

**USA**  
**MICHIGAN**  
Detroit  
+1.313.963.6420  
Ann Arbor  
+1.734.663.2445  
Grand Rapids  
+1.616.454.8656  
Kalamazoo  
+1.269.381.7030  
Lansing  
+1.517.487.2070  
Saginaw  
+1.989.791.4646  
Troy  
+1.248.879.2000

**FLORIDA**  
Naples  
+1.239.596.1975

**ILLINOIS**  
Chicago  
+1.312.460.4200

**NEW YORK**  
New York  
+1.212.704.4400

**OHIO**  
Cincinnati  
+1.614.203.7800

**CANADA**  
Toronto  
+1.416.599.7700  
Windsor  
+1.519.977.1555

**CHINA**  
Shanghai  
+86.21.6103.7000

**MEXICO**  
Monterrey  
+52.81.8335.0011

**POLAND**  
Gdynia  
+48.58.782.0050  
Warsaw  
+48.22.447.4300  
Wroclaw  
+48.71.722.5090



QUESTIONS,  
COMMENTS AND  
TO SIGN UP FOR  
E-HOT POINTS:

[silkworth@millercanfield.com](mailto:silkworth@millercanfield.com)

[millercanfield.com](http://millercanfield.com)

# KEY changes TO Google's ADWORDS POLICY



*In June 2009, Google expanded its AdWords policy allowing competitors to bid on trademarks as keywords in over 190 countries.*

Google adopted this policy in the U.S. and Canada in 2004 and expanded it to include the U.K. and Ireland in 2008. Google is not expanding the policy in the majority of European Union (EU) member states, where it has met strong resistance. Google also updated its U.S. trademark policy to allow the use of trademarked terms in ad text in certain circumstances, even without the trademark owner's permission. Google's updated trademark policy can be found at <https://adwords.google.com/support/aw/bin/answer.py?answer=145626>.

A report by The Search Monitor, a research company that monitors trademark use in search engine ads, indicates that the use of trademarks in ad copy has increased across all major search engines since Google's policy change. For example, the study indicates that trademark use in ad text rose 33% for telecom, 67% for travel products and services, 106% for electronics, and 271% for health and beauty products and services. The study was limited to a small sample of brands and The Search Monitor has cautioned that "The research is early." However, brand owners should be aware of the impact that Google's policy changes may have on their businesses.

Google implemented these changes despite recent challenges to its policies. In May 2009, a Texas-based software company filed the first class action lawsuit claiming that the sale of keywords by internet search engines is trademark infringement. The claim is that Google and other companies that use its technology allow competitors to bid on search terms through Google's AdWords program. The suit seeks to certify a class of Texas-based individuals or companies that own registered trademarks that were sold by Google as keywords from May 11, 2005, through the present.

The suit was filed about a month after the U.S. Court of Appeals for the Second Circuit issued an opinion in *Rescuecom Corp. v. Google Inc.* In *Rescuecom*, the plaintiff sued Google for

trademark infringement and other claims, alleging that Google recommended and sold its trademarks as keywords to plaintiff's competitors. The plaintiff also alleged that customers who searched for its Website on Google were misdirected to its competitors' Websites in a manner that would mislead them to believe the sites were affiliated with Rescuecom. The Second Circuit vacated the district court's dismissal of the complaint, holding that Rescuecom sufficiently pled an "actionable" trademark violation by Google.

The *Rescuecom* decision is an important victory for trademark owners seeking to stop competitors from using their trademarks as keywords or sponsored links. Based on prior decisions, the Second Circuit had been perceived by some as a hostile forum for such claims. The majority of other circuits that have considered the issue have held that use of a competitor's trademark as a keyword to trigger ads constitutes "use in commerce," a required element for maintaining a trademark infringement claim. The decision could impact the number of infringement cases involving keyword advertising that are filed in the Second Circuit and across the country. It may also bring more consistency to the federal courts' approach to these cases.

Trademarks  
Kristen I. Spano 313.496.7562

*Information Technology Hot Points* is published as a free service to Miller Canfield clients and friends.

The articles in *Information Technology Hot Points* are for general information only and should not be used as a basis for specific action without obtaining legal advice.

If you would like your name added to our mailing list, please call Heather Willis at 313.496.7902.

Reproduction of *Information Technology Hot Points* articles is authorized by permission, with credit given to Miller Canfield.

DISCLOSURE UNDER TREASURY CIRCULAR 230:

Nothing in this publication is intended to be written tax advice. This publication may not be used or referred to in the promoting, marketing or recommending of any entity, investment plan or arrangement, and may not be used by a taxpayer for the purpose of avoiding Federal tax penalties.