

## ECJ's second ruling on AdWords!

The highly expected ECJ very first ruling on Google AdWords has been issued on March 23, 2010. This decision involved three joint cases originating from France (C-236/08 to C-238/08) and has been quite commented.

The ECJ however issued another decision relating to the AdWords system on March 25, 2010, in Case C-278/08 which has apparently brought a lower level of attention. This decision truly is however the second step of the building up of the Community case law relating to the AdWords system.

The proceeding arose with the Austrian Supreme Court deferring a matter to the ECJ for preliminary ruling. The matter involved the owner of the word and device trademark for "BergSpechte" covering classes 25, 39 and 41 against Trekking.at Reisen GmbH. Said trademark owner disclosed that when an internet user entered the word "Bergspechte" as a search term in the search engine a Trekking.at Reisen an advertisement was displayed as a sponsored link. In short, the Austrian inquired whether use by advertisers by selecting a trademark as keyword in a referencing service constituted infringement of that trademark.

This ECJ ruling of March 25 only deals with the entitlement of trademark owners to act against advertisers (it does not deal with Google's direct liability like in the March 23 decision) but it says that trademark enforcement can be sought against them when the keyword is identical with **or similar to** the trademark.

In the first decision of March 23, 2010, "*identity*" (identity of the marks / keywords and identity of the products of the services) was the master word. The ruling of March 25 thus opens the door to "*similarity*" situations.

The action of trademark owners is submitted to the same conditions than in the rulings of March 23: the advertising must not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or by an undertaking which is economically connected to it or, on the contrary, originate from a third party.

That is a long term story which has now started on the Community level. Watch out for it because there still are four proceedings pending before the ECJ relating to Google AdWords (Case C-558/08, "*Portakabin*", originating from the Dutch Courts; Case C-91/09, "*Bananabay*", originating from the German Courts; Case C-323/09 "*Interflora v. M&S*" and Case C-324/09 "*L'Oreal v. eBay*", both originating from UK Courts).

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