

A plum(b) deal?

When can you use someone else's name as a keyword to attract visitors to your website? The High Court's recent ruling in a dispute between bathroom retailers is the latest decision in a string of cases about sponsored advertising.



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Mindy Jhittay explains the complexities of internet advertising for brand owners

Most internet users will be familiar with sponsored advertising. It means you can pay a search engine so that your click-through ads appear first in response to internet searches for certain terms. Bidding on your competitor's trade mark as a keyword is lawful, unless the ad *'does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to in the "ad" originate from the proprietor of the trade mark.'*

What does this mean in practice?

The crux of the legal test is whether the ad is likely to cause confusion. Internet users who search for a brand name are likely to be looking for that brand. In this context there is a particular risk of confusion if the resultant advertising is vague as to the goods' or services' origin. The 'confusion' test is designed to ensure transparency, so that consumers are protected from unclear advertising that is liable to mislead.

What can we learn from the recent case law on keyword advertising?

In 2008 Interflora sued Marks and Spencer (M&S) for trade mark infringement because M&S paid Google to display click-through advertisements for M&S flower services when internet users searched for the words 'Interflora,' or 'Interflora flowers'.

Interflora represents a network of florists, so the court held that this might lead the public to reasonably assume M&S was part of that network. Interflora's affiliate structure certainly provides a greater opportunity for confusion, so was this unusual case a one off? An ad will only infringe if it is not clear to an internet user where the goods or services referred to in the ad come from.

The 2014 case brought by Lush – which sells soaps and similar products – against Amazon was set against a backdrop of improving internet literacy. The

court recognised that consumers were familiar with sponsored ads, and were used to seeing them from competing suppliers.

In this case, Amazon used Lush's name as a sponsored keyword so that Amazon's adverts for soap and other toiletries would appear as sponsored links at the top of internet search results. The court held that only the Amazon ads that actually included the Lush name infringed Lush's trade mark rights, for example, *'Lush soap at Amazon'*. The Amazon ads for soap and similar products that did not include the name Lush did not infringe because it was clear to the average consumer that these were ads from a different supplier offering similar products.

This year, the court considered a claim brought by Victoria Plum Ltd. against Victorian Plumbing Ltd. for use of the name 'Victoria Plum' to display ads for Victorian Plumbing Ltd. Those ads contained the signs 'Victorian Plumbing' and www.victorianplumbing.com. The High Court found that Victorian Plumbing Ltd. had infringed Victoria Plum Ltd.'s registered trade mark. The internet user who had searched for 'Victoria Plum' was expecting to find links to Victoria Plum's website, and the ads from Victorian Plumbing Ltd. contained names that were confusingly similar to 'Victoria Plum'. Those ads would therefore mislead internet users.

How should online advertisers avoid causing confusion?

As the keyword advertising market continues to expand, further litigation will undoubtedly follow. To avoid falling foul of the legal test, online advertisers must be careful not to confuse the public as to the origin of the goods or services being advertised. The safest thing is to include your own brand name or trade mark in the ad and to ensure you do not include your competitor's trade mark in your ad text, link or URL.