

# MACFARLANES

## LOGOS AND NO-GOS



### HIGH COURT DELIVERS FOR INTERFLORA

**Marks & Spencer (M&S) has lost a long-running trade mark battle with Interflora after the High Court ruled this week that the retailer had infringed Interflora's trade marks by its use of Google AdWords. While this is far from a deathblow to the widespread practice of purchasing competitors' trade marks as advertising keywords, which the Court confirmed is not inherently objectionable and, in general, promotes competition, the decision does emphasise that such cases will turn on their facts and keyword advertisers cannot assume that they are necessarily immune from infringement actions.**

#### BACKGROUND

The case concerns M&S's purchase of "Interflora" (and variations thereof) as keywords in Google AdWords, which meant that searching "Interflora" on Google would trigger the display of a sponsored link advertising M&S's flower delivery service above the natural search results. The text in the link and the M&S site made no reference to Interflora.

The Court had to consider infringement under Article 5(1)(a) (identical marks/ identical services) and Article 5(2) (unfair advantage/ dilution of marks with a reputation) of the Trade Marks Directive, in light of responses received from the European Court of Justice (CJEU) to questions referred by the Court. Under Article 5(1)(a), the key question to be answered was whether M&S's use of keywords affected, or was liable to affect, the essential function (of guaranteeing origin) of Interflora's trade marks.

#### LEGAL ANALYSIS

While many trade mark practitioners had expected the decision to turn on the Court's interpretation of the CJEU's rather woolly wording regarding the newly articulated "investment" function of a trade mark, the Judge quickly dismissed the relevance of the investment function to this case and explained that the claims for dilution and unfair advantage would also fail if there was no adverse effect on the origin function. The case would therefore be won or lost on the question of whether there was any confusion as to the origin of M&S's services (i.e. whether the origin function of Interflora's trade marks was adversely affected).

Accordingly, as established in *Google France*, the key question was whether the M&S adverts appearing as sponsored links "enabled reasonably well-informed and reasonably attentive internet users to ascertain (without undue difficulty) whether the service originated from Interflora (or an economically connected entity) or from a third party".

Importantly, the Judge clarified that the onus is on the advertiser (M&S) to show that the use of the sign "in light of how the ad is presented as a whole" is sufficiently clear so that there is no real risk of confusion on the part of the average consumer as to the origin of the advertised goods or services.

The Judge held that there is no "single meaning rule" in European trade mark law, whereby use of a sign in a particular context is deemed to convey a single meaning in law even if it is in fact understood by different people in different ways. Rather, if the advertisement would cause a significant section of the relevant class of persons (which excludes any ill-informed or unobservant internet users) wrongly to believe that the advertised goods or services are connected to the trade mark proprietor, then this would constitute an adverse effect on the mark's origin function, even if the majority of customers would not be confused.

Perhaps surprisingly, the Court found on the evidence that a significant portion of consumers who searched for "Interflora" and who clicked on the M&S link did so because they were led to believe that M&S was part of the Interflora network (notwithstanding that the M&S advert made no mention of Interflora). Critical to this conclusion were the Judge's findings that: (i) average well-informed internet users did not know how Google AdWords operate (and the distinction between "paid for" and "natural" search results); (ii) the average internet user is not generally aware that M&S's flower service is not part of the Interflora network and this is not made clear in the advert; and (iii) the particular nature of the Interflora network (being made up of independent members who often traded under their own names and which sometimes included arrangements with major retailers) meant that it was plausible that there could be a connection between Interflora and M&S. Interflora was not, as Counsel for M&S had put it, "a brand like any other".

#### CONCLUSION

While this case turns on its facts (and is likely to be appealed), it provides some cautionary notes for advertisers using competitors' trade marks as keywords, especially as the Court's view was that internet users were still not familiar with how AdWords operated. However, as consumers become increasingly internet-savvy over time, this is likely to become less of a relevant factor.

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