
United Kingdom: “Google Adwords Case” Sent Back to High Court after Appeal Court Ruling in Marks & Spencer’s Favor

Interflora, Inc. v Marks and Spencer PLC [2014] EWCA Civ 1403

On May 21, 2013, the High Court of England and Wales handed down a decision holding that Marks & Spencer’s purchase of the term “Interflora” as a Google ad word infringed Interflora’s trademark rights (prior decision [2013] EWHC 1291 (Ch) was reported in our Information Letter of September 2013). [More](#)

Interflora, Inc. v Marks and Spencer PLC [2014] EWCA Civ 1403

On May 21, 2013, the High Court of England and Wales handed down a decision holding that Marks & Spencer’s purchase of the term “Interflora” as a Google ad word infringed Interflora’s trademark rights (prior decision [2013] EWHC 1291 (Ch) was reported in our Information Letter of September 2013). The case was then remitted to the Court of Appeal for further proceedings.

With its “Adword” program, Google effectively allows advertisers to purchase a preferred spot in the search results for certain search terms. In this case, Marks & Spencer (sometimes hereafter “M&S”) purchased the right to show up in the preferred search results whenever a Google user searched the term INTERFLORA. The results appear at the top of the page, and are therefore more likely to be clicked on by users, as multiple studies that were introduced into evidence in the case demonstrated. The search produced a result that did not itself bring up the INTERFLORA mark, and it would become clear to a user that they were being directed to the Marks & Spencer website. The court acknowledged that M&S’ use of the adword infringed one of the integral functions of a trademark, the

indication of origin, and ruled that the potential risk of confusion outweighed any practical reason why a competitor (M&S) should be able to purchase rights to have their services displayed when the trademark (INTERFLORA) is used as a search term.

Marks & Spencer appealed the decision to the Court of Appeal, and on 5 November 2014, the case took an interesting turn when the Court of Appeal pointed out various errors by the High Court. Having found the High Court decision flawed, the Court of Appeal considered, but in the end refused to rule on, the issue of infringement itself. Instead, the court remitted the case back to the High Court for re-trial.

The Court of Appeal focused on several issues, the following being the most important:

1. The Court of Appeal found that the High Court misapplied the doctrine of the “average consumer” in part, disagreeing with the High Court that a finding of infringement is precluded by a finding that many consumers would not be confused.
2. The High Court had read the CJEU decision in *Google France SARL v Louis Vuitton Malletier SA* ([2010] ECR I-0000) to indicate that in keyword advertising cases, the onus of proof should be reversed, i.e., that the burden should be on the defendant, M&S, to prove that their use was not confusing. The Court of Appeal rejected such reversal; rather, the burden was on Interflora to prove that there was confusion.
3. The High Court had ruled that in this case, a finding of initial interest confusion was sufficient to prove confusion for the purposes of infringement. The Court of Appeal held that the High Court should not have considered the doctrine of initial interest confusion in this case because it is not helpful in a keyword advertising case, as it has the potential to mislead. In particular, the doctrine itself does not take into account certain checks and balances that have been engrained into trademark law to ensure that competitors are permitted to compete fairly in the marketplace. The Court of Appeal instead held that the High Court should decide only whether the advertiser has enabled the average consumer to ascertain the origin of the advertised goods or services, thus making it possible for the consumer to make an informed decision. The Court of Appeal held that the High Court should not have imposed an affirmative obligation on an advertiser in this context to ensure that the consumer is not confused at first.

The case will now be retried. We will be monitoring this case and will report further developments.

Primary Contacts

John P. Margiotta