Hidden Harm: Unveiling Invisible Trademark Infringement in India
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Introduction

In intellectual property law, the unauthorized use that harms the distinctive character or reputation of a trademark is known as trademark infringement. Such unauthorized use, especially in advertising in a hidden manner, can lead to legal consequences, with implications for both the distinctive identity of the mark and fair competition practices.

Meta-tagging, an invisible method in online advertising, involves embedding keywords in a website's code, thus influencing search engine rankings. Meta-tags, though invisible, serve as digital trademarks, impacting a site's performance, click-through rates, and online presence and reputation. Misuse of meta-tags, including a competitor's trademark, can lead to trademark infringement, which involves an unauthorized use causing confusion among consumers and diminishing the original mark's value.

Competitors strategically use meta-tags to enhance search visibility, but mimicking a competitor's trademark may risk infringement. This article aims to analyze and elaborate upon this invisible trademark infringement through meta-tags, among other things, in the following manner:

- Key Concepts
- Applicable Law and Indian Judicial Standpoint
- Challenges and Grey Areas

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- Key Concepts
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- Assessing Harm in Invisible Infringement
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Key Concepts

Meta-tags, which are essential to the website coding, work as invisible trademarks in the digital landscape, influencing a site's performance and online reputation. Meta-tags, like real-world trademarks expressing a brand's identity, serve as digital signatures that guide search engines. However, its misuse has increased meta-tag trademark infringement claims.

- Meta-Tags Defined: These are HTML code snippets that provide information about a website's content. While consumers cannot see them, search engines, social media platforms, and web browsers use meta-tags to comprehend and categorize a website.
- Meta-Tag Varieties: Examples include Meta Description, Meta Keywords, Meta Robots, Meta Viewport, and Open Graph Meta Tags, each of which serves a specific role in providing information to search engines.
- Invisible Trademarks: When utilized correctly, meta-tags improve website exposure, providing hidden benefits in competitive online circumstances. However, improper use, such as using another company's trademark without authorization, can result in trademark infringement.
- Marketers' use of Meta-Tags: Marketers use meta-tags because search engines utilize them to determine relevancy, which affects website performance and click-through rates. Competitors carefully optimize these tags to attract more visitors, however using a competitor's meta-tags, including their trademark, might result in confusion, trademark infringement, and legal ramifications.
- Examples of Meta-Tag Trademark Infringement: Unethical practices include keyword stuffing, false representations, and click-through rate manipulation. Furthermore, counterfeit product listings with popular brand names in metatags increase the potential for consumer confusion and trademark infringement.

Applicable Law and Indian Judicial Standpoint

Applicable Law in India

Section 29 of the Trademarks Act, 1999[1] addressed trademark infringement, extending its scope of application to meta-tags as well. This section protects registered trademarks from unauthorized use, whether in connection with similar or dissimilar goods or services. Meta-tag trademark infringement may occur if a website employs someone else's trademark in its meta-tags, potentially misleading users.

Section 29(4)(c) specifies that using a registered trademark without authorization in a way that unfairly benefits or harms its distinctive character constitutes infringement. Additionally, Section 29(8)(b) provides that any advertising of a registered trademark that is harmful or dilutes its distinctiveness is infringement.

However, in the absence of any specific legislative provisions, legal interpretation from court decisions becomes crucial in determining the applicability of Section 29 to such invisible trademark infringement.

Judicial Standpoint

In *MakeMyTrip India Private Limited v. Booking.com*[2] before the Delhi High Court, the plaintiff sought a perpetual injunction to protect its registered

trademarks. The defendant had allegedly utilized various marks owned by MakeMyTrip as keywords (meta-tags) on the Google Ads Program. The Court interpreted Section 29 of the Trademarks Act and held that taking unfair advantage of a registered trademark, its distinctive qualities, or reputation, without a valid basis amount to infringement. Notably, the defendant's bids on the keyword "makemytrip" raised concerns about encashing on MakeMyTrip's goodwill.

In addressing the issue of third parties profiting from the goodwill of a registered trademark through the Google Ads Program, the court considered the nature of using a trademark as a keyword. The plaintiff argued that the defendant's bid for the usage of MakeMyTrip's registered mark as a metatag forced the trademark owner to bid for its own mark to avoid being subverted by competitors. The court, recognizing the potential harm to the trademark owner, granted an injunction in favor of MakeMyTrip.

In the case of *Mattel Inc. & Ors. v. Jayant Agarwalla & Ors.*[3], the court delved into the intricacies of search engine indexing. Noting that search engines employ machine-readable codes, known as meta-tags, to index sites, the court held that the utilization of trademarks as meta-tags amounts to trademark infringement.

In a similar case, *Kapil Wadhwa & Ors. v. Samsung Electronics Co. Ltd.*[4], the plaintiff accused the defendants of meta-tagging registered marks, leading to infringement. The Delhi High Court's Single Bench ruled in favor of the plaintiff, issuing an injunction against the defendants. The Division Bench affirmed this ruling in the subsequent appeal.

DRS Logistics (P) Ltd & Ors. v. Google India Pvt. Ltd.[5] highlighted the court's stance on the imperceptible use of trademarks. The court emphasized that even subtle usage, aiming to divert users from the owner's website to an advertiser's or infringer's site, falls under the ambit of Section 29 of the Act.

The case of *People Interactive (I) Pvt. Ltd. v. Gaurav Jerry*[6] before the Bombay High Court showcased a similar scenario. The defendant's use of the plaintiff's registered mark "shaadi.com" in meta-tags diverted Internet traffic from the plaintiff's site, leading to the court acknowledging the dilution and damage to the unique nature of the plaintiff's mark.

Challenges and Grey Areas

Assessing Harm in Invisible Infringement

- *Difficulty in Quantifying Impact*: Determining and proving the connection between invisible trademark infringement, such as through keyword stuffing or meta-tag manipulation, and specific traffic or sales losses directly affecting the trademark owner is a challenge.
- *Descriptive v. Unfair Leverage*: Determining whether the use is for descriptive purposes or is unfairly leveraging its reputation is difficult, especially when associated with general terms like 'matrimony' etc.
- *Indirect Harm*: Assessing damage to brand reputation, consumer confusion, and dilution of distinctiveness are indirect and intangible forms of harm, that are difficult to determine in a nuanced online environment.

Navigating the Evolving Online Landscape

- *New Advertising Formats*: Emerging formats like voice search and targeted ads, etc. create challenges in identifying infringement, especially because of the lack of established legal frameworks.
- *Global Reach and Enforcement*: Online activities transcend beyond borders and

thus monitoring and enforcing against infringement becomes challenging due to jurisdictional issues and identifying anonymous infringers.

- *Confusing tactics*: Infringers may use techniques like domain masking or keyword variations, etc., which makes detection difficult.

Balancing Fair Use and Trademark Protection

- *Freedom of Expression*: Striking a balance between trademark protection and ensuring freedom of expression is a constant debate. Criticism, parody, comparative advertising, and other such activities blur the lines further.
- *Dynamic Legal Frameworks*: Existing legal frameworks may not adapt to the evolving online landscape. Static definitions and rigid interpretations pose challenges.

Conclusion

The judicial decisions in India on invisible trademark infringement reflect a greater understanding of the challenges posed by online practices such as meta-tagging. To fully address the challenges such as the imposition of liability for damage, the emerging advertising formats, and the complex balance between trademark protection and fair use, the legal framework must be adapted in response to technological advancements. Maintaining this balance while accounting for the complexities of the digital realm remains critical to promoting equitable competition, protecting intellectual property rights, and ensuring a flexible legal response to the constantly changing digital environment.

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[1] https://lddashboard.legislative.gov.in/sites/default/files/A1999-47_0.pdf.

[2] MakeMyTrip India Private Limited v. Booking.com B.V. & Ors., CS (COMM) 268/2022.

[3] Mattel Inc. & Ors. v. Jayant Agarwalla & Ors., 2008 (38) PTC (416) (Del).

[4] Kapil Wadhwa & Ors. v. Samsung Electronics Co. Ltd., 194 (2012) DLT 23.

[5] DRS Logistics (P) Ltd & Ors. v. Google India Pvt. Ltd., 2021 (88) PTC 217 (Del).

[6] People Interactive (I) Pvt. Ltd. v. Gaurav Jerry, 2014 SCC OnLine Bom 4607.