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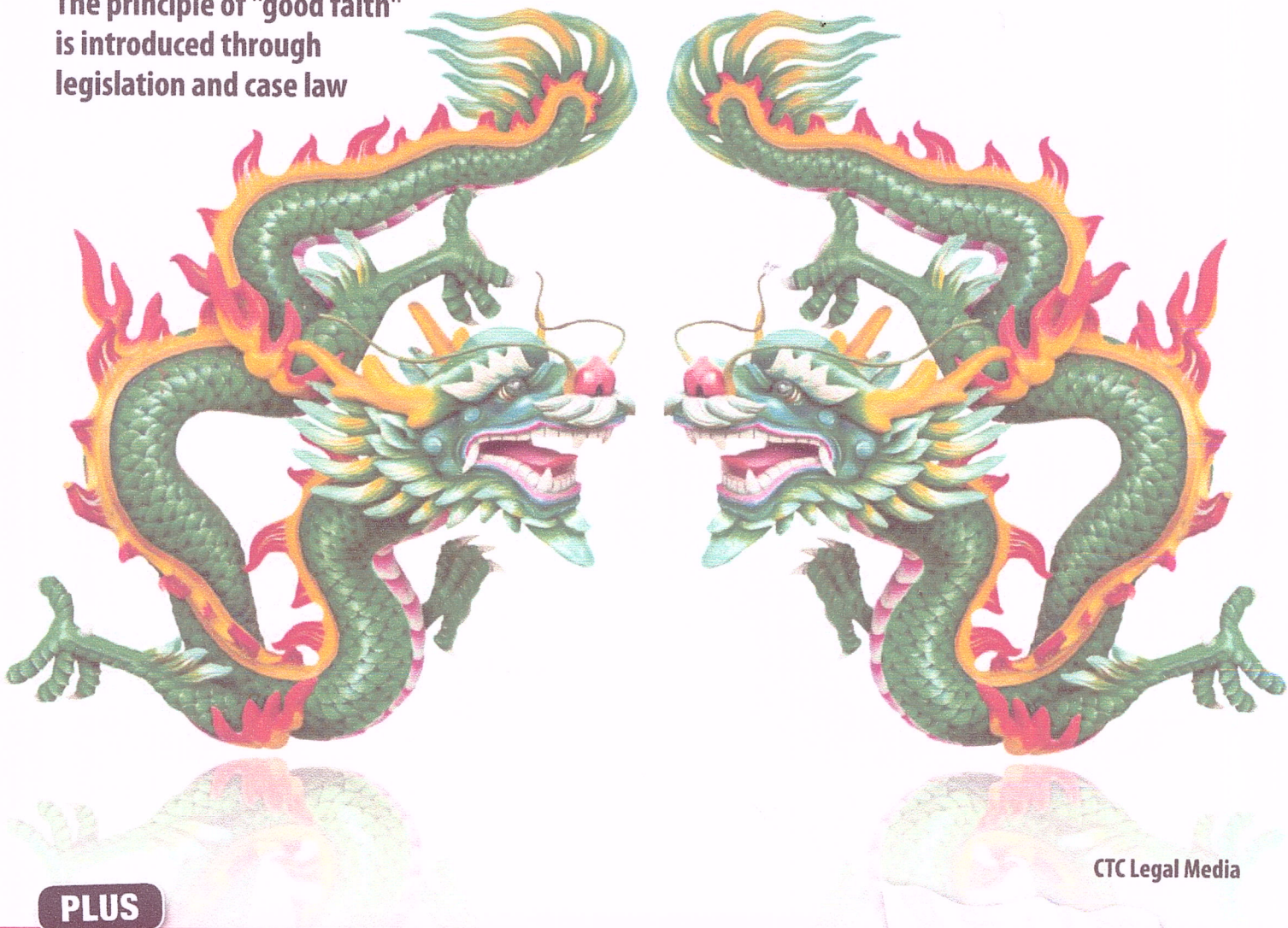
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Search engines - sponsored links

Marianna Furtado de Mendonça of Montaury Pimenta, Machado & Viera de Mello investigates whether search engines infringe trademarks in the process of providing service sponsored links.

Over the past 15 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 the radio, television, newspapers and magazines. Such an importance as a form of media molded the internet into a new and powerful market for publicity.

The internet is a vast and robust knowledge repository with a worldwide range, with an access that disseminates at an alarming velocity, making it possible for different people, located in the most remote of places to easily and immediately connect to one another. As a result the internet has transformed into an important source of dissemination of knowledge as well as an instrument of communication, becoming a strong ally of society in its exercise of the constitutional right to 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 the localization and organization of information in the web. This way, the mechanisms of key search present themselves as important allies in the organization and access to such information.

It so happens that the main source of income for these search engines is from the commercialization of keywords in sponsored service links. Sponsored links, in a very brief summary, is a service offered by the search engines which make it possible for products and service ads to be redirected to the consumer who searches for words that are thematically linked to a determined ad. Sponsored links are highly specialized and efficient advertising and marketing tools.

In the early days of the internet, advertising on websites was basically spaces purchased by advertisers, known as *banners*, which were unprofitable to the information providers and were very similar to what was seen previously in traditional media ads such as newspapers, magazines and television, having no user interaction. However, the rapid development of the internet and its increasingly range, caused companies to invest large sums into the research and development of innovative solutions that attracted both new investors and advertisers. It did not take long for such providers to identify that the closer a particular ad was to the information originally sought by the user, the greater the efficiency of that particular ad, and, consequentially, the return provided to the advertiser.

Such a perception led to the creation of the concept of ads in the format of sponsored links, where advertisers would pay a certain amount for keywords that were related to their products or services and, with each search generated by that specific word, sponsored links would appear in highlight, referring back to the advertiser's website.

The success of such a formula was immediate. Until then, none of the traditional broadcasting media had managed to establish such a precise relationship – segmented and specialized – between adverts and their target audience. As a result the market for sponsored links transformed into a billion dollar revenue source for search engine providers, which associated the effectiveness indexes of an ad to the number of user clicks, allowing the advertisers an exact notion of how successful a keyword choice could be.

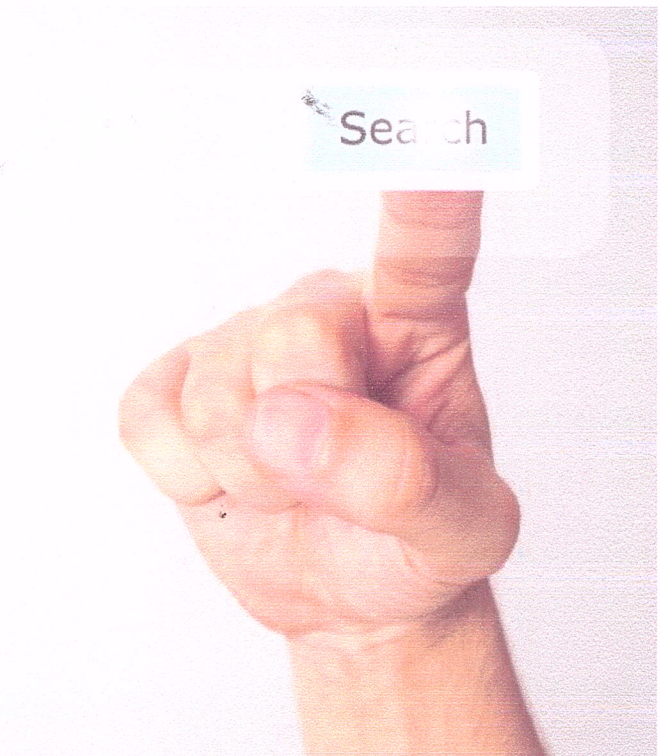
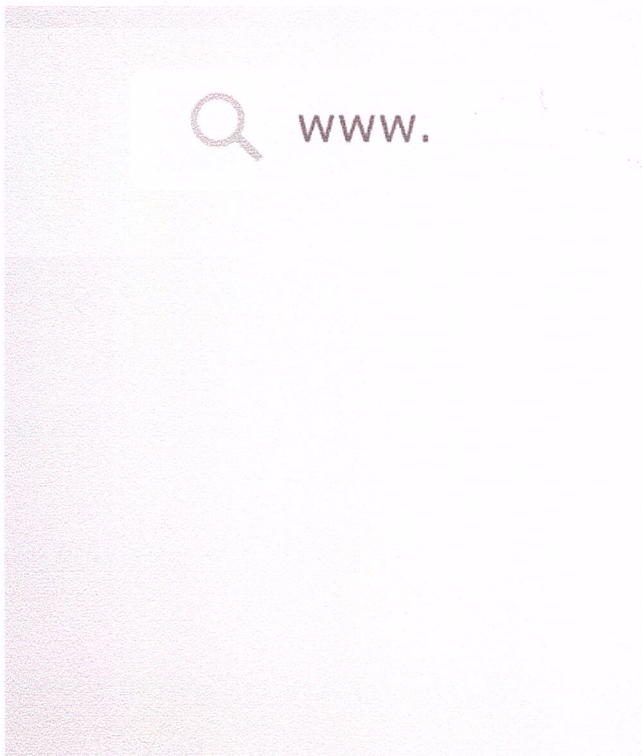
In this scenario, with the internet acting as an important tool for visual communication and a showcase of signals and symbols, its resources in some cases may cause conflicts with intellectual property rights. In addition, among the various forms of branding on the internet, the use of keywords so that ads for services or products from certain advertisers are scored in the results of the so-called sponsored links, has currently caused significant controversy¹.

It is this very conflict that this article seeks to investigate. More specifically, this article aims to answer whether the use of trademarks as keywords in sponsored link services constitutes trademark violation by the search engines².

Résumé

Marianna Furtado de Mendonça, Partner and Litigation Attorney of Montaury Pimenta, Machado & Viera de Mello

Marianna has a L.L.M degree in Intellectual Property and Innovation at the Brazilian Patent and Trademark Office Academy and graduate degree Civil Procedure Law and Intellectual Property Law. The firm is one of Brazil's leading Intellectual Property Law Firms providing efficiency, integrity and expertise on a full range of IP legal issues.



The mark role

According to item I of article 123 of Brazilian Law 9279/1996 (Intellectual Property Law – IPL), “a product or service mark is that which is used to distinguish a product or service from one having a different origin, that is identical, similar or akin”. Perhaps, it is for this reason that specialized doctrine refers to original brand functions as simply indicating the source of the product or service as well as to distinguish them from identical products or services, similar or related services offered by competitors.

According José de Oliveira Ascensão³, there is no mistaking the function of determining the origin and the distinctive function, suggesting that a distinction should be made between the two functions, since the purpose of determining origin is that which occupies the aforementioned item I of Article 123 IPL. The distinguishing feature would be the attribution of a mark in order to determine the capacity of distinguishing a series of products and services.

There is, however, a more current view of these signals that expands these functions. From a modern concept, it can be observed that the marks not only serve to identify the source or provide uniqueness to the product or service. According to Professor Denis Borges Barbosa:

“When designating a product, goods or service, the mark is traditionally used for calling out its origin and, considering other competitive marks for other competing items, indicates the existing differences. But used as propaganda, in addition to identifying the origin and the relative differences in the face of competitors, it should primarily encourage the consumption or increase the value of the business activity of the holder.”⁴

According to the Professor, “the brand can be a very powerful advertising tool”⁵. This is because, despite not being granted to fulfill this role, a mark is easily assimilated by consumers if conveyed by the media. However, a mark is not protected by law to carry out an advertising function. The performance of such a function is a consequence of the fact “that nothing reverberates in the legal world. Therefore, from this function there are no effects of law”⁶.

Moreover, in addition to the origin determining function and uniqueness function, both referring to the aforementioned Article

123 of the IPL, the mark also has an economic function. According to Denis Borges Barbosa, American scholars identify two main bases of the economic function: the first would be that the mark would serve to reduce the search effort of the consumer and the second would be relative to the creation of incentives in order to establish and maintain product quality⁷.

Thus, the mark shall have a significant economic role, becoming an element of approximation in relation to the consumer, seeing that the consumer is able to identify the presence of the features they desire, trusting that the entrepreneur who placed the product on the market, or who offers a service, will conduct a proper quality control in order to maintain their consistency.

However, contrary to what occurs with the manual of an electronic device or the instructions for a certain solution (containing specific information about its object) the mark “provides” only superficial information that a particular product or service has the qualities and characteristics specified in the message of an ad. Furthermore, on the other hand, the mark provides the consumer with no need for reflection and also calls for less effort, in addition to inducing consumption⁸.

According to Denis Borges Barbosa, “advertising techniques and the creation of a market for products with induced differentiation altered the balance of the mark trade system”⁹, since mark protection turns more towards ensuring the return of investment made in the image of the mark rather than on the quality and characteristics of the product identified by it.

The most coherent understanding in relation to the Brazilian system would be to consider the protection afforded to marks as a means of conferring a legal guarantee of return on investment in building the image of a particular commodity or product alongside the public consumer. Denis Borges Barbosa’s understanding is the following¹⁰:

“The owner of the mark created the product or service and introduces them in the market essentially seeking a return to his investment; few will have in mind the social importance of giving employment, or merit in meeting human demands and necessities. This way, it is primarily with the aim of justifying such interest that

marks are protected. This is where the pure subjective interest lies; the importance of a mark in relation to information and the independent choice made by a consumer will be an accessory interest, in view of the Intellectual Property Law and, until made subjective by a particular case, will be subject only to collective rights. However, (and it is imperative to pay close attention to what lectures Ascarelli) the autonomous and informed positioning of the consumer can also be of interest to the investor if the product or service in which he invests accesses the market with the purpose of maintaining the public informed of a decision, and so would remain even when, for technological or fashion reasons or due to other market mishaps, the public's wasn't independent and, naturally, pend towards another option."

Moreover, it should be noted that, besides the functions of indicating origin and distinctiveness as well as the consuming and business functions, the mark also has a discriminant function.

The mark garnered an independent importance of the product it identifies. That is, consumers buy a product, not for the product itself or its quality, but for the mark that it identifies and especially by the status that the mark provides for the consumer who uses the products identified by it. In today's consumer society and mark worship, such signs are capable of labeling people, of conferring status and social value to the owners of the products that they identify.

Therefore, it may be concluded that the function of a mark not only reduces itself to its legal effects of indicating origin and distinctiveness, as noted in Article 123 of Law 9279/1996, but also presents an advertising and discriminant function, attributing status and social value to its proprietors as well as an economic function, ensuring consumer information (consumption function) and the return of the investment of their holders (business role).

Sponsored links

For a better contextualization and understanding of the matter, it is worth mentioning Marcel Leonardi's explanation about search engines, since such mechanisms are essential for the sponsored link service:

"A search engine is a combination of computer programs that perform various tasks with the goal of enabling the location of files and websites that contain or relate to any information requested by the user programs.

"Its operation involves the use of keywords provided by the user, which are searched in the billions of pages available on the internet and in index pages or files previously accessed.

"Such search engines draw up a list of links and provide the user with the access to this information, found according to the specified search terms. Naturally, the efficiency of the search depends essentially on the use of keywords related to information or to the desired subject.

"To find this information, the search engines use computer programs known as *spiders*, which create lists of existing words in websites and initiate their search in servers with high traffic and in popular pages.

"Different search engines use different technologies, but they all essentially use keywords to locate desired information."¹¹

Regarding the definition of sponsored links, it is worth mentioning the explanation of specialist Dirceu Pereira Santa Rosa:

"Sponsored links are a form of internet advertising and marketing in which a person or company can run their ads on search results of major search engines of the Internet. Among the existing sponsored links formats today, the "keyword" is the most known and used by advertisers. In the keyword format, every time a

user of the search engine searches the keyword with which the owner wants to associate his product or service, the ad will be prominently displayed along with the results that the search engine generated. Such keywords may be nominative expressions such as common names, marks and even names of artists, cities, athletes or sports associations".¹²

In search websites that offer sponsored links, for every search performed the internet user is presented with two types of results: a sequence of links to sites related to the keyword, called natural results and, in addition to these, the site suggests a list of sponsored links that are nothing more than ads.

The listing and the natural results order follow an objective criteria determined by the search engines and by technical configuration settings of each website. These criteria and settings are selected and classified according to their relationship – identity and proximity – with the keyword and then form the list of natural search results¹³.

It can be noted in the print screen¹⁴ shot that when contracting the sponsored link service, it is the contractor of the service and not the search website which chooses the keywords that will serve as a base for demonstrating a certain ad in the results of the sponsored links. Moreover, it is the contractor who both writes and revises the text of the ad that will appear in search results of the sponsored links.

Note that none of the words chosen as a search key – "birthday", "wedding decoration", "event decoration", "Valentine's Day" and "party decór" – appear in the advert's text: "flowers & events; "tulips, gardenias, roses."; all kinds of flowers for celebrations – www.floresfestas.com; which is the only part of the sponsored link service that is actually externalized.

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Are keywords mark usage?

In order to fully answer the question proposed above, it is necessary to investigate the requirements that constitute the use of a mark. According to Cabanellas and Bertone:

“To define the concept of the typical use of a mark, it is necessary to assume that the mark portrays multiple functions, such as: distinctiveness, identifying the origin of services and goods, quality control, competitive protection, protection in relation to the mark’s owner, consumer protection, etc.

“Among this set of functions, the essential – under the legal point of view – is the distinctive function. What the objective law fundamentally protects is the subjective right that mark owner is the only one who authorizes the use of hallmarks of certain goods and services, his own mark. The mark is then lawfully used and identifies such goods and services with the permission of the proprietor of that mark. The other functions that the marks “play” originate physically from this main function. Thus, the function of quality assurance is physically possible because the mark owner has an economic interest in preserving the quality of the products identified with it. If the mark owner gives up in maintaining the quality, there is, in general, no possible legal action designed to preserve, in such a case, the function of quality assurance. It is in this sense that its distinctive function qualifies as legally essential. “The distinctive function, (which is legally essential), of the mark is that which allows the typical use of this signal as opposed to an atypical use.”¹⁵

Thus, in the understanding of those authors, the mark use is characterized only when the use occurs in its distinctive function. According to Denis Borges Barbosa:

“The American jurisprudence, moreover, have rightly that such use will be, in comparison to the other signal functions (such as trade dress) that does not have the nature of mark use. In an essential definition, the US Supreme Court proclaimed that: “It is the ability of the mark to identify the origin – and not its ontological status, such as color, smell, verbal or figurative element – which gives you protection.”

“Such as is stressed in the jurisprudence, the mark use is one that is designed to ensure the creation or continuation of reputation relative to the product or service image-to-mark. Other uses of a sign, or another element; will not be considered as mark use.

“Thus, the use of a sign as a mark is such a sign that points to, or even, signifies the origin of the products or services: one that makes the consumer attribute the object to the origin, personalized

or anonymous, to which it imputes the competitive value, a result from the cohesion and consistency of the products and services linked to the mark. Without this attribution to an origin effect, the mark does not exist.”¹⁶

In his article *O Conceito de Uso de Marca* (The Concept of Mark Usage), the specialist José Antonio BL Faria Correar teaches that:

“Usage is an intuitive notion: to use something is to exercise, by operating. To use, which is an activity (= action), the opposite is the disuse, which is nothing more than a neutral activity (= default). Both use and disuse are legal facts, causing consequences in law, in relation to the industrial property terrain. (...) To use, in the field of trademark law, is to project the signal to the world in order for the mark, previously a simple potentiality, begins to exercise the function it is actually intended to.”¹⁷

Therefore, in order for the mark to exercise its functions, it is necessary that it be projected to the world, that is, it must be publicly flaunted in its commercial activity with the affixing of the mark or its use in a product and service.

Another interesting observation brought by Faria Correa is that: “The Brazilian law, when predicting the end of registration as a result of its disuse, employs the term “effective use”. This means that the legislature does not accept, as a fact of excluding forfeiture, “any use”, but a qualified use: it must be effective. The effectiveness is regarding the quality that radiates effects in the material world. Effective is something that is current and real. It is reflecting the will of the proprietor to give the mark a destination, as the fruit of its ontic category. This desire will materialize in acts that push the signal or sign into a stage where it must play its role: the stage of commerce, (...)”¹⁸

Hence, the usage as a mark occurs when the signal or sign is used effectively to achieve its primary purpose, which is to identify the origin and distinguish the product or service from its competitors. In addition, in order for the usage of a mark to configure, it is necessary that there is a projection of the signal to the world and that such a projection occurs in the context of commercial activity.

Furthermore, it is important to note that there are certain uses that cannot be considered mark use. Professor Denis Borges Barbosa explains that there are three situations where the use of the mark cannot be regarded as mark usage, namely: ornamental or aesthetic purposes; the usage with the purpose of communicating or persuading without its (simultaneously and dominant) distinctive nature, and in its utilitarian function¹⁹. This article will focus on the analysis of the latter hypothesis.

According to the understanding of Professor Denis Borges Barbosa:

“In order to function as a mark, the element considered cannot have a utilitarian character.

“If the element is utilitarian, it may lie in another field of intellectual property and its protection as a trademark would unbalance the constitutional equilibrium of such an object of law, in violation of the constitutional principle that we call *specific protections*.

“In exact accordance with this rule, the American jurisprudence excludes from the field of trademark law any element that is essential to the use or purpose of the article allegedly pointed out, or that affects the cost or quality, so that the exclusive use of such element would lead to the competitive disadvantage of others in ways that have nothing to do with the creation or continuation of the reputation relative to the product or service (mark image).”²⁰

The American doctrine known as functionality doctrine provides that a product feature or service is functional when it is essential to the use or purpose of the product or service and this characteristic

“The keywords, in the opinion of Judge Lee, have an essential indexing function because they allow the search engine to promptly identify in their databases relevant information in response to queries of the internet.”

affects the cost or quality of the article. The doctrine under analysis was developed by Patent Law. Consequently, by watching how the functionality doctrine has developed in relation to patents, it may be concluded that the protection of the utilitarian aspects of products is the proper domain of Patent Law which grants inventors a monopoly over new products or functions of these for a given period of time.

However, since the trademark rights may be renewed in perpetuity, guaranteeing those rights over the utilitarian aspects of products would extend the monopoly power over the mechanism indefinitely. Thus, the exclusive use granted in relation to the mark confers an improper monopoly for the configuration or structure that is actually required.²¹

Moreover, the discussion of whether the application of a mark as a keyword in search engines consists or not of a utilitarian aspect of the search service is presently in discussion in the US courts.

The understanding, which isn't yet firmed, but that is gradually solidifying, is that there is no doubt that the keywords are essential for the use and purpose of search technologies. Thus, the impossibility of using marks as keywords would create significant disadvantages for these technologies. Therefore, it would be difficult to imagine how such search engines could work otherwise.

In a recent court decision in first instance, in a lawsuit filed by Rosetta Stone Ltd. against Google Inc., Judge Gerald Bruce Lee of the United States District Court for the Eastern District of Virginia – Alexandria Division held that the use Google makes of the marks as keywords to identify sponsored links doesn't differ from using it for searching the web pages that appear in the natural search results of the internet, given that the term that is searched will yield both natural results as well as sponsored links results. The keywords, in

“It so happens that the main source of income for these search engines is from the commercialization of keywords in sponsored service links.”

the opinion of Judge Lee, have an essential indexing function because they allow the search engine to promptly identify in their databases relevant information in response to queries of the internet.

According to Judge Lee:

“Google uses marks as keywords, including the Rosetta Stone trademarks, in order to identify relevant sponsored links. This usage is no different than using a Google search query to drive the organic search results relevant to the user's search. In both cases, a search term like Rosetta's Stone provides a sequence of sponsored links and organic search results. The keywords, therefore, have an essential indexing function because they allow Google to easily identify in their databases, the relevant information in response to an internet user's inquiry. (...) This is especially important when advertisers rely on keywords to bring their products and services to interested consumers. Moreover, the keywords affect the cost and quality of Google's AdWords because, if they are forbidden to

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display third party ads on searches made by internet users in their search site, Google would be forced to create an alternative system for displaying ads on their site - a system that would be potentially more expensive and less effective in generating relevant ads. In terms of encouraging competition, the words also play a role of advertising, which benefits consumers who spend time and energy to locate certain information, goods or services, as well as to compare prices. The Google search engine offers consumers a useful way to search the internet in order to find products and competitive prices. If Google is prevented from using Rosetta's Stone trademark, consumers lose the ability to quickly locate potentially relevant sites that sell genuine products from the Rosetta Stone at competitive prices. Consequently, the Court is convinced that the particular use of the Google keywords corresponding to trademarks as bait to select and display paid advertisements is functional, and no other form of prohibition exists, the Court considers that the *functionality doctrine* prevents the realization of the infringement.¹

As demonstrated by the wording of the decision, the keywords entered in the search technology have an essential indexing function, which enables the search engine to find relevant results in response to user inquiries. Such a practice is protected by the functionality doctrine to the extent that search engines use such signs in a functional way and such a use is not protected by trademark law.

Thus, according to the functionality doctrine, the use of marks as

keywords in search engines on the internet does not constitute use as a mark, due to its utilitarian character.

Therefore, it can be concluded that the use of keywords in sponsored links services do not characterize mark usage, for three reasons. The first reason is due to the fact that keywords are not used to identify the origin and distinguish the source of the product or service, but solely for the purpose of triggering ads. Moreover, as demonstrated in the section about the *modus operandi* of sponsored links, the keyword is used internally in the search engine and there is no projection of the keyword to the world; this is the second reason.

Finally, the third and final reason is in relation to the utilitarian character that the keyword has for the operation of search engines, given that without a keyword, the search engine cannot operate due to the absence of research parameters.

Thus, since the use of words corresponding to marks as keywords in sponsored links service does not characterize mark usage, therefore, there is no need to speak of mark infringement practiced by the search site.

However, it is important to highlight the fact that the use of marks as keywords in search engines do not constitute mark use – and hence, does not configure the violation of mark by the search engine – this doesn't mean that trademark owners are helpless and that they are obliged by law to be inert in case they feel negatively affected. Nevertheless, it will not be the mark law that will rescue them, they must make use of other legal institutions to secure their rights.

¹ "Some search engines offer as a service the hiring of a sponsored link, linking the pursuit of certain words, in exchange for remuneration. (...) It turns out that list of words is borne by the contractor and he (the contractor), on behalf of client acquisition, also indicates trademarks and trade names related to the service or product. Thus if interested in locating product information, e.g., from the Nike company, you can view, not only Nike's electronic address, but also information on the Nike's competitors (contractor of the sponsored link), which indicates the brand Nike in the moment of its hiring as one of the words that were the object of the research (even though it is a brand and business name)". CARVALHO, Patrícia Luciane de. *Parasitic Competition in relation to brand and Commercial Name in Sponsored Links from Search Engines*. Available in: <http://www.migalhas.com.br/depeso/16,M1110050,81042Concorrência+parasitária+sobre+marca++nome+empresarial+em+link>. Accessed on July 24, 2010.

² Our courts, as well as some experts in the field of intellectual property law, have already spoken about setting acts of unfair competition practiced service sponsored links. However, this article investigates only the alleged occurrences of mark violation in this business model from the search site itself.

³ ASCENSÃO, José de Oliveira. The Functions of Marks and Descriptors (metatags) in the Internet. *ABPI Magazine*, n.61, p.44, nov/dec.2002.

⁴ BARBOSA, Denis Borges. THE SEMIOLOGICAL FACTOR IN THE CONSTRUCTION OF THE MARK SIGNAL. Available at: <http://denisbarbosa.addr.com/testetoda.pdf>. Accessed on December 5, 2010.

⁵ ASCENSÃO, José de Oliveira, op.cit. p.46.

⁶ ASCENSÃO, JOSÉ DE Oliveira, op. Cit., p.46.

⁷ BARBOSA, Denis Borges, op. Cit., p.14.

⁸ BARBOSA, Denis Borges, op. Cit., p.15.

⁹ BARBOSA, Denis Borges, op. Cit., p.16.

¹⁰ BARBOSA, Denis Borges, op. Cit., p.19.

¹¹ LEONARDI, Marcel. *Responsabilidade Civil dos Provedores de Serviços de Internet*. Available at <http://www.leonardi.adv.br/mlrcpsi.pdf>. Accessed on June 26, 2009.

¹² SANTA ROSA, Dirceu Pereira de. *Os Links Patrocinados e a Concorrência Desleal*. Available at <http://dirceurosa.wordpress.com/2008/07/18/outro-artigo-em-versao-10/>. Accessed on June 26, 2009.

¹³ In this article, only the sponsored links will be discussed. The natural results are ranked by another mechanism, known as a metatags, which are not included in this article.

¹⁴ As an example, we have the sponsored link service offered by AdWords, offered under the domain name www.google.com.br - available in <http://www.google.com.br/pt-BR/adwords/education-us/a>, owned by Google Inc., the world leader in this segment.

¹⁵ CABANELLAS DE LAS CUEVAS, Guillermo e BERTONE, Luis Eduardo. *Derecho de Marcas: marcas, designaciones y nombres comerciales*. Buenos Aires: Heliasta, 2003, p.244-250. Original Text: "A fin de delinear el concepto de uso típico de la marca, debe partirse de la observación que la marca presenta una multiplicidad de funciones: distintiva, de identificación del origen de bienes y servicios, de garantía de calidad, publicitaria, competitiva, de protección del titular de la marca, de autorización del consumidor, etc. De este conjunto de funciones, la esencial – desde el ángulo jurídico – es la distintiva. Jurídicamente, las restantes funciones constituyen una consecuencia de la distintiva. Lo que protege fundamentalmente el Derecho objetivo de marcas es el derecho subjetivo a que el dueño de la marca sea el único que autorice a utilizar como signos distintivos de ciertos bienes y servicios los tutelados como marca. La marca es así lícitamente utilizada so identifica tales bienes o servicios con la autorización del titular de esa marca. Las restantes funciones que desempeña la marca se derivan fácticamente de esa función principal. Así, la función distintiva – jurídicamente esencial – de la marca es la que permite caracterizar el uso típico de este signo, en contraposición al atípico".

¹⁶ BARBOSA, Denis Borges. Note about the notion of usage as a mark. Available at: <http://www.denisbarbosa.addr.com/arquivos/200/propriedade/usocomomarca.pdf>. Accessed on November 24, 2010.

¹⁷ CORREA, José Antonio B. L. Faria. O conceito de uso de marca. *Revista da ABPI*, n.16, p.22-24, mai./jun. 1995.

¹⁸ CORREA, José Antonio B. L. Faria, op. Cit., p.22.

¹⁹ BARBOSA, Denis Borges. Note about the notion of usage as a mark, op.cit., p.9-13.

²⁰ BARBOSA, Denis Borges. Note about the notion of usage as a mark, op.cit., p.9-10.

²¹ "(...) this rationale holds that if access to a given configuration is necessary to compete in the marketplace, that configuration must be functional and do unavailable for trademark protection (...) "(...) then trademark status would confer an improper monopoly on a needed configuration or structure." BURK, Dan. *Cybermarks*. Legal Studies Research Paper Series No. 2010-11, p.1.048. Available at: <http://ssrn.com/abstract=1601468>. Accessed on February 21, 2011.