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The Interflora Opinion – some cheer for brand owners

On the 24th March 2011, the Advocate General published his Opinion in *Interflora Inc and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Limited*. This is a reference to the Court of Justice of the European Union (ECJ) for a preliminary ruling from the UK High Court of Justice. The *Interflora* case deals with the issue of the use of registered trade marks in keyword advertising. Advocate General's Opinion is non-binding on the ECJ. The ECJ could come to different conclusions when it finally decides the case in a few months. The Advocate General's Opinion is followed in around 80% of the decisions of the ECJ.

Brand owners can take some heart from the Opinion - particularly *Interflora*.

Part of the opinion is non-controversial. The Advocate General found that the proprietor of a trade mark is entitled to prohibit use of a trade mark in a keyword. This is limited to situations where the resulting advert does not enable an average internet user to ascertain, except with difficulty, whether the goods or services referred to originate from the trade mark proprietor or from a third party. This finding is not a surprise following the decision of the ECJ in the earlier *Google France* case (click [here](#)).

The key question here to answer is what are the circumstances of use of a trade mark in a keyword to cause 'an average internet user' confusion as to trade origin? And who is this 'average internet user'? The *Google France* case did not answer these questions. The subsequent *Portakabin* decision suggested visible use of a trade mark in an advert linked to a keyword to sell genuine second hand branded goods was allowed. However, this is always likely to be a question for the national courts of the European Union to decide on a case by case basis and depending on the facts of the individual case.

The Advocate General did give some real encouragement to *Interflora* in the case at hand finding:-

"...in the case of a trade mark such as INTERFLORA which identifies a well-known commercial network of independent enterprises providing a special uniform service, i.e. delivery of flowers according to a standard procedure, the display of the name of another enterprise in a sponsored link is in my opinion likely to create the impression that the enterprise mentioned in the ad belongs to the network of undertakings identified by that trade mark.....Consequently, an association between the trade mark of Interflora and an identical delivery service of flowers provided by Marks & Spencer is possible and even likely in the mind of an average consumer seeking information about such services in the internet..."

This finding on the facts may be restricted to the particular nature of *Interflora's* business structure, which is a commercial network of independent enterprises rather than a traditional corporate structure. Thus, even if the ECJ and the national court were to follow this reasoning, the applicability of the decision to

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broader usage of trade marks in keywords may be limited. This possibility was strengthened by the following comments of the Advocate General:-

"In many cases display of commercial alternatives does not seem harmful for the origin function of the trade mark because the appearance of an ad in a sponsored link following the typing of a keyword identical with a trade mark does not create an association or a link between the trade mark and the good or the service promoted by the ad. As the Court has stated, the internet user may perceive the advertising links as offering commercial alternatives to the goods or services of the trade mark proprietor. This applies to identical or similar goods or services. The risk of error is even less likely in the case of different but related goods or services. This is the case, for example, if the trade mark chosen as a keyword relates to air travel and the ad displayed concerns car rental or hotel accommodation. Moreover, one of the blessings of the internet is precisely that it greatly enhances consumers' possibilities to make enlightened choices between goods and services."

This would suggest that in many cases the use of trade marks in keyword advertising will be allowed providing there is no confusion as to trade origin. That of course begs the question what would cause confusion as to trade origin? This question needs answering, but the visible use of a trade mark in keyword adverts where it is unclear as to the ownership of the linked website would appear to be prohibited. This may also be the case where there is use of branding which causes any form of doubt or confusion in the minds of the public.

Visible use of a trade mark in a keyword ad may be asking for trouble. This view is strengthened by the following comments of the Advocate General on the use of 'reputable' trade marks. The visible use of a trade mark seems a pre-requisite for the finding of infringement under this heading:-

"In my opinion, the use of third party trade marks as keywords in search engine advertising is detrimental to the distinctiveness of a trade mark with a reputation in cases of identical goods or services when the following conditions are met: the sign is mentioned or displayed in the ad in the sponsored link, and the marketing message or communication in the ad uses the sign in a generic sense to refer to a category or class of goods or services, and not as distinguishing between goods and services of different origins."

So what can we learn from this Opinion? Well, Interflora will be cheered by the Opinion and undoubtedly the use of trade marks in keyword advertising can be prevented in certain circumstances. However, the Advocate General did still chime some 'laissez faire' notes. It will be interesting to see the decision of the ECJ and the subsequent guidelines laid down by the national courts on a case by case basis. This story has some way to run.

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