

IAB Europe Position Paper on the Proposed Trademark Directive and Regulation

The Internet offers greater choice and information about products for the benefits of consumers than were available previously. Consumers can easily compare, review and recommend products online. Researching information online and reading product reviews is key in the decision to buy. In 2010 G-20 consumers researched online and then purchased offline \$1.3 trillion in goods.¹ Consumers today are spending more time reading reviews before making purchasing decisions: 64% take ten minutes or more (as compared to 50 percent in 2007) and 33% take half an hour or more (as compared to 18 percent in 2007).² 61% of European consumers say they are able to choose better products/services since going online.³

The Internet also offers new opportunities for brand owners. Online advertising, whether via search, social, display or affiliate marketing, significantly increases the number of e-commerce transactions. As demonstrated by McKinsey, it improves companies' performance (increase of 25% of revenue growth and of 30% of market share) and has a 'turbocharge' effect on GDP growth⁴. Thanks to digital advertising, SMEs, the European economy's backbone, can widely promote their services. Digital advertising allows SMEs to affordably reach a wide global audience of consumers who are searching for goods and services online.

An effective trademark framework is important and necessary. It should remain within its original goal of protecting consumers and ensuring they are not tricked into purchasing a product that is not the one they expected. However, trademarks should not be used to hinder greater consumer choice and the flourishing of the e-commerce sector in Europe.

Referential uses:

In its proposals the Commission clarified the referential use of a trademark, i.e. the use of a trademark *"for the purpose of identifying or referring to goods or services as those of the proprietor"* (Article 12 CTMR and 14 TMD - 'limitation of the effect of a trade mark').

This provision is critical to a balanced and effective trademark law regime and in particular to ensuring that trademark law remains in the public interest. Trademark law has never made it unlawful to merely use a trademark to refer to a product. In the offline environment, this has led to developments on the use of trademarks, that are clearly pro-consumer e.g. in relation to spare parts. It is now accepted that trademark law should not prevent the use of trademarks to offer, for example, alternative spare parts, and thus indirectly restrict consumer access to, and choice of, spare parts at competitive prices. Similarly, in the offline

¹ See Boston Consulting Group (2012) The Internet Economy in the G-20. The \$4.2 Trillion Growth Opportunity.

² See 2010 Social Shopping Study.

³ Mediascope Europe 'European Consumers – Myths or Reality?' (June 2013), available at http://www.iabeurope.eu/files/7013/7302/6480/IAB_Europe_Mediascope_Europe_European_Consumers_-_Myths_or_Reality_Bulletin_June_2013.pdf. The report found that in 2012, each person in Europe spent on average €554 on e-commerce across a 6 month period. Online Europeans bought 50% more items online when compared to 2010 were 10% more likely to buy an item they researched online.

⁴ See McKinsey (March 2012). Advertising as an economic-growth engine ? The new power of media in the digital age.

world, it is normal to place an advertisement e.g. for a Renault in a car magazine next to an article about a Toyota.

The shift to online and e-commerce requires similar clarifications, to ensure trademarks are not used to restrict consumer choice online and innovation in e-commerce. Clear rules are needed for referential use as it is commonly practiced in the online environment. Our members, including online advertising companies and e-commerce platforms, use it to promote alternative goods and the resale of genuine goods. Other online examples include so-called 'recommendation' engines, which provide consumers information such as 'Customers who bought X also bought Y' or 'if you liked movie X, you might also like movie Y'.

In addition, consumers may also make referential use in product reviews and recommendations displayed on our members' websites.

In order to ensure that trademarks continue to serve their function of protecting consumers and businesses in a dynamic and competitive market place, IAB Europe strongly recommends the inclusion of further cases of authorised referential use. These should include:⁵

- i) to do lawful comparative advertising (meeting conditions set in Directive 2006/114/EC),
- ii) to bring to the attention of consumers the resale of genuine goods that have originally been sold by or with the consent of the trademark owner,
- iii) to put forward a legitimate alternative to the goods or services of the trade mark owner,
- iv) for the purpose of criticism or comment in particular for product reviews and recommendations by consumers.

Background:

In March 2013, the European Commission issued a proposal for a revision of the Regulation on the Community trademark and a proposal for a recast of the Directive approximating the laws of the Member States relating to trademarks. The European Parliament adopted its legislative recommendation on 25 February 2014.⁶ On 23 July 2014, Coreper agreed on a Council common position and authorised the Italian Presidency to enter negotiations with the European Parliament to ensure swift agreement. Trilogue negotiations between the Commission, the Presidency and the European Parliament will soon be under way.⁷

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About IAB Europe

IAB Europe is the voice of digital business. Its mission is to protect, prove, promote and

⁵ See e.g. Amendments 29 CTMR and 33 TMD of the European Parliament's legislative resolution.

⁶ See <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0118> for the CTMR.

⁷ See <http://data.consilium.europa.eu/doc/document/ST-11826-2014-INIT/en/pdf> for the CTMR.

professionalise Europe's online advertising, media, market research and analytics industries. Together with its members – companies and national trade associations – IAB Europe represents over 5,500 organisations. IAB Europe is part of the Transparency Register.

The member countries are: Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Norway, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and United Kingdom.

The corporate members include: AB Inbev, Adconion Media Group, AdRoll, ADTECH, affilinet, AGOF Services, AOL Advertising Europe, AppNexus, AudienceScience, BBC Advertising, CNN, CoAdvertise, comScore Europe, Creafi Online Media, Criteo, Deutsche Post, eBay International Advertising, Emediate, Evidon, Expedia Inc, Exponential, Fox Interactive Media, Gemius, Goldbach Group, Google, GroupM, Hi-Media, Improve Digital, IPG Mediabrands, Koan, Meetic, Microsoft Europe, Millward Brown, News Corporation, Nielsen Online, nugg.ad, OMD, Orange Advertising Network, Performics, PHD, Prisa, Proxistore, Publicitas Europe, Quisma, Sanoma Digital, Selligent, The Exchange Lab, Triton Digital, TrustE, United Internet Media, Verisign, Viacom International Media Networks, White & Case, Yahoo!, Yandex and Zanox.

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