

The Brazilian Superior Court of Justice issues its first decision on Sponsored Links and Unfair Competition Acts.

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Over the past years, the internet has established itself as a new and important vehicle for disseminating information, increasingly occupying a spotlight position that usually belonged to other media sources such as radio, television, newspapers and magazines. Such importance as a form of media molded the internet into a powerful new market for publicity.

Being a vast and robust knowledge repository with a worldwide range, with an access that spreads at an alarming speed, making it possible for different people, located in the most remote places to easily and immediately connect with each other, the internet has transformed into an important source of knowledge dissemination as well as a communication instrument, becoming a strong ally of society in its exercise of the constitutional right of free speech and access to information.

However, the decentralized nature of this media has led to an immense volume of information, causing the search engines, by way of keywords, to become extremely fundamental for locating and organizing information on the web. This way, the key search mechanisms present themselves as important allies in the organization and access to such information.

It so happens that the main source of income from these search engines on the internet is the result of the commercialization of keywords in sponsored service links.

In this scenario, the internet being an important tool for visual communication and a showcase of signals and symbols, its resources in some cases may cause conflicts with intellectual property rights. And it was this very conflict that the recent decision issued by the Brazilian Superior Court of Justice (BSCJ) sought to clarify.

Recently, the BSCJ recognized unfair competition in the behavior of a company that used a competitor's trademark as a keyword in a sponsored link service, as a way to obtain privileged results in searches and direct potential new clients to its services.

The lawsuit was filed by a tourism company, which claimed that when a user searched Google using its name as a keyword, the search engine showed as the first result the website of another tourism company – providing the same type of service and travels.

In the first instance, the court recognized the misuse of the plaintiff's trademark due to the practice of unfair competition and set the compensation for moral damages at R\$ 15.000,00 (fifteen thousand reais). Such amount was reduced to R\$ 10.000,00 (ten thousand reais) by the São Paulo's Court of Appeals.

In the special appeal, the defendant company claimed that attracting customers is inherent to any economic activity, especially in the context of e-commerce. For the defendant, considering any diversion of customers as being repressible would imply the elimination of free competition itself.

The rapporteur of the special appeal, Minister Luis Felipe Salomão stated that "(...) *the use of sponsored links, in the way engendered by the appellant, is conduct repressed by article 195, items III and V, of the Industrial Property Law and by article 10 bis of the Paris Union Convention for the Protection of Industrial Property*".

Minister Luis Felipe Salomão recalled that article 195 of the Industrial Property Law provides as a crime of unfair competition, among other conducts, the use of fraudulent means to divert, for one's own or someone else's benefit, another's clientele.

The minister also commented that, although it is lawful to hire a service to prioritize search results, the lack of parameters, rules or prohibitions of keywords in the actions advertising may result in intellectual property disputes. Minister Salomão considered that the use of another company's trademark as a keyword to target consumers of the competing product or service is, as understood by the TJSP, capable of causing confusion as to the activity carried out by both companies.

"Stimulation of free competition, inside or outside the world wide web, must know limits, and it is inconceivable to recognize lawful conduct that causes confusion or purposeful association with the trademark of a third party operating in the same market field", concluded the minister.

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