Keyword Advertising Updates

Prof. Eric Goldman
Director, High Tech Law Institute
http://www.ericgoldman.org • http://hightechlaw.scu.edu
egoldman@gmail.com
Trademark Owner v. Search Engine

- 6 pending lawsuits against Google (down from 12+)
  - Google won Rosetta Stone case; written opinion pending
  - Rescuecom and Parts Geek gave up

- Google transferred Flowbee and Parts Geek cases to ND Cal per its AdWords contracts

- Google ECJ opinion
  - Keyword vending ≠ use in commerce
  - E-commerce Directive covers keyword vending
Trademark Owner v. Advertiser

- Caselaw remains anarchistic but...
  - ...good news for defense in US
    - Fair Isaac v. Experian: judge says keyword ad buys wasn’t likely to confuse consumers
    - Tiffany v. eBay: ad copy and triggering were nominative uses
  - ...less good news in EU
    - Google ECJ opinion: keyword ad must enable average internet user to determine source of goods
Suggestions…

…for Trademark Owners

- Take advantage of keyword sellers’ TM policies
- Contractually restrict affiliates (and others?) from competitive bidding
  - Compare Video Professor v. Amazon
- Make good investment decisions
  - 800-JR Cigar: defendant’s gross revenues = $345
  - Storus: defendant got 1,347 clicks in 11 months
  - King v. ZymoGenetics: defendant got 84 clicks
  - 1-800 Contacts: $1.1M legal fees against Lens.com
- Don’t be duplicitous

…for Advertisers

- Competitive keyword advertising as a Prisoners’ Dilemma
- Consider “negative matching” competitive TMs