

INVISIBLE TRADEMARK INFRINGEMENT AND THE GOOGLE ADWORDS CONUNDRUM: AN ANALYSIS FROM THE PERSPECTIVE OF INDIAN TRADEMARK LAW

Dr. Ankit Singh *

Dr. Yogendra Kumar Srivastava**

Abstract

Modern businesses such as online retailers, service providers, etc., adopt various strategies to gain an edge over competitors both in online and physical space. One of such advertising strategies is the use of Google AdWords Program which requires advertisers to bid on or buy keywords so that their advertisement appears more prominently when any online user searches for such keywords.

This practice might lead to a situation where an advertiser tries to capitalize on the goodwill of a registered trademark by using trademarked terms as keywords on the Google AdWords Program. It is possible that a user searched for a particular business entity and landed on the website of its competitors because the AdWords Program displayed the latter's website as the prominent result.

This can be understood by a single example. If Google enables a registered trademark 'Giga' to be used as keywords by the proprietor's competitors, advertisements of these competitors will be displayed prominently whenever a consumer searches for 'Giga'. It may divert consumer traffic to the competitors' website which was meant for Giga's proprietor and may also lead to consumer confusion regarding the origin of goods and services.

Since keyword search is a back-end functioning of a search engine, the issue of trademark infringement becomes a tricky one.

The authors, in this paper, have tried to comprehensively examine the functioning of the AdWords Program and the approach taken by courts across the globe in relation to invisible infringement of trademarks. The emerging jurisprudence of invisible infringement has been critically analysed with special reference to the Indian trademark law.

Keywords: Google AdWords, Invisible Infringement, Keyword, Search Engine, Trademark, Advertisement, Digital Marketing

* Assistant Professor of Law, Hidayatullah National Law University, Raipur, Chhattisgarh, India

** Professor of Law, Hidayatullah National Law University, Raipur, Chhattisgarh, India

I

INTRODUCTION

We are in the modern era of competitive digital marketing where most businesses have their presence online. Movement of internet traffic is important as far as online marketing is concerned and businesses resort to various tactics and techniques to ensure that they get maximum hits. In this regard, Google AdWords and its algorithm play a huge role.

Online advertising system can simply be defined as a method by which a search engine company, say Google, allows internet users free access to the search engine by entering a keyword. The series of results that the users get in this way is categorized as “natural” or “organic” that is to say, selected by the search engine company on the basis of the relationship between searched terms and keywords. Simultaneously, search engines also set up a commercial advertising system (such as Google AdWords), which along with the natural results is designed to display paid advertisements as well.

Google Ads provide systematic and optimum campaigns for businesses. Before going into the trademark issue relating to AdWords/keywords, it is important for us to have a basic understand of how Google Ads work. It is an auction-based algorithm where businesses bid their keywords to get traffic on their websites.

While buying keywords, a Google Adwords customer selects either one word or multiple keywords that offer an appropriate description of the goods and services on the customer’s webpage. Customer also has the option to determine certain key aspects of the keyword for effective audience targeting which may include time or geographical location. Competitors of a particular trademark might get displayed right next to the search results of a specific keyword type by a user.

Prior to 2004, Google’s trademark usage policy had restrictions in place for using keywords protected under a trademark on the request of the trademark proprietor. However, in recent years, Google has relaxed the restrictions to a considerable extent. Google’s customers are now allowed to purchase trademarked keywords notwithstanding the objections raised by the trademark owner. Though this relaxation significantly increases the risk of litigation but it is still compared nothing to the revenue generated through such keyword purchases.

Google also has keyword tool in place that allows the customers to browse for trademark-specific words and phrases that would help them to effectively target audience. But Google still block use of trademarks within ad text because it is proved through various studies that

allowing customers to freely use trademarks in these ad texts can lead to customer confusion during their web search.

1.1 Google Keyword Bidding

A bid basically means the amount of money a business is willing to pay for a single click on a particular keyword in Google Ads. The rank of display of such keywords depends on the amount that has been bid on those keywords. Hence, the keyword auction is a system that decides the placement of a particular keyword or an ad-term in Google Ads.¹

Google conducts consultation with businesses about their bidding strategy but it is ultimately the proprietor's prerogative. There are two methods to adjust the keyword bid – manual and automated.

Automated bid method is highly recommended as it allows Google to maximize the output as per the strategy and budget of the investor.

However, one thing needs to be kept in mind that the bid amount is not the only factor that determines the rank of ad display. Google, as a part of its ad strategy, cannot just give away the priority rank to the highest bidder. It must first validate the content of bidder and assess its legitimacy. In other words, Google must first make itself sure as to the veracity of the content of the page an ad is promoting.

There are three factors that determine the quality score of a particular keyword which can be summarized as follows²:

- (1) **Ad Relevance:** It is the measurement of the proximity of a keyword with the message of the ad. It is the measure of alignment of the keyword with the message that the ad is trying to convey to the people.
- (2) **Landing Page Experience:** This depends on the relevance of the contents of the landing page for the who people who arrive at it after clicking on a particular ad.
- (3) **Expected Click-through Rate:** Of the three, this is the most complex factor. It is an estimate of how likely an ad is going to appear or be shown.

¹ Wesley Clyde, *Understanding Keyword Bidding in Google Ads*, available at <https://www.newbreedrevenue.com/blog/understanding-keyword-bidding> (last visited on November 6, 2023)

² *How does Google Ads algorithm work?*, available at <https://orbitalads.com/blog-en/how-does-google-ads-algorithm-work#:~:text=Google%20calculates%20the%20Ad%20Rank,on%20your%20keywords%20of%20interest>. (last visited on September 6, 2023)

Based on the above factors, Google determines the quality score on the basis of which businesses can calibrate their keywords in order to increase the score.

II

USE OF TRADEMARKS AS KEYWORDS ON GOOGLE ADS

Of late, quite a few instances have been witnessed where businesses resorted to using trademarks as keywords on Google Ads Program. It gives rise to an intriguing discussion as it provides us with an interesting intersection of digital marketing, technology, and the law.

Legally speaking, a trademark in the form word, symbol, logo, etc. cannot be used by anyone during trade to promote their products or services as it is likely to create confusion in the minds of consumers.³ Against such kind of activities, the proprietor can claim remedies by way of an infringement suit (in case of a registered trademark) or passing-off action (in case of an unregistered trademark).

However, the issue of business using trademarked words as keywords on Google Ads is quite a complex one. Such use cannot be said to be an outright infringement because the said use is invisible or unapparent in nature. Such a use by a non-user of the trademark could only distract or divert and not create actual confusion in consumer's mind. Even the Google Ads Rules state that it does not investigate the issue of trademarks being used as keywords.

2.1 Trend in the European Union (EU)

Through a series of judgments delivered by the Court of Justice of the European Union (CJEU), a norm has been established that the use of third-party trademarks as a keyword on the Internet constitutes an infringement regarding the trademark rights of the actual proprietor of the mark.⁴

2.1.1 The European Commission's Guess Decision

The decision of the European Commission (EC) in Guess case is arguably the most comprehensive ruling as far as the ad keyword issue is concerned. EC has recently imposed a fine on Guess for restricting retailers from using its trademark on Google AdWords for the purpose of advertisement. This restriction was basically a part of a package deal entered into by Guess with the retailers. The deal included some other restrictions as well, such as, territorial boundaries and resale price maintenance. EC has categorically held these agreements as anti-

³ *The use of trademarks and Google Adwords*, available at <https://merx-ip.com/2018/03/the-use-of-trademarks-and-google-adwords/> (last visited on September 9, 2023)

⁴ C-236/08, *Google France vs. Louis Vuitton*; C-237/08, *Google France vs. Viaticum*; and C-238 / 08, *Google France vs. Centre national de recherche en relations humaines*; C-324/09, *L'Oréal SA vs. eBay International AG*; C-323/09, *Interflora Inc. vs. Marks & Spencer plc*

competitive. EC had presumed such restrictions to be harmful irrespective of the market impact. It is widely argued by critics that the EC's opinion that the restrictions imposed by Guess is against the mandate of competition law is a flawed one and sets a bad precedent. It is further contended that EC's findings give rise to a level of uncertainty as to whether the imposition of AdWords restrictions by brand proprietors to protect their distinctiveness in certain other circumstances would be justified under the canons of competition law or not.

In case of a registered mark, the owner has the exclusive right to restrict the usage to ensure that the products or services covered by such mark originate only from the owner or a connected party in course of trade. This was laid down by the European Court of Justice in the Google France case.⁵ However, this ruling does not apply to retailers who resell the original and authentic products of a trademark proprietor. Under the trademark law, retailers are allowed to use the brand while reselling the products or services. Producer and retailer may voluntarily devise different kinds of arrangements while signing a distribution agreement.

For example, under an exclusive distribution system, lawful restrictions can be imposed on a retailer in relation to active advertisement of a particular product or service on the internet in jurisdictions that are outside the agreed territorial boundaries. As per the European Commission's Guidelines on Vertical Restraints, the exclusive distribution principle also applies in case of making a payment to a search engine or an online advertisement provider to display advertisements to users in a pre-defined territory.

The intersection of intellectual property protection and competition law has again been explored in the Guess decision which was published on 25-01-2019. A fine to the tune of 39 million Euros was imposed on Guess. The entire issue was of Guess' online search advertising restriction. The European Commission firmly laid down that Guess, under its Selective Distribution System, had a market strategy in place that included selling online to customers directly and thereby competing in the market with its affiliated retailers. Inspection of Guess' internal documents disclosed that Guess intentionally imposed restrictions on retailers' online dealings in favour of its own e-commerce strategy. Let us look at some of the restrictions that formed part of the agreements that Guess made with its retailers⁶:

⁵ *Google France Sarl, Google Inc vs. Louis Vuitton Malletier*, 2009C-236/08; *Google France vs. Viaticum Luteciel*, 2009C-237/08; *Google France vs. CNNRRH*, 2009C-238/08

⁶ Jolling De Pree, Bart de Rijke and Helen Gornall, *AdWord Restrictions: Commission's Guess Decision Creates Uncertainty for Brand Owners*, De Brauw, Blackstone, Westbroek (February 14, 2019), available at <https://www.debrauw.com/articles/adword-restrictions-commissions-guess-decision-creates-uncertainty-for-brand-owners> (last visited on August 30, 2023)

- (1) Restriction on the use of brand names and trademarks of Guess in Google AdWords;
- (2) Restriction on selling the products on the internet without obtaining prior authorization from Guess;
- (3) Restriction on selling the products to the customers who are located outside the pre-defined territories;
- (4) Restriction on cross-selling among other authorized retailers and wholesalers; and
- (5) Restriction on fixing retail prices of products independently of Guess.

The European Commission had taken into account each single restriction under the cartel prohibition and vertical block exemption instead of analyzing the entire package of restrictions. The findings of the European Commission can be summarized as follows⁷:

(1) The Commission held that by implementing online search advertising restriction, Guess wanted to reduce the pressure of competition by authorized retailers on its own retail activities online, and in light of this argument the Commission rejected Guess' claim that such restriction protected the brand image of Guess in its popular selective distribution system.

(2) The Commission held that Guess suppressed intra-brand competition between authorized retailers by imposing online search advertising restrictions to restrict the retailers from selling outside the agreed territory. It was held that the said arrangement by Guess resulted in partitioning of the market and was in clear violation of the cartel prohibition provision as provided under Article 101(1) of TFEU.

There are certain conditions where keyword search restrictions could be justified. We can summarize them as follows:

- (1) To prevent sales in another territory, however, the retailer may be allowed to use the trademark in combination with a geographical indication or language of a particular territory;
- (2) To allow a supplier to have a control over pre-sales information and services through its website to disseminate information among potential customers about the products particularly in cases where quality is a crucial factor differentiating brands in the marketplace.

The Commission considered only a standalone online search advertising restriction and made its decision instead of looking into the whole package of restrictions employed by Guess which

⁷ *Ibid.*

made it practically impossible for an authorized retailer of Guess to have an online presence. Therefore, the Commission has given rise to uncertainty about the ability to exempt such a restriction on a standalone basis. Moreover, the Commission has left little room for itself or even some other national authority regulating competition to assess a narrower restriction, such as a restriction to use a trademark in online search advertising in isolation, but which otherwise allows retailers to use the trademark in combination with other search terms or without restrictions offline.

Through its Guess judgment, the Commission has created uncertainty among global brand owners in relation to AdWords restrictions and exemptions and their interplay with competition law.

Under the laid down principles in the EU trademark jurisprudence, registered trademarks can be used as keywords to display sponsored links based on the condition that such use does not discredit the function indicating the place of origin of the brand or does not color its economic function in a bad light. It should also be made clear to the common internet user that the advertised products or services do not belong to the actual brand-owner or do not come from any other economically linked organization. In case such a thing is not made apparent, it must be clearly indicated under what circumstance products of a specific brand are being sold through an unofficial website.

The proprietor of a reputed and established trademark has the right to prevent a competitor from using a keyword similar for the purpose of advertising his products or services without the consent of the said proprietor or any person authorized by him in this regard. When a competitor's advertisement discredits or undermines the distinctive character of a trademark, it amounts to trademark dilution. Thus, an advertisement based on a keyword that undermines or blurs the distinctive quality of a renowned brand, amounts to dilution of such brand.⁸

However, a trademark proprietor does not have the right to prohibit any advertisement exhibited by her competitors using keywords corresponding to such trademark that present the consumers with an alternative to the proprietor's products or services and do not actually lead to any blurring or undermining the reputation or distinctive character of the trademark.

It is a very common practice in the world of online marketing to use a phrase or word that is registered as a trademark to attract internet traffic and potential customers. As discussed above, European Court of Justice has laid down that using a keyword that is identical to an already

⁸ *Merck & Co., Inc., et al. v. Mediplan Health Consulting, Inc., d/b/a RxNorth.com*, 425 F.Supp.2d 402 (S.D.N.Y., March 30, 2006)

registered trademark is not the same as using the mark for business purpose. The court also laid down that the said practice is not in violation of the Trademark Directive, 1989, which contained a principle that using a registered trademark as keywords without a reasonable cause is detrimental to the distinctive nature of the mark. Though the 1989 Trademark Directive has been replaced by the Trademark Directive, 2008, but the principle still holds good.

2.2 Developments in other Jurisdictions

Several judgments relating to improper, illegitimate, or inappropriate use of trademarks as AdWords by businesses have been reported in the Argentine jurisdiction. Recently, in a case⁹, the Argentine Court of Appeals enjoined the defendants from using the plaintiffs' trademarks "Veraz" and "Organización Veraz" in their publicity ads until the final judgment.

While in Mexico, the Federal Administrative Court ruled no person shall be allowed to incorporate any confusing signs on the internet and obtain registration in respect to the same afterwards with due permission of the registered proprietor of the said signs. Further, such an act that causes confusion among the internet users constitutes unfair competition. As per a proposal presented by the Mexican Institute of Industrial Property, use of a trademark on the internet by registering it as a domain name is deemed to be an inappropriate use and an act of unfair competition. So, the issue is whether the use of competitor's trademark as AdWords would also constitute an act of unfair competition. To address this issue, we must address the functional aspect of both trademark law and competition law – while the former gives a subjective right over an intangible property the latter regulates the activities of traders and ensures that the competition arises in the market on its own merits and is not manipulated through unethical behaviors.

In Andean Community¹⁰, the use and commercialization of a trademark LATAM as an AdWord was in question. Plaintiff's appeal was rejected by the Division with Jurisdiction over Intellectual Property of the Court of the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI) and denied the use of precautionary measures laid down by the European Courts in a case of alleged infringing use of trademarks as AdWords by a third party. INDECOPI held that there was a need to conduct an exhaustive

⁹ *Organizacion Veraz v. Open Discovery S.A.* (May 28, 2009 – Federal Court of Appeals, Civil and Commercial Matters)

¹⁰ Andean Community (*Comunidad Andina*) is a free trade area created with the aim of establishing a customs union of the South-American countries of Bolivia, Columbia, Ecuador and Peru). The associate members of the Andean Community include Argentina, Brazil, Chile, Paraguay and Uruguay.

analysis of the arguments presented by both the parties in order to come to a conclusion regarding the infringing use and commercialization of LATAM.

2.3 Exceptions in Some Countries

Google has recently updated its AdWords policy that is in line with the ruling of the European Court of Justice. It carries a prescribed format in which a trademark proprietor can submit his grievance in relation to the use of his mark as keywords in Google AdWords. In furtherance of such grievances, Google can investigate the matter and restrict the usage of the mark in the ads.

However, there are some countries that allow for authorized use of trademarks in the text of advertisements. Such a use is allowed when the components or the product is the prime option available on the main landing page. Further, if the proprietor of the mark has himself authorized the use, other people may also use it in ads. The process of approval is simple. One just needs to fill out and submit a Google Authorization Form. Countries where this exception exists are Canada, United States, Australia, United Kingdom, and New Zealand.

III

INVISIBLE INFRINGEMENT AND INDIAN TRADEMARK LAW

A common practice in digital marketing is to use a registered or a well-known trademark as metatags. Metatags are basically those words which are a part of a website's HTML programming source code. This practice is widely termed as keyword advertising and is aimed at deriving undue benefits out of the reputation of an established brand. It is also known as invisible infringement of trademark. The Indian trademark jurisprudence has been evolving continuously and there have been several notable judgments in relation to keyword advertising and invisible trademark infringement. We will delve into some vitally important cases in this regard.¹¹

3.1 Bharat Matrimony – Google Case

It is notably the earliest case in India relating to the issue of invisible infringement.¹² Back in 2009, Bharat Matrimony (plaintiff) filed an infringement suit against Google and others (defendants), alleging that Google made it possible for Bharat Matrimony's competitors to use its trademarked name as a keyword in its internet searches. Further, it was contended by the plaintiff that the defendants permitted third parties to purchase keywords that automatically generate sponsored links whenever any user types phrases like matrimony in their online

¹¹ *Invisible Use of Third-Party Trademarks Considered Trademark Infringement*, available at <https://www.azbpartners.com/bank/invisible-use-of-third-party-trademarks-considered-trademark-infringement/> (last visited on September 3, 2023)

¹² *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd. and Ors.* 2013 (54) PTC 578 (Mad)

search. As per the plaintiff, this feature was used unfairly by its competitors and that it was a clear infringement of their trademark-related rights.

The defendants, on the other hand, argued that 'Bharat Matrimony' constituted a combination of generic and descriptive terms and thus, any company cannot claim exclusivity over the same. It was also contented by the defendant the use of 'Bharat Matrimony' as a keyword suggestion on its search engine doesn't constitute 'use in the course of trade' which is an essential requirement for setting up an infringement claim under Section 29 of the Trade Marks Act, 1999.

The Madras High Court laid down that defendants' use of plaintiff's trademark in their keyword search constituted 'use in ordinary course of trade. However, the Court did not find the defendants responsible for trademark infringement. It was observed by the court that intent of the defendants behind using the plaintiff's trademark was not to divert the online traffic but was only used in a descriptive sense. The court, while deciding in favor of the defendants, observed that if it restrained the defendants from using those keywords then it would result in an unfair monopoly over a very common term 'matrimony'.

One might argue that the entire business model of Google Ads runs on the concept of earning profits through advertisements and not sale. Therefore, where registered trademarks are used as a tool for advertising products of competitors on popular search engines like Google, appropriate responsibility must be attached to such search engines.

The matter was referred to the Division Bench which looked at the issue from a different perspective. It observed that registration of trademark of was prima facie evidence of its validity, and the defendants' act was indeed an infringement of plaintiff's trademark right. Following this, Google had informed the court that its AdWord policy had been amended and that they will not permit the use of plaintiff's trademark as keyword in online searched pending the conclusion of the trial court proceedings.

Bharat Matrimony had also approached the Supreme Court of India in search of relief. The Supreme Court granted interim injunction in favor Bharat Matrimony and asked the trial court to conclude the proceedings within six months.

As a part of their strategy of protecting their market, Bharat Matrimony approached the Competition Commission of India (CCI) alleging that Google's AdWord Policy was in violation Section 4(2)(a)(i) of the Competition Act, 2002. Bharat Matrimony claimed that Google was abusing its dominant position in the online search market by offering for sale trademark registered terms as keywords to the competitors for targeted advertising campaigns thereby allowing the opportunity to the competitors to enjoy a free ride off the goodwill and

brand value of a trademark proprietor, and killing fair competition. It was observed the CCI that Google AdWord Policy was indeed a sound policy that ensure free and fair competition in the digital space. This case was widely known as the starting point of CCI's intervention in the digital space.

3.2 Matrimony.com – Kalyan Jewellers Case

In March 2020, the Madras High Court again took up the issue of trademark infringement through Google AdWords.¹³ In this case, the court refused to grant injunction to the plaintiff. The order was in line of the Bharat Matrimony case wherein the court held that the term 'matrimony' was generic and descriptive and cannot be infringed if used as keyword in an online search.

Currently, Google's AdWord Policy is clear in its functioning. While trademarked terms cannot be used as text or title, nothing prevents trademarks from being used as keywords to trigger a competitor's advertisement. It was further contended by Google that restraining advertisers other trademark owners from using trademarked keywords affects competition and gives rise to ad-space monopoly to trademarked terms.

3.3 Agarwal Packers – Google Case

Another matter relating to the issue of trademark infringement through use of trademarked terms as keywords on Google Ads came into light in 2017.¹⁴

DRS Logistics (plaintiffs and owner of Agarwal Packers and Movers) approached the Delhi High Court seeking an interim injunction against Google and Just Dial. They sought to refrain Google and Just Dial from using or allowing third parties to use their registered trademark in ad titles. The plaintiffs basically wanted to restrain the defendants from offering their trademarked terms to advertisers, including plaintiffs' competitors. Plaintiffs' contention may be summarized as follows:

- (1) Use of the trademark 'Agarwal Packers and Movers' as an AdWords led to the diversion of targeted customers from the plaintiffs' website to that of their competitors'.
- (2) Such diversion online traffic resulted in confusion among potential consumers.

The defendants' contentions can be summed up as follows:

- (1) Keywords used in the AdWords program were merely back-end aspect and are invisible to the consumers.

¹³ *Matrimony.com Limited v. Kalyan Jewellers India Limited*, 2020 (82) PTC 1 (Mad)

¹⁴ *M/s DRS Logistics Pvt. Ltd. and Anr. v. Google India Pvt. Ltd. and Ors.*, CS/COMM 1/2017

(2) Use of a trademark as keyword does not constitute ‘use’ within the meaning of the Trade Marks Act, 1999, and hence, does not constitute trademark infringement.

The Delhi High Court rejected the arguments raised by the defendants. The court based its assertion on the existing jurisprudence pertaining to the use of trademarks as metatags,¹⁵ and held that use of trademarks as keywords, albeit invisible, can constitute trademark infringement under the Indian trademark law.¹⁶

The Court also made it clear in its order that invisible use of trademark intended to divert the traffic from trademark proprietors’ website to that of the advertiser’s or infringer’s will prima facie constitute ‘use’ of trademark within the meaning of Section 29 of the Trade Marks Act, 1999.

The defendants’ maintained their contention that even if using a trademarked term as keywords constituted ‘use’ of trademark as per the Indian trademark law, it did not constitute trademark infringement or passing-off since there was no consumer confusion. The court, while rejecting this contention, held that ads generated by third-party were likely to cause uncertainty as to the sources of the advertised products or services.

The following statement of the court firmly establishes its stance:

“Once the search engine has been made aware of a registered trademark in a certain jurisdiction, it is incumbent upon the search engine to exercise a higher duty of care to ensure protection of the goodwill attached to such trademark.”

The court took an aggressive approach in this case. It observed that Google’s Ad policy was discriminatory in nature. It was put forth by the court that in the European Union, Google conducts an investigation into the use of keywords while the same is not the case in India that shows a serious lack of policy parity.

While the court dropped the petitions, it urged Google to investigate the case at hand and if it was found that the use of keywords amounted to trademark infringement to immediately cease such ads.

This case strengthened the jurisprudence of invisible trademark infringement in India. The Delhi High Court’s ruling in this matter has established a very strong precedent for various pending lawsuits against Google over its AdWords across the country.

¹⁵ *Hamdard Foundation & Ors v. Hussain Dalal & Ors.*, CS(OS) No.1225/2013

¹⁶ *Amway India Enterprises & Ors. v. IMG Technologies & Ors.*, CS (OS) 410/2018

However, in opinion of the authors, it could be a matter of deliberation that where a trademark's registration status is under question because of being too generic or descriptive on the spectrum of distinctiveness, whether the approach undertaken by the court in DRS Logistics would still hold solid ground.

3.4 MakeMyTrip – Booking.com Case

The same jurisprudence continued in this case.¹⁷ The plaintiff (MakeMyTrip) contended that whenever a search of the term 'makemytrip' is carried out on Google, the first results that is displayed is that of defendants' (Booking.com) website. Justice Pratibha M. Singh of the Delhi High Court, through her ad interim injunction order, restricted the defendants from using plaintiffs' trademark on Google AdWords Program as it amounted to trademark infringement. There have been more instances of invisible infringement wherein the Court has taken a pro-plaintiff stance and has come down hard upon Google and its Ad Policy.

Recently, a trademark infringement action was brought by the renowned EdTech upGrad against Scaler and demanded INR 3 crore in damages.¹⁸ The Delhi High Court decided in favor of upGrad and prevented Scaler from bidding on trademarks belonging to upGrad on the Google AdWords Program. In another case,¹⁹ the Delhi High Court, while granting an injunction in favor of the plaintiffs, held that the defendants' use of plaintiffs' trademark "POLICY BAZAAR" as keyword in the Google Ad search constituted trademark infringement under Section 29 of the Trade Marks Act, 1999.

Therefore, the authors strongly believe that the stance of the Indian judiciary is abundantly clear as far as invisible trademark infringement through keywords and metatags is concerned.

IV

CONCLUSION

In our discussion, we have found out some glaring differences between the jurisprudential approach of India and other countries (particularly including the United States, the United Kingdom, and the European Union). The approach of courts of these jurisdictions towards Google AdWords Program also varies significantly. The realm of digital marketing is extremely competitive and trans-national in nature. On one hand, we see that Google gets leverage from European Courts, while on the other hand, we see a strong pro-plaintiff stance of the Indian courts.

¹⁷ *MakeMyTrip India Pvt. Ltd. v. Booking.com B.V. & Ors.*, CS (COMM) 268/2022

¹⁸ See <https://www.businessinsider.in/advertising/brands/news/upgrad-files-trademark-infringement-suit-against-scaler-demands-rs-3-crore-in-damages/articleshow/88025376.cms> (last visited on November 5, 2022)

¹⁹ *Policybazaar Insurance Web Aggregator & Anr. v. Acko General Insurance Ltd. & Ors.*, CS (COMM) 260/2019

A general overview of the international jurisprudence revealed that over fifty lawsuits relating to invisible infringement through Google AdWords Program were filed in the last decade, and majority of them resulted in an outcome that was unfavorable to the plaintiffs. This is a testimony to the pro-commerce approach of these courts. While it is evident from the case laws in India that Indian courts are very much determined to protect the interests of a registered trademark proprietor in the digital space. However, the most relevant judicial stand must lie somewhere in the middle of these two approaches. The interpretation of the word “use” in regards to keywords search on Google Ads must be done in a way to ensure synergy between the interests of business entities and the trademark law of a given jurisdiction.

A fine balance must be maintained to ensure that fair competition in the market is not stifled by providing overprotection to a brand especially in an era where online retailing and digital marketing have become the major source of profit for many upcoming entrepreneurs and proprietors.