

## KEYWORD ADVERTISING IN THE US AND EUROPEAN COUNTRIES

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### **A. General**

#### 1. How do search engines work?

Search engines are not the same as the so called *directories*. The latter are databases consisting of information compiled by users who search the web and feed information and websites into the database. By search engines this is done automatically: little computer programs (called *e-agents*) browse the web for websites and save the results of the research in indexes. The criteria for ranking the search results in the list differ from search engine to search engine. An overview on the different criteria for assessing the importance of a website and information about the methods which well known search engines apply can be found on the website:

<http://searchenginewatch.com/showPage.html?page=2167891>.

#### 2. Keyword Advertising:

Keyword advertising gets more and more popular. It means that an agreement is concluded with the operator of a search engine which provides that an advertisement is connected with certain keywords. If a user feeds the search engine with the keyword, the advertisement appears next to the search results. The main advantage of this kind of advertisement is that the content of the advertisement can be adapted to the special interests of the users. It is therefore more likely that they read the banner ad and follow the link. Keyword advertising is more selective than other forms of advertising and therefore more effective. Another advantage is that the banner ads are usually placed next to the first hits of the list of results so that they are very eye-catching. Keyword advertising is the main source of income for search engine operators.

There are three different kinds of keyword advertising:

- a competitor's signs are not only used as keywords, but also in the own banner ad
- the signs are used as keywords, but not in the banner ad
- generic terms are used as keywords instead of a competitor's signs.

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However, keyword advertising can be abused in various ways. For example, a company can link its advertisement to a competitor's company name in order to entice the competitor's customers away.

#### a. Technical background:

From the technical point of view keyword advertising is quite easy: The user feeds the search engine with a term (which can be seen in the URL of the search result list; if for example the search terms are "advertisement" and "Internet", the URL reads as follows: <http://www.google.at/search?hl=de&q=advertisement+Internet&meta=>) which serves as a keyword for the search engine. All banner ads are listed in a database and are attached to certain keywords. If the user feeds the search engine with a keyword, the software of the search engine can "decide" which banner ads are to be displayed.

#### 3. Paid listing:

Another method of linking search terms to keywords is called paid listing. The main difference between paid listing and keyword advertising is that with paid listing there are no banner ads which are displayed next to the search results, but the websites which are linked to the keywords show up in the search result list. There are two different forms of paid listing: paid inclusion and paid placement. Paid inclusion means that a website will show up in the result list without possibility to influence the position in the list. With paid placement, the position of the website in the search result list — usually among the first results — is defined in the contract with the search engine operator. Unlike keyword advertising, agreements on paid inclusion and paid placement are very difficult to be detected by outsiders. Lately, Google and Wikipedia were accused of having concluded a paid listing agreement.

### **B. United States**

Cases challenging the sale or purchase of a trademark as search engine keyword to/by competitors of the mark owner look at whether such a sale or purchase is "use" of a trademark in commerce in the sense of the Lanham Act, a threshold requirement for trademark infringement, and second, if it is "use", whether there is any likelihood of confusion by consumers.

In a decision in the Southern District of New York, *Merck & Co. v. MSD Technology* from 2006, plaintiff drug company brought an action against various Canadian entities that operated online pharmacies. It alleged unfair competition, including, inter alia, trademark infringement, trademark dilution, and false advertising, under federal and state law. The Canadian online pharmacies had purchased sponsored links from the Internet search engine companies Google and Yahoo, so that consumers who search the word "Zocor", which is plaintiff's trademark, will be offered links to these defendants' websites. The court found that in the search engine context, defendants do not 'place' the "Zocor" marks on any goods or containers or displays or associated documents, nor do they use them in any way to indicate source or sponsorship. Rather, the "Zocor" mark is "used" only in the sense that if a search engine is fed with the term "Zocor" the sponsored links to defendants' websites will be displayed. This internal use of the mark "Zocor" as a key word to trigger the display of sponsored links is not a use of the word as a trademark.

Half a year later, the Northern District Court of New York decided in the case *Rescuecom Corporation v. Google, Inc.* and held that trademark-triggered advertising does not constitute "use" under the Lanham Act, but that case has now been overturned.. In *Rescuecom Corp v. Google Inc.*, 06-4881-CV (CTA 2, April 3, 2009), The Second Circuit Court of Appeals came closer to harmonizing the rules on adword lawsuits. The Court of Appeals for the Second Circuit is the court of appeal for federal courts in New York and Connecticut. Since many trademark cases are bought in New York, the Second Circuit's views are important in trademark law. In the United States, Courts of Appeals in different Circuits often develop different interpretations of the law, which makes it difficult to advise a client what will happen if there is a lawsuit, because what happens may depend on where the lawsuit is filed.

Prior to the *Rescuecom* case, the general rule in courts within the Second Circuit was that the sale of a keyword which never appears in the advertisement itself was not use in commerce, a threshold requirement for then finding that there is infringement. This rule applied in cases where the defendant was a competitor.

In *Rescuecom*, the Court reasoned that the sale of another's trademark in a keyword, particularly where others' trademark are sometimes suggested by GOOGLE if the user uses the Keyword Search Suggestion tool, was use in commerce.

Whether this constitutes infringement, which requires a finding of likelihood of confusion, is still an open question. The court sent the case back to the trial court to determine this issue.

In *Edina Realty, Inc. v. The [MLSONline.com](http://MLSONline.com)* the plaintiff held the trademark "Edina Realty". The defendant was a direct competitor of the plaintiff and had purchased from Google and Yahoo search terms identical or similar to the word "Edina Realty". The court held that this kind of use constituted a use in commerce: As the defendant purchased search terms that included the trademark "Edina Realty" to generate its sponsored link advertisement, it used the trademark commercially.

Even Google concedes that if a keyword leads to a sponsored link which displays the trademark, this is improper trademark use, although GOOGLE is relaxing its rule on when the use of trademark will be permitted in displayed text. But if the consumer never sees the owner's mark, but simply sees a link to "INTA" when searching for "MARQUES", most U.S. courts have trouble finding likelihood of confusion even if they find use. Some courts, notably in California, also look at a doctrine called "initial interest confusion", which initially lures the consumer to the competitor's site even though he is no longer confused at the time of purchase, to find infringement.

## **C. FRANCE**

There has been a trend for French Courts to regularly condemn advertisers using competitors' trademarks in metatags or as adwords. The last years showed however a lack of unity in respect of the responsibility of providers of sponsored links (e.g. Google) and the Cour de Cassation has just decided to refer three pending cases to the ECJ for preliminary ruling.

### **1. Google v Louis Vuitton — decision of 28 June 2006, referred on 20 May 2008 to**

## the ECJ / Adwords

The Paris Court of Appeal has affirmed a decision which found that Google's practice of selling particular terms as triggers for so-called "sponsored" advertisements amounted to infringement of Louis Vuitton's trademarks.

The Court first found that French courts have jurisdiction over any use of infringing keywords on any website, as long as the website is accessible in France. The target public is irrelevant as long as the keywords reproduce a French or Community trademark without authorization.

The Court held that infringing use includes use for advertising purposes and not simply use in connection with products or services. Based on the French Intellectual Property Code and the EU Trademark Directive, Google was ordered to pay € 300,000 in damages for trademark infringement, unfair competition and misleading advertising for having sold keywords associating terms like "imitation", "replicas" or "fake" with Louis Vuitton's trademarks. The court also confirmed the first instance decision prohibiting Google from any future sale of keywords using the marks under a penalty of € 8,000 per day of non-compliance.

The Cour de Cassation has now referred to the ECJ on two main points: 1) whether the use of a keyword amounts to trademark use and 2) the liability of search engines:

*1) Do article 5 § 1 a) & b) Directive 89/104 and article 9 § 1 a) & b) Regulation 40/94 on the Community Trade Mark have to be interpreted in the sense that providers of sponsored links services who make available to advertisers keywords that are identical or imitate trademarks, and organise through a positioning contract the creation and privileged displaying based on these keywords, of promotional links toward sites on which counterfeit products are proposed, make use of these trademarks which the trademark owner is entitled to prohibit?*

*2) In case the trademarks are famous, could their owner prohibit such use on the basis of article 5 § 2 Directive and article 9 § 1 c) Regulation?*

*3) In case such use would not constitute a use that might be prohibited by the trademark owner pursuant to the Directive and the Regulation, could the sponsored links provider be considered as a hosting service provider in the sense of article 14 Directive 2000/31 of 8 June 2000, so that its responsibility might not be questioned before it is informed by the trademark owner of the illicit use of the sign by the advertiser?*

The two following decisions appealed before the Cour de Cassation are also referred to the ECJ for preliminary ruling:

## **2. Google v Luteciel and Viaticum — 10 March 2005 / Adwords**

The Court of Appeal of Versailles has upheld a decision against Google France in relation to its AdWords program. Upon discovering that Google had sold the use of the words "bourse des vols", "bourse des voyages" and the mark BDV to their competitors through the AdWords program, Online travel agents Luteciel and Viaticum, operating

the websites La Bourse des Vols and La Bourse des Voyages, brought a trademark infringement action.

The Appellate Court found that the LA BOURSE DES VOLS, LA BOURSE DES VOYAGES and BDV marks had a low level of distinctiveness but were nevertheless valid marks. It rejected the argument that Google was merely a technical intermediary. Instead, Google was rather providing an advertising service and failed to carry out any preliminary checks regarding the reserved keywords.

### **3. CNRRH v. 2L Multimedia - 19 May 2005 / Metatags**

The Strasbourg Court of First Instance has dismissed a trademark infringement claim against a domain name hosting company called SARL 2L Multimedia, holding that 2L was not liable for use of the CNRRH's EUROCHALLENGES mark in the metatags of third-party pornographic websites located at domain names hosted by 2L.

CNRRH argued that four pornographic websites hosted by 2L were using the EUROCHALLENGES mark in their metatags. Three websites were owned by third parties, while the fourth was a third-party sub-domain of a domain owned by 2L. The Court held that 2L had no control over the content of the websites and 2L's contract with the owners of websites contains a specific clause indicating that "use of reprehensible expressions, trademarks or names of other websites is forbidden."

The following decision deals with providers setting marketplaces for third parties:

### **4. Sedo v Societe des likels Meridien (SHM) - 7 March 2007 / Auction sites**

The Paris Court of Appeal has confirmed the First Instance decision according to which Sedo GmbH was liable for trademark infringement. The Court of Appeal ordered Sedo to pay damages of € 75,000 plus costs.

While an individual used Sedo's platform to advertise the domain name "hotel-meridien.fr" for sale, Sedo was accused to assist the registrant while being fully aware that the rights of SHM were being infringed.

The Court of Appeal stressed that SHM had rights in well-known trademarks so that auctioning domain names confusingly similar to these marks and displaying commercial links on the websites associated with them constituted infringement. Sedo was liable in tort as, according to the principles of loyalty and free trade, companies should always act with extreme care in the marketplace so as not to disrupt the activities of others, even though Sedo does not buy or sell domain names, but merely acts as a marketplace for sellers and buyers to meet.

## **D. GERMANY**

### 1. Keyword advertising and law

The different forms of keyword advertising (see above A.2.) have different legal consequences under German law. If a trademark is used as keyword, but not in the banner ad, the question arises if this is to be considered a use of the sign as a characteristic (this point is still controversial). If the trademark is not only used as keyword, but also in the banner ad, this can be qualified as a use of a sign as a characteristic. Even if the use of a trademark as keyword does not constitute an infringement of trademark rights, it can be contrary to Section 1 UWG (Unfair Competition Act).

The use of generic terms as keywords could be qualified — like in domain law — as a "channelling" of the flow of customers. However, also this question is still in discussion.

The OLG (Upper District Court) Diisseldorf held that the use of a trademark as adword is not a use of a sign that may create likelihood of confusion. However, for a use of a sign as a trademark it is not necessary that the sign is visible for the average internet user. The Court stated that there is no likelihood of confusion if the advertisement clearly shows the name of the advertising company. Nor is it contrary to the principles of fair competition that an advertisement is displayed if a search engine is fed with a competitor's sign.

### 2. Liability of the search engine operator

Normally the holder of a website registers for keyword advertising via an online form. There is no possibility for the search engine operator to influence the holder's choice of keywords. Therefore the search engine operator does not "use" a sign. However, if the sign is shown in the banner ad, the search engine operator may be liable for a trademark and/or competition law infringement if he deliberately participated in the infringement. Normally such participation will be given as the placement of a banner ad is not possible without the search engine operator's cooperation. However, the operator is liable only in case that he breached his reasonable duties. Anyway, he will be liable if he knew about the infringement and did not take every possible measure to stop the infringement. If trademark rights have already been infringed by keyword advertising in the past, it is in dispute if the operator has a special duty to investigate if there is an infringement which results from the use of this keyword.

## **E. AUSTRIA**

In its decisions 4 Ob 194/05s and 4 Ob 195/05p ("Google") of 19<sup>th</sup> December 2005 the Austrian Oberster Gerichtshof (Supreme Court) first dealt with the liability of the search engine operator for infringements resulting from keyword advertising. The Oberste Gerichtshof applied the principles established in connection with the liability of a domain allocator. It held that a search engine operator is liable for infringements committed by its customers only in case that the infringement is obvious to a legal layman as well as to a legally skilled person. Therefore, a search engine operator normally is not obliged to scrutinise if the search terms used by its customers infringe a competitor's trademark or are contrary to fair competition. Such duty may exist if the

search engine operator already was given a written warning. If the infringement is obvious even to a layman, the search engine operator has to stop the infringement. Otherwise he is regarded as deliberately assisting in the infringement. In the above mentioned decision the infringement was not obvious for Google and therefore Google was not liable. The Oberste Gerichtshof did not decide on the question if keyword advertising in general is lawful.

The first decision in which the Oberste Gerichtshof rendered on the lawfulness of keyword advertising is "Wein & Co" of 20<sup>th</sup> March 2007 (17 Ob 1/07g). The defendant, a food selling company, had bought 815 keywords, among them "Wein", "Rotwein", both generic terms, and „Wein & Co". The claimant was another food selling company which used the term "Wein & Co" as a trademark and acronym. If the search engine was fed with the term "Wein & Co", an advertisement with the headline "Wein & Co" was displayed directly above the search result list. The advertisement showed the web address "weinwelt.at" in small letters and the word "Anzeige" (advertisement) in the right-most position. If the user clicked on the headline "Wein & Co", he or she was connected to the defendant's website.

A few weeks later, the advertisement was changed insofar as it was displayed on the right side of the website, showing the word "Anzeige", but not the words "Wein & Co". Between the advertisement and the search results was a vertical black line.

The Oberste Gerichtshof held that "Wein & Co" was not a descriptive sign and was therefore protected by law. At least the defendant's first advertisement was considered to infringe the claimant's trademark rights: the trademark was used as headline of the advertisement so that it created likelihood of confusion. Another reason why the Oberste Gerichtshof qualified the advertisement as a trademark infringement was that the banner "Wein & Co" showed up in the result list before the website of the trademark holder. The Oberste Gerichtshof stated that the changes made to the advertisement do not avert the risk of repetition of a trademark infringement.

However, the Oberste Gerichtshof did not deal with the question of trademark infringement if a third party's trademark is only used as keyword, but not in the banner itself (like in the defendant's second advertisement). There are still no judgments on the question if any keyword advertisement which uses signs protected by law is illegal or if it is illegal only under certain circumstances.

The same question arose in regard to the use of metatags. In its decision "Numtec-Interstahl" of 19<sup>th</sup> December 2000 (4 Ob 308/OOy), the Oberste Gerichtshof dealt with the use of a competitor's trademark as metatag. The defendant was the holder of various patents, five of which it had sold to the claimant. It used the claimant's trademark "Numtec-Interstahl" as metatag in the source code of its website. On the website there was a list of the defendant's patent rights. Regarding the five patents sold to the claimant, the sale was indicated by the words "sold to C-Aktiengesellschaft (Numtec Interstahl) in 1996".

However, the Oberste Gerichtshof did not decide on the question if the use of a competitor's trademark as metatag constitutes use in the sense of the Trademark Act. It held that the defendant had a legitimate interest in using the term "Numtec Interstahl" on its website in order to inform clients about its inventions. As "Numtec Interstahl" was

legitimately used on the website, the defendant was also allowed to use the trademark as metatag.

In the decision "Kieser Training" of 7<sup>th</sup> June 2006 (30 R 4/06p), the Upper District Court of Vienna qualified the use of a trademark as invisible meta-information about the content of the website (metatags) as a use in the sense of trademark law. The Upper District Court had to rule on a case in which the defendant carried on a centre for physiotherapy specialised on backache treatment. The company used the claimant's trademark ("Kieser Training") as metatag in the source code of its website. The website itself did not contain the trademark or information about the claimant's enterprise. The Court ruled that the use of the claimant's trademark as a metatag in the source code of the defendant's website constituted a trademark infringement as the defendant had no reasonable interest in using the trademark nor was the use in accordance with honest practices in industrial or commercial matters. A reasonable interest may be given e.g. if the trademark is used to describe one's own products as component part or equipment of a branded product. However, the use of a competitor's trademark only as metatag, but not in the visible part of the website is not in accordance with honest practices in industrial or commercial matters as metatags are intended to describe the content of the website.

It is unclear if the same principles apply to the use of a trademark for keyword advertising which is clearly identified as such. The crucial question is if the trademark is used to distinguish goods and services so that the target public understands it as an indication of the commercial origin of the goods and services. There are different opinions on this point in literature.

## **F. THE NETHERLANDS**

In the Netherlands a substantial number of decisions have been rendered concerning adwords, metatags and their relevance in relation to trademark law. Decisions from the lower courts show a wide variety in outcome. In most of the published cases the courts held that the use of a trademark as metatag or adword does not qualify as use of the trademark to distinguish goods or services, but should be viewed as so-called 'other use', i.e. use other than for the purposes of distinguishing goods or services (cf. Article 5 para 5 HD), the optional infringement criterion which has been implemented in Benelux Trademark Law. There are some but a much smaller number of cases in which the court held that the use of a trademark as metatag or adword qualifies as use of the trademark to distinguish goods or services (cf. Article 5 paras 1 and 2 HD).

Yet, the fact that the use of a trademark as metatag or adword qualifies as relevant use of a trademark does not necessarily mean that such use is in all cases held to be infringing. In some cases the court ruled that the use by the defendant did not lead to a risk of confusion with the trademark, or did not result in any unfair advantage or detriment to the trademark.

In a number of cases, where the trademark was used in the metatag or as adword by a distributor or regular dealer, the courts have ruled that such use should be deemed to have been made with due cause within the meaning of Article 5 para 2 HD or that the trademark owner could not oppose such use because of the applicability of the exhaustion principle.

Even though there is a quite sizeable collection of published cases on the subject from Dutch courts it took the Netherlands until 2007 before one case was taken to the Supreme Court of the Netherlands. The first case to reach the Supreme Court was the Portakabin case. The facts of this case are as follows.

Portakabin Limited and Portakabin B.V. are trademark owner / licensee of the trademark 'Portakabin'. Portakabin started trademark infringement proceedings - summary proceedings - against their competitor Primakabin. Portakabin and Primakabin both offer modular and moveable buildings ("cabins") for sale via advertisements published on the internet. Primakabin sells new and used cabins under its own brand 'Primakabin', but it also acts as a reseller of new Portakabin units and as a trader of second hand Portakabin units. Primakabin had a Google adwords agreement for the word 'portakabin' and several spelling variations including 'portacabin', 'portokabin' and 'portocabin'. A google search on these words prompted a sponsored link to Primakabin's website. On its website Primakabin initially used the words 'new and second hand units'. Some time later Primakabin changed this indication to 'used portakabins'.

The key question in the case is: can use of the adwords involved in search machines on the internet be regarded as use of a trademark as defined in art. 2.20 par. 1, under a, b or c Benelux Convention on Intellectual Property ('use to distinguish goods', cf. Article 5 para 1 and 2 HD) or should it be deemed so-called 'other use' as defined in art. 2.20 par. 1 under d BCIP (cf. Article 5 para 5 HD)?

The Injunctive Relief Judge in first instance and the Court of Appeal both ruled that the use of these adwords should be deemed 'other use', but denied that Primakabin took unfair advantage of the trademark. The Court of Appeal, however, adopted a more nuanced approach and ruled that Primakabin was only allowed to use the words 'used portakabins' for the purpose of making a direct link to the page on its website were it advertised used Portakabin units.

In a decision rendered on 12 December 2008, the Dutch Supreme Court decided to refer five questions to the European Court of Justice (ECJ). The five questions relate to the interpretation of Articles 5(1), 5(5), 6 and 7 HD:

- 1) does the use of a trademark of a third party as an adword constitute "use for goods and services" under the directive? In this connection the Supreme Court wishes to know whether it makes a difference if the link to the advertiser's website that appears as a result of the use of the relevant adword as a search term is displayed in the "normal" list of search results produced by the search engine, or as a sponsored link next to the list. The court also wishes to know whether it makes a difference if the offer for sale by the advertiser of goods identical to the ones covered by the trademark appears on the webpage of the search engine operator (i.e. together with the link) or on the advertiser's own website that is reached by using the link.
- 2) In case the ECJ's answer to the first question will be in the affirmative, is it possible that the trademark owner nevertheless cannot object to the use of the trademark as adword in view of the limitations of Article 6 of the directive, more in particular paras b) and c) (i.e. that the trademark is merely used as an indication of the characteristics of the relevant goods)?
- 3) In case the ECJ's answer to the first question will be in the affirmative, is it possible that the trademark owner nevertheless cannot object to the use of the

trademark as adword in view of the exhaustion rule in Article 7 of the directive, as a result of which the use of the trademark would be acceptable because the advertiser is offering for sale genuine products, including possibly second-hand products of the trademark owner?

- 4) The fourth question is whether the ECJ's answers to the first three questions also apply to possible spelling variations of the trademark used by the advertiser, as a result of which the advertiser is able to offer enhanced search options, assuming that the trademark is used in the correct spelling on the website of the advertiser.
- 5) if the answer to the first question is negative (i.e. the use by an advertiser of the trademark of a third party as adword does not constitute "use for goods and services" under the directive), is it permissible for EU Member States to maintain a national provision of trademark law under Art. 5(5) HD to prevent such use if it is being made without due cause and takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the relevant trademark.

The last question is perhaps the most interesting of all five, as it will require the ECJ to effectively deal with a provision of non-harmonised trademark law.

Obviously, the Netherlands Supreme Court is aware that similar questions have been posed to the ECJ by the courts of other EU Member States. However, it should be noted that the Dutch Portakabin case differs from the other cases. The French cases concern the liability of the internet search engine operator (Google) and not the liability of the advertiser. The Austrian case involves the use by an advertiser of another party's trademark to advertise his (the advertiser's) goods and services, whereas the Portakabin case involves the resale of genuine products, including second-hand products of the trademark owner.

## **G. SUMMARY**

Keyword advertising is treated differently in the various jurisdictions. In the United States, the courts look at whether the sale or purchase of a trademark as keyword is use of this trademark in commerce in the sense of the Lanham Act. While the courts on the west coast sometimes find that keyword advertising is use in commerce, the courts on the east coast generally do not qualify it as such.

French Courts tend to regularly condemn advertisers using competitors' trademarks in metatags or as adwords. In May 2008, the Cour de Cassation referred the case Google v. Louis Vuitton to the ECJ. Google had sold keywords associating terms like "imitation", "replicas" or "fake" with Louis Vuitton's trademarks. The Cour de Cassation referred to the ECJ the questions whether the use of a keyword amounts to trademark use and whether the sponsored links provider is not responsible before it is informed by the trademark owner of the illicit use of the sign by the advertiser.

The Cour de Cassation also referred the case Google v. Luteciel and Viaticum to the ECJ. Through the AdWords program, Google had sold the use of the words "bourse des vols", "bourse des voyages" and the trademark BDV to competitors of the online travel agents Luteciel and Viaticum which operate the websites "La Bourse des Vols" and "La Bourse des Voyages".

In the case CNRRH v. 2L Multimedia, CNRRH filed a suit against the domain name hosting company SARL 2L Multimedia because its trademark "Eurochallenges" was

used in the metatags of third-party pornographic websites located at domain names hosted by 2L. The Court of First Instance dismissed the trademark infringement claim holding that 2L was not liable for the use of "Eurochallenges" in the metatags.

Under German law, it is controversial if the use of a trademark as keyword, but not in a banner ad can be considered a use of the sign as a characteristic. If the trademark is also used in the banner ad as well, this constitutes use as a characteristic. The use of a trademark as keyword can also be qualified as contrary to Section 1 UWG.

The Austrian Oberster Gerichtshof first stated on the lawfulness of keyword advertising in 2007. It had to decide on a case in which a company used a competitor's trademark both as keyword and in the banner ad. The Oberster Gerichtshof held that this was a trademark infringement. However, it did not deal with the question if the use of a trademark as keyword, but not in the banner itself constitutes an infringement.