

# Court rules in favour of M-Systems

Cochrane Steel had sought to interdict M-Systems for passing off because it bid on CLEARVU as a Google keyword generating adverts for its own products.



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The court held that where the use is solely as a keyword (i.e. it is not visible in the advert triggered) there is no likelihood of confusion or deception and therefore passing off does not occur.

The court also rejected an attempt to establish 'leaning on' as a new species of unlawful competition. The interdict application was rejected and costs were awarded to M-Systems. The decision was handed down on 29 October in the Gauteng High Court by Judge Nicholls.

"I am pleased with the decision because it promotes choice and competition which are good for the consumer, especially when there is no likelihood of confusion - which the Judge found to be the case," commented Timo Meintjes of M-Systems.

"This is a first for Africa but the ruling is in line with international case law," according to Darren Olivier and Ian Learmonth of Adams & Adams who represented M-Systems.

## Importance of case

This case is vitally important because:

- it is the first case in Africa on whether the bidding on a competitor's trade mark for keyword advertising is unlawful, an IP issue of much national and international debate;
- it provides further clarity on the scope of passing off, in particular that the concept of 'leaning on' is not part of our law and that keyword bidding (without more) is unlikely to be trade mark infringement;
- for Google, it supports their advertising model for South Africa; and
- it is of interest to all brand owners that use a website or other online marketing platforms.

Some take home points for brand owners are:

- Bidding on a competitor's trade mark as a keyword is not generally unlawful unless:
- there is a likelihood of confusion, e.g. counterfeit site or there is use of the mark in the text of the sponsored link or advert which leads to confusion; and
- the trade mark is registered and well known, and the owner is able to establish that there is an unfair advantage taken, or dilution can be shown.
- Legal advice should be sought if a competitor's trade mark will be used for keyword advertising.
- Brand owners need take steps to combat the risk of aggressive adwords campaigns by competitors when formulating their marketing strategies.

The case is open to a request for leave to appeal.

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