Is Invisible Use of TM in Google AdWords Infringement?

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With the advent of the digital age, companies are revisiting their digital advertising strategies. Google's AdWords program is a tool used by many businesses as a part of their advertising strategy, where they display their advertisements on the Google search engine results page. The companies can select a keyword they want to target and pay to get the advertisements displayed on the search engine page.

The usage of the Google AdWords program has invited the attention of trademark owners as, under this program, trademarks of a third party can also be used as AdWords. This has led to a rise in the number of trademark infringement cases, where third-party trademarks were being used in Google AdWords.

The most recent decision on this proposition was *Drs Logistics & Anr v Google India & Ors*, handed down on 30 October 2021. In this case, an application was filed by the plaintiffs seeking an *ad interim ex parte* injunction against Google India, Google, and Just Dial to restrain them from using or permitting third parties to use the plaintiffs' registered trademarks, Agarwal Packers & Movers or Drs Logistics, as keywords or as a meta tag or trademark.

The plaintiffs also sought a direction to allow inspection of the defendants' accounts to ascertain damages. The plaintiffs alleged that using their trademarks as Google AdWords led to the diversion of traffic from the trademark proprietor's website to that of the competitors, and thus resulted in infringement and/or passing off the trademarks. The defendants argued that there was no infringement or passing off under the provisions of the Trademarks Act since the "use" of trademarks as keywords as such did not qualify as "use" under the act. The said argument was supported by section 2(2)(b) and (c) of the Trademarks Act, which must be read with section 29 of the act. While section 2(2)(b) refers to use as "the use of printed or other visual representation of the mark", section 2(2)(c) states that the use should be considered as "part of any statement about the availability, provision or performance of such services". Therefore, as the end-user is not able to see the trademark when applied as a keyword, it does not fulfil the requirements of visual representation. They argued that since the end consumers could never see the trademarks being used as a keyword, such invisible use of the trademark did not amount to infringement under the Trademarks Act. Delhi High Court relied on the precedents in the case of *Hamdard National Foundation & Ors v Hussain Dalal & Ors*, and *Amway India Enterprises & Ors vs 1MG Technologies & Ors*, where it was observed that invisible use of a trademark to divert the traffic from the proprietors' website to the advertisers or infringers' website shall amount to use of a mark for the purposes of section 29, which includes sections 29(6) and 29(8) of the Trademarks Act, 1999, related to advertising. The court observed that "an infringement of a trademark can be by way of spoken use, which is different from printed or

visual representations of the mark. That is invisible use of the mark, and can also infringe a trademark." The Delhi High Court, while reading section 2(2)(b) and (c) of the Trademarks Act, stated that the use under these provisions only apply where context does not otherwise specify. The court referred to section 29(6) of the act and stated that the use of a trademark specifically for the purposes of infringement will not be required to meet the visibility criteria. It was also held that "allowing individuals who are not owners of a trademark to choose a keyword, which is a trademarked term, or use parts of the trademark interspersed with generic words in the ad title and/or ad text may constitute an infringement of a trademark and/or passing off". This decision of Delhi High Court is a well-reasoned and deliberated order as it deals with all the past precedents on AdWords, meta-tagging and the foreign jurisprudence on this subject. The court has dealt with the different policies being followed by Google in the EU against India, and observed that "as per Google's policy, they investigate the use of the trademark as a keyword but, i.e. only confined for the EU. This is in addition to the investigation undertaken for an infringement of trademark in the ad title and ad text. "From the above, it is clear that the fact that Google is investigating an ad where the use of trademark as a keyword is being used, there cannot be any reason why such a procedure is not followed in India." Therefore, Delhi High Court's latest decision does address the use of third-party trademarks as keywords in the search engine and holds that such usage amounts to infringement or passing off under the Trademarks Act.

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