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The Role of Keyword Advertising in Competition Among Rival Brands

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I. INTRODUCTION

A consumer types the name of a brand into a search engine. In most cases, the search-results page shows two sets of results: "organic search results" and "sponsored links" or "ads." The results in the middle of the page are the "organic search results" and they contain a set of links related to the brand itself as well as links to similar products that might be relevant to the consumer's query. The search result page might also show "sponsored links," which are advertisements that appear on the top and to the right of organic search results. These advertisements often contain links to the brand and to places where consumers can buy the brand. The sponsored links are generated through the keyword-bidding process used by search engines to sell ad space on the search-results page.

If a competitor to the brand, like the brand itself, bids on the brand-name keyword, their ads could also appear as sponsored links. The position of the competitor advertisement on the search-results page, including whether its advertisement is presented at all, depends in part on whether the ad is relevant to a user's query, which is measured in part by the number of clicks the ad is likely to get, and on how much the advertiser bids on the brand-name keyword. As a result, when a consumer queries "Gucci handbag" in a search engine, she may end up seeing organic results and sponsored links for Kate Spade handbags in addition to Gucci-related links.

Should courts prohibit or limit this sort of keyword advertising against competitors? Similar questions are being posed around the world as a result of complaints by companies that search engines are infringing on the trademarks of brand holders and confusing consumers. For example, the Australian Competition and Consumer Protection Commission ("ACCC") brought a case against Google in connection with the sponsored links it sells to advertisers. The case arose in part because some advertisers had bid on their competitors' names as keywords and their competitor names appeared in the heading of the advertisers' sponsored link. The ACCC alleged that Google was responsible for the content of these advertisements and that they were likely to mislead consumers in violation of Australian consumer protection law.[2]

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[2] The court of first instance disagreed, holding that Google, an intermediary, should not be held responsible for the contents of these advertisements. In the court's view, ordinary and reasonable users of Google's search engine would not be confused and they would know that it was the advertisers themselves, not Google, that determined the content of the advertisements. The ACCC appealed and the court of first instance's judgment was

This article argues that courts and regulators should be careful about limiting advertising by competitors in this situation. There is extensive empirical evidence that consumers are harmed, as a result of higher prices and poorer products, from restrictions on the ability of firms to show consumers informative and comparative advertisements.[3] Over the last two decades, competition authorities, courts, and legislatures have looked skeptically at efforts by firms to limit advertising by their competitors. At the same time, there is a strong presumption that consumers benefit when they obtain information on competing products in response to a query about a particular brand. Such comparative information is what consumers are often looking for and what search engines have strong financial incentives to provide.

In addition, harm from advertising restrictions is not limited to consumers. Businesses have a keen interest in identifying who their competitors are selling to and trying to persuade those customers to switch. That is the essence of competition. Using brand names as part of keyword advertising makes it easier for firms to find consumers who would be interested in learning about their product. It thereby increases the intensity of competition for customers.

Companies can abuse keyword advertising just like any other form of advertising, but there are well-developed legal and enforcement policies to deal with companies that try to mislead and deceive consumers. Regulators need to strike a proper balance between, on the one hand, encouraging competition for consumers, including allowing messages that allow consumers to compare one product with another and, on the other hand, protecting consumers from misleading and deceptive ads while protecting brands from dilution of their trademarks. In striking that balance, courts and regulators should recognize the very important contribution that informative comparative advertising makes to competition.

II. THE KEYWORD ADVERTISING CONTROVERSY

The basic construct of a search-results page is similar to traditional advertising-supported media. The page has content that attracts the attention of consumers, namely the organic search results that are returned in response to entering certain keywords. Advertisers pay to place ads on the search-results page. The search-engine company, just like any advertising intermediary, ultimately decides where to place the ads and how they are displayed.

The development of search engines has, however, created new ways for companies to reach consumers who might be more specifically interested in learning more about a company's products.[4] In this way, the mechanics behind a search results page are different from traditional media.

The unpaid content of the search results page comes from an algorithm that tries to deliver the most relevant results based on the keywords the consumer has typed in. The paid content of the search results page comes from a different algorithm that considers both the

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reversed. Australia's High Court has since agreed to hear the case, and a decision is currently pending. *Australian Competition and Consumer Commission v Google Inc.* [2012] FCAFC 49.

[3] Timothy Muris, *California Dental Association v Federal Trade Commission: The Revenge of Footnote 17*, (8)SUPREME COURT ECON. REV. 265-310 (2000).

[4] For a general introduction, *see* David S. Evans, *The Economics of the Online Advertising Industry*, 7(3) REV. NETWORK ECON. (September 2008).

relevance of the advertisement to the user's query and the maximum amount an advertiser is willing to pay for specific key words.[5] The algorithm determines how many ads to place on the search-results page and where to place them.[6]

Search engines have dramatically reduced the cost of reaching consumers. They provide companies with the ability to promote themselves for free through the organic search results, and also provide a key role in promoting the indexing of websites and their content. As a result, companies invest in search-engine optimization to help ensure that consumers will find links to their websites when they type in relevant key words. This enables companies to match themselves with prospective customers and inform those customers about the uses and characteristics of their products.

Search engines also provide companies with the ability to pay for advertising and thereby increase their chances of reaching relevant consumers. For example, a new tapas bar in Boston could buy search-ads on Google using the keywords "tapas bar restaurant Boston South End" and achieve the top left spot on the first search-results page for $3.16 a click if it had up to $100 per day to spend. The tapas bar would not pay at all unless users actually clicked on the ads.[7]

The keyword controversy results from the ability of advertisers to bid on keywords that correspond to competing brand names in order to enhance the likelihood of reaching all consumers interested in purchasing a certain type of product. For example, when one of the authors typed in "Gucci handbag" into Google, the right-hand side of the search result page, labeled clearly as "sponsored links," contained ads in the 7th (Nordstrom.com) and 9th (couture.com) positions for third party websites.[8] Upon clicking the link, handbags from many brands besides Gucci could be purchased. Both Nordstrom and couture.com might have entered "Gucci handbag" as one of their keywords and bid on them. Nordstrom and couture.com might have been able to get their ads displayed on the top of the page, or higher in the stack on the right-hand side of the page, if they had paid more for "Gucci handbag," assuming that their advertisements were otherwise relevant to the users' query.[9]

Of course, the brand whose name consumers have used in the query would most likely prefer that consumers not see information about the brand's competitors. But search engines, like all advertising supported media, are two-sided platforms, with two sets of customers whose

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[5] In assessing relevance, some search engines, such as Google, use a "quality score." Among others, factors that determine the quality score include the historical click-through rate for the ad, the click-through rate for the url for the advertiser, and the quality of the landing page for the ad. *See* http://support.google.com/adwords/bin/answer.py?hl=en&answer=2454010.

[6] Ads on the first page are more valuable to advertisers than those placed on the second and subsequent search results pages. Search engines provide guidance on how much an advertiser needs to bid to get on the first page.

[7] Based on information gathered by a Boston-based researcher on July 27, 2012.

[8] Based on submitting a query from a computer in the Boston area on July 26, 2012. Results for queries from different locations and times may differ.

[9] An advertiser cannot just pay more to get a better spot on the search-results page since the allocation of sponsored links to spots depends both on bids and the quality score. For instance, if a company bids on a keyword but its landing page and advertisement are completely irrelevant to a users' query, the ad is not likely to appear no matter how much the advertiser bids. Nevertheless, bidding more increases the likelihood of getting better spots, and having an advertisement that is more likely to be clicked will also increase the probability of getting a better spot.

welfare needs to be considered.[10] It is not at all obvious that consumers who type in the name of one brand are harmed when they see advertisements for another brand. Consumers may be performing widespread searches and comparisons and not just looking for a particular vendor. Even if they didn't intend to do a widespread search they may value the serendipitous finding that there are alternatives and value search-engine platforms that provide additional information. In some cases, consumers may intentionally type in a brand name because they know it will tend to display results for other luxury products. It would therefore seem likely that consumers would *benefit* from seeing information on other alternatives. Indeed, the search engine has strong incentives to deliver useful search results to consumers because that is how it generates the traffic that it sells to advertisers.

Some of the keyword advertising decisions to date have hinged on whether the courts believed that consumers could distinguish between the brand name they typed in and the sponsored links that appear for competitors.[11] Other decisions have considered the extent to which the search-engine intermediary is liable for alleged confusion caused by sponsored links that display advertisements from counterfeit sites.[12] From the standpoint of social welfare, however, the courts and regulators should balance the costs stemming from confusion, when in fact this occurs, with two other considerations:

1. The benefits that consumers who aren't confused get from more information, including comparative information, and increased competition.
2. The indirect effects of court and regulatory decisions that increase the risks to search engine intermediaries of helping businesses target and inform consumers who have expressed interest in their rivals.

We return to this cost-benefit analysis later.

III. TARGETING COMPETITOR'S CUSTOMERS

Although search-based advertising is still in its teens, targeting the customers of competitors isn't new, only the technology is different. Brand-name based keyword advertising is similar in many respects to other practices that firms have traditionally engaged in, and that intermediaries help these firms engage in, to target their rivals' customers.

It has always made business sense for companies to target their competitors' customers. Those consumers have already signaled that they are interested in a similar product. In many cases a competitor's customers are more likely sales prospects than people selected in some other way. A new company in a relatively mature market will want to position its product by making a comparison to a reference product. This is usually an effective means of both communicating

[10] Simon P. Anderson & Jean J. Gabszewicz, *The Media and Advertising: A Tale of Two-Sided Markets*, HANDBOOK OF THE ECONOMICS OF ART AND CULTURE (Victor Ginsburgh & David Throsby eds.) (2006).

[11] In *Rosetta Stone, Ltd. v. Google Inc.*, 730 F. Supp. 2d 531 (2010), the district court dismissed claims brought by Rosetta Stone holding that "no reasonable trier of fact could find that Google's practice of auctioning Rosetta Stone's trademarks as keywords triggers to third party advertisers for use in their Sponsored Link titles and text creates a likelihood of confusion as to the source or origin of Rosetta Stone's goods." The Fourth Circuit has since reversed and remanded the case. *See Rosetta Stone, Ltd. v. Google Inc.*, 676 F.3d 144 (4th Cir. 2012).

[12] *Australian Competition and Consumer Commission v Google. Inc.* [2012] FCAFC 49.

with the consumer and providing information about the quality of the product. In many instances, a new entrant does not have much choice but to make reference to another competing product in order to persuade the customers of incumbents to switch. In almost all these cases the rival entrant is using information generated by the incumbent brand and therefore could be accused of free riding.

Firms base new locations in part on where their rivals have located. In some cases they may decide they do not want to be near rivals to maximize their market share. But in other cases they may decide to locate right next to rivals because they realize an externality from the foot traffic generated by their rivals. Some of the people who are attracted to the rival might be attracted to them. They are free riding in another way as their rival may have identified a location that is particularly good for their product.[13]

Brands also pay slotting fees for placement on supermarket shelves. Those fees depend in part on the position on the shelf. Typically, similar products are placed together so that consumers get an opportunity to review product brands relative to each other. As a result, if a consumer goes to buy Kellogg's Corn Flakes at a Superama in Mexico City she will go to a cereal aisle where, surrounding Kellogg's cereals, she will see several other brands including Quaker, Post, Granvita, Bimbo, Maizoro, and Nutrisa. Any new entrant into the cereal business will be placed in that aisle and established brands like Kellogg's or Bimbo will have no say in the supermarket's decision.

Marketing companies also collect information on what products consumers have bought.[14] They sell that information to rival companies that will enable them to target those consumers. For example, if a consumer buys Pampers she may receive a coupon from Huggies. Some retail stores also use consumer purchase decisions to promote rival products. For example, if you buy ibuprofen, a pain reliever, under the brand name Advil at a CVS Pharmacy you may get a coupon to try the CVS generic version of ibuprofen.

These situations involve essentially the same issues as in brand-name based keyword advertising. The communication between the intermediary and the company that wants to know about its rival's customers will typically involve a request that relates to the brand name of the rival: "tell me what retail storefronts I could rent near Starbucks," "tell me who bought Huggies," or "put me near the Kellogg's cereals." All of these situations involve trading on information involving consumer purchases of a rival's products.[15] Keyword advertising differs from these situations mainly in its immediacy: For example, rather than having to wait for a consumer to buy a product, get recorded in a database, and have that information conveyed, a firm can use a search engine's tools to cater to consumers in real-time as they search for rivals' products.

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[13] Andrea Shepard studied this in the case of gasoline stations, which tend to cluster around each other instead of spreading out over a given location. *See* Andrea Shepard, *Discrimination and Retail Configuration*, 99(1) J. POL. ECON. 30-53 (1991).

[14] In the United States, companies that provide this service include Affinity Solution, Catalina Marketing, and FreeMonnee.

[15] Like keyword advertising in some cases, the intermediary could pass on information to a firm that offers a counterfeit product and is otherwise trying to deceive the consumer.

Keyword advertising using brand names helps companies compete for a common pool of customers. It makes it possible for firms to let people that have expressed interest in a brand, in particular by conducting a search using the name of this brand, know that there is a competing alternative. As with other methods for targeting a rival's customers, keyword advertising increases competition for consumers and likely improves customer satisfaction by enabling a better match between customers and producers at reduced prices and better quality. And, as with other methods, keyword advertising makes it easier for new firms to enter and compete with established players.

IV. THE ECONOMICS OF ADVERTISING AND ITS RESTRICTION

Keyword advertising generally provides concise information on firms. Most importantly, it enables a consumer to click on a link that takes the consumer to a website where the consumer can obtain more information and buy the product. Keyword advertising also includes a small amount of other basic information underneath the link. That is, it typically involves what is called "informative advertising."[16]

Economists have found that informative advertising is a market solution to the problem of imperfect information and, as such, has important pro-competitive effects. Informative advertising helps people find information about price and product features. For commodity products it enables consumers to search for the best price and location. For differentiated products advertising helps consumers find the best product that meets their needs. In particular, by enabling producers to advertise the characteristics of their products, possibly in comparison to other products, it helps consumers and producers find the best matches.

Informative advertising is especially important for companies that are trying to introduce new products, whether those companies are established or startups. Making consumers aware of these new products is likely to be important. For one, new products can increase social welfare considerably, a subject that has received considerable attention by economists.[17] For example, in introducing a new product to retailers, a manufacturer may use heavy advertising. The manufacturer may also engage in significant advertising to counter switching costs and general consumer inertia. One study found that informative advertising based on comparisons with existing brands is particularly helpful for new brands to establish themselves.[18]

The best way to see the importance of informative, including comparative, advertising to competition is to look at what happens when this sort of advertising is limited or banned. Economists who have studied various attempts by governments and trade associations to restrict

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[16] For an overview, *see* Keith Bagwell, *The Economic Analysis of Advertising*, THE HANDBOOK OF INDUSTRIAL ORGANIZATION, Vol. 3 (M. Armstrong & R. Porter eds.) (2007). Some economists have argued that "persuasive advertising," such as the kind frequently seen on television, does not provide any value to consumers and results in higher prices as advertisers recoup their costs, while others have argued that persuasive advertising has several positive features that ultimately benefit consumers. This debate isn't relevant here since the format of keyword advertising typically is not conducive to persuasive advertising.

[17] JERRY A. HAUSMAN, VALUATION OF NEW GOODS UNDER PERFECT AND IMPERFECT COMPETITION, THE ECONOMICS OF NEW GOODS 207-248 (1996) and Amil Petrin, *Quantifying the Benefits of New Products: The Case of Minivan*, 110(4) J. POL. ECON. 705-729 (2002), to name only a few.

[18] Dhruv Grewal, Sukumar Kavanoor, Edward F. Fern, Carolyn Costley & James Barnes, *Comparative versus Noncomparative Advertising: A Meta-Analysis*, 61(4) J. MARKETING, 1-15 (1997).

advertising have found overwhelmingly that these restrictions harm consumers by raising price and lowering quality.

A classic study by Lee Benham found that optometrist prices in U.S. states that prohibited advertising by this profession were 25 percent higher than in states that did not prohibit advertising.[19] Subsequent studies extended and confirmed his analysis. Kwoka, for example, tested the claim that advertising reduces prices and quality for optometric services. He found that average market quality is greater with advertising and that there are considerable social benefits from loosening advertising restrictions.[20] More recent studies, exploiting more sophisticated computational techniques, such as Haas-Wilson & Savoca's study into provider choice for contact lenses have put an emphasis on the significant effects of advertising limits and regulation on consumer choices, a lesson that should not be lost when considering new restrictions on advertising.[21]

Economists also have looked at these same effects on other products and services, including legal services, and prescription drugs sales at the retail level. Following Benham's classification of restrictive vs. non-restrictive states in terms of advertising regulations, Cady estimated the cost to consumers of imposing limits on advertising for prescription drugs at $135 to $152 million in 1970 (almost 4 percent of total prescription drug sales). He found that advertising prohibitions and limitations resulted in higher retail prices in pharmacies for these drugs—a net transfer from consumers to retailers.[22]

In legal services, Muris & McChesney found cost-savings resulting from increased advertising, mainly due to increased volume. They also addressed concerns about potential quality reductions resulting from increased advertising, concluding that lower prices did not lead to lower quality in their study.[23] Cox et al, also reviewing legal services, looked at routine legal services in 17 metropolitan areas in the United States and found that advertising exerts a downward pressure on prices and that the amount of time expended in offering routine services would consequently fall, leading to more efficient levels of quality offered.[24]

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[19] Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15(2) J. LAW & ECON. 337-352 (1972).

[20] John E. Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74(1) AMER. ECON. REV. 211-216 (1984).

[21] Deborah Haas-Wilson & Elizabeth Savoca, *Quality and Provider Choice: A Multinomial Logit-Least- Squares Model with Selectivity*, 24(6) HEALTH SERVICES RESEARCH, 791-809 (1990). The authors note: "We see that the advertising and licensing restrictions have the largest effects on consumer choices. When advertising is prohibited, the probability of selecting an optometrist drops from 69 percent to 49 percent."

[22] John F. Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14(4) ECON. INQUIRY, 493 (1976).

[23] Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 4(1) AMER. BAR FOUNDATION RESEARCH J. 179-207 (1979).

[24] Steven R. Cox, John R. Schroeter, & Scott L. Smith, *Attorney Advertising and the Quality of Routine Legal Services*, (2) REV. OF INDUSTRIAL ORG., 340-354 (1985) and John R. Schroeter, Scott L. Smith, & Steven R. Cox, *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36(1) J. INDUSTRIAL ECON. 49-60 (1987).

Almost all of the numerous subsequent studies of diverse industries have found similar results for quality as well as prices.[25] Restricting informative keyword advertising is likely to have the same sort of adverse effects on competition.

V. GOVERNMENT POLICY TOWARDS ADVERTISING RESTRICTIONS

Historically, there were many restrictions on the ability of firms to advertise. Trade associations imposed many of these restrictions on their members. In other cases governments imposed restrictions as a result of lobbying efforts by industry interests. Beginning with efforts by the U.S. Federal Trade Commission in the 1970s, competition authorities and other policymakers have recognized that these restrictions were anticompetitive and have worked towards eliminating them. Despite this, there is continual pressure to limit advertising.

The FTC began attacking advertising restrictions in the 1970s.[26] In 1978 the FTC preempted state advertising prohibitions by issuing the "Trade Regulation Rule on Advertising of Ophthalmic Goods and Services." A year later it challenged various advertising restrictions in professional codes of ethics for the American Medical Association and American Dental Association. During the 1980s it challenged various restrictions by state boards that regulate professions. As Beales has observed, "[t]hese widely supported commission actions reflect the belief that truthful advertising is an important competitive weapon that should be encouraged." Some of these restrictions in question involved brand comparisons. The FTC concluded, however, "[c]omparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace."[27]

In Europe, restrictions on advertising were more severe and long lived than in the United States, where many countries continued to have laws that prohibited or restricted advertising well into the 1990s. Even the United Kingdom, a jurisdiction with regulatory standards more

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[25] *See* Muris, note 23, for a survey and citations to the dozens of studies that have been done.

[26] J. Howard Beales III, *What State Regulators Should Learn from FTC Experience in Regulating Advertising*, 10(1) J. PUBLIC POL'Y & MARKETING 101-117 (1991).

[27] Statement of Policy Regarding Comparative Advertising, Federal Trade Commission, Washington, D.C., August 13, 1979. This policy statement has had a long-lasting impact in directing the FTC's approach to advertising as can be seen through various FTC actions and decisions since then. For example, in 1994, the Commission issued consent orders barring the Body Armor Producers' Association from restricting the use of comparative advertising, *Personal Protective Armor Ass'n,* 117 F.T.C. 104, 107-08 (1994); likewise, in *Ariz. Auto Dealers Ass'n*, 117 F.T.C. 781, 784-85 (1994), it issued a consent order prohibiting the association from restrictive non-deceptive advertising behaviors. A recent case where restraints on advertising were deemed to have negative effects on competition is *Polygram Holding v. Federal Trade Commission*, 416 F.3d 29, 33 (D.D.C. 2005) where a lower court's decision was affirmed in considering that a "moratorium on advertising" with respect to products not part of the joint venture was anticompetitive, and further noting that "such restraints by their nature tend to raise prices and reduce output." The more permissive approach towards comparative advertising, however, is older than the 1979 policy statement as can be gleaned form prior case law: *Bates v. State Bar of Arizona*, 433 U.S. 350, 785 (1977), stated that "price advertising plays an important role in the allocation of resources in a free enterprise system." Even in the 1960s, in *Federal Trade Commission v. Proctor & Gamble Co*., 368 U.S. 568, 603-04 (1967) the decision noted that "[p]roper advertising serves a legitimate and important purpose in the market by educating the consumer as to available alternatives" and is an aspect of "healthy competition."

akin to the United States, prohibited comparative advertising until 1994. When the European Union looked into rationalizing these policies it decided to largely end them, and published a directive in April 2000 to harmonize its laws on comparative advertising. In its preamble, the EU Directive emphasized the importance of comparative advertising as a consumer decision-making tool and a stimulus of competition. It therefore allowed comparative advertising.[28]

As in the United States, restrictions on advertising continue to be a competition concern as the EU's Commission noted in its 2004 "Report on competition in Professional Services," which asks regulatory authorities and professional bodies in Member States to put in place pro-competitive and transparency-enhancing mechanisms that can empower consumers.[29,30] In fact, the 2006 Misleading and Comparative Advertising Directive explicitly recognizes that comparative advertising "may be a legitimate means of informing consumers of [suppliers'] advantage".[31]

Of course, neither the United States nor the European Union endorses untruthful or deceptive advertisements. However, the FTC in particular has recognized that the pro-competitive benefits of advertising are so strong that policymakers need to be careful in restricting advertising on the grounds that it is misleading. As recently as 2007, in opposing state restrictions on legal advertising the Commission observed:[32]

> Courts and other state policy makers should be careful not to restrict unnecessarily the dissemination of truthful and non-misleading advertising that may help consumers make more informed choices. Overly broad restrictions of truthful and non-deceptive information are likely to harm consumers of legal services by denying them useful information and impeding competition among attorneys. Accordingly, consumers are better off when policy makers address concerns about potentially deceptive advertising with narrowly tailored restrictions.

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[28] Under the Directive comparative advertising is allowed provided it does not mislead; it compares like with like; does not confuse, discredit or take unfair advantage of a rival's trademark; or presents goods as imitations of those bearing a protected name.

[29] F. Barigozzi & M. Peitz, *Comparative Advertising and Competition Policy*, RECENT TRENDS IN ANTITRUST: THEORY AND EVIDENCE 215-263 (2006).

[30] This overarching regulatory principle is reflected in the case law of the European Commission, which has consistently treated agreements that stifle advertising as anticompetitive. For example, in the *Austrian Banks (Lombard Agreement)* case, the Commission cited "the renunciation of advertising lending and deposit rates" as an avoidance of competition at an information level and thus an object-based restriction of competition (Case 36.571, 11 June 2002, [2004] 5 CMLR 399, paragraph 79). Similarly, in the *Electrical and mechanical carbon and graphite products* case the Commission concluded that an "agreement not to advertise or participate in sales exhibitions can … be considered a form of avoiding competition and maintaining existing market share" (Case 38.35, 3 December 2003, [2005] CMLR 1062, paragraph 240); and in *Fine Art Auction Houses* (Case COMP/37.784, 30 October 2002, COM(2002)4283, paragraph 172), the Commission decided that an agreement not to include market share data in marketing materials constituted a distortion of competition.

[31] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006, Recital 8, OJ L 376 of 27 December 2006.

[32] Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, In the Matter of the Petition for Review of Civil Action Committee on Attorney Advertising Opinion 39. In the Supreme Court of New Jersey Docket No. 60,003. See www.ftc.gov/be/V070003opinion39.pdf.

The FTC's call for states to "narrowly tailor" any restrictions imposed on potentially deceptive advertising recognizes that users' interests are served by allowing firms to present them with as many options as possible, so they can make more informed purchasing choices.

VI. THE PROTECTING COMPETITORS OR PROTECTING AGAINST CONSUMER CONFUSION

Modern competition policy recognizes that its purpose is to protect competition, for the ultimate benefit of consumers. Courts and competition authorities, to varying degrees around the world, have become properly skeptical of appeals by firms for protection against their competitors in the absence of demonstration that consumers ultimately lose. In the United States, for example, courts no longer consider protecting the health of small businesses for its own sake.

Courts and regulators need to keep the interests of consumers, and not competitors, front and center in evaluating keyword-advertising restrictions involving the use of brand names. In evaluating keyword-advertising claims and their harm to competition, courts and regulators need to weigh the cost of restrictions against the benefits from limiting confusion. As discussed above, keyword advertising likely benefits consumers because it:

- offers consumers more information, reduces their search costs, and gives them ready access to competitive alternatives;
- lowers the cost to firms of reaching their customers and thereby lowers the cost of doing business, making it easier to enter and challenge existing brands; and
- intensifies competition between name brands and their rivals and thereby likely lowers prices and improves quality.

Recently, some companies have used the appearance of the relatively new keyword advertising technology to argue for restricting advertising by their competitors. They don't want their rivals to use the fact that a consumer has expressed an interest in their brand name—by typing in the brand name as part of the keywords for search—to reach those customers.

In evaluating such proposals to restrict keyword advertising, regulators and courts need to account for the fact that most consumers aren't confused by the practices at issue and are, in fact, likely to benefit from them for the reasons mentioned above. Forbidding search engines from using trademarked names at all as search terms would likely present a significant cost to consumers by eliminating an easy reference with which to compare existing or new products, resulting in important reductions in consumer benefits. Even narrower remedies, such as case-specific penalties for causing consumer confusion, could discourage search engines from offering this service to advertisers, decreasing their value to consumers as a search tool and resulting in significant harm.[33]

New means of advertising, such as keyword advertising through search engines, should not preclude the strict technical analysis that has led courts and regulators in the recent past to

[33] Courts and regulators would also need to take the costs of keyword advertising restrictions into account in striking the right balance between providing businesses the incentives to invest in brand names and securing a return on their risky investments and shielding these firms from the rigors of competition.

exercise extreme caution in considering attempts to limit competitive advertising. As in other modes of advertising, the costs of restricting comparative advertising can be higher than the likely benefits and these restrictions are likely to involve protecting competitors rather than consumers, just like before.