



UvA-DARE (Digital Academic Repository)

Trademark law, AI-driven behavioral advertising, and the Digital Services Act: toward source and parameter transparency for consumers, brand owners, and competitors

Senftleben, M.

DOI

[10.4337/9781800881907.00023](https://doi.org/10.4337/9781800881907.00023)

Publication date

2022

Document Version

Final published version

Published in

Research Handbook on Intellectual Property and Artificial Intelligence

License

Article 25fa Dutch Copyright Act (<https://www.openaccess.nl/en/in-the-netherlands/you-share-we-take-care>)

[Link to publication](#)

Citation for published version (APA):

Senftleben, M. (2022). Trademark law, AI-driven behavioral advertising, and the Digital Services Act: toward source and parameter transparency for consumers, brand owners, and competitors. In R. Abbott (Ed.), *Research Handbook on Intellectual Property and Artificial Intelligence* (pp. 309-324). (Research Handbooks in Intellectual Property). Edward Elgar Publishing. <https://doi.org/10.4337/9781800881907.00023>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

16. Trademark law, AI-driven behavioral advertising, and the Digital Services Act: toward source and parameter transparency for consumers, brand owners, and competitors

Martin Senftleben

1. INTRODUCTION

In its Proposal for a Digital Services Act (“DSA”),¹ the European Commission highlighted the need for new transparency obligations to arrive at accountable digital services,² ensure a fair environment for economic operators,³ and empower consumers.⁴ However, the proposed new rules seem to focus on transparency measures for consumers. According to the DSA Proposal, platforms, such as online marketplaces, must ensure that platform users receive information enabling them to understand when and on whose behalf an advertisement is displayed, and which parameters are used to direct advertising to them, including explanations of the logic underlying systems for targeted advertising.⁵ Statements addressing the interests of trademark owners and trademark policy are sought in vain. Against this background, the following analysis sheds light on computational advertising practices (section 2) and the policy considerations underlying the proposed new transparency obligations (section 3). In the light of the debate on trademark protection in keyword advertising cases, it will show that not only consumers but also trademark owners have a legitimate interest in receiving information on the parameters that are used to target consumers (section 4). The discussion will lead to the insight that lessons from the keyword advertising debate can play an important role in the transparency discourse because they broaden the spectrum of policy rationales and guidelines for new transparency rules. In addition to the current focus on consumer empowerment, the enhancement of information on alternative offers in the marketplace and the strengthening of trust in AI-driven, personalized advertising enter the picture (section 5). On balance, there are good reasons to broaden the scope of the DSA initiative and ensure access to transparency information for consumers and trademark owners alike (concluding section 6).

¹ European Commission, December 15, 2020, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, Document COM(2020) 825 final 2020/0361.

² European Commission, *ibid*, Explanatory Memorandum, 1–2.

³ European Commission, *ibid*, Explanatory Memorandum, 5–7.

⁴ European Commission, *ibid*, Explanatory Memorandum, 9. For further proposals to reduce consumer vulnerability in the digital environment, see Natali Helberger, Orla Lynskey, Hans-Wolfgang Micklitz et al., *EU Consumer Protection 2.0—Structural Asymmetries in Digital Consumer Markets*, Brussels: BEUC 2021, 78–79.

⁵ Articles 24 and 30 DSA; Recitals 52 and 63 DSA.

2. COMPUTATIONAL ADVERTISING

Computational advertising lies at the core of a paradigm shift in advertising. While, in the past, marketers designed brand information and advertising messages in accordance with a particular brand identity, AI systems nowadays use behavioral consumer data to generate tailor-made marketing messages on the basis of algorithmic content selection and creation processes.⁶ In marketing communications research, Guda van Noort, Itai Himelboim, and colleagues identified advancements in computing and marketing technology as drivers behind this remarkable change in brand-related communication: “Algorithms and mathematical methods are at the center of these changes that enable computational advertising: the use of computing capabilities to analyze consumer behavior, tailor content, and facilitate the delivery of advertising information to (potential) consumers across media vehicles and touch points.”⁷

At the same time, marketing research sheds light on the wide range of personal data that are used to tailor brand and advertising messages to individual consumers and generate targeted marketing messages.⁸ The range of consumer data fueling the process goes far beyond basic demographic information, such as age, gender, level of education, income, geography, and marital status. Access to mobile devices makes location-based information available. Most importantly, however, so-called psychographic marketing⁹ aims at obtaining more nuanced psychographic information to understand consumers’ stated preferences and observed choices. Psychographic marketing relies on information about psychological characteristics and traits that reflect a consumer’s personality (for example, introversion or extraversion) and values (for example, concerns about the environment).¹⁰ Data from social networking services, for instance, offer insights into personal connections and shared posts, pictures, and videos. In this way, it becomes possible to factor specific consumer interests and relationships into the equation.¹¹ Moreover, available data flows cover a consumer’s search requests, browsing history, online media consumption, and shopping patterns. Surveillance-enabling devices, such as smart speakers, virtual assistants, and health and fitness trackers, provide even more pervasive situational data and information on consumers’ personal conditions.¹² Website analytics add

⁶ Guda van Noort, Itai Himelboim, et al., “Introducing a Model of Automated Brand-Generated Content in an Era of Computational Advertising,” *Journal of Advertising* 49 (2020), 411 (411).

⁷ Van Noort, Himelboim et al., *supra* note 6, 411.

⁸ See the overview provided by Van Noort, Himelboim et al., *supra* note 6, 416.

⁹ Van Noort, Himelboim et al., *supra* note 6, 416. Cf. Natali Helberger, Jisu Huh et al., “Macro and Exogenous Factors in Computational Advertising: Key Issues and New Research Directions,” *Journal of Advertising* 49 (2020), 377 (381–2).

¹⁰ See Van Noort, Himelboim et al., *supra* note 6, 416, for a discussion of this personality information. As to case law discussing advertising that specifically addresses consumers’ environmental concerns, see German Federal Supreme Court, 26 October 2006, case I ZR 33/04, “Regenwaldprojekt I,” para. 34. Cf. For a discussion of the potential reintroduction of ethical considerations in unfair competition law following from this type of product marketing, see Karl-Nikolaus Peifer, “Schutz ethischer Werte im Europäischen Lauterkeitsrecht oder rein wirtschaftliche Betrachtungsweise?,” in Reto M. Hilty & Frauke Henning-Bodewig (eds.), *Lauterkeitsrecht und Acquis Communautaire*, Heidelberg/Dordrecht/London/New York: Springer 2009, 125 (137–41).

¹¹ Van Noort, Himelboim et al., *supra* note 6, 416.

¹² Van Noort, Himelboim et al., *supra* note 6, 416.

audience reports that offer information on visitors, including personal characteristics, interests, access locations, and incidental or repeated webpage visits.¹³

Given these proportions of personal data use, it does not come as a surprise that targeted online behavioral advertising gives rise to privacy concerns and triggers feelings of vulnerability and intrusiveness among consumers.¹⁴ Natali Helberger, Jisu Huh and colleagues describe the dimension of the phenomenon as follows:

The knowledge advertisers and advertising firms amass about individual consumers by tracking consumers' behaviors online over time can become quite extensive and precise. Based on the combined data of search terms entered, web pages visited, products clicked on, articles read, and videos watched, ads can be composed of specific information and images compiled about an individual consumer across a network, making them precisely attractive to the individual and personally relevant.¹⁵

At the same time, they point out that many consumers are not fully aware of the mechanisms underlying online behavioral data tracking and related advertising and branding initiatives. In the absence of a clear understanding of data-driven targeting and persuasion tactics, consumers may succumb to disguised advertising messages without even realizing that they are exposed to subtle, algorithmic marketing influences. Consumers may also provide personal information without considering potential threats to their privacy.¹⁶ Due to this lack of knowledge and awareness, online behavioral advertising may trigger individual biases, desires, fears, and other emotions.¹⁷ The information asymmetry can culminate in power imbalances between advertisers and consumers, and lead to undue manipulation of consumer choices.¹⁸

Against this background, Helberger, Huh, and colleagues highlight the need for transparency to fill the information gap and strengthen consumers' ability to understand computational advertising mechanisms and processes. They recall that in the EU, the General Data Protection Regulation already sets forth obligations to inform consumers not only about the collection of personal data but also about the underlying purpose and logic of automated profiling, and potential consequences for consumers.¹⁹

Considering the recognition of a need for more transparency in automated brand-related communication, it is consistent that the DSA Proposal comprises new legal rules in this area. Article 24 DSA addresses the issue of online advertising transparency by stating that online platforms²⁰ displaying advertising on their online interfaces:

¹³ For example, see Andrew Kucheriavy's discussion of information flowing from the use of Google Analytics, available at: www.intechinc.com/blog/google-analytics-audience-analysis-and-demographics-reports/. Cf. Oliver Busch, "The Programmatic Advertising Principle," in Oliver Busch (ed.), *Programmatic Advertising: The Successful Transformation to Automated, Data-driven Marketing in Real-time*, Cham: Springer 2016, 315.

¹⁴ Sophie C. Boerman, Sanne Kruijemeier, and Frederik J. Zuiderveen Borgesius, "Online Behavioral Advertising: A Literature Review and Research Agenda," *Journal of Advertising* 46 (2017), 363 (365–70).

¹⁵ Helberger, Huh et al., *supra* note 9, 382.

¹⁶ Helberger, Huh et al., *supra* note 9, 382.

¹⁷ Helberger, Huh et al., *supra* note 9, 382.

¹⁸ Helberger, Huh et al., *supra* note 9, 384–5. Cf. Rachel L. Finn and Kush Wadhwa, "The Ethics of Smart," *Info* 16 (2014), 22 (27–8).

¹⁹ Helberger, Huh et al., *supra* note 9, 382 and 386. Cf. Recital 52 DSA.

²⁰ Article 2(h) DSA defines "online platform" as follows: "'online platform' means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public

shall ensure that the recipients of the service can identify, for each specific advertisement displayed to each individual recipient, in a clear and unambiguous manner and in real time:

- (a) that the information displayed is an advertisement;
- (b) the natural or legal person on whose behalf the advertisement is displayed;
- (c) meaningful information about the main parameters used to determine the recipient to whom the advertisement is displayed.

Reaching beyond mere *source transparency* (sub (b): “Who sent this?”), this provision explicitly requires *parameter transparency* (sub (c): “Why me?”). The accompanying Recital 52 DSA clarifies that consumers should receive not only information on the main parameters used to target them, but also “meaningful explanations of the logic used to that end, including when this is based on profiling.” Hence, the proposed new transparency obligations are intended to capture the principles and criteria underlying automated processes of directing specific advertising to targeted consumers.

With regard to advertising systems used by very large online platforms, Recital 63 DSA highlights particular risks that may arise from the scale of advertising activities—reaching more than 45 million active recipients of the service²¹—and the “ability to target and reach consumers based on their behaviour within and outside that platform’s online interface.” In the light of this risk dimension, the European Commission identified a need for “further public and regulatory supervision.”²² In this vein, Article 30(1) DSA obliges very large online platforms to ensure public access, through application programming interfaces, to repositories of advertisements displayed on their online interfaces until one year after the last use of the advertising. With this additional transparency measure, the proposed new legislation seeks to facilitate supervision and research into emerging risks of online advertising, including exposure to “illegal advertisements or manipulative techniques and disinformation with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality.”²³ In line with Article 30(2) DSA, the repository must include at least the following information:

- (a) the content of the advertisement;
- (b) the natural or legal person on whose behalf the advertisement is displayed;
- (c) the period during which the advertisement was displayed;
- (d) whether the advertisement was intended to be displayed specifically to one or more particular groups of recipients of the service and if so, the main parameters used for that purpose;
- (e) the total number of recipients of the service reached and, where applicable, aggregate numbers for the group or groups of recipients to whom the advertisement was targeted specifically.

information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.”

²¹ Article 25(1) DSA clarifies that the rules on “very large” online platforms apply to “online platforms which provide their services to a number of average monthly active recipients of the service in the [EU] equal to or higher than 45 million, calculated in accordance with the methodology set out in the delegated acts referred to in paragraph 3.”

²² Recital 63 DSA.

²³ Recital 63 DSA.

3. CONSUMER AND BRAND OWNER INTERESTS

In the light of the described discussion on consumer vulnerability and the increasing exposure of consumers to AI-supported behavioral advertising, the configuration of the proposed new obligations can give the impression that the European Commission focused exclusively on consumer empowerment when drafting the new transparency provisions. Using broader terminology, however, the Explanatory Memorandum accompanying the DSA Proposal confirms that stakeholder consultations drew the Commission's attention more generally to "the way algorithmic systems shape information flows online."²⁴ A "wide category of stakeholders"²⁵ highlighted AI-generated information as a particular area of concern:

Several stakeholders, in particular civil society and academics, pointed out the need for algorithmic accountability and transparency audits, especially with regard to how information is prioritized and targeted. Similarly, regarding online advertising, stakeholder views echoed the broad concerns around the lack of user empowerment and lack of meaningful oversight and enforcement.²⁶

Interestingly, the Commission speaks about a lack of "user" empowerment in this statement instead of referring more restrictively to "consumer" empowerment. In line with this openness of the Explanatory Memorandum, the terminology used in the new provisions leaves room for a broad understanding of the proposed transparency obligations. In particular, it seems possible to develop an interpretation that would cover not only consumers but also brand owners. While the DSA Proposal contains specific definitions of the terms "consumer" and "trader,"²⁷ Articles 24 and 30 DSA refrain from limiting the scope of the new transparency obligations to the specific category of "consumers." In a more neutral manner, both provisions refer to "recipients of the service"—an expression which Article 2(b) DSA defines as "any natural or legal person who uses the relevant intermediary service."

Obviously, both consumers and traders use online platforms, such as search engine services hosting third-party ads²⁸ and online marketplaces hosting third-party offers.²⁹ When the neutral expression "recipients of the service" is understood to encompass both consumers and traders, the new obligations can be interpreted in a way that ensures access to transparency information not only for consumers but also for brand owners (= "traders" in the sense of Article 2(e) DSA). As explained, Article 24 DSA seeks to ensure that the recipients of the service can identify, "for each specific advertisement displayed to each individual recipient, in a clear and unambiguous manner and in real time," the source of the advertisement (source transparency) and the parameters used to target the recipient (parameter transparency). Hence, the new legal obligation can be understood to mean that:

²⁴ DSA, Explanatory Memorandum, 9.

²⁵ DSA, Explanatory Memorandum, 9.

²⁶ DSA, Explanatory Memorandum, 9.

²⁷ Article 2(c) and (e) DSA.

²⁸ CJEU, March 23, 2010, C-236/08-238/08, Google France and Google, paras 114–116.

²⁹ CJEU, July 12, 2011, case C-324/09, L'Oréal/eBay, paras 114–120. As to the assumption of hosting status in these cases, see Martin R.F. Senftleben, "Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions," *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 4 (2013), 87 (94–5).

[a *consumer* using an online platform] can identify, for each specific advertisement displayed to each individual [*consumer*], in a clear and unambiguous manner and in real time [source and parameter information].

Extending this approach to brand owners (= traders), it can be assumed that there is also an obligation to ensure that:

[a *trader* using an online platform] can identify, for each specific advertisement displayed to each individual [*trader*], in a clear and unambiguous manner and in real time [source and parameter information].

Importantly, however, an approach covering consumers and traders alike can lead to an even broader interpretation that opens the “black box” of algorithmic behavioral advertising and gives brand owners access to marketing messages that are directed to consumers. This more extensive scenario combines the trader entitlement to transparency information with brand-related messages displayed to consumers. To arrive at this broader reading, it is necessary to interpret Article 24 DSA to include the obligation to ensure that

[a *trader* using an online platform] can identify, for each specific advertisement displayed to each individual [*consumer*], in a clear and unambiguous manner and in real time [source and parameter information].

As indicated, this more extensive reading would give brand owners access to transparency information covering the source of online behavioral advertising (“the natural or legal person on whose behalf the advertisement is displayed”)³⁰ and the parameters used to target consumers (“meaningful information about the main parameters used to determine the recipient to whom the advertisement is displayed”).³¹ In practice, this would mean that Cartier would be in a position to receive (at an aggregated level without disclosing personal data of individual consumers) transparency information on whether the behavioral advertising tools of an online platform lead to a situation where consumers who purchased Cartier jewelry in the past receive advertising inviting them to consider Tiffany products. Similarly, BMW could check whether consumers who searched for BMW repair services receive advertising messages that draw their attention to Mercedes-Benz cars.

In the Explanatory Memorandum, this broader approach—providing brand owners an overview of behavioral advertising messages triggered by previous consumer activities relating to their products and trademarks—finds some support in the section dealing with the choice of the legal instrument. In this context, the Commission invokes the policy objective to “prevent divergences hampering the free provision of the relevant services within the internal market, as well as guarantee the uniform protection of rights and uniform obligations for business and consumers across the internal market. This is necessary to provide legal certainty and transparency for economic operators and consumers alike.”³²

Admittedly, the reference to “legal certainty and transparency” in this statement need not be understood in the specific sense of source and parameter transparency addressed in Article 24 DSA. Nonetheless, the fact remains that the Commission explicitly mentions the desire to

³⁰ Article 24(b) DSA.

³¹ Article 24(c) DSA.

³² DSA, Explanatory Memorandum, 7.

establish harmonized legal rules for “economic operators and consumers alike.” Considering the explicit reference to both stakeholder groups, it seems possible to draw a line between the Explanatory Memorandum and Article 24 DSA, and posit that the new transparency obligations should serve the interests of both “economic operators [= brand owners] and consumers alike.”

More clarity about the inclusion of brand owner interests may follow in the near future. The DSA still constitutes draft legislation. As long as the legislative process has not come to an end, there is room to clarify the scope of Articles 24 and 30 DSA and dispel doubts about brand owner access to source and parameter data. As already indicated, this broader approach would allow brand owners to identify advertisers who use brand-related data to direct tailor-made advertising messages to consumers. Considering the described diversity of data sources used to generate targeted behavioral advertising messages, there can be little doubt that brand-related data, such as information on search requests, browsing history, and online purchases concerning branded goods and services, can play a role in computational advertising. Brand owners’ interest in clarity about advertisers relying on brand-related data and the use of these data to bring (potentially competing) offers to the attention of consumers can hardly be denied against this backdrop.

Before jumping to the conclusion that the DSA should serve the purpose of introducing new data transparency obligations for the benefit of both brand owners and consumers, however, it is important to consider the legislative path which the EU has traditionally followed in the regulation of commercial practices in the internal market.

On the one hand, the Unfair Commercial Practices Directive (“UCPD”)³³ puts a clear emphasis on business-to-consumer relations. It seeks to protect consumers against misleading and aggressive practices. Recent amendments³⁴ introduce new rules on parameter transparency in the area of search result rankings. Adding a category of misleading omissions, this update of the EU *acquis* confirms the traditional focus on consumer protection. Employing the UCPD—and thus an instrument for regulating business-to-consumer relations—as a vehicle, the new legislation refrains from addressing potential interests which brand owners may have in information about the parameters used for the ranking of products.³⁵ The new provision only mentions consumers:

When providing consumers with the possibility to search for products [...] general information [...] on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material.³⁶

³³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, *Official Journal* L 149, 22.

³⁴ See the new rules following from Directive 2019/2161/EU of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *Official Journal* L 328, 7.

³⁵ As to the discussion on the ranking of search results in keyword advertising cases, see CJEU, March 23, 2010, C-236/08-238/08, *Google France and Google*, paras 97–98; CJEU, March 25, 2010, case C-278/08, *BergSpechte*, para. 33; CJEU, July 8, 2010, case C-558/08, *Portakabin*, paras 32–33. Cf. Annette Kur and Martin R.F. Senftleben, *European Trade Mark Law: A Commentary*, Oxford: Oxford University Press 2017, paras 5.88–5.91.

³⁶ Article 7(4a) UCPD, as amended by Article 3(4)(b) of Directive 2019/2161.

On the other hand, it must not be overlooked that the Directive on Misleading and Comparative Advertising (“MCAD”)³⁷ sets forth harmonized rules that shape business-to-business relations, including the relationship between advertisers and brand owners. By virtue of Article 10(3)(f) of the Trade Mark Directive (“TMD”)³⁸ and Article 9(3)(f) of the European Union Trade Mark Regulation (“EUTMR”),³⁹ the rules on comparative advertising have a direct impact on the legal position of brand owners: use of a protected mark in comparative advertising in a manner that complies with the MCAD rules⁴⁰ does not amount to trademark infringement.⁴¹ Hence, the EU legislator does not leave the regulation of advertiser/brand owner relations to national legislation in EU Member States.⁴² The interests of brand owners are directly addressed in EU legislation itself.

A foray into existing legislative approaches at EU level, therefore, does not yield clear results. While the UCPD reflects a clear focus on business-to-consumer relations and the protection of consumers, the MCAD rules have repercussions on business-to-business relations and impact the legal position of brand owners in comparative advertising cases. The analysis does not reveal an overarching legislative scheme allowing identification of the beneficiaries of the proposed new transparency obligations laid down in Articles 24 and 30 DSA.

4. LESSONS FROM KEYWORD ADVERTISING

In the absence of clear guidelines in the DSA Proposal and the EU *acquis*, the decisive question is whether, from an overarching policy perspective, it could make sense to factor brand owner interests into the equation and employ Articles 24 and 30 DSA as legal tools to give brand owners access to brand-related transparency information. The trademark debate on keyword advertising and the related court decisions offer important insights in this respect.⁴³

³⁷ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), *Official Journal* L 376, 21.

³⁸ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, *OJ* 2015 L 336, 1.

³⁹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), *OJ* 2017 L 154, 1.

⁴⁰ Article 4 MCAD.

⁴¹ CJEU, June 12, 2008, case C-533/06, *O2/Hutchison*, para. 45; CJEU, 18 June 2009, case C-487/07, *L’Oréal/Bellure*, para. 54. Cf. Martin R.F. Senftleben, *The Copyright/Trademark Interface: How the Expansion of Trademark Protection Is Stifling Cultural Creativity*, The Hague/London/New York: Kluwer Law International 2020, 459–60; Kur and Senftleben, *supra* note 35, paras 5.307–5.308 and 6.43–6.44.

⁴² As to the freedom enjoyed by EU Member States in other areas, see Ansgar Ohly, “Trademark Law and Advertising Law in the European Union: Conflicts and Convergence,” in Irene Calboli and Jane C. Ginsburg (eds.), *Cambridge Handbook on International and Comparative Trademark Law*, Cambridge: Cambridge University Press 2020, 323 (323–4). For an overview of domestic regulatory models, see Frauke Henning-Bodewig, “Die Bekämpfung unlauteren Wettbewerbs in den EU-Mitgliedstaaten: eine Bestandsaufnahme,” *Gewerblicher Rechtsschutz und Urheberrecht—International* 2010, 273 (283–4).

⁴³ For an in-depth overview and analysis, see Nicole van der Laan, *The Use of Trademarks in Keyword Advertising*, Amsterdam: Vrije Universiteit Amsterdam 2020, available at: <https://research.vu.nl/en/publications/the-use-of-trade-marks-in-keyword-advertising>. As to the individual stages of the debate and case law evolution, see Martin R.F. Senftleben, “Adapting EU Trademark Law to New Technologies: Back to Basics?,” in Christophe Geiger (ed.), *Constructing European Intellectual*

The keyword advertising debate is an important reference point because it addresses the triangular relationship between brand owners, consumers and advertisers that also arises in online behavioral advertising when search results, browsing history and online purchases concerning brand A are used as parameters to direct brand B advertisements to consumers.

First, experiences with keyword advertising show that the involvement of brand owners adds important policy considerations. While source and parameter transparency for consumers may already be an important step in the right direction, a focus on consumer empowerment only leads to enhanced consumer knowledge of online behavioral advertising and the data reservoir used for this purpose. This may help consumers to deal adequately with the AI-generated advertising “bubble” that is surrounding them in the digital environment. With brand owners, however, the overarching policy dimension of trademark law and trademark protection enters the picture. Individual brand insignia typically enjoy trademark protection. According to traditional trademark theory, trademarks primarily serve the purpose of indicating the commercial origin of goods and services offered in the marketplace.⁴⁴ The CJEU refers to “the essential function of the trade mark, which is to guarantee the identity of the origin of the trade-marked product to the consumer or final user by enabling him to distinguish without any possibility of confusion between that product and products which have another origin.”⁴⁵

To enable trademarks to fulfil the essential origin function, trademark law offers enterprises the opportunity to establish an exclusive link with a distinctive sign. As a result, the protected sign is rendered capable of functioning as a source identifier in trade. In this way, trademark law guarantees market transparency.⁴⁶ It ensures fair competition, protects consumers against confusion and contributes to the proper functioning of market economies by allowing consumers to clearly express their preference for a particular product or service. From an economic

Property, Cheltenham: Edward Elgar Publishing 2013, 137; Ansgar Ohly, “Keyword Advertising auf dem Weg zurück von Luxemburg nach Paris, Wien, Karlsruhe und Den Haag,” *Gewerblicher Rechtsschutz und Urheberrecht* 2010, 776; Stacy L. Dogan, “Beyond Trademark Use,” *Journal on Telecommunication and High Technology Law* 8 (2010), 135; Jonathan Cornthwaite, “AdWords or Bad Words? A UK Perspective on Keywords and Trade Mark Infringement,” *European Intellectual Property Review* 2009, 347; Roland Knaak, “Keyword Advertising—Das aktuelle Key-Theme des Europäischen Markenrechts,” *Gewerblicher Rechtsschutz und Urheberrecht International* 2009, 551; C. Well-Szőnyi, “Adwords: Die Kontroverse um die Zulässigkeit der Verwendung fremder Marken als Schlüsselwort in der französischen Rechtsprechung,” *Gewerblicher Rechtsschutz und Urheberrecht International* 2009, 557; Olaf Sosnitzer, “Adwords = Metatags? Zur marken- und wettbewerbsrechtlichen Zulässigkeit des Keyword Advertising über Suchmaschinen,” *Markenrecht* 2009, 35; Charles Gielen, “Van adwords en metatags,” in: Nico A.N.M. van Eijk et al. (eds), *Dommering-bundel*, Amsterdam: Cramwinckel 2008, 101; Graeme B. Dinwoodie and Mark D. Janis, “Lessons from the Trademark Use Debate,” *Iowa Law Review* 92 (2007), 1703; Ot van Daalen en Arnout Groen, “Beïnvloeding van zoekresultaten en gesponsorde koppelingen. De juridische kwalificatie van onzichtbaar merkgebruik,” *BMM Bulletin* 2006, 106.

⁴⁴ For an overview of trademark functions, pointing out this traditional focus on identification and distinction functions and potential extensions with regard to communication, investment and advertising functions, see R. Keim, *Der markenrechtliche Tatbestand der Verwechslungsgefahr*, Baden-Baden: Nomos 2009, 37–61.

⁴⁵ For an early use of this formula, see CJEU, December 3, 1981, case C-1/81, *Pfizer v Eurim-Pharm*, para. 8. As to the reappearance of the same formula in later judgments, see particularly CJEU, November 12, 2002, case C-206/01, *Arsenal/Reed*, para. 48. Cf. I. Simon Fhima, “How Does ‘Essential Function’ Doctrine Drive European Trade Mark Law?” *International Review of Intellectual Property and Competition Law* 36 (2005), 401.

⁴⁶ Cf. Senftleben, *supra* note 41, 85–7; Kur and Senftleben, *supra* note 35, paras 1.06–1.07.

perspective, it can be added that the clear indication of the commercial origin of goods and services reduces consumers' search costs.⁴⁷ Quite clearly, the inclusion of brand owners in the debate on transparency in online behavioral advertising thus broadens the policy frame. In addition to consumer protection, overarching market transparency rationales, such as the efficient regulation of supply and demand on the basis of consumer preferences, enter the picture.

Moreover, trademark law contributes substantially to "fair play" in the battle between brand owners and competitors for market shares, including individual fights in the online advertising arena. For instance, the CJEU imposed specific transparency obligations on keyword advertisers. To safeguard the essential origin function of trademarks in the context of "double identity"⁴⁸ cases falling under Article 9(2)(a) EUTMR and Article 10(2)(a) TMD, the Court stated in *Google/Louis Vuitton*:

In the case where the ad, while not suggesting the existence of an economic link, is vague to such an extent on the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine, on the basis of the advertising link and the commercial message attached thereto, whether the advertiser is a third party vis-à-vis the proprietor of the trade mark or, on the contrary, economically linked to that proprietor, the conclusion must also be that there is an adverse effect on that function of the trade mark.⁴⁹

In the almost simultaneous *BergSpechte* decision, the Court confirmed this specific standard with regard to the likelihood of confusion analysis under Article 9(2)(b) EUTMR and Article 10(2)(b) TMD.⁵⁰ Both the origin function analysis in sub (a) infringement cases and the likelihood of confusion examination in sub (b) cases, therefore, now include the test whether the advertising is too vague to exclude a potential risk of consumer confusion. This calibration of legal obligations is nothing less than a shift from proof of likely confusion by the trademark owner to an obligation on all advertisers to secure market transparency when using keyword

⁴⁷ With regard to the search costs argument, see Kur and Senftleben, *supra* note 35, paras 1.08–1.09; Andrew Griffiths, "A Law-and-Economic Perspective on Trade Marks," in Lionel Bently, Jennifer Davis, and Jane C. Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique*, Cambridge: Cambridge University Press 2008, 241; Robert G. Bone, "Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law," *Boston University Law Review* 86 (2006), 547 (555); William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge, MA: Harvard University Press, 2003, 166–8; Mark McKenna, "The Normative Foundations of Trademark Law," *Notre Dame Law Review* 82 (2007), 1839 (1844); Matthias Strasser, "The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context," *Fordham Intellectual Property, Media & Entertainment Law Journal* 10 (2000), 375 (379–82); Stephen L. Carter, "The Trouble with Trademark," *Yale Law Journal* 99 (1990), 759 (762); Nicholas Economides, "The Economics of Trademarks," *The Trademark Reporter* 78 (1988), 523 (526). With regard to questions arising in the digital environment, see Stacy L. Dogan and Mark A. Lemley, "Trademarks and Consumer Search Costs on the Internet," *Houston Law Review* 41 (2004), 777.

⁴⁸ As to protection of trademark in cases of so-called double identity (use of an identical conflicting sign in respect of identical goods or services), see Annette Kur, "Trademarks Function, Don't They?" *International Review of Intellectual Property and Competition Law* 45 (2014), 434; Martin R.F. Senftleben, "Function Theory and International Exhaustion: Why It Is Wise to Confine the Double Identity Rule in EU Trade Mark Law to Cases Affecting the Origin Function," *European Intellectual Property Review* 36 (2014), 518–24.

⁴⁹ See CJEU, March 23, 2010, cases C-236/08-238/08, *Google France and Google/Louis Vuitton et al.*, para. 90.

⁵⁰ See CJEU, March 23, 2010, case C-278/08, *BergSpechte/Trekking*, at, paras 36 and 38–40.

advertising services.⁵¹ Instead of conceiving of trademark rights as instruments that shield trademarks from confusing use by third parties at the initiative of the trademark owner, the CJEU redefined protection against confusion as a positive obligation of third parties to keep a sufficient distance from the origin information conveyed via the trademark.⁵²

The evolution of a specific transparency obligation in keyword advertising cases confirms the importance of appropriate transparency measures in advertising contexts: a universal insight that can be extended to modern advertising techniques using behavioral consumer data. Experiences with keyword advertising, thus, support the proposal of new transparency obligations in Articles 24 and 30 DSA. Again, however, it is noteworthy that the objective underlying the transparency obligation is twofold in a trademark context: it is not only the goal of consumer protection that is deemed important, but also the protection of trademark owners against indirect confusion that can arise from false indications of a commercial connection or cooperation between the advertiser and the brand owner.⁵³

Admittedly, online behavioral advertising is less likely than keyword advertising to cause confusion about an economic link between the advertiser and the trademark proprietor. In keyword advertising cases, a search for brand A triggers sponsored search results (advertising messages) concerning brand B—a scenario which can induce consumers to speculate about an economic link. The crux with online behavioral advertising, by contrast, is that consumers may not even be aware that they see brand B advertising because they did a search for brand A some time ago. The central risk, therefore, seems to lie in the area of freeriding and the unfair exploitation of consumer interest in brand A, as evidenced by corresponding search and browsing data, for the purpose of persuading consumers of the particular merits of products stemming from brand B. This shift from a confusion risk to a freeriding risk, however, does not mean that keyword advertising case law does not offer valuable insights that can be put to good use in the regulation of online behavioral advertising. To the contrary, CJEU jurisprudence offers important signposts that may help to develop a well-functioning transparency system under Articles 24 and 30 DSA.

In *L'Oréal/Bellure*, the CJEU used the terms “parasitism” and “free-riding” as synonyms for acts taking unfair advantage of the distinctive character or the repute of a mark with a reputation.⁵⁴ The Court explained that this concept of infringement related “not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign.”⁵⁵ In particular, it covered “cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the iden-

⁵¹ Cf. Ansgar Ohly, *supra* note 43, 780; Nicole van de Laan, “Die markenrechtliche Lage des Keyword Advertising,” in J. Taeger (ed.), *Digitale Evolution: Herausforderungen für das Informations- und Medienrecht*, Oldenburg: Oldenburger Verlag für Wirtschaft, Informatik und Recht 2010, 597 (605), who refer to active information obligations in unfair competition law; Nicole van der Laan, “The Use of Trade Marks in Keyword Advertising: If Not Confusing, Yet Unfair?” in Nari Lee, Guido Westkamp, Annette Kur, and Ansgar Ohly (eds), *Property and Conduct: Convergences and Developments in Intellectual Property, Unfair Competition and Publicity*, Cheltenham: Edward Elgar Publishing, Chapter 10, Section 5.

⁵² Senftleben, *supra* note 43, 162–3.

⁵³ As to the concept of indirect confusion, see CJEU, November 11, 1997, case C-251/95, *Sabèl/Puma*, paras 16–26. Cf. Kur and Senftleben, *supra* note 35, paras 5.127–5.130.

⁵⁴ CJEU, June 18, 2009, case C-487/07, *L'Oréal/Bellure*, para. 41.

⁵⁵ CJEU, *ibid*, para. 41.

tical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.”⁵⁶ More concretely, this means that the taking of unfair advantage will be found in cases where

a third party attempts, through the use of a sign similar to a mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark.⁵⁷

At first glance, this general formula points towards a rather low threshold for a finding of actionable freeriding. In particular, it seems that a mere attempt to ride on the coat-tails of a mark with a reputation is sufficient to substantiate a trademark infringement claim. Would the involvement of brand owners in transparency policymaking in the field of online behavioral advertising, as proposed in Articles 24 and 30 DSA, thus have a chilling effect? Could it lead to a general ban on the use of brand-related consumer data without the brand owner’s prior consent?

In fact, the CJEU concluded in the keyword advertising case *Interflora/Marks & Spencer* that in cases where a competitor of the proprietor of a trademark with a reputation selected that trademark as a keyword for triggering its own online advertising, the purpose of that use was indeed to take unfair advantage. The selection of the mark with a reputation was liable to create a situation in which a probably large number of internet users using the reputed mark as a search term would see the competitor’s advertisement displayed on their screens.⁵⁸ When these internet users then purchased the competitor’s product instead of that of the proprietor of the trademark, the competitor derived a real advantage from the distinctive character and repute of the trademark without paying any compensation.⁵⁹ Unfair freeriding was particularly likely in cases where the competitor used keyword advertising based on a mark with a reputation to offer imitations of the goods of the trademark proprietor.⁶⁰

This finding of freeriding, however, did not readily imply a finding of infringement. By contrast, the Court pointed out that:

where the advertisement displayed on the internet on the basis of a keyword corresponding to a trade mark with a reputation puts forward—without offering a mere imitation of the goods or services of the proprietor of that trade mark, without causing dilution or tarnishment and without, moreover, adversely affecting the functions of the trade mark concerned—an alternative to the goods or services of the proprietor of the trade mark with a reputation, it must be concluded that such use falls, as a rule, within the ambit of fair competition in the sector for the goods or services concerned and is thus not without “due cause.”⁶¹

Hence, the CJEU not only established a due cause defense⁶² for the purpose of informing consumers about an alternative offer in the marketplace but also developed three factors

⁵⁶ CJEU, *ibid*, para. 41.

⁵⁷ CJEU, *ibid*, para. 49.

⁵⁸ CJEU, September 22, 2011, case C-323/09, *Interflora/Marks & Spencer*, para. 86.

⁵⁹ CJEU, *ibid*, paras 87–88.

⁶⁰ CJEU, *ibid*, para. 90.

⁶¹ CJEU, *ibid*, para. 91.

⁶² Article 9(2)(c) EUTMR; Article 10(2)(c) TMD. For a discussion of the open-ended due cause defence in EU trademark law, see Kur and Senftleben, *supra* note 35, paras 5.250–5.272; Martin R.F.

to be taken into account in this context, namely whether the defendant (1) offered a mere imitation of the goods or services of the trademark proprietor; (2) damaged the trademark by causing harm to its distinctive character (dilution or blurring) or repute (tarnishment);⁶³ (3) made use that adversely affects the functions of the trademark. The emergence of these due cause factors in the keyword advertising case *Interflora/Marks & Spencer* reflects the need to balance trademark owner interests against the interests of competitors, including freedom of competition and freedom of commercial expression.⁶⁴ The CJEU is prepared to employ the due cause defense as a tool to outweigh the broad grant of protection against freeriding.⁶⁵ The evolution of a specific due cause defense in *Interflora/Marks & Spencer* shows that the broad grant of protection in the area of freeriding need not be the last word when it comes to use that enhances fair competition and consumer information.

5. TRUST IN AI-DRIVEN, BRAND-BASED COMMUNICATION

The *Interflora/Marks & Spencer* decision—more specifically, the insight that the trademark system must offer room for informing consumers about alternative offers in the marketplace—can play a crucial role in the further development of the transparency obligations that have been proposed in Articles 24 and 30 DSA. As Helberger, Huh, and colleagues point out in their analysis of the discussion surrounding new transparency obligations in the field of online behavioral advertising: “[t]his transparency requirement has been commonly dreaded by the industry as it expects such transparency to have negative impacts on computational advertising

Senftleben, “The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provisions,” *American University International Law Review* 33 (2017), 231 (256–65); Vincenzo Di Cataldo, “The Trade Mark with a Reputation in EU Law – Some Remarks on the Negative Condition ‘Without Due Cause’,” *International Review of Intellectual Property and Competition Law* 42 (2011), 833.

⁶³ For a more detailed discussion of these different forms of harm, see Martin R.F. Senftleben and Femke van Horen, “The Siren Song of the Subtle Copycat: Aligning EU Trade Mark Law with New Insights from Consumer Research,” *The Trademark Reporter* 111 (2021), 739 (750–6); Kur and Senftleben, *supra* note 35, paras 5.231–5.244.

⁶⁴ As to the need to reconcile trademark protection with these fundamental freedoms, see Martin R.F. Senftleben, Lionel Bently et al., “The Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition: Guiding Principles for the Further Development of EU Trade Mark Law,” *European Intellectual Property Review* 37 (2015), 337–43. Cf. Łukasz Żelechowski, “Invoking Freedom of Expression and Freedom of Competition in Trade Mark Infringement Disputes: Legal Mechanisms for Striking a Balance,” *ERA Forum* 19 (2018), 115 (115–35); Martin R.F. Senftleben, “Free Signs and Free Use: How to Offer Room for Freedom of Expression within the Trademark System,” in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, Cheltenham: Edward Elgar Publishing 2015, 354; Lisa P. Ramsey and Jens Schovsbo, “Mechanisms for Limiting Trade Mark Rights to Further Competition and Free Speech,” *International Review of Intellectual Property and Competition Law* 44 (2013), 671; Ilanah Simon Fhima, “Trade Marks and Free Speech,” *International Review of Intellectual Property and Competition Law* 44 (2013), 293; Wolfgang Sakulin, *Trademark Protection and Freedom of Expression – An Inquiry into the Conflict between Trademark Rights and Freedom of Expression under European Law*, The Hague/London/New York: Kluwer Law International 2010 (247–82); Robert Burrell and Dev Gangjee, “Trade Marks and Freedom of Expression: A Call for Caution,” *International Review of Intellectual Property and Competition Law* 41 (2010), 544.

⁶⁵ Kur and Senftleben, *supra* note 35, paras 5.261–5.262.

effects and effectiveness, and to lead to massive rejection of data-driven advertising by consumers, thus substantially distorting the computational advertising ecosystem.”⁶⁶

Exploring consumer reactions to the use of behavioral data in AI-driven online advertising, Sophie Boerman, Sanne Kruijkemeier, and Frederik Zuiderveen Borgesius identified a whole spectrum of negative consumer perceptions, ranging from privacy concerns and feelings of vulnerability and intrusiveness to more general ad-skepticism and doubts about the fairness of data use.⁶⁷ Consumers may perceive personalized behavioral advertising as “creepy marketing.”⁶⁸ This research gives rise to the question whether transparency information that confirms the extensive use of behavioral data implies the risk of doing more harm than good. Will the new transparency obligations in Article 24 and 30 DSA thwart the evolution of promising new marketing technologies? Are they likely to frustrate the remarkable potential of online behavioral advertising to enhance consumer knowledge and consumer choice by providing consumers with useful, tailor-made information about offers in the marketplace that appear most relevant in the light of personal interests and characteristics that can be deduced from psychographic data?

As Boerman, Kruijkemeier, and Zuiderveen Borgesius point out, it is possible to avert this undesirable result. If the discussion about Article 24 and 30 DSA leads to a legal framework that ensures sufficient trust in personalized marketing messages, in particular trust resulting from the reliability and usefulness of tailor-made information about products and services, the introduction of new transparency obligations can lead to a well-functioning computational advertising system which consumers are willing to accept: “research has shown that privacy concerns and trust play important roles in consumer acceptance and the effectiveness of [online behavioral advertising]. For instance, more trusted retailers can increase the perceived usefulness of their ads by developing ads that reflect consumers’ interests in a complete way.”⁶⁹

As an example of trust-enhancing measures, Boerman, Kruijkemeier, and Zuiderveen Borgesius mention the use of a “privacy trustmark” that would symbolize and confirm the involvement of the certified website in a program that protects consumer privacy.⁷⁰ The described keyword advertising debate sheds light on further options. Besides compliance with privacy and personal data protection standards, the market transparency rationale in trademark law and the insight that trademark protection must be reconciled with competitors’ freedom of competition and freedom of commercial expression offer important additional signposts. Using these principles as a compass, it becomes possible to devise a regulatory framework that makes AI-driven, personalized advertising more helpful and more beneficial for consumers.

⁶⁶ Helberger, Huh et al., *supra* note 9, 386.

⁶⁷ Boerman, Kruijkemeier, and Zuiderveen Borgesius, *supra* note 14, 365 and 368–9. Cf. Finn and Wadhwa, *supra* note 18, 26–7.

⁶⁸ Robert S. Moore, Melissa L. Moore, Kevin J. Shanahan, and Britney Mack, “Creepy Marketing: Three Dimensions of Perceived Excessive Online Privacy Violation,” *Marketing Management* 25 (2015), 42–53.

⁶⁹ Boerman, Kruijkemeier, and Zuiderveen Borgesius, *supra* note 14, 369, referring to Alexander Bleier and Maik Eisenbeiss, “The Importance of Trust for Personalized Online Advertising,” *Journal of Retailing* 91 (2015), 390–409.

⁷⁰ Boerman, Kruijkemeier, and Zuiderveen Borgesius, *supra* note 14, 369. Cf. Andrea J. Stanaland, May O. Lwin, and Anthony D. Miyazaki, “Online Privacy Trustmarks,” *Journal of Advertising Research* 51 (2011), 511–23.

Hence, trademark law and policy can contribute substantially to consumer acceptance. In the keyword advertising debate, the concern to frustrate the evolution of promising and useful new ways of advertising that are capable of reducing consumer search costs played a crucial role as well.⁷¹ Against this background, Graeme Dinwoodie and Mark Janis proposed the adoption of specific conditions which providers of keyword advertising services should fulfil to escape liability for trademark infringement:

For example, search engines might be required to present disclaimers on search results pages, to disclose information about search methodology, to differentiate clearly between organic and sponsored search results, or when put on notice of allegedly infringing activity, to de-index the infringing webpage. The goal is to develop conditions that oblige search engines to present information accurately and transparently, without imposing costs so high as to thwart innovation or implicate other social objectives such as privacy.⁷²

Considering the described outcome of the CJEU ruling in *Interflora/Marks & Spencer*, it can be added that, apart from confirming the obligation to police and prevent the advertising of mere imitations,⁷³ trademark law also provides important guidelines as to the diversity of offers that should be brought to the attention of consumers. Instead of limiting the spectrum of products and services to those which consumers have explored previously (as evinced by browsing history, search requests, and online purchases), online behavioral advertising should be designed in a way that offers providers of alternative products and services sufficient opportunities to inform consumers about their alternative offers. In other words, previous online behavior concerning brand A should lead to the display of personalized messages covering not only brand A but also alternative offers made by brands B and C. In this way, AI-driven personalized advertising can enhance consumer information about available offers, broaden the spectrum of choices that consumers consider before taking a decision, reduce search costs for alternatives outside the bubble of personalized marketing messages, and contribute to market transparency and effective competition. The display of information about alternative offers in compliance with the *Interflora* criteria⁷⁴ offers an attractive avenue to demonstrate the added value and usefulness of targeted, personalized advertising based on behavioral consumer data. As a result, consumers can experience the benefits and advantages of the new, AI-driven advertising paradigm.

Trademark law can thus constitute an important ingredient in the recipe for more trustworthy online behavioral advertising. It prevents the misuse of new advertising techniques to present counterfeit offers. It also bans advertising messages that would damage the original brand which consumers have explored in previous browsing, search, and online shopping sessions. Information on alternative offers is reduced to what can be deemed fair and useful in the light of trademark protection standards. To achieve this goal of trust-enhancing, brand-related rules for online behavioral advertising, however, it is necessary to interpret and develop Articles 24 and 30 DSA in a way that gives trademark proprietors and their competitors access to transparency information. To avoid inroads into personal data protection, this information

⁷¹ Graeme B. Dinwoodie and Mark D. Janis, "Confusion over Use: Contextualism in Trademark Law," *Iowa Law Review* 92 (2007), 1597 (1664–5).

⁷² Dinwoodie and Janis, *supra* note 71, 1665–6.

⁷³ CJEU, case C-323/09, *Interflora/Marks & Spencer*, para. 91.

⁷⁴ CJEU, *ibid*, para. 91.

should be reduced to anonymized, generic data, such as the mere fact that a search for brand A has taken place. This information can then trigger marketing messages relating not only to brand A products but also to brand B and C alternatives.

6. CONCLUSION

The discussion on new transparency obligations in the area of online behavioral advertising should not be limited to the issue of consumer information and consumer empowerment. To devise a regulatory framework capable of counterbalancing chilling effects of transparency information—in particular privacy concerns and feelings of vulnerability and intrusiveness—it is advisable to adopt rules that make beneficial effects of AI-driven, personalized advertising visible to consumers. Trademark law—and the involvement of trademark owners and their competitors in the debate—can play an important role in this context. Lessons from trademark law can pave the way for the use of consumer data to generate beneficial, reliable and useful marketing information. If applying insights from the keyword advertising debate to online behavioral advertising, transparency rules can evolve that enhance consumer information about alternative offers in the marketplace, broaden the spectrum of consumer choice, reduce search costs, and contribute to market transparency and effective competition. By ensuring compliance with the rules and rationales of trademark law, transparency legislation can enhance benefits for consumers and strengthen trust in AI-driven personalized advertising.