordinated platform for search engine keywords would protect its ability to further liberalization of international trade and commerce, while at the same time not unduly strain domestic legal regimes. To internationally implement such kind of platform would be an efficient solution to the issues inherent in the ongoing patchwork of different national trademark traditions. In consequence, both the United States and the EU should take a leading role in the formulation of an international trade liberalization approach to an internationally coordinated platform for search engine keywords.

¹⁰⁸Considering the United States, the Interstate Commerce Clause represents the basis for Congress' power to legislate on trademark. With regard to the EU, its corresponding institutions are authorized to legislate on trademark issues stemming from their power to establish and uphold a common economic policy which was the EU's original *raison d'être* and still remains to be one of its fundamental pillars. Gillingham, John R: "*The German Problem and European Integration*", Oxford University Press (2006), p.433

¹⁰⁹Pauwelyn & Guzman

¹¹⁰The TRIPS Agreement allows for the use of the WTO dispute settlement mechanism provided that there are any disagreements arising between member states under TRIPS, TRIPS Agreement art.64

6 CONCLUDING REMARKS

As allegorized through Google AdWords, the use of search engine advertising has decisively altered the world of media and online advertising, inducing a verily global marketplace with the potential to advance trade liberalization far beyond what any governmental or intergovernmental initiative would be able to achieve. However, its current status has at the same time been subject of extensive criticism for the way in which it enables trademarked terms to use keywords for targeting and putting ads on search result sites. Considering that trademark protection is characterized by a long and varied history among states, its genuine policy concern inevitably incorporates the unrestricted flow of trade and commerce. In accordance, the protection of search engine advertising's outstanding and efficient ability to facilitate the lowering of trade barriers should be based on this common ground.

At present the key instrument for the development of trademark law on search engine advertising is represented through national judicial systems. However, the outcomes have led to an ineffective hodgepodge of legal regimes that on the one hand fail to regulate the use of trademarked terms as keywords and on the other hand may seriously impede progress in the liberalization of trade. Therefore, an alternative to a better solution would be the creation of a legislative platform established on the international level which would match search engine advertising's global scale while guaranteeing that the promotion of free flow of trade and commerce will be maintained. Considering that the United States and the EU as the major trading powers are already involved in the development of trademark law on search engine advertising, both superpowers should pursue coordinated efforts to establish an efficient international agreement. In doing so, not only their own economic growth would be promoted but also the global improvement of the world's economy as a whole.

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