

September 29, 2009

## **Important Opinion Issued Concerning Google's Adwords Service in the EU**

An important opinion was issued last week by the European Court of Justice (the "ECJ"), which will likely have broad implications for Google and other online search engines' business practices<sup>1</sup>. In the opinion, the Advocate General found that Google is not liable for trademark infringement resulting either from its offering of trademarked search terms as keywords to advertisers or its display of advertisements that correspond to such keywords when users search for those terms. However, the Advocate General left open the possibility that Google could be held responsible to individual trademark owners under the liability laws of the respective member countries.

This case was referred to the ECJ by the French Cour de Cassation, the highest appeals court in France. The lower court in France had found Google liable for trademark infringement stemming from its offering of the Louis Vuitton trademark as a keyword. Google appealed, but the decision was upheld by the intermediate court. Google then appealed to the Cour de Cassation, which referred the case to the ECJ. The ECJ was asked, among other things, whether Google is liable for direct trademark infringement because it offers trademarked search terms as keywords to advertisers and displays advertisements which correspond to such keywords when users search for those terms.

The law in the EU with respect to potential liability of online search providers stemming from their offering of trademarked search terms as keywords has been unclear. Courts from various EU member countries have issued different opinions on this and related issues. In addition to France, the ECJ has been referred cases involving questions relating to Google's Adword service from courts in Germany, Austria, the Netherlands and the UK.

In his opinion, the Advisor General ruled in favor of Google on the issue of whether Google could be held liable for trademark infringement. The opinion noted that to rule otherwise would result in an impermissible extension of EU trademark law to cover claims for contributory infringement—a claim that is available in the U.S., but not in the EU. In addition, the Advisor General opined that if Google was prevented from selling trademarked terms as keywords, many legitimate uses would be foreclosed as well (e.g. commentary and reseller sites). Moreover, the Advisor General feared that if the activity at issue here was found to be infringing, then a similar line of attack could be advanced against the use of trademarked terms in Google's traditional search results.

The Advocate General's opinion should help to clarify the law in this area within the EU. However, there is a possibility that the full ECJ decision will differ from the Advocate General's opinion in one or more ways. Moreover, it is unknown what changes Google may choose to make to its policies either before or after the final ruling is issued. Therefore, brand owners and other observers should remain cognizant of ongoing developments in this area. Please feel free to contact us if you have any questions or if you would like additional information ([trademarks@montagulaw.com](mailto:trademarks@montagulaw.com)).

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<sup>1</sup> This opinion, which was issued by the ECJ Advocate General, is not binding on the full court, but the court often follows the Advocate General's opinion (a full decision is not expected to be published until 2010).