

PRELIMINARY RELIEF GRANTED AGAINST GOOGLE FRANCE IN ADWORDS CASE

Another chapter was added to what is already the hottest legal issue for internet search engines.

Le Meridien, a French resort company, filed a trademark infringement suit against Google's Adwords service. It alleged that Google infringed upon its trademarks - "Meridien" and "Le Meridien"- on two grounds:

- The Adwords Google Keywords Tool suggested, as keywords, the words "meridien" or "le meridien", and
- Searches for "Meridien" or "Le Meridien" triggered ads from competitors in the "sponsored links" results.

The Nanterre district court followed Le Meridien's reasoning and ordered Google (i) to suppress from its Keyword Tool the words "meridien" and "le meridien" combined or not with the words hotel or resort and (ii) to stop triggering ads from competitors when users search for "meridien" and "le meridien" combined or not with the words hotel or resort.

Under French trademark law, such preliminary relief can only be granted if (i) the suit is filed shortly after the plaintiff knows of the allegedly infringing facts and (ii) the plaintiff is likely to prevail on the merits. Le Meridien was prompt, so the main issue to be resolved is whether the plaintiff had a case.

Even if in the French language the word "meridien" is dictionary-defined, the Court first held that the trademarks at issue are "*unquestionably notorious*". Notorious trademarks may be protected under all classes of good and services.

Google argued that it has used its best efforts to prevent such triggering of competitors' ads. It produced evidence that on October 14, November 12, and November 29, 2004, some of the "sponsored links" were not triggered anymore.

On the other hand, Le Meridien's evidence demonstrates that searches for words combined with "meridien" or "le meridien" triggered competitors' ads and that the Adwords Keyword Tool suggests "meridien" and "le meridien" as keywords when the advertiser is posting an ad related to the hotel industry.

The Court dismissed Google's efforts considering that so long as it does not completely suppress the allegedly infringing words, new sponsored links may appear "*due to the automatic aspect [of Adwords] and the part of bidding in the system designed by Google for the creation and the display of ads.*"

Further, the Court held that Google played an active role in the choices made by the advertiser since it implemented the Keyword Tool which suggests new keywords that may improve the ad relevance.



The plain-language legal disclaimer displayed on the Keyword Tool webpage was deemed insufficient to avoid liability towards third parties.

Lastly, the Court ruled that a user searching for “meridien” or “le meridien” was likely to be confused by a commercial link offering identical or similar services, and may believe that such services are of the same origin.

This decision raises more issues than it solves. The Adwords system is a breakthrough in internet advertisement. There have been few decisions so far, and French courts are struggling with this novel way of selling goods and services. Applying the law without fully understanding the technical aspect of the matter simply does not work.

As much as this case focuses on trademarks, it involves a fundamental right: free enterprise. Technological changes often come with new ways of doing business. Well-established market participants should not hinder innovation only to maintain their market shares, nor should they be granted more rights on the internet than in the “real world”.

One might wonder why Le Meridien did not sue its competitors that posted the ads. If Google is an infringer, these advertisers may share the liability.

In addition, Adwords suggests additional keywords on the basis that they are “*popular queries that include your keyword*” or that “*users who searched for your keyword(s) also searched for the following terms*”. Adwords also offers an “*expanded broad match option*”. Thus, a search for “le meridien” may trigger ads from competitors even though the latter did not select “meridien” as a keyword. Furthermore, if Google has an active role in the creation of the webpage, Google users are the ones who indirectly (and unknowingly) create such lists of keywords, and Adwords users are the ones who select the keywords.

In view of the Court’s decision, if Google completely abandoned its Keywords Tool and stopped suggesting potentially infringing words, it may still be liable if a user purposefully chooses to use a notorious trademark as a keyword in order to sell identical or competing goods and services.

Not only is the Court’s technical description of Adwords incomplete, but also it is puzzling that Le Meridien never produced any evidence that the word “meridien” had been actually selected by an advertiser (even if Google may suggest such keyword), nor that the reason why a search for the word “meridien” triggers the ads at issue is because such word was selected.

The Meridien only proved that (i) Google may suggest the word “meridien” as a keyword, and (ii) a search for such word might trigger ads posted by its competitors. This is circumstantial evidence.

However, Google is selling keywords to the highest bidders since the ranking of the ads depends on how much a user is willing to pay for a “click”.

If Google is ordered to stop selling potentially infringing words, this assumes that it knows or should know all the words that give right to some form of trademark



protection, the scope of such protection, the place where it is protected, etc. This would be quite a high burden, unless Google is protected by a notice and take down provision.

Yet, the most disturbing legal issue is the lack of analysis of how the word “meridien” is used. One must not forget that Google does not allow a user to select trademarks, but words. A trademark is only a trademark because of the goods or services it identifies, and the law offers protection for a limited territory, for a limited time and for certain classes of goods and services. Trademark protection is subjects to limitations (comparative advertising, free speech, etc.).

A broad ban, as the one ordered, completely disregards the above elements.

Lastly, one might question the ruling that sponsored links may confuse the users who searched for “le meridien”.

Consumers are smart. They understand the concept of “sponsored links” and the domain names of advertisers are clearly displayed. When consumers click on a clearly identified link, they are aware they are not going to Le Meridien website. As such, if a customer goes to a shop with the idea of purchasing brand A goods and, as she inspects the goods, sees an ad for goods from competing brand B, she might change her mind and purchase the latter. Yet it would not be because she thought brand B goods were brand A goods.

Ads may convince customers to change their mind. This is healthy competition. Why should it be any different on the internet?

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