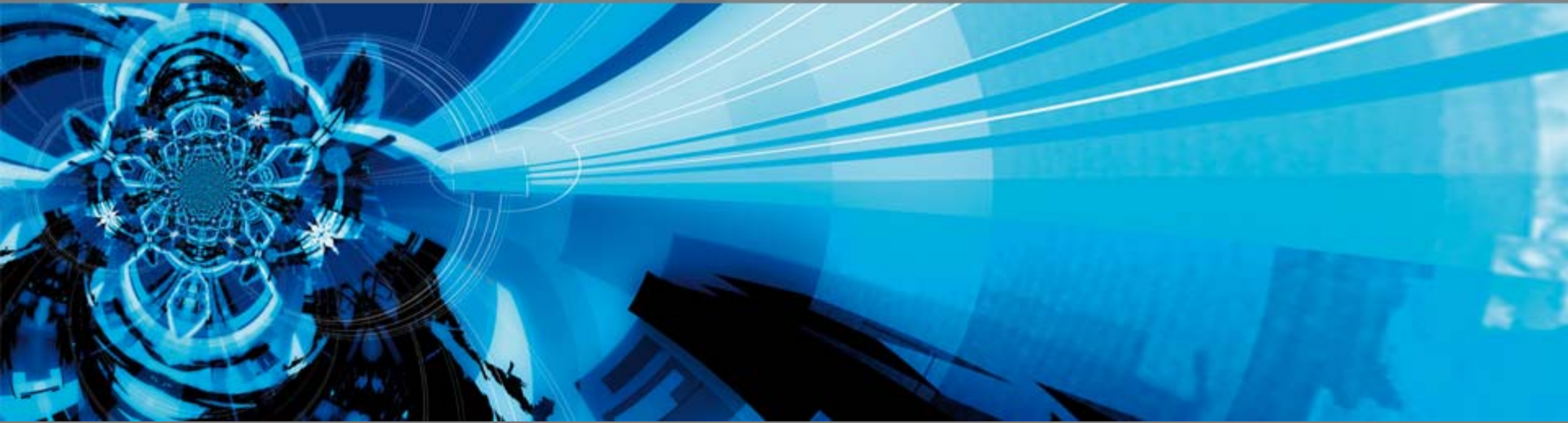


Developments in on-line comparative and behavioural advertising



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E-commerce: the facts

- European e-commerce market was estimated to be €106 billion in 2006
- 70% of turnover in UK, Germany and France
- In 2008 most popular online purchase were travel and holiday accommodation (42% of individual on-line shopping) followed by clothes and sports good (41%) books/magazines, e-learning (39%) , electronics goods (25%)
- Internet is the fastest growing retail channel (more popular than mail order, door-to-door and telesales)
- On-line advertising in UK grew 17% to £3.3 billion in 2008
- Internet Advertising Bureau: UK behavioural advertising makes up between 10-15% of all online advertising
- Enders Analysis predicts this likely to grow to 30% by 2013

What we will cover today

- **IP issues surrounding the use of keywords in paid-for search**
- Behavioural advertising: current and regulatory controls
- Regulatory scrutiny of consumer concerns and possible future controls

Developments in online advertising

- **Keywords:** the legal debate
- **On-line auctions:** liability for infringing sales



New challenges – same IP rights

We've had:

- Domain names
- Meta-tags

Now:

- Search engines and keywords
- Online auctions

Next?

- Scraping and data mining?
- Back to framing and linking?

Trade marks – what's infringement?

S.10: *A person infringes a trade mark if he uses in the course of trade:*

- (i) a sign identical with the trade mark for identical goods or services;
 - (ii) (a) an identical sign for similar goods or services; or
(b) a similar sign for identical or similar goods or services where there exists a likelihood of confusion, including a likelihood of association.
 - (iii) an identical or similar sign, where the trade mark has reputation in UK and the use of the sign, without due cause, takes unfair advantage of, or is detrimental to, distinctive character or the repute of the trade mark.
- Corresponding provisions under CTM regulations (Art.5)

Trade mark infringement

- On-line infringement – often comprises “use” of an identical sign.
- What sort of “use” is required?
 - Descriptive use is not infringing.....if it is in accordance with honest practices (s.11(2) Trade Marks Act)
 - Comparative adverts (EU Comparative Ad Directive)
- Arsenal v. Reed (ECJ & CofA)
 - Does use “affect essential function of a trade mark as a guarantee of trade origin”?

Is the infringing act in the UK?

- *“The mere fact websites can be accessed anywhere in the world does not mean, for trade mark purposes, that [they are] being used everywhere in the world”* (800-FLOWERS Trade Mark [2000])
- Placing a mark on the internet from a location outside the UK can constitute use of that mark in the UK
- Fundamental question is, *“whether or not the average consumer of the goods or services in the UK would regard the advertisement and site as being directed at him”* (Richard Dearlove (Diddy) v. Sean Combs (Puffy/P.Diddy/Diddy...) [2007])
- Examples: eBay decision; Google adword options

Keywords

The context:

2008

- Ad revenue in UK fell 3.5%
- On-line advertising in UK grew 17% to over £3.3b
- Paid-for search in UK was 59% (approx £2b) of on-line spend

2009

- UK, H1: £1.05b spent on paid-for search (60% of on-line spend)

Keywords

Two questions:

- Is the use of keywords an infringement?
(note: e.g. Google's policy in UK/EU/US)
- Is the sale of keywords an infringement?

Any answers?

- UK: *Interflora v M&S*; *L'Oréal v eBay*
- ECJ: *Google v Louis Vuitton*

Interflora's claims:

- TM infringement under 10(1) and 10(3) by M&S (primarily and as joint tortfeasor for Google acts)

- Use by M&S:
 - Selecting and nominating INTERFLORA signs as keywords
 - Associating those keywords with M&S URLs

Interflora v M&S - ECJ questions

- Do M&S acts constitute use?
- Is any such use “in relation” to goods/services?
- Is such use infringing?
- Does likelihood of confusion matter?
- Those 4 questions in relation to Google’s use
- Does Google’s use consist of mere conduit/caching/hosting?
- If not, what effect on remedies?
- Can advertiser be held jointly liable with search engine if it is use and no e-commerce defence?

L'Oreal v eBay

- eBay had bought keywords for various L'Oreal brands from Yahoo!, MSN and Google.
- Sponsored link displaying brand on search results.
- User clicking taken to eBay website page listing brands for sale.
- Test case brought by L'Oreal in a number of EU countries

L'Oreal v eBay

Arnold J held that:

- No joint liability with users for sale of counterfeit/grey goods.
- eBay liable for infringement for its use of brand name in sponsored link ads and its website (possibly).
- Questions referred...
- Note: Germany (L'Oreal); France, Belgium (eBay); Spain (pending)

Questions referred to ECJ

- **French Court** - Cases C-236/08 C-237/08 C-238/08 - *Google France and Google Inc. v Louis Vuitton Malletier, Google France v Viaticum Luteciel, and Google France v CNRRH and others*
- **German Court** - Case I ZR 125/07 – *bananabay*
- **German Court** - Case C-91/09 *Eis.de GmbH v BBY Vertriebsgesellschaft mbH*
- **Austrian Court** - Case C-278/08 - *Die BergSpechte Outdoor Reisen und Alpenschule Edi Koblmüller GmbH v Günter Guni and trekking.at Reisen GmbH*
- **Dutch Court** - Case C-558/08 - *Portakabin Ltd v Primakabin BV*
- **UK Court** - *L'Oréal SA v eBay International AG* [2009]
- **UK Court** – *Interflora v M&S*

The first answers...

Advocate General's Opinion (*Google v Louis Vuitton*):

- Sale of keywords by Google not infringing
- Display of adverts by Google not infringing
- Purchase of keywords by advertiser not infringing
- [Use of third party brand in advert might be...]
- Google not “hosting” for E-Commerce defence

Much more to come?

- Renewed focus on comparative advertising, following *O2 v Hutchinson*

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- **Behavioural advertising: current and regulatory controls**
- Regulatory scrutiny of consumer concerns and possible future controls

Developments in online advertising - behavioural

- *behavioural advertising*: what's that all about then?
- *current legal regime*: what has an impact here?
- *and (self) regulation*: some industry response?

Behavioural advertising – rationale

- *who* - ISPs, search engines and online vendors
- *what* – browsing data (generally)
- *why* – relevance of advertising to audience
- *how* - site-based or network-based

Behavioural advertising – means

- *site-based*
 - cookie sets unique ID
 - cookie sends data to rules engine & content served back
 - session v. persistent
 - additional classification

Behavioural advertising – means

- *network-based*
 - cookie based v. deep packet inspection
 - DPI re-routing
 - e.g. Phorm's 'Webwise'
 - additional classification again

Behavioural advertising - legal regime

- *general consumer laws* still apply:
 - UCTA: UTCCR; CPUTR: etc
- key issues of *data collection* and *consent* addressed in:
 - Data Protection Act 1998
 - Privacy and E-communications Regulations 2003
 - Regulation of Investigatory Powers Act 2000
 - Computer Misuse Act 1990
 - Copyright, Designs and Patents Act 1988
- *self regulation*

Behavioural advertising – legal regime

- *Data Protection Act 1998* – site and network
 - personal data involved?
 - basis for processing
 - sensitive personal data involved?
 - suitable consent
- *Privacy and Electronic Communications (EC Directive) Regulations 2003* - site and network
 - public communications networks communications/related traffic data
 - use of traffic data for marketing purposes
 - UK issues
 - cookies

Behavioural advertising - legal regime

- *Regulation of Investigatory Powers Act 2000* - site and network
 - public communications networks communications/related traffic data
 - ‘intentionally’
 - transmission
 - grounds for legality?
- *Computer Misuse Act 1990* - network
 - criminal offences
 - intentional unauthorised access to program/data
 - intentional unauthorised change/addition to impair access to/ prevent operation of computer

Behavioural advertising – legal regime

- *Copyright, Designs and Patents Act 1988* – network
 - infringement of database right
 - infringement of copyright

Behavioural advertising – regulation

- *Industry regulation*

- ASA

- *Self regulation*

- Internet Advertising Bureau Good Practice Principles
- <http://www.youronlinechoices.co.uk>
- 3 core elements - transparency, user choice and education
- 6 months from sign up to Principles to comply with 3 core commitments
- **12** since March 2009 – *AOL, AudienceScience, Google, Microsoft Advertising, NebuAd, Phorm, Platform A, Specific Media, Wunderloop 24/7 Real Media, Adconion Media Group and Yahoo! SARL*

Behavioural advertising – key issues

3 key issues:

- *user consent* – informed?
- *data collection* - personal intrusion?
- *regulation left behind innovation* – over to Susannah...

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- **Regulatory scrutiny of consumer concerns and possible future controls**

What are the regulators doing?

- European Commission
- US
- OFT

- *September 2008* – EU Information Commissioner states behavioural targeting in advertising must be structured on an ‘opt in’ basis for consumers and queries Phorm
- *April 2009* – EC reveal plans to sue the UK government over its failure to take any action against BT and Phorm for their secret broadband interception (so not data protection)
- *October 2009* – EC moves to second phase of an infringement proceeding against UK

- *March 2009* - the European Consumer Commissioner called for self-regulatory “principles of acceptable behaviour” as consumers feel “uncomfortable” covering:
 - Commercial communications: Targeted messages and viral marketing
 - Commercial Discrimination: What are the parameters for legitimate discrimination?

- *November 5 2009*: - European Commission: Blueprint for Consumer Policy in Europe: Making markets work with and for people
- three actions to promote trust on-line:
 - Establish and enforce fair marketing practices on-line
 - Provide consumers with effective cross border redress
 - Ensure collection and use of personal data is fair

- Further research on fair marketing practices on-line
 - Price dripping: final price revealed only after many clicks, deep into the transaction process
 - Increased confusion of commercial and non-commercial communications
 - Licensing contracts that impose restrictions of access and useage of digital materials that are not clear
- Consumer Protection Co-operation network has co-ordinated joint exercise in all Member States enforcing e.g. online sales of airline tickets and sales of electronic goods over the internet
- Online Data Collection
- Convened Stakeholder Forum on Fair Data Collection to meet several times in 2010 to analyse the problems and to inform the Commission on actions to be taken

- *E-privacy Directive proposed amendments (2009)*
- European Parliament Internal Market & Consumer Protection Committees:
 - include a requirement that cookies may only be used where users have consented to their use (*i.e. an opt-in rather than the current opt-out requirement*)
 - the reference to “electronic communication networks” is removed to cover cases where cookies are sent and received on a user's computer via external storage media
- Art 29 WP:
 - establish beyond all doubt that the *processing of traffic data* falls within the scope of the Data Protection Directive
 - default browser settings should be “privacy friendly” but *not a means to collect free, specific and informed consent of the users* as required in Data Protection Directive
 - controller of the cookies should inform its users in its privacy statement and *may not rely on (default) browser settings*

US - Federal Trade Commission

- *Staff Report (Feb 2009)* on self-regulatory principles for on-line behavioural advertising
 - 1st principle – transparency and consumer control
 - 2nd principle – responsible data security measures
 - 3rd principle – material changes to privacy policies
- FTC recognise the need to evaluate and conduct investigation into self-regulatory programs

“The jury is still out about whether [self-regulation] alone will effectively balance companies’ marketing and data collection practices with consumers’ privacy interests”

US –House of Representatives & Senate

- *July 2008* - House of Representatives & Senate conduct hearings behavioural targeting
- *August 2008* – US HoR Energy and Commerce Committee ask 33 cable/Internet corps for information gathered including Google, Microsoft, Comcast, AT&T, AOL and Time Warner
- Congressman Rick Boucher, Chairman of the House Energy and Commerce Sub-Committee on Communications, Technology and the Internet – planning bill on internet advertising, covering:
 - websites collecting visitor information to prominently disclose what information is gathered
 - website will have to describe how the information is used, how long it is retained and whether shared with third parties
 - websites that share user information with outside advertisers are required to obtain user consent before collecting data (opt-in) but with a possibility of opt-out subject to qualifying criteria
 - websites dealing with sensitive personal information, e.g. medical, financial, sexual orientation, social security numbers and other ID number to be opt-in only
 - websites sharing data with unaffiliated third parties – opt-in only

US - State Legislation

- 3 States (New York, Connecticut and Massachusetts) introduced legislation to regulate on-line behavioural advertising
- Legislation attempted to codify self-regulatory principles set out by the Network Advertising Initiative

US – Self Regulation?

- *July 2009* – US trade bodies representing more than 5,000 companies to develop the Self-Regulatory Principles for Online Behavioural Advertising for implementation early 2010
- *September 2009* – UPenn and the Berkeley Centre for Law and Technology report
 - 66% of users don't want targeted advertising
 - 63% believe advertisers should be required by law to immediately delete information about users internet activity

- *March 2009* - U.K. Parliament Debates ISP-Based Behavioral Targeting
- *May 2009* – UK All-Party Parliamentary Group on Communications announces investigation into Deep Packet Inspection and behavioural advertising - key findings out on [October 15th](#)
- *October 2009* - UK All Party Parliamentary Group on Communications Report recommends:
 - *“that the Government review the existing legislation applying to behavioural advertising, and bring forward new rules as needed, to ensure that these systems are only operated on an explicit, informed, opt-in basis.”*

- *August 2009*: OFT announced market study on the impact on consumers of potentially misleading advertising and pricing
- Following the initial consultation it decided in October 2009 to arrange this into two separate studies:
 - Advertising of prices: focusing on ways in which prices are often advertised giving rise to consumer concerns;
 - Online targeting of advertising and pricing: covering online behavioural advertising and customised pricing
- Study to be completed Summer 2010

OFT Marketing Investigation - Advertising of Prices

- Covering various pricing practices which may potentially mislead consumers including:
 - ‘drip’ pricing, where price increments ‘drip’ through during the buying process
 - ‘baiting sales’, where only some products are available at the discount price and consumers may ultimately purchase a full priced product
 - ‘reference prices’ where there is a relatively high reference price compared to sale price, for example ‘was £50, now £20’, or ‘50% off’
 - Time-limited offers, such as sales which finish at the end of the month or special prices which are available for one day only
 - Complex pricing, where it is difficult for consumers to assess an individual price, for example ‘three-for-two’ or ‘non-inclusive’ prices, and
 - Price comparison sites which may use some of the practices described above

OFT Market Investigation - Targeted Advertising

- To consider whether some targeted advertising practices may result in consumer detriment, e.g.:
 - Where the data collected for profiling is identifiable to a specific person or a specific computer
 - Where the data is collected and used by a single website known as 'first party' behavioural advertising, and
 - Where advertising is based on a single visit or search criteria and involves no retention of data known as 'contextual behavioural advertising'
- To clarify how existing legislation may apply to online behavioural advertising and assess existing self regulatory measures

OFT Market Investigation - Targeted Prices

- The targeted prices study will consider:
 - the ways in which online retailers use consumer profiles and segmentation to target specific products and prices to individual consumers
 - whether these practices cause consumer detriment where consumers are unaware that they are being targeted, e.g. affecting the extent to which they compare products as well as potentially raising privacy concerns

Conclusion

- Wide ranging investigations in to behavioural advertising practices
- General unrest amongst regulators due to consumer concerns
- New regulations likely
- Disparity between EU and US?

Questions?



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