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Trade Mark Use in Keyword Advertisements in the United States and European Union

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Abstract

The rapid development of online keyword advertising has triggered a series of trade mark disputes in the United States and Europe. This Article analyses the legal disputes concerning the unauthorised use of trade marks in the keyword advertisements, in particular those in *Rescuecom Corp. v. Google Inc.* in 2009 and in *L'Oréal SA & Ors v. eBay International AG & Ors* in 2011. As to the trade mark infringements regarding keyword advertisements, those sued by trademark owners include search engine operators, online marketplace operators, and those involved in promoting online sales of products bearing signs identical or similar to third party trade marks. As regards the types of infringement concerned, those who make unauthorised use of trade marks may be held responsible for primary infringement in certain circumstances, and in the others, the infringers may be held responsible for joint torfeasorship or contributory infringement. As to what constitutes trade mark infringement, the key standards include “use in commerce (or in the course of trade)” and “likelihood of confusion”, which can be found in the US law and in the

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EU trade mark regime. This Article focuses its attention on the issues concerning the first standard, which have proved to be extremely controversial as far as the *Rescuecom* and *L'Oréal* cases are concerned.

Keywords: Keyword Advertisements, Trade Mark Infringement, Trade Mark Use, Likelihood of Confusion