

## Trade Mark Ruling – Interflora Comes Up Smelling of Roses

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The High Court has given its judgment in the now five-year old trade mark dispute between Interflora and Marks and Spencer (M&S). The dispute centred on the use of trade marks as keywords in search engine advertising. The Court found for Interflora, the trade mark owner. However, this ruling does not necessarily mean that businesses must stop using their competitors' trade marks as keywords in online advertising.

### Background

Interflora operates the best known flower delivery network in the UK. It owns both a UK and a Community Trade Mark for the word "INTERFLORA". Both Interflora and M&S, the well-known retailer, operate Internet websites which take orders for the delivery of flowers.

The dispute between the parties arose in May 2008 when M&S began to use "Interflora" as a keyword for advertising on Google. This meant that when a user typed "Interflora" into Google's search engine, M&S adverts for its flower delivery service were displayed in the search results as sponsored (or paid for) links, alongside the "natural" service results. Interflora's own advert appeared in the natural search results. Interflora alleged that M&S's use of "Interflora" as a keyword amounted to trade mark infringement, pursuant to Article 5(1)(a) of the Trade Marks Directive (89/104/EEC) and Article 9(1) of the Community Trade Mark Regulation (207/2009/EC). Both Articles provide that to use a word identical to another's trade mark for identical goods without the trade mark owner's consent amounts to trade mark infringement. Interflora issued proceedings relying on these two Articles.

### CJEU Involvement

The evolution of the Internet, and website use, has thrown up a lot of new, never before considered, legal issues, and this dispute was no exception. Whether M&S's actions amounted to infringement was a relatively new question for trade mark law. Accordingly, when this dispute first came before the High Court, the judge decided to refer it to Europe's highest court, the Court of Justice of the European Union (CJEU), for a ruling on what the law should be in this area. That ruling was given in 2011 ([read our briefing on that ruling](#)). The High Court's latest judgment is an application of that ruling on the law to the facts of the dispute between Interflora and M&S.

### The Ruling

Applying the law as stated by the CJEU, the High Court ruled in Interflora's favour and found that M&S's use of "Interflora" in keyword advertising amounted to trade mark infringement. The Court found that the M&S adverts displayed when the word "Interflora" was used as a search term did not enable reasonably well-informed and reasonably attentive Internet users, or enabled them only with difficulty, to ascertain whether the service referred to in the adverts originated from Interflora, from M&S as an undertaking economically linked with Interflora or from M&S as an independent third party. A significant proportion of consumers who searched for "Interflora" and then clicked on the M&S advert displayed were led to believe, incorrectly, that the M&S flower delivery service was part of the Interflora network, resulting in an adverse effect on the origin function of Interflora's trade marks.

## Relevant Factors

In reaching this decision, the Court took a number of factors into account including the general lack of awareness amongst consumers of whether M&S was part of the Interflora network and the fact that the M&S adverts themselves did nothing to inform the consumer that there was no connection between M&S and Interflora. In addition, the Court was presented with evidence from six witnesses who had seen the M&S advert and believed that there was an Interflora/M&S connection.

However, what appears to have been decisive in this case was the unique nature of the Interflora network. Interflora has a number of tie-ups with some of the major high street retailers, including Tesco and Sainsbury's. There was every reason, therefore, for consumers typing in "Interflora" and presented with M&S adverts to believe that there was a similar tie-up here. In addition, the Interflora network comprised many independent retailers. Each was contractually permitted to use the Interflora branding but, in reality, did so to a greater or lesser extent depending on personal choice. This meant that it was still possible for consumers to believe that there was a link between Interflora and M&S even though the M&S advert itself contained no Interflora branding.

## Implications of the Ruling

The judgment is heartening for trade mark owners. It shows that, contrary to previous indications, the courts are, in principle, willing to interpret the law in this area in their favour. In this case, the judge found that a significant proportion of Internet users would not understand the distinction between natural search results and paid-for adverts. He was also satisfied that instances of only "initial confusion" (consumers believing there was a connection between M&S and Interflora when first presented with M&S's advert, but realising there was no connection after clicking through to the M&S advert) and only six instances of ongoing confusion were sufficient to make out Interflora's case. All of these are factors which would assist a trade mark owner to succeed in a similar claim.

However, advertisers should not necessarily stop using their competitors' trade marks for keyword advertising. The ruling in this case is fact specific, the pivotal issue probably being the unique nature of the Interflora network and the possibility of connections between different businesses that that network suggested. Furthermore, the judge made clear in the judgment there is nothing inherently or inevitably objectionable about targeted keyword advertising<sup>1</sup> on the Internet and whether it was lawful depended only on the application of the law as laid down by the CJEU. An advert which enables reasonably well-informed and reasonably attentive Internet users to ascertain that the goods or services referred to in the advert originate from a third party, not the trade mark owner, will be lawful. And it is at least arguable that a simple advert which clearly states the advertiser's name and associated URL, and does nothing else to suggest a link with the trade mark owner, would be lawful in the absence of an Interflora-style network of businesses.

The issue is not yet settled however since the courts have halted the action ordered by the judge and granted M&S leave to appeal.

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<sup>1</sup> i.e., to distinguish from cookie or other targeted advertising, which presumably Arnold J was not talking about.