

# Divergent Laws Concerning “Keyword Bidding” Mean Businesses Should Proceed with Caution

The practice of bidding on and purchasing a third party’s trademark as a keyword to trigger advertisements for the bidder’s goods or services (“Keyword Bidding”) has become an increasingly common commercial practice facilitated by search platforms such as Google Ads. Notwithstanding the prevalence of Keyword Bidding,[More](#)

The practice of bidding on and purchasing a third party’s trademark as a keyword to trigger advertisements for the bidder’s goods or services (“Keyword Bidding”) has become an increasingly common commercial practice facilitated by search platforms such as Google Ads. Notwithstanding the prevalence of Keyword Bidding, businesses should be mindful of the potential pitfalls of this practice internationally, notably the potential liability for trademark infringement and/or unfair competition.

## Keyword Bidding is Permissible in Certain Jurisdictions

In certain jurisdictions, such as the European Union and United Kingdom, case law holds that Keyword Bidding does not constitute trademark infringement so long as the advertisement in question enables reasonably well-informed and reasonably observant internet users to ascertain that the goods or services referred to by the advertisement originate from a third party (i.e., the advertiser), and not from the proprietor of the trademark that was used as a keyword (or an undertaking economically connected to it). See *Google France SARL v. Louis Vuitton Malletier SA* [2010] (C-236/08); *Interflora Inc. v. Marks and Spencer plc* [2015] IP & T 109.

## Keyword Bidding is Prohibited in Certain Jurisdictions

In other jurisdictions, Keyword Bidding is strictly prohibited. In India, for example, recent case law has held that “invisible uses” of a mark, including bidding on keywords, constitute “use” of the mark under

---

the Trademark Act. Such use causes traffic to the trademark owner's website to be diverted to the advertiser's website, which causes confusion regarding the origin of the webpage in question, and constitutes trademark infringement (assuming the trademark used as a keyword is registered in India) and may constitute passing off (assuming that the trademark used as a keyword is unregistered but enjoys a reputation in India). *See M/S DRS Logistics (P) Ltd & Anr. v. Google India Pvt Ltd & Ors.*, CS (COMM) 1/2017.

### **The Law Concerning Keyword Bidding is Unclear in Certain Jurisdictions**

The law concerning Keyword Bidding is unsettled in certain jurisdictions. For example, although Belgian courts generally adhere to the European Court of Justice's precedential case law concerning Keyword Bidding in the trademark infringement context, national unfair competition and advertisement laws are not as harmonized. Belgian courts have adopted a restrictive approach, such that purchasing a competitor's trademark as a keyword is prohibited even in the case of only minimal consumer confusion. Belgian courts have, in some circumstances, held that Keyword Bidding gives rise to consumer confusion even when the webpage that users are directed to is an advertisement for a third party's goods or services.

### **Businesses Should Proceed with Caution**

Given the divergent approaches to Keyword Bidding across jurisdictions, businesses should proceed with caution and seek the advice of local counsel before bidding on or purchasing a competitor's trademark as a keyword to trigger advertisements. Even in jurisdictions where the practice is permissible, the following precautions should be taken so as to minimize the risk of liability:

- The advertisement should not display the trademark used as a keyword in question.
- The proprietor's trademark should not appear in the URL of the advertisement.
- The advertisement should not otherwise imply a connection or association with the proprietor of the trademark.

## **Primary Contacts**

Cole S. Mathews