

TRADEMARK LAW — INFRINGEMENT LIABILITY — EUROPEAN COURT OF JUSTICE HOLDS THAT SEARCH ENGINES DO NOT INFRINGE TRADEMARKS. — Joined Cases C-236/08, C-237/08 & C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, 2010 ECJ EUR-Lex LEXIS 119 (Mar. 23, 2010).

Since the emergence of the internet, courts in the European Union, like their U.S. counterparts, have been called upon to adapt traditional trademark doctrine to new forms of commercial behavior.¹ One practice that has sparked considerable controversy is keyword-based advertising — the display of advertisements in response to terms, including trademarked ones, entered by internet users.² Recently, in *Google France SARL v. Louis Vuitton Malletier SA*,³ the European Court of Justice⁴ (ECJ) held that website operators did not violate EU trademark law by engaging in this practice.⁵ Although the ECJ reached the correct result, it needlessly relied on a novel criterion: that Google had not used trademarked keywords “in its own commercial communication.”⁶ This reasoning overlooked important elements of the factual record, sidestepped established ECJ case law, and removed a valuable judicial check on future abusive behavior. Instead, the ECJ should have followed the recommendations of its Advocate General⁷ and applied a more traditional analysis to reach the same result.

¹ In the United States, internet-related trademark litigation has mostly arisen under the Lanham Act, ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.). See, e.g., *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 124 (2d Cir. 2009). In the European Union, litigation has arisen under national trademark laws that implement First Council Directive 89/104, of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1 (EEC) [hereinafter 1989 Trademark Directive]. That directive sought to ensure that each EU country applied the same legal provisions to trademark protection. See HECTOR MACQUEEN ET AL., *CONTEMPORARY INTELLECTUAL PROPERTY* 21 (2008). The 1989 Trademark Directive was recently succeeded by Directive 2008/95, of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks, 2008 O.J. (L 299) 25 (EC). The two directives contain nearly identical language in the provisions on infringement, such as Article 5 of both directives.

² See generally Noam Shemtov, *Mission Impossible? Search Engines' Ongoing Search for a Viable Global Keyword Policy*, J. INTERNET L., Sept. 2009, at 3 (cataloging keyword-based advertising litigation in the United States and in several European countries).

³ Joined Cases C-236/08, C-237/08 & C-238/08, 2010 ECJ EUR-Lex LEXIS 119 (Mar. 23, 2010). See note 22, below, for a discussion of the differences among the three joined cases.

⁴ “European Court of Justice” is the conventional name of this institution, but officially it is simply the “Court of Justice.” See Consolidated Version of the Treaty on the Functioning of the European Union art. 251, Dec. 13, 2007, 2010 O.J. (C 83) 47, 157 [hereinafter TFEU]. The ECJ is ultimately responsible for the interpretation of the 1989 Trademark Directive, see MACQUEEN ET AL., *supra* note 1, at 21, hence its rulings are not subject to appeal.

⁵ *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶ 105.

⁶ *Id.* ¶ 56.

⁷ Opinion of Advocate General Poiares Maduro, *Google France*, 2010 ECJ EUR-Lex LEXIS 119 (Sept. 22, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:>

Google operates a free internet search engine that displays a list of “natural” results — websites algorithmically ranked in descending order of relevancy — in response to search terms, or “keywords,” entered by internet users.⁸ Google supports its free search engine with income from AdWords, its paid referencing service.⁹ AdWords displays advertisements in fields near the natural results under a heading of “sponsored links.”¹⁰ As part of the process in which advertisers select the keywords that will trigger their advertisements, Google provides information on the number of searches that feature related keywords in order to help advertisers maximize their exposure to internet users.¹¹ This feature is sometimes referred to as the “Keyword Suggestion Tool.”¹² Advertisers pay Google a fee for each internet user who clicks a website link on their advertisement.¹³

In early 2003, Louis Vuitton, a manufacturer of luxury goods,¹⁴ discovered that Google displayed advertisements of websites selling imitation products when internet users entered Louis Vuitton’s trademarks as keywords.¹⁵ Louis Vuitton brought suit against Google in a French regional court, seeking a declaration that Google had infringed its trademarks.¹⁶ The court found that Google offered advertisers the opportunity to select Louis Vuitton’s trademarks both as standalone keywords and in expressions with words such as “replica” and “copy,” possibly through its Keyword Suggestion Tool.¹⁷ On this basis, the court found Google liable for trademark infringement, and an intermediate court affirmed the ruling.¹⁸ Google appealed to the Cour de cassation.¹⁹ Seeking clarification on several issues of EU law, in particular the interpretation of the 1989 Trademark Directive,²⁰ the

62008Co236:EN:HTML. The Advocate General assists the ECJ by issuing impartial, reasoned opinions prior to the court’s ruling. See TFEU, *supra* note 4, art. 252, at 158.

⁸ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 9.

⁹ *Id.* ¶ 13. Indeed, Google relies on advertising services such as AdWords for nearly all its income. See Greg Lastowka, *Google’s Law*, 73 BROOK. L. REV. 1327, 1340 (2008).

¹⁰ *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶ 23.

¹¹ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 12.

¹² See, e.g., *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 126 (2d Cir. 2009).

¹³ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 11.

¹⁴ *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶ 28.

¹⁵ *Id.* ¶ 29. These keywords included the Community (that is, EU-level) trademark “Vuitton” and the French national trademarks “Louis Vuitton” and “LV.” *Id.* ¶ 28.

¹⁶ *Id.* ¶¶ 30–31.

¹⁷ See Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 18 & n.11.

¹⁸ *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶ 31.

¹⁹ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 19.

²⁰ The 1989 Trademark Directive applied to the national trademarks “Louis Vuitton” and “LV,” but Council Regulation 40/94, of 20 December 1993 on the Community Trademark, 1994 O.J. (L 11) 1 (EC), applied to the Community trademark “Vuitton.” Under ECJ case law, the trademark infringement provisions of Regulation 40/94 must be interpreted in the same way as those of the 1989 Trademark Directive. See Case C-62/08, *UDV N. Am. Inc. v. Brandtraders NV*,

Cour de cassation referred three questions to the ECJ for a preliminary ruling.²¹ The three questions asked, in essence, whether Google could be enjoined from using trademarked keywords or otherwise held liable for such activity.²²

In an advisory opinion,²³ Advocate General Poiares Maduro recommended that the ECJ find Google not liable for infringement under the 1989 Trademark Directive.²⁴ Making clear his desire to adhere to traditional European trademark analysis²⁵ and citing well-established ECJ case law,²⁶ the Advocate General outlined a four-prong test for infringement. First, a defendant's use of a trademark must lack the proprietor's consent.²⁷ Second, the use must happen in the "course of trade."²⁸ Third, the use must relate to goods or services "identical or similar" to ones covered by the trademark.²⁹ Fourth, the use must affect or be liable to affect the functions of the trademark.³⁰ Particularly important among these functions is the "essential" one of guaranteeing

2009 E.C.R. I-1279, ¶ 42. Hence, discussion in the text is limited to the 1989 Trademark Directive.

²¹ See *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶ 32. Under the preliminary ruling procedure, courts in the European Union that need clarification on a matter of EU law may request that the ECJ rule on the matter. See TFEU, *supra* note 4, art. 267, at 164. After the ECJ ruling, the case returns to the referring court for further adjudication.

²² See *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶¶ 43, 106. The Cour de cassation also referred questions from two additional French cases against Google: Case C-237/08, *Google France SARL v. Viaticum SA*, 2010 ECJ EUR-Lex LEXIS 119 (Mar. 23, 2010); and Case C-238/08, *Google France SARL v. Centre National de Recherche en Relations Humaines (CNRRH) SARL*, 2010 ECJ EUR-Lex LEXIS 119 (Mar. 23, 2010), which the ECJ considered jointly with Louis Vuitton's case, C-236/08. See *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶¶ 37, 41. These cases concerned trademarks registered for travel-arrangement and matrimonial services, respectively. See *id.* ¶¶ 33, 38. Unlike Louis Vuitton's case, the joined cases concerned the advertisements of competitors, not imitators. *Id.* ¶ 42. In addition to Google's liability for trademark infringement, the liability of the underlying advertiser was also at issue in the matrimonial services referral. *Id.* ¶ 44.

²³ Although not binding, the Advocate General's opinion carries significant persuasive authority. JOSEPHINE STEINER & LORNA WOODS, *EU LAW* 45 (10th ed. 2009).

²⁴ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶¶ 113, 125.

²⁵ See *id.* ¶ 48. In particular, the Advocate General noted that the U.S. doctrine of "contributory infringement" is "foreign" to trademark protection in Europe. *Id.* In the United States, a "knowing participant" in another's trademark violation can be held liable under this doctrine. See *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231, 1245 (11th Cir. 2007). Indeed, some AdWords suits against Google in the United States have been brought under a theory of contributory infringement. See, e.g., *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 701 (E.D. Va. 2004) (alleging both direct and contributory infringement).

²⁶ E.g., Case C-17/06, *Céline SARL v. Céline SA*, 2007 E.C.R. I-7041.

²⁷ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 54.

²⁸ *Id.*

²⁹ *Id.* For trademarks with a reputation, like Louis Vuitton, the 1989 Trademark Directive gives member states the option to waive the "identical or similar" requirement in their national laws. See 1989 Trademark Directive, *supra* note 1, art. 5(2), at 4.

³⁰ See Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶¶ 54, 93-113.

the origin of goods or services.³¹ Uses that raise a likelihood of confusion undermine this “essential function.”³²

The Advocate General analyzed AdWords as two separate uses: one when Google allowed advertisers to select keywords initially and a second when Google displayed advertisements in response to keywords entered by internet users.³³ Louis Vuitton consented to neither use,³⁴ and both uses occurred in the course of trade, in the sense that at both stages Google was performing a commercial activity with the object of profiting from advertising fees.³⁵ However, only the display of advertisements fulfilled the third prong of the infringement test because only at that stage was a link established between the trademarked keywords and goods that were “identical or similar” to Louis Vuitton’s products.³⁶ In contrast, at the earlier selection stage no such link was established because the marketed service, inclusion in AdWords, was neither similar nor identical to Louis Vuitton’s goods.³⁷

Hence, the Advocate General reached the fourth prong of the infringement test only with respect to the second use, the display of advertisements. He found that such display was not sufficient to undermine the essential function of trademarks — to guarantee the origin of goods — because it did not lead to confusion.³⁸ Although the Advocate General acknowledged that advertisers paid for the benefit of the “expectation of being relevant to the search,”³⁹ he emphasized that search results often disappointed the particular expectations of individual users.⁴⁰ For such reasons, internet users assessed the origin of goods or services only on the basis of the content of the advertisement and, ultimately, the advertised websites.⁴¹

Sitting as a Grand Chamber,⁴² the ECJ followed the Advocate General’s recommendation in finding Google not liable, but relied on

³¹ *Id.* ¶ 54.

³² *Id.*

³³ *Id.* ¶ 55.

³⁴ *Id.* ¶ 54.

³⁵ *Id.* ¶¶ 61, 76.

³⁶ *Id.* ¶¶ 78–79.

³⁷ *Id.* ¶¶ 66–67.

³⁸ *Id.* ¶ 92.

³⁹ *Id.* ¶ 90.

⁴⁰ *Id.* ¶ 88.

⁴¹ *Id.* ¶ 91. The Advocate General’s opinion continued by examining whether Google’s behavior jeopardized functions other than the essential function of guaranteeing origin. These functions include guaranteeing quality and facilitating communication, investment, or advertising. *Id.* ¶¶ 94–95. For trademarks with a reputation, such as those owned by Louis Vuitton, defendants may incur liability if their use undermines such additional functions. *Id.* The Advocate General concluded that Google’s use did not undermine them. *Id.* ¶ 113.

⁴² The Grand Chamber consists of a panel of thirteen of the twenty-seven ECJ judges, and Grand Chamber hearings are held when a case is particularly important or complex. STEINER & WOODS, *supra* note 23, at 44.

different reasoning. Rather than applying the full four-prong trademark infringement test, the court focused exclusively on “use in the course of trade,” finding it unnecessary to reach the other prongs.⁴³ The court acknowledged that Google carried out “a commercial activity with a view to economic advantage” when it stored keywords and displayed advertisements on the basis of those keywords.⁴⁴ However, the ECJ reasoned, “use” in the sense required by the 1989 Trademark Directive “implies, at the very least, that [a defendant] uses the sign in its own commercial communication.”⁴⁵ Because AdWords failed to meet this test, Google had not used the trademarked keywords at all — instead, it had merely created the “technical conditions” for others to use them.⁴⁶

The ECJ reached the correct result in *Google France*, but its reasoning inappropriately relied on the novel criterion that Google could be liable for infringement only if it used trademarked signs “in its own commercial communication.” As an initial matter, it is important to examine the meaning of this test. The phrase “commercial communication” appears in neither the 1989 Trademark Directive nor the prior ECJ case law on trademarks.⁴⁷ Within the *Google France* ruling, however, the court used the phrase in the context of another EU law, the Electronic Commerce Directive.⁴⁸ That directive defines “commercial communication” as “any form of communication designed to promote, directly or indirectly, the goods, services or image of a company . . . pursuing a commercial . . . activity.”⁴⁹ The “own commercial communication” test therefore limits liability to third parties that use trademarks to promote, directly or indirectly, their *own* goods, services, or image.⁵⁰ Given that the ECJ was adapting traditional trademark

⁴³ *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶¶ 50–59. In contrast to its analysis of Google’s conduct, the court reached the remaining prongs when examining the liability of *advertisers* (AdWords clients) for trademark infringement. *Id.* ¶¶ 60–98.

⁴⁴ *Id.* ¶ 53.

⁴⁵ *Id.* ¶ 56.

⁴⁶ *See id.* ¶¶ 56–57.

⁴⁷ *See, e.g.*, Case C-17/06, *Céline SARL v. Céline SA*, 2007 E.C.R. I-7041; Case C-206/01, *Arsenal Football Club plc v. Reed*, 2002 E.C.R. I-10273; Case C-425/98, *Marca Mode CV v. Adidas AG*, 2000 E.C.R. I-4861.

⁴⁸ Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 (EC) [hereinafter *Electronic Commerce Directive*]; *see, e.g.*, *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶ 86 (citing *Electronic Commerce Directive, supra*, art. 6, at 11).

⁴⁹ *Electronic Commerce Directive, supra* note 48, art. 2(f), at 9.

⁵⁰ By requiring that defendants promote their *own* services as a condition of incurring liability, the ECJ may have moved EU trademark law closer to the “trademark use” theory proposed by some U.S. legal scholars. *See* Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 805 (2004) (“It is the use of the mark to brand or advertise the defendant’s services or to suggest an affiliation with the plaintiff — so-

doctrine to internet commerce, it may at first seem appropriate that the court crafted a test based on a concept from the Electronic Commerce Directive. Upon closer examination, however, it becomes apparent that the court's reasoning was faulty for three reasons.

First, parts of the record suggest that Google may have been promoting its *own* services through the activities at issue, meeting the court's test. Through the Keyword Suggestion Tool, Google provided advertisers with information on the number of searches featuring related keywords so that they could maximize their exposure.⁵¹ By displaying additional keywords, Google encouraged advertisers to use its services to a greater extent by supplementing their initial selection. Hence, if Google ever presented Louis Vuitton trademarks in its Keyword Suggestion Tool, it would be difficult to escape the conclusion that Google used them to promote its *own* service, AdWords, thereby meeting the test set by the ECJ.⁵² More broadly, it is possible to view the search engine's natural results as a form of commercial communication, in the sense that advertisers observing that Google is a popular provider of high-quality search results would be more likely to become its customers.⁵³ Since Google uses the trademarked keywords to generate these results, which in turn promote AdWords, the company uses these signs to promote its own services.

Second, the court's reasoning departed from its well-developed trademark jurisprudence. In *Google France*, the ECJ incorporated the "own commercial communication" criterion into the "use in the course of trade" prong.⁵⁴ In previous case law, however, the court examined no such criterion under this prong. Instead, it merely inquired whether a defendant had used a sign "in the context of commercial activity with a view to economic advantage."⁵⁵ Indeed, about a year before it

called 'trademark use' — that triggers trademark law."). Indeed, Google's defenders in U.S. lawsuits have asked courts to apply precisely such a theory. See Brief of Amici Curiae Intellectual Property Law Faculty in Support of Affirmance at 8–12, *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009) (No. 06-4881-cv), 2007 WL 6475455. Due to unfavorable prior case law, however, it seems unlikely that the ECJ will fully embrace the "trademark use" view. See *Arsenal Football Club*, 2002 E.C.R. I-10273 (finding that a souvenir merchant could be liable for infringement despite the merchant's special measures to avoid using marks as a brand and to disavow affiliation with the trademark proprietor, a football club).

⁵¹ Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 12.

⁵² Indeed, in finding that Google's practices could satisfy the "use in commerce" prong of a direct infringement claim by trademark proprietor Rescuecom, the Second Circuit emphasized that "Google encourage[d] the purchase of Rescuecom's mark through its Keyword Suggestion Tool." *Rescuecom*, 562 F.3d at 129.

⁵³ See Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 77 ("Natural results are not provided out of charity: they are provided because, as was mentioned above, AdWords operates within the same context by offering some sites added exposure. The value of this exposure depends on the use of the search engine by internet users.").

⁵⁴ *Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶¶ 50–59.

⁵⁵ See, e.g., *Arsenal Football Club*, 2002 E.C.R. I-10273, ¶ 40.

decided *Google France*, the ECJ found that a defendant could violate EU trademark law *without* having promoted its own image, goods, or services. In *UDV North America Inc. v. Brandtraders NV*,⁵⁶ an online broker entered into a contract to sell Smirnoff Ice beverages on behalf of a vendor that had advertised them on the broker's website.⁵⁷ The contract did not mention Smirnoff Ice, but these words appeared in a confirmation letter to the vendor and a later invoice to the purchaser.⁵⁸ Focusing on these business papers, the ECJ found that the broker could be held liable for trademark infringement despite never having owned the beverages.⁵⁹ The broker's contract of sale and remuneration sufficed to satisfy "use in the course of trade."⁶⁰ This result is in tension with the reasoning of *Google France* in at least two ways. The broker in *UDV* lacked ownership, and the business papers at issue merely confirmed and invoiced an already completed sale, rendering it unlikely that they "promoted" any goods at all.

Third, the court's reasoning in *Google France* is problematic because of its potentially negative practical consequences. By terminating its inquiry at the threshold question of "use in the course of trade," the court did not even examine whether Google's behavior could undermine the essential function of trademarks, to guarantee the origin of goods and services.⁶¹ This informational function lies at the heart of trademark law.⁶² By shielding Google from scrutiny, the ECJ left open the door for future misbehavior.⁶³ For example, suppose that, as a bonus for its most loyal clients, Google modified its natural results so that on occasion the link to a trademark proprietor's website diverts users to an advertiser's page. This behavior would surely cause significant confusion, yet it would be difficult to attribute to the underlying advertiser, as opposed to Google itself. Under the court's analysis, however, Google would still be immune from trademark infringement

⁵⁶ Case C-62/08, 2009 E.C.R. I-1279.

⁵⁷ *Id.* ¶¶ 13–14. "Smirnoff Ice," like "Vuitton," is a Community trademark, *id.* ¶ 5, but the difference between national and Community trademarks, as already noted, is immaterial for purposes of the relevant trademark infringement provisions, *see supra* note 20.

⁵⁸ *UDV*, 2009 E.C.R. I-1279, ¶¶ 14–15.

⁵⁹ *Id.* ¶¶ 37–41, 54.

⁶⁰ *See id.* ¶¶ 44–46.

⁶¹ *See Google France*, 2010 ECJ EUR-Lex LEXIS 119, ¶¶ 59, 77.

⁶² Commentators have long justified the existence of trademarks by pointing to their "informative function" in helping consumers identify the source of goods. *See, e.g.*, Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L.J.* 1165, 1185 (1948). More recently, scholars have translated this basic intuition into the language of law and economics. *See, e.g.*, William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & ECON.* 265, 275–80 (1987).

⁶³ This danger was also identified by the Second Circuit, which suggested that search engines could generate confusion by automatically diverting users to advertisers' websites or by including advertisements directly in the natural results of searches. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 130 & n.4 (2d Cir. 2009).

liability.⁶⁴ By removing a check on such abusive behavior, *Google France* undermined what scholars have called the “valuable regulatory role” of trademark law in the context of search engines.⁶⁵

The ECJ had good reason to find Google not liable. AdWords provides information that allows consumers to benefit from a competitive internal market, an important goal of EU trademark law.⁶⁶ The court’s ruling protected Google from national courts that had reached “wildly” divergent conclusions regarding its liability,⁶⁷ and it ultimately allowed Google to adopt more uniform business practices throughout Europe.⁶⁸ The Advocate General’s opinion demonstrates, however, that a more traditional analysis could have avoided the flaws in the court’s reasoning while still achieving the same result. The Advocate General focused squarely on the right issue — whether AdWords undermined the functions of trademark law — and found no liability primarily because internet users were not confused.⁶⁹ Traditional doctrine would have served the ECJ well in *Google France*, even in the age of the internet.

⁶⁴ It is important to note, however, that compromising the integrity of its search results could jeopardize Google’s standing in the search engine market, where operators compete on relevancy. It is precisely on this logic that many scholars advocate curtailing the scope of trademark law and leaving the search engine market to self-regulate. See, e.g., Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 590–93, 595–96 (2005). Even if these scholars are correct and markets are sufficiently competitive at present, foreclosing the possibility of regulation through trademark law ties the hands of courts if the market structure ever changes.

⁶⁵ Graeme B. Dinwoodie & Mark D. Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1635 (2007); see also Lastowka, *supra* note 9, at 1410.

⁶⁶ See 1989 Trademark Directive, *supra* note 1, at 1; Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶ 112; Laure Marino, *Google au Pays des Publicités: Du Droit des Marques au Droit de la Responsabilité*, 2010 SEMAINE JURIDIQUE 1190, 1191 (Fr.).

⁶⁷ See Jonathan Cornthwaite, *To Key or Not to Key? The Judgment of the European Court of Justice in the Google France AdWords Cases*, 2010 EUR. INTELL. PROP. REV. 352, 352 (“The national courts of various Member States reached wildly different conclusions [when applying] trademark law [that] is supposed to have been harmonised throughout the European Union.”).

⁶⁸ See Matthew Saltmarsh, *Google Will Sell Brand Names as Keywords in Europe*, N.Y. TIMES, Aug. 5, 2010, at B7.

⁶⁹ See Opinion of Advocate General Poiares Maduro, *supra* note 7, ¶¶ 82–92, 107; cf. J.G. Wentworth, S.S.C. Ltd. P’ship v. Settlement Funding LLC, No. 06-0597, 2007 WL 30115, at *6 (E.D. Pa. Jan. 4, 2007) (concluding that the evidence could not reasonably support a finding that keyword-based advertising resulted in a likelihood of confusion). Empirical studies support this logic. See Jacob Jacoby & Mark Sableman, *Keyword-Based Advertising: Filling in Factual Voids* (GEICO v. Google), 97 TRADEMARK REP. 681, 750 (2007) (concluding based on survey data that Google’s practices did not confuse internet users about the fact that advertisers were not affiliated with a trademark proprietor).